

**Maritime Drug Interdiction
in
International Law**

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Maritime Drug Interdiction in International Law

Maritieme drugsbestrijding in het internationale recht

(met een samenvatting in het Nederlands)

Proefschrift

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CHAPTER 1

INTRODUCTION

1.1. General

The present study examines the international legal regime applicable to combating the transportation of illicit drugs¹ at sea as part of illicit drug trafficking worldwide. The first chapter of this study examines the drug problem and gives an overview of this study. Drugs in general are discussed, including production, consumption and trafficking in illicit drugs. Jurisdiction and maritime counter-drug cooperation as a means of combating illicit drug trafficking at sea will also be explored. At the end of the chapter, some conclusions will be drawn.

1.2. The problem

Illicit drug trafficking is part of the worldwide drug problem. It is the crucial link in the chain between production and consumption. The problem is that, annually, thousands of tons of illicit drugs are transported by sea. This raises the question of how illicit maritime drug traffic can best be combated. To allow law enforcement officials to stop, board and search a foreign flag vessel, irrespective of the location at sea, international agreements are required. The current legal framework of international agreements for the interdiction of illicit drug trafficking at sea is the subject of the present study.

1.2.1. The drug problem

For a basic understanding of the problem of illicit maritime drug trafficking, the general global drug problem will be examined briefly first.

The United Nations General Assembly stated:

Despite continued increased efforts by states, relevant organizations, civil society and non-governmental organizations, the drug problem is still a challenge of a global dimension, which constitutes a serious threat to the health, safety and well-being of all mankind, in particular young people, in all countries, undermines development, including efforts to reduce poverty, socio-economic and political stability and democratic institutions, entails an increasing economics cost for Governments, also threatens the national security and sovereignty of States, as well as the dignity and hope of millions of people and their families, and causes irreparable loss of human life.²

The drug problem is deeply rooted in broader socio-economic concerns. Illicit drugs therefore not only have to be countered for economic reasons, as in the case of other illicitly trafficked commodities such as tobacco, alcohol, etc., but also for social and political reasons.

Effects of drugs on society

Economy

The total cost to society of drug abuse in the United States was estimated at \$ 180.9 billion in 2002. The majority of those costs were productivity losses, particularly those related to incar-

¹ Illicit drugs, including production, consumption and trafficking, are examined in detail in the next sections of this chapter.

² Resolution adopted by the United Nations General Assembly, A/RES/55/65, 4 December 2000.

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ceration, crime careers, illness related to drug abuse, and premature death. This cost to society of drug abuse is expected to continue rising at a 5.3 percent annually, continuing to outpace the combined increase in the adult population and consumer prices that are expected to have an annual combined increase of about 3.5 percent.³ There are no indications that other countries have significantly different figures.⁴

In many states, all over the world, the accumulation of huge sums of money outside the official governmental and economic structures threatens the stability of governments, economic institutions and civil society.⁵ With so much additional capital from the drug trade competing with funds from normal economy, drug money has introduced many more macroeconomic distortions than central banks have been able to handle. Macroeconomic impacts have been felt on foreign exchange flows, aggregate demand and inflation, and, indeed, on economic growth in general.⁶

The magnitude of funds under criminal control poses special threats to governments, particularly in the developing countries, where the domestic security markets and capital markets are far too small to absorb such funds without quickly becoming dependent on them.⁷

Social structure

Drug abuse has an impact on some parts of the social structure of a country. One of these parts is the family structure. The country study carried out by United Nations Research Institute for Social Development (UNRISD) and the United Nations University in Mexico, for example, shows that illicit drug abuse correlates more strongly with the disintegration of the family than with poverty.⁸

Similarly, the country study into the Lao People's Democratic Republic in the same series found that in areas where social controls exercised by the family and the community had broken down, opium and heroin consumption became prevalent among young men, women and children, and affected as much as ten per cent of the population.⁹

Increased morbidity and mortality and associated family, educational and unemployment problems due to drug abuse are pervasive.¹⁰ The negative impact of drug abuse on health is obvious, scientifically established and documented in extensive literature, which is beyond the scope of this study. While health problems primarily affect the drug abuser concerned and only indirectly affect society in general by giving rise to higher health costs, the links between drug addiction, needle sharing, prostitution, AIDS¹¹ and other diseases are understandable.

³ Office of National Drug Policy (ONDCP), *The Economic Costs of Drug Abuse in the United States (1992-2002)*, Publication No. 207303, Executive Office of the President, Washington (DC), December 2004, www.whitehousedrugpolicy.gov (visited Fall 2006).

⁴ See Mott and Mirrlees-Black (1995). See also the 2006 World Drug Report, Volume 1: Analysis, United Nations Office on Drugs and Crime (UNODC), E.06.XI.10, Vienna, June 2006, (further referred to as the 2006 World Drug Report) p. 214.

⁵ *Social Impact of Drug Abuse*, UNDCP, Vienna, August 2002, p. 44. See *Economic and Social Consequences of Illicit Drug Abuse and Illicit Trafficking*, number 6, UNDCP, Vienna, January 1998.

⁶ Tullis (1995) pp. 93, 143-146, 170-172.

⁷ *Drug Money in a Changing World: Economic Reform and Criminal Finance*, UNDCP/TS. 4, Vienna (1996).

⁸ Toro (1995), p. 49. See Grosse (2001). See also the UN Global Program Against Money Laundering on www.unodc.org/en/money_laundering (visited Fall 2006).

⁹ Hennings (1993), p. 38.

¹⁰ *Social Impact of Drug Abuse*, UNDCP, Vienna, August 2002, p. 42.

¹¹ AIDS has changed the nature and impact of drug abuse. In the illicit drug scene, the HIV virus is spread by sharing needles and the wide travel of infected injecting drug abusers; see Alexandrova (2004). See also the

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Political system

The drug cartels are well-positioned to influence Latin America's economic reforms and manipulate the region's weak political and judicial institutions. In Colombia, they have penetrated the regulatory and lawmaking processes to the point that they can influence constitutional and financial reform.¹² It is difficult to have a functioning democratic system when drug cartels have the means to buy protection, political support or votes at every level of government of a society.¹³

Environment

Environmental damage related to illicit drugs is caused in producing countries by the clearance of forests, the use of monocultures in growing crops, processing harvested plants into drugs and the use of environmentally dangerous chemicals without the necessary precautions being taken. It is feared that the cocoa cultivation may have resulted in the deforestation of seven thousand hectares in the Amazon region in Peru.¹⁴

In South-East Asia, most poppy cultivation takes place in the rain forest. The slash-and-burn agriculture damages the environment by denuding the land, destroying the topsoil and silting up rivers.¹⁵

1.3. The study

1.3.1. General

The present study focuses on the interdiction of trafficking in illicit drugs at sea as one part of the general problem of illicit drug trafficking. More specifically, the study focuses on the legal framework for the interdiction of illicit maritime drug trafficking under international law. Firstly, the general legal framework of international law will be examined, followed by an examination of the specific legal framework for maritime drug interdiction. Some attention will be given to the question of how state practice in that area of activity has contributed to the interpretation and application of the relevant provisions of the legal framework. Another issue is whether that practice has contributed to the formation of customary international law. For the research the point of view is that of a coastal state and the point of view of an intervening state. For the present study, intervening states are states, - other than flag states or coastal states -, that act to exercise authority over maritime drug trafficking at sea (see Section 3.1. of the study).

The research will concentrate on the legal framework of public international law, including the law of the sea, for maritime drug interdiction. International law of the sea are rules that bind states in their international relations concerning maritime matters.¹⁶

More specifically, the study is concerned with rules that bind states in interdicting illicit drug trafficking at sea. Maritime drug-interdiction treaties may provide legal bases to national law in order to address drug-related offences. This study does not discuss, in general, national law

2004 World Drug Report, Volume 1: Analysis, United Nations Office on Drugs and Crime (UNODC), E.O.XI.16, Vienna, 2004 (further referred to as the 2004 World Drug Report), p. 47-51.

¹² Sweeney (1995).

¹³ International Narcotic Strategy Report, Bureau of International Narcotics and Law Enforcement Affairs, Volume I, Drug and Chemical Control, Department of State, Washington, March 2006.

¹⁴ Dourojeanni (1992). See the 2006 World Drug Report, p. 16.

¹⁵ Tullis (1995) p. 112.

¹⁶ See Churchill and Lowe (1999), p. 1.

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relating to conduct at sea. Nonetheless, this leaves a considerable body of law, mainly provisions found in treaties and customary international law, within the purview of this study.

Illicit drug trafficking at sea forms part of a larger complex of criminal operations. Present forms of maritime crimes (in a broad definition of the term) can be divided into two categories. One category concerns activities directly linked to the sea and occur there, such as piracy or illegal fishing. The other category concerns activities that form a part of a larger complex of criminal operations that mainly take place on land, such as smuggling migrants or the illegal transportation of wastes.¹⁷ Trafficking in illicit drugs belongs to this second category.

The sea is the area *par excellence* where international law establishes the conditions for states to exercise their jurisdiction.¹⁸ Although, in principle, states have complete jurisdiction within their own territories, at sea this jurisdiction is clearly defined and limited by international law. Rules of customary international law have been applicable to the uses of the ocean for hundreds of years. Those rules were codified and partly further developed in some specific law of the sea treaties (see Section 3.1.1.).

1.3.2. Aims of this study

This study intends to investigate how the current framework of international law for maritime drug interdiction may contribute to solving the problem of illicit drug trafficking at sea as a part of the global drug problem. The current framework of international law for maritime drug interdiction will be examined to determine whether it is sufficient and adequate to fulfill the aim of the international community to combat illicit drug trafficking at sea to the fullest extent possible.

The first aim of this study is to analyze the general framework of international law for maritime drug interdiction. After a short overview of the history of illicit drug trafficking, including illicit maritime drug trafficking, the aim is to focus on some general international agreements that include maritime drug interdiction. Maritime drug interdiction will be examined from the point of view of coastal states and from the point of view of states that want to stop and search suspects vessel at sea. The question here is:

Based on the general framework of international law for maritime drug interdiction, what is the scope and extent of the authority of coastal states and intervening states over illicit maritime drug trafficking in various maritime zones and over ships under specific regimes?

Some specific provisions, dealing with illicit maritime drug trafficking, of general treaties and customary international law are examined in detail.

The second aim of this study is to analyze the specific framework of international law for maritime drug interdiction, formed by multilateral and bilateral maritime drug-interdiction treaties. The aim is to examine the most relevant multilateral and bilateral maritime drug interdiction-treaties for regions most threatened by illicit drugs. The question here is:

Based on the specific framework of international law for maritime drug interdiction, what is the scope and extent of the authority of coastal states and intervening states over illicit maritime drug trafficking in various maritime zones and over ships under specific regimes?

¹⁷ Soons (2004), p. 4.

¹⁸ *Idem*.

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Those analyses may contribute to a less ambiguous interpretation and implementation of the provisions found in the treaties forming the frameworks. The aim of those analyses of the general and specific framework of international law for maritime drug interdiction is also to contribute to discover differences and similarities, and to identify contradictions.

The third aim of this study is to examine whether there is a relationship or parallel between the multilateral and bilateral maritime drug-interdiction treaties, respectively for various regions of the world. The question here is:

What is the relationship between the general legal framework and the specific legal framework for maritime drug interdiction?

What is the relationship between the specific maritime drug-interdiction treaties examined?

Another aim of this study is to examine whether those drug-interdiction treaties have contributed to the formation of customary international law in the area of maritime drug interdiction. When illicit drug trafficking is a crime under customary international law, it is less complicated to stop and search a vessel suspected of being engaged in illicit drug trafficking. The question here is:

Have the drug interdiction-treaties examined contributed to the formation of customary international law in the area of maritime drug interdiction?

The last aim of this study is to examine the development of maritime drug-interdiction provisions based on international law. The development of the maritime drug-interdiction treaties is looked at from the point of view that illicit drug trafficking must be combated to the fullest extent possible. By examining the development of maritime drug interdiction from no maritime drug-interdiction provisions in international agreements at all, to sufficient and adequate provisions in those treaties, it may be possible to extrapolate that development into the future. The pace of the development of the maritime drug-interdiction treaties, as a function of time, might give some indications of further developments. The question here is:

How did the legal framework for maritime drug interdiction develop?

For this purpose, the development, the *travaux-préparatoires*, national and international documents and other sources referring to the relevant treaties will be examined, followed by an analysis of and a commentary on the provisions of those treaties. Research into the literature about illicit maritime drug trafficking will be carried out as well. The relevant provisions of the treaties will also be compared with one another. The results of the study will be discussed in detail in Section 8.8. of this study.

In conducting this study, attention will be focused on the relationship among three fundamental principles of international law. The first is the principle of the freedom of the high seas, *c.q.* the freedom of navigation. The second, corollary, principle is that of exclusive flag state jurisdiction in respect of vessels sailing on the high seas. The third principle referred to is the sovereignty of a coastal state in its territory, including territorial waters.¹⁹

Each of those principles is well established in the main corpus of public international law. Although usually stated in absolute terms, those principles are not and have never been absolute. States can agree – and have agreed – to exceptions to these principles. This study seeks

¹⁹ These principles are described in detail in the subsequent chapters of this study.

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to examine whether and, if so, to what extent and in what circumstances the principles have been modified in the context of maritime drug interdiction.

1.3.3. Structure of this study

Chapter 2 will briefly describe the development of international drug control. That includes the period from early the 1900s until the 1980s.

Maritime drug interdiction based on the current general framework of public international law, including the law of the sea and customary international law, is examined in Chapter 3. That framework forms the background for the more specific maritime drug-interdiction treaties.

The subjects of Chapters 4, 5 and 6 are the multilateral and the bilateral maritime drug-interdiction treaties respectively for various regions of the world. The preparation of those treaties will be dealt with, followed by an analysis of and a commentary on the provisions of those treaties. In Chapter 7 those multilateral and bilateral maritime drug-interdiction treaties are compared. Conclusions about the current legal framework for maritime drug-interdiction, based upon the analyses and upon the comparison, are drawn in this chapter.

The consequences of the maritime drug-interdiction treaties examined are discussed in the last chapter, as well as some particular aspects of maritime drug interdiction, and some conclusions are drawn. Some possible future developments of legal aspects of maritime drug interdiction are also dealt with in that chapter.

1.3.4. Geographic scope of this study

Navigation is one of the oldest uses of the sea. While aircraft may have replaced ships as the principal means of conveying people across the oceans, ships are still the most important means of transporting goods: 95 per cent of all international trade by weight is seaborne.²⁰ By extrapolation, it is possible to state that a major part of illicit drugs is transported by sea. An argument in support of that contention is the fact that 85 percent of the illicit drugs in the Caribbean region are transported by sea.²¹

Because illicit drug trafficking at sea takes place all over the world, the geographic scope of this study is global. In general, the airspace above the sea will not be taken into consideration in the present study.

Inasmuch as ships that are involved in illicit drug trafficking usually depart from and eventually return to harbors or ports, port states play a prominent role in the fight against maritime drug trafficking. Those locations are beyond the scope of the present study, because they are generally part of a national legal regime; this study deals with illicit drug trafficking in international law.

²⁰ Churchill and Lowe (1999), p. 255.

²¹ United Nations Drug Control Program (UNDCP), Caribbean Regional Office, *Illicit Drug Trafficking in the Caribbean Region*, 3rd Revision, Barbados, 27 May 1997. See the Memorandum for the Secretary of State: Presidential Determination on Major Drug Transit or Major Illicit Drug Producing Countries for Fiscal Year 2007, Presidential Determination No. 2006-24, September 2006.

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1.3.5. Illegal conduct related to drugs covered by this study

General

Many studies have found that more than half of all of those arrested and charged or convicted for drug related offences are users of illicit drugs.²² Drugs are related to illegal conduct in various ways. Most directly, it is an offence in almost all states to use, possess, and manufacture or distribute drugs classified as having the potential for abuse. Some crimes can be qualified as income-generating crimes, other crimes are related to drugs through the effects they have on the user's behavior and by generating violence and other illegal activities associated with drug abuse.

The international organized crimes most related to illicit drug trafficking in general, including illicit drug trafficking at sea,²³ are illicit trafficking in precursors,²⁴ money laundering²⁵ and international terrorism.²⁶

Illicit (maritime) drug trafficking

Offences that are related to illicit trafficking in drugs, including maritime drug trafficking, are defined in the United Nations Convention against Illicit Traffic in Narcotic and Psychotropic Substances²⁷ (the 1988 Convention). Illicit drug traffic means the offences set forth in Article 3, paragraphs 1 and 2 of the 1988 Convention.

These offences are: the production, manufacturing, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation, possession, purchasing or cultivation of any narcotic drug or psychotropic substance contrary to the provisions of the United Nations drug control treaties: the 1961 Single Convention,²⁸ the 1972 Protocol²⁹ and the 1971 Conven-

²² Office of National Drug Policy (ONDCP), *The Economic Costs of Drug Abuse in the United States (1992-2002)*, Publication No. 207303, Executive Office of the President, Washington, (DC), December 2004, p. xii, www.whitehousedrugpolicy.gov (visited Fall 2006).

²³ See the United Nations International Convention against Transnational Organized Crime, supplemented by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, the Protocol against Smuggling of Migrants by Land, Air or Sea and the Protocol against illicit Manufacturing and Trafficking in Firearms, their Parts and Components and Ammunition, A/55/383, Palermo (2000).

²⁴ A precursor is a chemical that is transformed into another compound, such as illicit drugs. The 1988 Convention (see supra note 27 and Section 3.1.3. of this study) brought under international control 22 chemicals that can be used in illicit drug manufacture. See for updates of that list: www.incb.org/incb/en/precursors.html (visited Fall 2006).

²⁵ See the Financial Action Task Force on Money Laundering, *Basic Facts about Money Laundering* at www.fatf-gafi.org (visited spring 2006). See also Grosse (2001). See further the International Narcotic Control Board (INCB) Report for 1995, Chapter 1.

²⁶ See the SC Resolution 1373 (2001). See also *Drugs and Terrorism: a New Perspective*, September 2002, www.DEA.org (visited Fall 2006). See further *Threat Posed by the Convergence of Organized Crime, Drug Trafficking, and Terrorism*, Hearing before the Subcommittee on Crime of the Committee on the Judiciary House of Representatives, 106th Congress, second session, serial No. 148, 13 December 2000.

²⁷ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 20 December 1988. Including Final Act and Resolutions, as agreed by the United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, and the Tables annexed to the Convention, full text, including Tables, available on www.incb.org/e/index.htm (visited Fall 2006); see also Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, E/CN.7/590, New York, October 1998. In the present study, that convention is referred to as the 1988 Convention; see further Section 3.1.3. of this study and the Annex to Chapter 8 of this study.

²⁸ Single Convention on Narcotic Drugs, New York, 1961, UNTS 520, p. 151. In the present study referred to as the 1961 Convention.

²⁹ Protocol Amending the Single Convention on Narcotic Drugs 1961, New York, 1972, UN Doc. E/CONF.63/9. In the present study referred to as the 1972 Protocol.

tion.³⁰ The study concentrates on the offence of illicit maritime drug trafficking worldwide. This means mainly, the transport at sea of any illicit narcotic drug or psychotropic substance.

1.4. Drugs

1.4.1. General

We have stated above that the drug problem is a challenge of global dimension that constitutes a serious threat. To create a background for this study, the history of drugs is briefly described. First, however, the term ‘drugs’ will be defined. That definition will be used in the present study, except where otherwise expressly indicated or where the context otherwise requires.

The term ‘drugs’

Drug(s) is a term of varied usage. In medicine, it refers to any substance with the potential to cure diseases or to enhance physical or mental well being. In pharmacology, the term drug refers to any chemical agent that alters the biochemical or physiological process of tissues or organisms. In common usage, the term refers specifically to psychoactive substances, and often, even more specifically, to illicit substances. A psychoactive substance is any substance that people take to change either the way they feel, think or behave. This includes alcohol and tobacco as well as naturally manufactured substances.

In the past, most substances were made from plants, such as the cocoa bush for cocaine, opium poppies for heroin and cannabis for hashish or marijuana. Now synthesizing various chemicals produces psychotropic substances such as Ecstasy or LSD. Psychotropic substances are also known as synthetic drugs.

The International Narcotics Control Board (INCB)³¹ uses the legal understanding of these terms for control purposes: “Narcotic drugs are those covered in the 1961 Convention and the 1972 Protocol, while psychotropic substances are those listed in the 1971 Convention.” This study follows that legal definition.

Overview of drugs

In the present study, the term ‘drugs’ or ‘illicit drugs’ will include the items mentioned in the overview of table 1-1, excluding ‘Other Abused Drugs and Substances’, unless otherwise stated or indicated (see below Table 1-1).

³⁰ Convention on Psychotropic Substances, New York, 1971, UN Doc. E/CONF.58/7. In the present study referred to as the 1971 Convention.

³¹ The International Narcotic Control Board (INCB) is in charge of the international drug control system and directly responsible to the Economic and Social Council of the United Nations (ECOSOC). See the INCB Annual Report, Background Note No.3, Vienna, 23 February 2000. See also Section 2.4.1 of this study.

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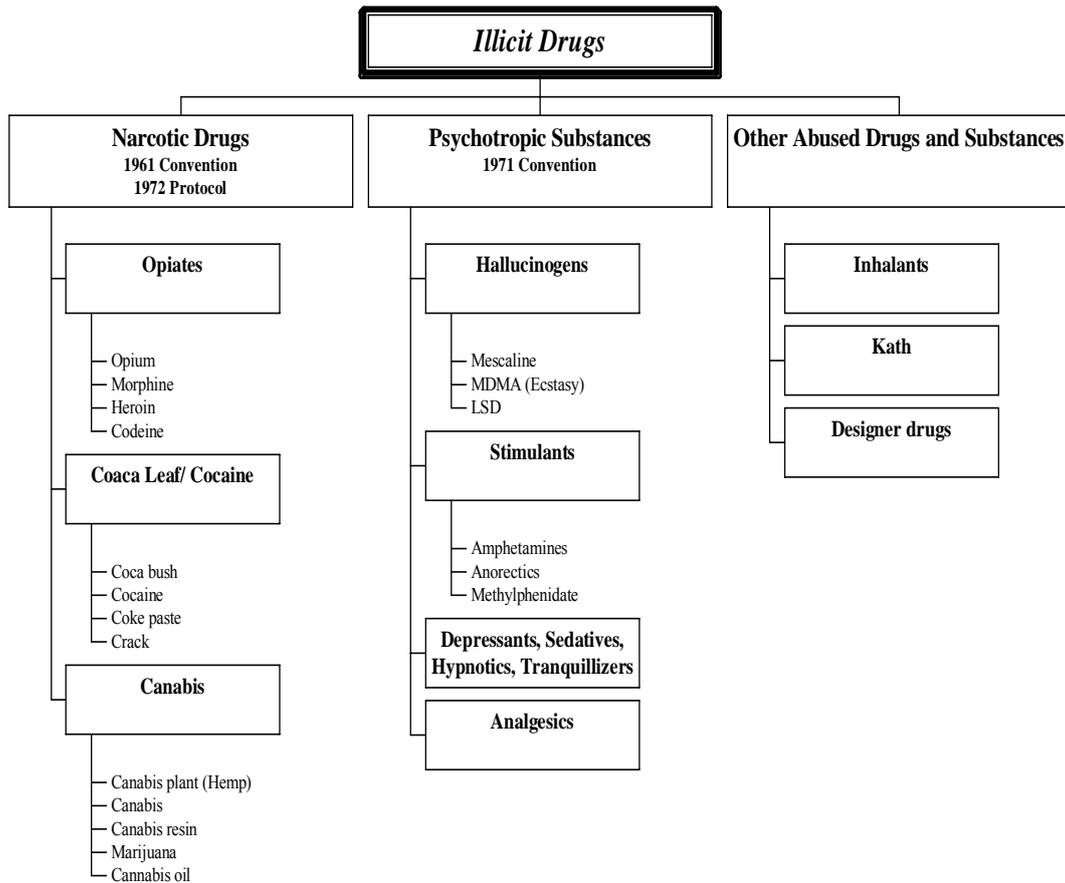


Table 1-1 Overview of illicit drugs

Table 1-1 gives an overview of illicit drugs. Currently more than 200 substances, found in thousands of different medical products, are subject to international control under the 1961 Convention including the 1972 Protocol, or under the 1971 Convention. Originally created to alter behavior, almost all depressants now under international control, belong to the pharmacological group of barbiturates or benzodiazepines. Not all analgesics are under the control of the 1971 Convention. Other abused drugs and substances are those that are not, or are not yet, under international control.

1.4.2. History of drugs

General

In this section the term ‘drugs’ is not the same as defined above. That definition was only introduced in the second half of the twentieth century. In this section the term ‘drugs’ is used as a common term. In the past, the use of drugs was not considered illicit.

Opium

People have taken drugs for curative, religious and recreational purposes for hundreds of years. An example is opium that has been used for many centuries. The earliest known mention of the opium poppy is in the language of the Sumerians, a non-Semitic people who descended from the uplands of Central Asia into Southern Mesopotamia some five or six thousand years before the birth of Christ.³² In 2737 BC, the Chinese emperor Shen Nung wrote

³² Negligan (1927).

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about the use of opium.³³ By about 1300 BC, Crete, Greece, was exporting small jugs to Egypt that probably contained opium dissolved in wine or water. In Egypt, opium was used, *inter alia*, to quieten crying children. The opium flower was known to Homer³⁴ and was mentioned in contemporary Assyrian medical tablets.³⁵ Hypocrites (460-370 BC) wrote about it in medical literature. Opium was known to be addictive. The Roman emperor Marcus Aurelius (121–180) reportedly began each day with a portion of opium dissolved in wine.³⁶

Cocaine

The history of cocaine, more specifically the chewing of cocoa leaves by the Indians of Peru and Bolivia goes also a long way back. Cocoa leaves were chewed by Andean Indians from the third century BC. The use was a court privilege as well as a religious observance.

Cannabis

Cannabis has been used as an agent for achieving euphoria since ancient times. It was described in a Chinese medical compendium traditionally considered to date from 2737 BC.³⁷ Its use spread from China to India and then to North Africa and reached Europe at least as early as 500.

1.4.3. Production of illicit drugs

General

In order to reduce the abuse of drugs worldwide, the production of illicit drugs has to be decreased. Only drugs for medical or scientific use should be allowed to be cultivated and this has to be done under national or international control. All estimates in this section are derived from the 2006 World Drug Report.³⁸

Narcotic drugs

Cocaine

Cocaine is mainly produced in Bolivia, Colombia and Peru. The total global production of cocoa leaves is about 270,000 metric tons per year. The global potential cocaine production is about 900 metric tons per year.³⁹ The trend for producing cocoa leaves and cocaine remains more or less stable.

Opium

Opium production is increasingly concentrated in Afghanistan, which produces three-quarters of the world's illicit opium. Global production of opium has remained stable at around 4,500 metric tons per year, resulting in a potential of 450 tons of heroin per year. The trend of the global heroin market has remained largely stable.

Cannabis

Production of cannabis, in contrast to opium poppy and cocoa leaf, is geographically much less concentrated. Linking production and consumption estimates, The United Nations Drug

³³ Meijering (1974), p. 23.

³⁴ Homer, Book VIII.

³⁵ Terry and Pellens (1928), p. 54.

³⁶ Reeves (2001 B); Reeves (2001 A).

³⁷ Meijering (1974), p. 52.

³⁸ *Supra* note 4.

³⁹ 2006 World Drug Report, p. 81; 2004 World Drug Report, p. 99; Global Illicit Drug Trends 2002, United Nations Office for Drug Control and Crime Prevention (UNODCCP), New York (2002), p. 57.

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Control Program (UNDCP)⁴⁰ estimated worldwide cannabis production at about 30,000 metric tons per year in the late 1990s.⁴¹ Production has been rising and may have reached some 45,000 tons in 2004/5.⁴² The production of cannabis is probably increasing.

Psychotropic substances

Production of psychotropic substances or synthetic drugs is not restricted to specific geographical areas. Synthetic drugs can easily be manufactured at the place of final consumption. Synthetic drugs are therefore not very relevant for illicit trafficking at sea. The global amount of production of psychotropic substances is very roughly estimated at 500 metric tons per year. The trend of the production of synthetic drugs is increasing.

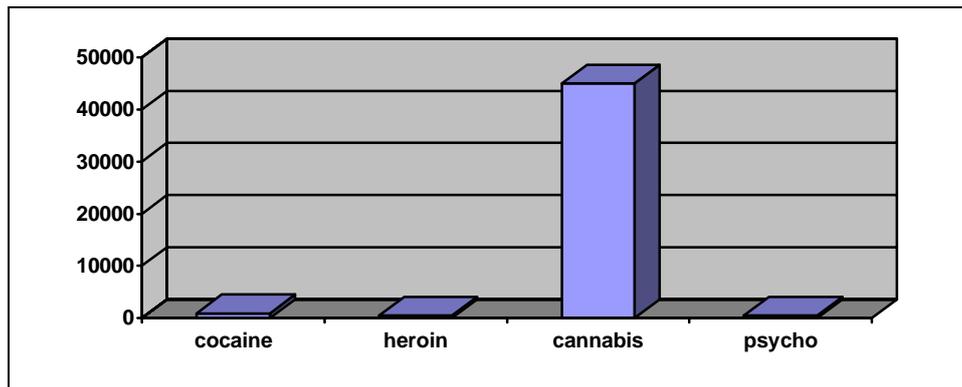


Table 1-2 Yearly production of illicit drugs in metric tons

Table 1-2 gives an overview of the yearly production of illicit drugs. That production is an estimate based on sources from, *inter alia*, the United Nations. It is quite clear that cannabis is the most-produced illicit drug.

1.4.4. Consumption of illicit drugs

General

About 185 million people worldwide consume illicit drugs. Consuming illicit drugs refers to the mode of administration, i.e. the way in which a substance is introduced into the body, such as oral ingestion, intravenous, subcutaneous or intramuscular injection, inhalation, smoking or absorption through skin or mucosal surface, such as gums, rectum or genitalia.⁴³

Inasmuch as it generally leads to addiction, the consumption of illicit drugs is the core of the worldwide drug problem. Addicts have great difficulty in voluntary ceasing or modifying drug use, and exhibit determination to obtain illicit drugs by almost all means, including criminal activities to sustain their addiction.

Trends of illicit drug consumption

Most of the spread of drug consumption at the global level is linked to cannabis, which, however, is less of a problem drug than heroin or cocaine. The most significant increase world-

⁴⁰ For the United Nations Drug Control Program (UNDCP) see Section 2.4.1. of this study.

⁴¹ UNDCP, Cannabis as an Illicit Narcotic Crop (1997) and (1998). See Global Illicit Drug Trends 2001, United Nations Office for Drug Control and Crime Prevention (UNODCCP), E.01.XI.11, New York (2001).

⁴² 2006 World Drug Report, p. 261; 2004 World Drug Report, p. 126.

⁴³ World Health Organization (WHO), Lexicon of Alcohol and Drug Terms, Geneva (1994).

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wide in the 1990s was in the consumption of synthetic drugs. The increase was most pronounced up until 1996/1997. In subsequent years, a number of countries in Europe (in respect of amphetamines and ecstasy) and North America (in respect of methamphetamines) reported a leveling off of abuse levels. Abuse, however, continues to expand in South East Asia (in respect of methamphetamines).

Trend data show that the most popular substances of abuse worldwide in the early 2000s were cannabis and synthetic drugs, followed by cocaine and heroin. The trend worldwide is not a decline in the abuse of illicit drugs. At some places in the world, declining trends are promising for certain kinds of illicit drugs, but other trends are less promising.

1.4.5. Trafficking in illicit drugs

General

Illicit drug trafficking⁴⁴ is the crucial link in the chain between production and consumption. It is also far and away the most lucrative stage in the process from cultivation of illicit drug to the point of final consumption. Along the many routes on which illicit drug traffic moves, there appears to be some spillage, partly because of a tendency of traffickers to pay middlemen in kind. Several transit countries along trafficking routes are consequently showing evidence of increasing drug abuse and consumption. In law, trafficking offences typically receive harsher penalties than those associated with drug possession for individual use. This distinction between trafficking and the more minor offences may be according to the amount of drug deemed in law to be trafficable quantity. In practice, many users are also engaged in small-scale drug selling transactions.

The number of countries and territories reporting illicit drug seizures rose from 120 in 1980/81 to 170 in 2002/2003, indirectly confirming that illicit drug trafficking has become a truly global problem. Illicit trafficking in drugs is done by land, by air and by sea. The large quantities are done by land and by sea. As drugs are only a small part of all the commodities that are transported and the fact that time is a commercial entity, it is very hard to find the relative small amounts of drugs within a reasonable time.

Illicit maritime drug trafficking

Seizure data indicate that a substantial portion of the total quantity of drugs seized has been transported by sea. Trafficking in illicit drugs by sea has virtually become an industry comprising many individual enterprises of varying size and organization. The shipment of drugs to the primary consuming countries has not been curbed in recent decades, and there is every indication that the overall movement of drugs remains unimpeded.

Ancient maritime drug transport

The transport of drugs by sea dates back at least two millennia. It is probably the oldest mode of drug conveyance, apart from the use of animals and humans. Among the drugs first carried by sea were cannabis and opium. Drug smuggling by sea firstly occurred during the Social

⁴⁴ The information on illicit drug trafficking as presented in this study is mainly drawn from the Global Illicit Drug Trends 2001 and 2002, the 2004 World Drug Report and the 2006 World Drug Report, from the United Nations Office for Drug Control and Crime Prevention (UNODC). Additional sources were used to supplement the information. These sources are governmental reports, documents from International Criminal Police (INTERPOL), the World Customs Organization (WCO), European Monitoring Center for Drugs and Drug Addiction (EMCDDA), the US Office of National Drug Control Policy (ONDCP), the US Department of State's Bureau for International Narcotics and Law Enforcement Affairs (INL), and the US Drug Enforcement Administration (DEA).

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Wars in Rome (91-88 BC). To protect its currency, Rome banned the highly prized drugs and perfumes.⁴⁵ In the modern sense of the term, illicit drug trafficking by sea first occurred in 1796, following the banning of the importation of opium into China.⁴⁶

Contemporary maritime drug transport

In the twentieth century, illicit drug trafficking by sea grew. According to seizure data, a substantial proportion (about 70 per cent) of the total weight of illicit drugs seized is confiscated either from maritime means of conveyance or after having been transported by sea.⁴⁷ The analysis of drug seizures carried out by the European Union member states' customs administration reveals that the vast majority of the drug seizures by quantity (71 per cent) are the result of operations at sea.⁴⁸ INTERPOL estimates that 67 per cent of all cocaine worldwide is smuggled by ship. INTERPOL also estimates that 55 per cent of all cocaine entering Europe is estimated to enter by sea.⁴⁹ Maritime conveyance continues to be the predominant means for smuggling drugs into the United States.⁵⁰

1.5. Global maritime drug interdiction

1.5.1. General

As can be seen on the maps in the Global Illicit Drug Trends 2002⁵¹, the 2004 World Drug Report and the 2006 World Drug Report, the main part of illicit drug traffic by sea is destined for North America and Europe, mainly via the Caribbean region and the seas adjacent to Europe.

Illicit drug trafficking at sea does exist in other regions of the world such as South-East Asia, Oceania, and around the African continent, but is less important than the amounts of illicit drugs smuggled into North America and Europe.⁵² No treaties are known that implement Article 17 of the 1988 Convention⁵³ for the above mentioned regions. It appears that maritime counter-drug cooperation by treaty has not yet evolved in those regions as it has in Europe and the Caribbean region.⁵⁴ That is why, this study only looks at maritime drug interdiction in the latter regions.

⁴⁵ Frank (1933).

⁴⁶ Jendwine (1923); Section 2.1.2. of this study.

⁴⁷ Aune (1990), pp. 63-72.

⁴⁸ Council Document 8937/01 ENFOCUSTOM 26, Brussels, 23 May 2001.

⁴⁹ Informal Open Ended Working Group on Maritime Cooperation against Illicit Drug Trafficking by Sea, UNDCP/2000/MAR.2, 6 November 2000, p. 2.

⁵⁰ Drug Control Update on US Interdiction Efforts in the Caribbean and Eastern Pacific, Report to Congressional Requesters, GAO/NSIAD-98-30, October 1997, p. 4; Hearing of Jurith, E.H., for the Senate Caucus on International Narcotics Control, Washington, 15 May 2001, at www.drugcaucus.senate.gov (visited Fall 2006).

⁵¹ Global Illicit Drug Trends 2002, UNODCCP, E.02.XI.9, New York (2002).

⁵² See the maps of drug flows in the UNODCCP's Global Illicit Drug Trends of the year 2001 and 2002, and in the 2004 and 2006 World Drug Report.

⁵³ Article 17 is named: Illicit Traffic by Sea. See Section 3.3.5. of this study.

⁵⁴ A meeting of the Heads of National Drug Law Enforcement Agencies in the Asia Pacific Region was held in Sydney, Australia, 21 October 2001, under the auspices of the United Nations Drug Control Program (UNDCP). A plan was accepted, but maritime counter-drug cooperation was not an important item. In May 2002, a first ever Ministerial Meeting on Drug Control in Africa was held by the Organization for African Unity (OAU), in cooperation with the UNDCP. New strategies and action plans did not speak about maritime counter-drug cooperation.

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1.5.2. Maritime jurisdictional zones

For jurisdictional purposes, the world's oceans can be divided into three parts. Those parts are divided into the maritime jurisdictional zones mentioned hereafter and covered by the principles codified and progressively developed in the UN Convention on the Law of the Sea;⁵⁵ some of those zones are determinative for this study and will be discussed further in Chapter 3. The other maritime jurisdictional zones are not examined, because they are not relevant for maritime drug interdiction and are therefore beyond the scope of this study.

The first part covers waters under the sovereignty of a coastal state. These waters include maritime internal waters, archipelagic waters and the territorial sea. The waters are subject to the territorial sovereignty of the coastal state, with navigational rights reserved for foreign flag ships. In international straits covered by territorial seas of riparian states, the regime of transit passage is applicable.

The second part of the world's oceans is the waters under functional jurisdiction of a coastal state and includes the contiguous zone and the exclusive economic zone (EEZ). The coastal state has only restricted jurisdiction in that part, specifically related to particular activities. Those are waters in which all ships, in general, enjoy freedom of navigation.

The third part is the waters beyond the jurisdiction of a coastal state: the high seas. Here the flag state of a vessel has, in general, exclusive jurisdiction.

See Chapter 3 of the study for a research in detail on the relevant maritime jurisdictional zones.

1.5.3. Maritime counter-drug cooperation

The core of maritime counter-drug cooperation in order to interdict maritime drug trafficking is to board and search a foreign flag vessel when there are grounds to suspect that the vessel is engaged in illicit drug trafficking. If evidence of involvement in illicit drug traffic is found, appropriate actions, such as detention and disposition, should be taken with respect to the vessel, persons and illicit cargo on board. In order to do so, there have to be applicable national and international legal rules.

The grounds for suspecting a vessel are acquired from strategic and operational intelligence. Information therefore is collected by national and international information centers. This information has to be disseminated as intelligence to indicate suspect vessels. When a vessel has been classified by intelligence as suspect, it should be possible for the vessel to be boarded, searched, and if illicit drugs are found the vessel ought to be detained and dispositioned, either by the flag state or by a competent foreign state. Disposition is the management or control of a detained vessel at sea, such as: Who takes in that vessel? Who will direct and accompany that vessel to port? Should law enforcement officials stay on board to control that vessel?

International agreements will greatly expedite the process by which law enforcement officials can board and search suspect vessels flying a foreign flag, especially when the flag state is unable to exercise its own control over the vessel due to its location or other factors. Treaties authorizing law enforcement officials to exercise law enforcement authority aboard foreign flag vessels or in foreign sovereign waters take many forms. They may be bilateral or multi-lateral; they may authorize boarding in advance or on request. In this study 'advance' means

⁵⁵ See Section 3.1.1. of this study.

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permanent authorization laid down in a treaty, 'on request' means granting authorization on request on an *ad hoc* basis.



Figure 1-1 Structure of Maritime Counter-Drug Cooperation

Figure 1-1 shows that maritime counter-drug cooperation in order to interdict illicit maritime drug trafficking is built on national law and international agreements. Those international agreements are the subject of the present study.

1.6. Jurisdiction

1.6.1. General

General

As has been stated above, the interdiction of maritime drug trafficking is a partial solution to the global drug problem. To combat maritime drug trafficking effectively, it will be necessary to undertake actions at sea. Rules of international law governing those actions are complex, because distinctions have to be made between various maritime jurisdictional zones and between the positions of intervening non-flag states and coastal states.

Combating maritime drug trafficking involves the exercise of jurisdiction which is important for effective and legal maritime drug interdiction. That is why the concept of jurisdiction is discussed in this section of this study.

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Jurisdiction

Jurisdiction has been defined as the capacity of a state under international law to prescribe or to enforce a rule of law.⁵⁶ As the study deals with various forms of jurisdiction, it is deemed to be necessary to describe how international law distinguishes between the authority of a state to enact laws - the prescriptive or legislative jurisdiction - and that state's authority to enforce its laws, - the enforcement or prerogative jurisdiction. Jurisdiction is an aspect of sovereignty and refers to judicial, legislative, and administrative competence.⁵⁷

Prescriptive jurisdiction refers to the power of a state to make its laws applicable to persons, events and things, whether by legislation, administrative rule, executive order, or sometimes judicial ruling. Prescriptive jurisdiction embraces those acts by a state, usually in legislative form, whereby the state asserts the right to characterize conduct as illegal. It refers, in the criminal context, to a state's authority under international law to assert the applicability of its criminal law to a given conduct.

Enforcement jurisdiction refers to the power of a state to ensure through coercive means that its legal commands are complied with. Enforcement jurisdiction embraces acts designed to enforce the prescriptive jurisdiction, either by administrative action such as arrest or seizure or by judicial action through the courts or even administrative agencies of a state.

The relationship between the two kinds of jurisdiction is reasonably clear. There can be no enforcement jurisdiction unless there is prescriptive jurisdiction. There may, however, be a prescriptive jurisdiction without the possibility of enforcement jurisdiction, as, for example, where the accused is outside the territory of the prescribing state and not amenable to extradition. Jurisdiction therefore hinges, fundamentally, on the power to prescribe.⁵⁸ A further distinction common to most legal systems is the distinction between civil and criminal jurisdiction.⁵⁹ The present study will mainly concentrate on criminal jurisdiction.

1.6.2. Jurisdiction to prescribe the law

General

Maritime law enforcement action aboard a suspect vessel is based on the assertion of jurisdiction over the suspect vessel. Jurisdiction, in turn, depends upon nationality, the location, the status and the activity of the vessel over which maritime law enforcement action is contemplated.

A controversial area of contemporary international law concerns the extent to which a state may apply its domestic law to events and persons outside its territory in circumstances affecting the interests of other states. Disputes about jurisdiction have not been unusual in international law and much was said on the subject by Grotius, Vattel and other writers of past centuries.⁶⁰

The general tendency in the literature on jurisdiction is to identify the rules governing jurisdiction in the form of the principles on which jurisdiction is commonly based. The four prin-

⁵⁶ Restatement of the Law Third: Foreign Relations Law of the United States (1987), American Law Institute, Chapter IV.

⁵⁷ Brownlie (1998), p. 301; Mann (1964), pp. 13-14; Akehurst (1972/1973), p. 145. The last mentioned author divides jurisdiction as follows: executive, judicial and legislative.

⁵⁸ See the Lotus Case, PCIJ, Ser. A, no 10 (1927), p. 25.

⁵⁹ Verzijl (1973), p. 38; Brownlie (1998) p. 299; Mann (1964), pp. 73-76.

⁶⁰ Schachter (1991), pp. 250, 252.

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ciples recognized in public international law that potentially authorize states to enact criminal laws applicable to maritime law enforcement operations are the territorial, nationality, protective and the universality principle.

The territorial principle

The primary form of national criminal jurisdiction is jurisdiction over crimes committed in the territory of a state (territorial jurisdiction). That form of jurisdiction is accepted by all states as an essential aspect of state sovereignty, and is based upon the territorial principle, which recognizes that a nation may prescribe conduct in its sovereign territory. Thus a state may prescribe an act as criminal, (e.g. possession, use, importation or distribution of narcotics or psychotropic substances), that occurs in that state's territory. This includes the waters under its sovereignty. The territorial principle may be regarded as the most fundamental of all principles governing jurisdiction. That principle is generally considered to be the normal basis of jurisdiction.⁶¹ A state may prosecute a crime, including illicit drug trafficking, on grounds of territoriality only if at least a part of the crime was committed in the prosecuting state's territory. That means that a constituent element of the crime must have taken place in its territory.⁶²

The nationality principle

The nationality principle (or active personality principle) is based on the concept that a state has jurisdiction over objects and persons having the nationality of that state. There is general agreement with the basic proposition that a state may prescribe for the conduct of its own nationals abroad.⁶³

Relevant to this study, the nationality principle is the basis for the concept that a ship in waters beyond coastal state sovereignty is subject to the exclusive jurisdiction of the state under whose flag it sails. The state may apply its laws to its nationals wherever they may be and to all persons, activities, and objects on board ships having its nationality.

The passive personality⁶⁴ principle enables states to exercise jurisdiction over crimes committed abroad when any of the victims are their own nationals. This principle focuses on the nationality of the victim rather than that of the perpetrator. The passive personality principle, however, is less well established as a basis for jurisdiction than the active one.

The protective principle

International law recognizes the competency of a nation to prescribe conduct as criminal if it may have a significant adverse impact on its national security or governmental processes. At the core of this principle lies the idea that a state is entitled to protect its security by means of exercise of its jurisdiction. The principle therefore has its application primarily in the domain of the criminal law, for conduct threatening the state's security will usually be so serious as to qualify it as a criminal act. Commonly, therefore, this principle justifies jurisdiction in respect of political offences such as espionage, sedition, counterfeiting of currency, perjury in respect of official documents such as visas, or attacks against embassies or consulates abroad.

⁶¹ *Idem*, p. 254.

⁶² Mann (1973), pp. 72-73.

⁶³ Restatement of the Law Third: Foreign Relations Law of the United States (1987), American Law Institute, Chapter 1.

⁶⁴ The nationality principle encompasses both active personality principle and passive personality principle.

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The purpose of the protective principle is to safeguard the political independence of the state prescribing and exercising jurisdiction, but not to serve as a means of enforcing the state's policy abroad.⁶⁵

The United States, one of the primary actors in the field of maritime drug interdiction, has used the protective principle in drug-smuggling cases. It was determined that all drug trafficking aboard vessels threatened the nation's security, regardless of whether the cargo was intended for the United States, and therefore illicit drug traffickers apprehended at sea could be convicted⁶⁶ (see also Section 8.6.3. of this study).

The universality principle

By virtue of the principle of universality all states would have jurisdiction to try and punish certain crimes. Jurisdiction based on the universality principle means that in cases of acts internationally defined as crimes under international law, the state of capture may prosecute the alien offender. The applicability of the universality principle to certain crimes can be determined by customary international law or can be stipulated by international agreements. The universality principle is limited to crimes, which the nations of the world have qualified as attacks upon the international legal order and have mutually agreed to suppress, e.g. war crimes.⁶⁷

During an official conference in 1927, illicit drug trafficking was drafted as a crime under universal jurisdiction for the first time. Later on, several treaties drafted similar provisions. None of those drafts materialized into concrete provisions.

Although it has been suggested that trade in drugs belongs to the limited number of international crimes that may justify recourse to the universality principle,⁶⁸ the existence of such state practice on this moment has not been established in customary international law.⁶⁹

Though it still seems unlikely that drug smuggling will evolve into a crime under international law, and so become subject to universal jurisdiction in the way that war crimes or piracy are, for the foreseeable future, it seems quite possible that the law will develop so as to give to states a jurisdiction over ships engaged in drug smuggling similar to what they enjoy over ships engaged in slave trade on the high seas.⁷⁰

It is worthy to note, that the right to exercise jurisdiction under the universality principle can stem either from a treaty of universal or quasi-universal scope, or from acceptance under customary international law. The latter provides the basis for the most commonly accepted example of an offence allowing of universal jurisdiction: piracy on the high seas.⁷¹ See for a research in detail about universal jurisdiction and maritime drug interdiction Section 8.7. of this study.

⁶⁵ Jennings and Watts (1992), p. 471; Akehurst (1972/1973) p. 159; Mann (1973), p. 80.

⁶⁶ See *US v. Nestor Suerte*, No. 01-20626, 5th Circuit (2002).

⁶⁷ See the Rome Statute of the International Criminal Court, A/CONF.183/9, 17 July 1998. See also Section 8.7 of this study.

⁶⁸ Mann (1973), p. 81; Oehler (1986), pp. 52, 53.

⁶⁹ Kunig (1978), pp. 594, 596; *The Princeton Principles on Universal Jurisdiction*, Princeton University, Program in Law and Public Affairs, Princeton (NJ), 2001, p. 48. See for (universal) prescriptive jurisdiction and illicit drug trafficking at sea Section 4.2.4. of this study.

⁷⁰ See Churchill and Lowe (1999), p. 218.

⁷¹ Higgins (1994), p. 58.

1.6.3. Jurisdiction to enforce the law

General

Enforcement jurisdiction is the right to actually coerce compliance with the laws. It is a function of prescriptive jurisdiction; it exists only when the criteria for prescriptive jurisdiction exist.

When, for example, one state has territorial jurisdiction and another state has jurisdiction based upon the protective principle, concurrent jurisdictions exist. It has therefore been suggested that rather than rely on the established principles or rules of jurisdiction, one has to go back to the far more basic principles of law which govern relations between states⁷² and, of these, there are three that appear relevant. These are the principles of sovereignty, non-intervention and territorial integrity.⁷³

Enforcement jurisdiction at sea

For jurisdiction to enforce the law of a state at sea, the rules are different, depending on whether national or foreign flag vessels are involved and on the maritime zone in which the exercise of jurisdiction takes place. National law applies at all times aboard a nation's vessels as the law of the flag state and is enforceable on that vessel by that nation's law enforcement officers. The governing principle, however, is that a state cannot take measures in the territory of another state by way of enforcement of national laws without the consent of the latter.⁷⁴ International law is clear in prohibiting officials of the enforcing state from entering or carrying on activities in a foreign state without the consent of that state.⁷⁵

Coastal state jurisdiction

The ability of a coastal state to enforce its jurisdiction over foreign flag vessels depends largely on the maritime zone in which the foreign flag vessel is located and on the activities in which it is engaged. Maritime law enforcement action, including maritime drug interdiction, may be taken by the coastal state against a foreign flag vessel without the authorization of the flag state, in the waters under sovereignty of the coastal state when there are reasonable grounds for believing that vessel is engaged in the violation of coastal state law applicable at that location. Two important exceptions will be described later on. Law enforcement actions may take place against foreign flag vessels without authorization of the flag state in the coastal state's contiguous zone for fiscal, immigration, sanitary and customs violations and in the EEZ for all natural-resource law violations.⁷⁶

Flag state jurisdiction

Under customary international law, in respect of enforcement jurisdiction, a flag state may exercise its jurisdiction in respect of violations committed anywhere by its vessels. The flag state may enforce its jurisdiction against its vessels when they are located in waters under its sovereignty, in waters under its functional jurisdiction or in waters beyond coastal jurisdiction. Where the vessel is in the waters under the sovereignty of another state, the flag state may not exercise its enforcement jurisdiction, but may nevertheless institute criminal proceed-

⁷² Brownlie (1998), p. 310; Akehurst (1972/1973), p. 159; Mann (1973), pp. 46, 128.

⁷³ Brownlie (1998), p. 289; Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, UN General Assembly Resolution 2625 (XXV), 24 October 1970.

⁷⁴ Brownlie (1998), p. 310.

⁷⁵ Schachter (1991), p. 257.

⁷⁶ For a more detailed discussion see Section 3.4. of this study.

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ings against the vessel before its own court provided that the ship owner or master is within, or the vessel returns to, the flag state,⁷⁷ or in a trial in absentia.

Exceptions

Important exceptions, relevant to illicit drug trafficking, to the flag state's exclusive jurisdiction over its vessels on the high seas are, *inter alia*, hot pursuit, constructive presence, and special arrangements in international agreements. The last mentioned are the main subject of the present study.

1.7. Conclusions

1.7.1. The drug problem

The facts and statistics in the present study should leave no doubt about the problem of drugs in the world today. Illicit drugs can be divided into narcotic drugs and psychotropic substances or synthetic drugs. The use of drugs has been known for thousands of years and in many places on the globe. The problem of addiction to drugs is a development of recent years. Individual drug-related crimes and organized drug-related crimes, such as illicit drug trafficking, are compounding an economic, social, political and environmental threat to various countries.

The supply capacity of drug producing countries has not been exhausted, nor is it likely to be so in the foreseeable future. While supply and demand for narcotic drugs seem to be reasonably stable, with new users taking the place of those who either come off the drug successfully or who have died from it, the demand for psychotropic substances or synthetic drugs such as ecstasy, is increasing.

One part of the worldwide drug problem is illicit trafficking in drugs at sea, which is the issue of the present study, more specific the current legal framework for maritime drug interdiction is the issue of this study.

1.7.2. Maritime drug interdiction and jurisdiction

A partial solution to the global drug problem is the interdiction of illicit trafficking in drugs at sea. An international network of intelligence is needed in order to find out which ships are suspected of illicit trafficking in drugs and those ships should be tracked and monitored until a vessel of a law enforcement agency can be directed to the ship to board and search it. When drugs are found the ship, crew and cargo have to be detained and instructions for disposition have to be applied by the intervening state or the flag state of this ship.

In general, ships on the high seas are under the exclusive jurisdiction of the flag state. A coastal state has jurisdiction over ships sailing under its flag and over foreign flag ships suspected of illicit drug trafficking in the waters under its sovereignty and within the context of the exercise of jurisdiction to the extent provided for under public international law. Those exclusive jurisdictions of different states in various maritime zones make effective maritime drug interdiction difficult. That is what is meant by the struggle between the freedom of navigation and coastal state sovereignty, and the dilemma of how to enforce international law by means of national rules.

⁷⁷ Churchill and Lowe (1999), p. 345.

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Many obstacles can be overcome by concluding international agreements providing a legal framework for maritime drug interdiction. When a legal framework of international agreements for the interdiction of illicit drug trafficking at sea exists, then vessels engaged in illicit drug trafficking can be legally stopped, visited and searched. When illicit drugs are found, those can be taken off the market and the illicit drug traffickers can be brought to justice. In that way, a legal framework of international agreements for maritime drug interdiction can help in solving a part of the global drug problem as discussed in the beginning of this chapter.

CHAPTER 2

DEVELOPMENT OF THE INTERNATIONAL LEGAL REGIME FOR DRUG CONTROL

2.1. Introduction

2.1.1. General

Chapter 2 provides a historical background for the consequent part of this study. As one of the aims of this study is to examine the development of maritime drug-interdiction provisions in various international conventions, the first international agreement will be examined, followed by all other relevant drug treaties that include the maritime part of illicit drug trafficking.

After examining the internationalization of the drug problem, this chapter discusses the chronology of the development of the international legal regime for drug control. This is done by scrutinizing the relevant drug treaties from the 1909 Shanghai Resolutions, the first instrument of multilateral international cooperation, up to the 1972 Convention.¹ The subsequent period will be examined in detail in the next chapters, because the focus shifted in that period from 'licit-drug control', to 'illicit-drug interdiction', including 'illicit-drug interdiction at sea', which had become more essential.

The history of international drug control can be divided in three eras: the years preceding the League of Nations period, during the League of Nations period and during the United Nations period. The establishment of the drug-control mechanisms of the League of Nations and the United Nations (UN) are discussed in detail because those two global institutions have been important within the context of the suppression of illicit traffic in drugs. This chapter ends with an examination of whether those drug-control treaties were successful in the fight against illicit drugs.

2.1.2. Internationalizing of the drug problem

Internationalizing of the drug problem until 1900

One of the reasons that an international drug-control system emerged in the twentieth century was the opium problem in China.² Opium became so popular in China that a trade in opiates was developed in the eighteenth century to meet the increasing demand. The opium trade between China and India was developed by the East India Company (England), which not only had a statutory monopoly of trade between China and India by the 1760s, but also assumed powers of government in India. The British Governor General to India largely encouraged the export of opium from India to China because of a need to increase the revenue of the East India Company.³ By the end of the eighteenth century, there were serious addiction problems

¹ An historical overview of the drug control treaties can be found in the Annex to this chapter.

² 2004 World Drug Report, p. 26.

³ Morse (1910), pp. 81-82.

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in China, and authorities in Peking declared the opium trade to be illegal.⁴ The East India Company ignored the declarations and kept on trading with the Chinese by bribing local officials.⁵ Between 1814-1818, opium accounted for one third of all export trade from Bengal to China.⁶ China had only forbidden the import of drugs, not the use and cultivation in China. England and France continued smuggling those drugs, however. Those countries were probably the first illicit drug traffickers by sea.

Opium wars

In 1839, the Peking government tried to enforce the opium ban to which the British responded by defending the principle of free trade. In the ensuing Opium War (1840-1842), the port of Canton was bombarded, and China was forced to surrender to Great Britain. Under the Treaty of Nanking, 1842,⁷ the opium trade was opened again. So, in those days a treaty entered into force to legalize illicit drug trafficking (*in casu* importing) by sea.

The Second Opium War (1857-1860) resulted in a further loss of Chinese sovereignty. In 1858, the Treaty of Tientsin⁸ was signed. Under that treaty, opium was declared to be a dutiable article, and only China was allowed to carry the drug of forgetfulness into the Chinese interior, Great Britain's monopoly of the opium trade did not disappear, however. The Treaty of Tientsin was also designed to give the indigenous population the right to cultivate opium for the purpose of local consumption.

Internationalizing of the drug problem from 1900

Around 1900, most European states did not have a drug problem on the European continent, but did have in their colonies and dependent territories. Russia, Germany, Italy and Austria were involved in the opium problem, due to the fact that they had some areas of interest in China.⁹ The non-medical use of opium had only become a serious problem in France,¹⁰ England¹¹ and Portugal.¹² In the Dutch colony of Surinam, a drug problem existed among the Chinese population.¹³ In what would later become the Netherlands East Indies, the use of opium already existed before the Dutch arrived in the sixteenth century.

Although drugs were a problem in North America, it was under control. As far as the South American countries were concerned, only Mexico had some kind of drug control. On the African continent, South Africa faced a drug problem in the twentieth century. Of the countries in the South Pacific, New Zealand had no problems in this area, while opium persisted as a

⁴ In 1796, an edict formally prohibiting the import into China of all opium was issued, International Opium Commission, Vol. I, p. 45.

⁵ Lowes (1966), p. 35.

⁶ Reeves (2001, A).

⁷ The Treaty of Nanking was signed on 29 August 1842 at Nanking, UK Parliamentary Papers, 1844, li Paper 521. A later official printing of the English text appeared in the British and Foreign State Papers, London, 1858, xxx, 1841-1842, pp. 389-392. See www.midley.co.uk/Nanking/NANKING_JICH.htm#_ftn1 (visited fall 2006). See also the Encyclopedia Britannica, Edition 1971, p. 188.

⁸ The Treaty of Tientsin was signed on 8 November 1858 at Tientsin, parties were China, UK, US, France and Russia, British Foreign and State Papers 48, 58 and 60.

⁹ Florio (1975), p. 21.

¹⁰ Florio (1975), p. 17.

¹¹ Quincy (1825); Encyclopedia of the Social Sciences, Volume 11, Opium Problem, New York (1937), pp. 471-476.

¹² Goodrich (1969), Chapter 2.

¹³ Boom (1980), p. 1.

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problem in Australia. Opium abuse was prevalent in the Middle East, the East and the Far East, i.e. Persia¹⁴ and Japan.¹⁵

It may be observed that in these countries where opium was a problem, it was usually either because of the absence of control-measures, or due to some external reason such as the immigration of an opium-smoking population, despite the adoption of some measures of control through national legislation, as in the case of Australia, Canada, Russia and South Africa.¹⁶

In the year 1906, 27 per cent of the male adult population in China was addicted to opium or morphine. In that year, the Chinese government forbade the consumption of opium and the cultivation of the opium poppy in China. In 1907, China and Great Britain signed a Ten-year Agreement.¹⁷ They agreed to reduce the opium import into China by Great Britain and at the same time they agreed to decrease the opium producing capability in China.¹⁸

China wanted more international support, due to the enormous problem they had to cope with. The government asked the United States for help. The United States also had a drug problem,¹⁹ which had arrived with the Chinese immigrants at the end of the nineteenth century. In addition, the Spanish-American War had been concluded by a treaty transferring the Philippines to the United States²⁰ and it soon became apparent that opium smoking amongst the Chinese population of the Philippines, where whole communities had abandoned themselves to the practice, was a widespread practice.²¹

It can be stated that although drug abuse caused problems in many states, the suppression of illicit use of drugs was a domestic problem at the beginning of the twentieth century, which could be solved within the limits of jurisdiction and available resources. It became a matter of international concern due to several changes like those mentioned above, the development of international trade and alarming tendencies toward non-medical use. Attempts for a solution by bilateral agreements²² were followed by multilateral efforts, such as the International Opium Convention of Shanghai in 1909. That convention will be discussed below.

2.2. The pre-League of Nations period

2.2.1. General

Around the beginning of the twentieth century, the holding of an international conference in the Far East was quite new, but in Europe precedents were already well established. There was active government cooperation in organizations such as the International Telecommunications Conferences and the Universal Postal Union. The Second Hague Peace Conference²³ had just been held. In the consideration of the drug problem, principally opium smoking and supply, one could already notice two divergent viewpoints which continued to play an impor-

¹⁴ Encyclopedia of the Social Sciences, Volume 11, Opium Problem, New York (1937), pp. 471-476.

¹⁵ Idem.

¹⁶ Chatterjee (1981), p. 20.

¹⁷ Dunn (1920), pp. 46-48.

¹⁸ Mac Namara (1973).

¹⁹ The 61st Congress, 2nd Session, Senate, Document No. 377, Opium Problem, Washington (1910), p. 13.

²⁰ Treaty of Peace Between the United States and Spain, was signed at Paris on 10 December 1898 and ratified by the US on 6 February 1899, 30 Stat. 1754; TS 343; 11 Bevans 615.

²¹ American Journal of International Law (1909), Vol. 3, p. 670.

²² Eisenlohr (1934), p. 218; Bailey (1935), p. 1. E.g. the Chinese-British Agreement of 1908, reducing the export of opium from India into China over a period of three years, Great Britain Treaty Series, No. 13 (1911).

²³ The Hague Peace Conference in 1907.

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tant role during the decades preceding World War II. One, mainly represented by the US, urged a very early or immediate suppression of opium smoking; the other advocated regulation and gradual prohibition.

2.2.2. The 1909 Shanghai Resolutions

The Shanghai Opium Conference

On 24 July 1906, the American Episcopalian Bishop Brent wrote a letter²⁴ to President Theodore Roosevelt in which he described the opium problem and suggested an internationally coordinated action to counter this multinational opium problem. It is doubtful whether a letter in the 21st century from an American bishop to the President of the USA would receive any attention at all, or would have the effect this one did. For that letter of 24 July 1906 was the direct cause of the Shanghai Opium Conference.

At 11 a.m. on 1 February 1909, in the Palace Hotel in Shanghai, Bishop Brent was elected president at the opening session of a thirteen-nation International Opium Commission, also referred to as the Shanghai Commission. That time and date can be considered as marking the official beginning of international narcotics control.²⁵

Due to lack of precedents for organizational procedure, the rules of the Second Hague Peace Conference were, *mutatis mutandis*, adopted by the Shanghai Opium Conference. The main objective of the Shanghai Commission was to consider the question of putting a stop to opium consumption.²⁶ It became apparent from the national reports to the Shanghai Commission, that each participant state had regulatory measures available, which offered at least theoretical possibilities of countering the production of and traffic in opium. Some of them, apart from the United States and Great Britain, had treaty relations with China restricting the traffic in opium to legitimate purposes only. One of those countries was The Netherlands.

The Netherlands régime system

The Netherlands was invited to this international conference because of the country's control over the Dutch East Indies and the fact that very good control of opium was in place in those islands.²⁷ The Netherlands report to the Shanghai Commission explained that there was virtually no cultivation of opium in the Dutch East Indies. A localized government monopoly that had been formed in 1894 was being gradually extended and was expected to cover all the islands within four or five years.²⁸ That *régie system* controlled the import of raw opium, which mainly came from Turkey. The *régie system* also manufactured the opium at a government *bouillierie* set up in Java,²⁹ as well as controlling its subsequent sale and distribution.

There was no export. A special branch of the local navy was established in order to suppress illicit drug trafficking by sea.³⁰ The objective of the *régie system* was to reduce the abuse of opium by controlled sale. The Netherlands, by virtue of its Tiensin Treaty with China (1863), was authorized to export opium into China, but that right was never exercised. Due to the *régie-system*, there had been a decrease in opium consumption per capita in the Dutch East In-

²⁴ Letter of the Right Reverend Charles H. Brent, Protestant Episcopal Bishop of the Philippine Islands, House Document 380, 68th Congress, First Session, p. vii.

²⁵ Lowes (1966), p. 1.

²⁶ Williams (1934), p. 70.

²⁷ Meijering (1974), Chapter 3.

²⁸ International Opium Commission (1909), Vol. II, p. 294.

²⁹ Chanut (1938), p. 38.

³⁰ Backer Dirks (1986), Chapter XXVII.

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dies between 1894-1906.³¹ The *régie system* ended in late 1944. By then, the use of narcotic drugs had been prohibited completely, except for medical or scientific use.³²

Economic aspect

During the Shanghai Opium Conference in 1909, the Dutch Government stated that financial aspects could not restrict the efforts to counter opium use. China agreed, but the United Kingdom disagreed. Due to the fact that the United Kingdom generated large revenues from the traffic of drugs from India to China, it opposed the Chinese proposal of monopolizing the traffic of drugs by China.³³ The economic interests of the powerful states reigned supreme, and consequently, it proved difficult for states having such interests to let go of the reins.

The Resolutions

The International Opium Commission adopted the 1909 Shanghai Resolutions.³⁴ Bishop Brent reminded the delegates that:

“They were neither Envoys Extraordinary nor Ministers Plenipotentiary; [...], that none of the Governments represented would be bound to accept the conclusions or to act upon recommendations of the Commission; consequently, they would not, in any sense, commit their Governments to any definite course of action by the views which they might express, individually or collectively, during the course of the enquiry”.³⁵

The importance of the Shanghai Commission, however, lays not in its structural ingenuity,³⁶ but in its very important role in creating a consensus,³⁷ although the terms of reference of the commission were neither extended to the scientific investigation of anti-opium remedies and of the properties and effects of opium and its products, nor to any resolution which involved existing international treaties and agreements.³⁸ While the regional aspect of opium smoking and of international trade in prepared opium constituted the primary concern of the commission, its members were already well aware of the wider geographical scope of the narcotics problem in general, including addiction to manufactured opiates.

Some of the resolutions were addressed to governments having concession territories in China, requesting them to regulate the trade, the distribution and the consumption of opium while conforming to Chinese national legislation. The other resolutions, –concerning the desirability of the gradual suppression of opium smoking, restricting the use of morphine to medical purposes and national control of morphine and other derivatives of opium–, can be considered the first universal appeal to fight drug abuse and the first declaration of the principles of a future international narcotics control system.³⁹

³¹ International Opium Commission (1909), Vol. I, p. 2.

³² Indisch Staatsblad, nr. 14 (1944).

³³ Oudendijk (1909).

³⁴ The Final Resolutions of the International Opium Commission were signed at Shanghai, China, on 26 February 1909. These resolutions were not a binding legal instrument, International Opium Commission (1909), Vol. I, pp. 15-16.

³⁵ Report of the Advisory Committee on the Traffic in Opium and Other Dangerous Drugs, First Session, LN Doc. A.38.1921.XI.

³⁶ LN Doc. A. 15.1922, Annex I, pp. 14-17.

³⁷ International Opium Commission (1909) Vol. I, p. 42. Consensus was the normal mode for international agreements in those days.

³⁸ *Idem*, p. 82.

³⁹ Bayer and Ghodse (1999).

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2.2.3. The 1912 Convention

The Hague Conference

The International Opium Commission of 1909 paved the way to the Hague Opium Convention of 1912, known officially as The International Opium Convention, also known as The Hague Convention. In the present study it is referred to as the 1912 Convention.⁴⁰ The International Opium Conference took place at The Hague from 1 December 1911 to 23 January 1912. The president of the conference was the American Bishop Brent. Twelve states were present, out of 46 nominally sovereign states. The conference led to the conclusion of the 1912 Convention, the first international binding instrument in which an attempt was made to suppress the abuse of opium and other related substances.

Contents of the 1912 Convention

The 1912 Convention consisted of six chapters dealing exclusively with opium (raw and prepared) and related substances (cocaine, morphine etc.). Definitions of opium and other related substances such as morphine and cocaine were drawn up by the technical delegates. Article 1 was one of the most important articles. This article stated:

The contracting Powers shall enact effective laws or regulations for the control of the production and distribution of raw opium, unless laws or regulations on the subject are already in existence.

The first part of this article was the major provision for the control of the production and distribution of raw opium. That provision was the genesis of the many subsequent treaties in this field, which will be dealt with in the next part of this chapter. The 1912 Convention failed to define the extent to which production of raw opium should be controlled, however.

It can be seen that the responsibility for enacting laws and regulations in this field lay with the contracting powers. As this was exclusively a matter within the respective domestic jurisdiction of the contracting powers, the efficacy of such provisions obviously very much depended upon good intentions of the contracting powers concerned.

Import and export of raw opium

Articles 3, 5, 7, 8 and 13 of the 1912 Convention controlled the export and import of opium. Such export and import of raw opium was only permitted to duly authorized persons. The Dutch delegate suggested that the trade in opium should be taken out of the hands of individuals and to place the trade exclusively in the safe hands of the Governments.⁴¹ That proposal was not adopted.

Article 7 of the 1912 Convention stated that contracting powers that were not ready to prohibit the export of prepared opium immediately, should prohibit it as soon as possible; rather vague and indefinite provision, as a specific time was not mentioned. Article 8 contained the phrase "...which desires to restrict its entry". This is not a legal prohibition.

Article 13 stipulated that contracting powers "[...] shall use their best endeavors"; this is weak and does not appear to have created any legal obligation. Article 9 however, outlined some positive steps towards the limitation of the manufacture, sale and use of morphine, co-

⁴⁰ The International Opium Convention was signed at The Hague, The Netherlands, on 23 January 1912, LNTS, Vol. 8, p. 87. In 1915, China, the Netherlands and the US put the 1912 Convention into force among these countries. Globally it entered into force in 1919.

⁴¹ Summary of the Minutes of the International Opium Conference (1912), p. 19.

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caine and their respective salts, by the enactment of pharmacy law or regulations. No amounts were mentioned.

Possession of raw opium

Article 20 of the 1912 convention mentioned the examination of the possibility of enacting laws or regulations making it a penal offence to be in the illegal possession of raw or prepared opium, morphine or cocaine. Again a weak article but, on the other hand the 1912 Convention was helpful in enacting the first federal drug control law in the USA: The Harrison Narcotic Act of 1914,⁴² which would remain a pillar of US drug policy for the coming decades.⁴³

The Chinese articles

Chapter IV of the 1912 Convention was made applicable only to China, giving effect to some of the 1909 Shanghai Resolutions. Chapter IV's, Articles 15, 16, 17, 18 and 19 were the so-called Chinese articles: they dealt with contracting powers having treaties with China.

It is rather interesting that states that signed the 1912 Convention, at the very same moment were involved in illicit trafficking of drugs into China. This problem was the reason that China insisted that the articles with regard to China should be included in the main convention.⁴⁴ These Chinese articles had little relation to any other part of the 1912 Convention because they virtually only concerned the contracting powers having treaties with China.⁴⁵ Other delegations even dissociated themselves from these articles.⁴⁶

The remarkable final provisions

Chapter VI included the final provisions. Those final provisions provided one of the most remarkable curiosities in the history of pre-1914 international agreements.⁴⁷ These final provisions were very different from those adopted in any other international convention.⁴⁸ The unusual feature of this arrangement was the way in which ratification, even by those states represented at the conference, was made to depend upon the adherence of all other states that had not been represented.

Pursuant to Article 22 of the 1912 Convention, the signatures of the 34 non-represented states were to be embodied in a special 'protocol of signature by powers not represented at the conference'. That protocol was to be added after the signatures of the contracting powers present. The extraordinary provision of Article 23 of the 1912 Convention stated that, after 'all the powers' had signed either the convention or the protocol, the Dutch Government would invite these states to ratify the 1912 Convention with the protocol.

This special way of ratification was used to attain a universal application of the convention,⁴⁹ but created a problem due to the fact that in different countries, various methods of ratification existed. In a number of countries, a convention could not be ratified without the intervention of a legislature, although in some other countries an act of the legislature was not necessary for the ratification of a convention. It is unusual to make the ratification of a treaty condi-

⁴² The Harrison Narcotics Tax Act, 17 December 1914, Public Law No. 223.

⁴³ Musto (1999), pp. 59-63.

⁴⁴ Summary of the Minutes of the International Opium Conference (1912), p. 102.

⁴⁵ Article 15 of the 1912 Convention stated that Contracting Powers having treaties with China were called Treaty Powers.

⁴⁶ Summary of the Minutes of the International Opium Conference (1912), pp. 112, 116.

⁴⁷ Lyons (1963), p. 376.

⁴⁸ Vitta (1930), p. 646.

⁴⁹ Summary of the Minutes of the International Opium Conference (1912), pp. 76-77.

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tional upon adherence to the treaty by other powers – that have not signed. Such a radical scheme for universality was not only caused by commercial interest already mentioned but also by illicit traffic fears.⁵⁰

The second and third Hague Conferences

Through diplomatic channels and convening two further international conferences, it was possible to attain the signatures of all but five states. The Second and Third Hague Opium Conferences, in 1913 and 1914, were organized by the Government of The Netherlands in order to bring more states on board and to drive the 1912 Convention into force.

The convention only came into force at the end of the World War I, which began shortly after the Third Hague Opium Conference. The 1912 Convention was made part of the Treaty of Versailles, and therefore came into force in 1919 (see below Section 2.3.1).

2.3. The League of Nations period

2.3.1. General

On 11 November 1918, an armistice ended fighting in Europe. The victorious Allied Powers of World War I established the League of Nations by the Treaty of Versailles.⁵¹ The League of Nations' charter, known as the Covenant, was approved as part of the Treaty of Versailles⁵² at the Paris Peace Conference in 1919. The League's mission, as stated in the Covenant, was "to promote international cooperation and to achieve international peace and security".⁵³

There were three categories of League of Nations organizations: autonomous bodies, principal organs and committees, and commissions and conferences. The principal organs were the Assembly, the Council and the Secretariat. Committees, commissions, and conferences received mandates from the League of Nations. Examples include the Opium Advisory Committee, the European Union Commission, the Office of the High Commissioner in Danzig and the Permanent Mandates Commission.

The League of Nations and illicit drugs

Article 23(c) of the Covenant entrusted the League of Nations with the task of general supervision over the traffic in opium and other dangerous drugs. The Assembly's functions, as far as control of the traffic in opium and other dangerous drugs was concerned, were mostly supervisory, owing to the fact that the major task concerning this matter was entrusted to the Advisory Committee on the Traffic in Opium and Other Dangerous Drugs, hereinafter called the Opium Advisory Committee (OAC). Although the US had chosen not to join the League of Nations, American influence in international drug control did not wane. They pressured the League to convene a new conference because they were worried by the limited effects of the 1912 Convention.⁵⁴

⁵⁰ Vitta (1930) p. 647.

⁵¹ The Treaty of Peace between the Allied and Associated Powers and Germany, was signed at Paris on 28 June 1919 and entered into force on 10 January 1920, *The Treaties of Peace 1919-1923*, Carnegie Endowment for International Peace, New York, 1924.

⁵² Articles 1-26 (Part I) of this treaty form the Covenant of the League of Nations.

⁵³ Preamble of the Covenant of the League of the Nations.

⁵⁴ Sinha (2001), under C.

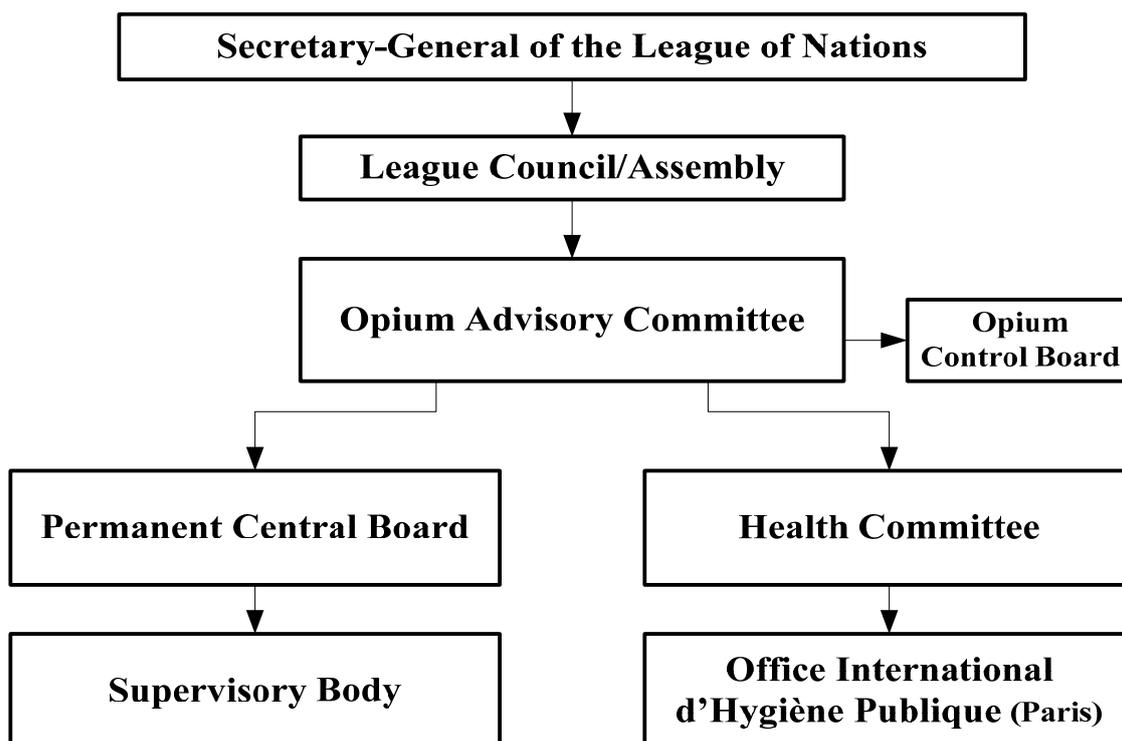


Figure 2-1 Structure of the League of Nations machinery concerned with drug control

Figure 2-1 shows the structure of the licit drug-control mechanism of the League of Nations, a combination of political and technical bodies which did not appear to be very successful.

The Opium Advisory Committee (OAC)

The League Council's functions in this area of international law were not limited to executive functions; it could also request⁵⁵ the Opium Advisory Committee to undertake specific studies and to prepare conventions.⁵⁶ In the case of control of traffic in drugs during the League of Nations' period, the main responsibility lay with the Opium Advisory Committee, which was directly accountable to the League Assembly/Council. Although implementing decisions depended upon political bodies, the advisory function of the Opium Advisory Committee on technical matters influenced the final decisions of those political bodies. The Opium Advisory Committee was nothing less than a laboratory for the discovery and testing out of new measures of international cooperation against the traffic in dangerous drugs.⁵⁷

The Opium Control Board (OCB)

Administration of the import and export of raw opium pursuant to the 1912 Convention had originally been the responsibility of the Netherlands, but was transferred to the Opium Control Board (OCB) created by the Opium Advisory Committee. Notwithstanding this transfer, communications with countries that were not members of the League of Nations, such as the United States, continued to pass through The Hague.⁵⁸

⁵⁵ Article 8 of the Covenant.

⁵⁶ See the Final Act of the Conference on the Application in the Far East of Chapter II of the 1912 Convention, LN Doc. C.82.M.41. 1925.XI, p. 12.

⁵⁷ Records of the Second Opium Conference, LN Doc. C.82M.41.1925.XI, Vol. I, p. 378.

⁵⁸ Willoughby (1925), p. 44.

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The Permanent Central Board (PCB)

The Permanent Central Board (PCB) was set up by the 1925 Convention⁵⁹ as an impartial body whose members should not be government representatives but should serve in a personal capacity, not holding any office, which would put them in a position of direct dependence of their government.⁶⁰ The Permanent Central Board was established to watch continuously the course of the international trade in narcotic drugs. To that end, the contracting powers took measures to furnish the Permanent Central Board with detailed annual and quarterly statistical returns, the so-called estimates.

The Supervisory Body (SB)

The genesis of the Supervisory Body could be found in the 1931 Convention.⁶¹ The Supervisory Body examined the estimates that were received by the Permanent Central Board. The Supervisory Body might require further information from governments on their estimates and might with their consent change the estimates. It published an annual statement of estimates for each country or territory. The Supervisory Body was authorized to establish estimates for those countries that failed to furnish them, regardless of whether they were parties to the 1931 Convention. The Permanent Central Board was called upon to request estimates for countries and territories that the 1931 Convention did not apply to.

The Health Committee (HC)

The Health Committee was one of the constituent parts of the Health Organization of the League; members were medical experts or officials. Their role in international drug control was restricted to scheduling or categorizing the narcotic and other drugs. The Supervisory Body had some executive powers⁶² but the Health Committee, which was a more specialized body for carrying out technical tasks, did not have any executive power. The Health Committee was assisted by the *Office International d'Hygiène Publique* in Paris.

2.3.2. The 1925 Agreement including the 1925 Protocol

The 1925 Agreement

The purpose of the 1925 Agreement⁶³ was stated in its preamble, which expressed a determination to bring about the gradual and effective suppression of the manufacture of, the internal trade in and the use of prepared opium, as provided for in Chapter II of the 1912 Convention. The 1925 Agreement was supplementary to the 1912 Convention.

The scope of the 1925 Agreement was limited to the Far Eastern possessions or territories of the contracting powers.⁶⁴ An analysis of the features of the 1925 Agreement shows, that establishing the monopoly by government of the cultivation and manufacture of and trade in opium was the most important issue. Signatories were permitted to sell opium only through government-run monopolies and were required to end trade within 15 years.

Article 6 of the 1925 Agreement was one of the important provisions in the light of prohibition. It said that the export of opium, raw or prepared, for smoking was prohibited.

⁵⁹ See below Section 2.3.2.

⁶⁰ Article 19 of the 1925 Convention.

⁶¹ See below Section 2.3.4.

⁶² Article 5 of the 1925 Convention.

⁶³ The Agreement concerning the Manufacture of, Internal Trade in, and Use of Prepared Opium, including the 1925 Protocol, was signed at Geneva on 11 February 1925 and entered into force on 28 July 1926. LNTS Vol. LI, p. 337; LN Doc. C. 82.M.41, 1925.XI.

⁶⁴ Those were China, France, Great Britain, India, Japan, the Netherlands, Portugal and Siam.

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The 1925 Protocol

In the 1925 Protocol, the contracting powers agreed that, when the measures pursuant to the 1925 Agreement appeared to be effective, they would take additional measures that might be necessary for the reduction of the consumption of prepared opium; the purpose of the additional measures was to end the consumption of prepared opium. A commission would be appointed by the League of Nations to decide when the effective implementation of the measures concerning the above matter should be taken.⁶⁵ The commission was not appointed.

2.3.3. The 1925 Convention

General

The scope of the 1925 Convention⁶⁶ was worldwide, and for the first time Indian hemp,⁶⁷ also known as cannabis or hashish, was recognized as a dangerous drug and put under international control. The objective of the 1925 Convention was to bring about more effective limitation of the production or manufacture of narcotic substances by exercising a closer control and supervision of the international trade.⁶⁸

Drug control by certificates

The objective of the present convention was to be achieved by issuing certificates for each importation of any of the substances covered by the 1925 Convention. This, in fact was a new direct method of controlling the international trade in drugs. The export was controlled by governmental-export authorization. An import certificate was a prerequisite for the export authorization. That system was very complicated and generated a great deal of bureaucracy.

The new system was not compulsory for the contracting powers, nor did it have any universal application.⁶⁹ The French and American delegates did propose that the import and export-control system must be universally applied, but opposition arose for various reasons. One of the reasons was the expectation that too many restrictions would cause a price increase and that clandestine trade would therefore increase as a result.⁷⁰

The lack of universality was why the trade with non-contracting powers was hampered little, if at all. The reason for not becoming party to the 1925 Convention was obvious for some producing countries: they were safeguarding their economic interests. On the other hand, it may be said that this convention was not meant to be a truly universal convention.⁷¹

The Permanent Central Board as controller

In order to control the new system of import certification and export authorization, a new organ was created. Chapter VI of the 1925 Convention was devoted to the Permanent Central Board (see Section 2.3.1.). The question of limiting the manufacture and/or production of drugs was not discussed at the constituting conference,⁷² and this fact led to the withdrawal of

⁶⁵ Articles 2 and 3 of the 1925 Protocol.

⁶⁶ The International Opium Convention was signed at Geneva on 19 February 1925 and entered into force on 25 September 1928, LNTS Vol. LXXXI, p. 317; LN Doc. C.88(1).M.44(1).1925.XI.

⁶⁷ Chapter IV, Article 11 of the 1925 Convention.

⁶⁸ The preamble of the 1925 Convention.

⁶⁹ The convention, of course, only applied to the signatory parties.

⁷⁰ Report of the Opium Advisory Committee, LN Doc. C.760.M.260.1924.XI, Annex 1, p. 377-378.

⁷¹ Chatterjee (1981), p. 121.

⁷² The Second Opium Conference held at Geneva from November 1924 to February 1925.

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China and USA. The Chinese delegate wanted to forbid the smuggling of drugs by governments in possession of territories in China.⁷³

An important gap from the aspect of the supply-control paradigm was that the 1925 Convention did not place any limitation on agricultural production or manufacturing of drugs by pharmaceutical companies.⁷⁴ Contracting parties remained free to produce and manufacture as much as they liked, provided they reported accurately to the Permanent Control Board.

Weakness of the 1925 Convention

Although the new system of import certification and export authorization was a landmark in international drug control, the 1925 Convention had favorable conditions. The 1925 Convention must be easily acceptable by all states, for otherwise the drug industry would merely be transferred to non-signatory parties and would thus escape international control.⁷⁵ At the time the 1925 Convention was drafted, it was not deemed impossible to control the export of raw material from most of the exporting countries within a short time.⁷⁶

In addition the manufacturing and exporting countries were afraid that they would be exposed to discussion of the limitation of their rights of manufacture and exportation and also to unwelcome conditions of business.⁷⁷ Moreover, the countries were not prepared to respect the authority of the League of Nations in the matter of supervision of the control of drugs,⁷⁸ nor was it possible for the League of Nations to impose any penal sanctions upon recalcitrant countries, because the Permanent Central Board received a weak mandate.⁷⁹

Another aspect to the drug problem was the lack of alternative sources of income and employment in those countries for which manufacture and/or production of drugs was vital to their economy.⁸⁰ Significantly, the term 'legitimate purposes' which appeared in the 1912 Convention⁸¹ was removed from the 1925 Convention.

2.3.4. The 1931 Convention

General

During the interval between the signing of the 1925 Convention and its ratification in 1928, it became apparent that the smuggling of drugs was so extensive, that more drastic legislation would be necessary. The 1925 Convention was inadequate to meet the challenge of ever-growing drug trafficking, because it imposed a general obligation to limit manufacture, it did not devise any method for achieving such a limitation.⁸² The import-control system put in place by the 1925 Convention was only partially effective because drugs were simply transhipped through non-signatory countries. In 1931, the League of Nations convened a further

⁷³ LN Doc. C.760.M.260.1924.XI, Vol. I, p. 497.

⁷⁴ Gavit (1927), Chapter 8.

⁷⁵ Records of the Second Opium Conference, LN Doc. C.82M.41.1925.XI, Vol. I, p. 378.

⁷⁶ *Idem*, p. 378.

⁷⁷ *Idem*, p. 396.

⁷⁸ *Idem*, p. 398.

⁷⁹ McAllister (2000), p. 76.

⁸⁰ That economic aspect is still valid at the time of this writing, Fall 2006.

⁸¹ E.g. Article 9 of the 1912 Convention.

⁸² International Administration of Narcotic Drugs, 1928-1934, Geneva Special Studies, Vol. I, No.1 Geneva Research Center, p. 6.

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conference at Geneva to place limits on the manufacture of narcotic drugs, and to control their distribution. The result of the conference was the 1931 Convention.⁸³

The purpose of the 1931 Convention was to supplement the provisions of the international opium conventions, signed at The Hague in 1912 and at Geneva in 1925, by rendering effective by international treaties the limitation of the manufacture of narcotic drugs to the world's legitimate requirements for medical and scientific purposes and by regulating their distribution.⁸⁴ This was the first convention that put the contracting parties to the test: whether they had real understanding of the problem of control of manufacture of and traffic in narcotic drugs, and their willingness to adopt effective measures to suppress drug abuse.

Contents of the 1931 Convention

The centerpiece of the 1931 Convention was the manufacturing-limitations system. Estimates of national drug requirements, for medical and scientific purposes, were the bases on which the Permanent Central Board calculated a manufacturing limit for each signatory. A new organ was created; the Supervisory Body (SB) to administer the system. Article 26 of the 1931 Convention decreased the effectiveness of the convention however, because the contracting powers did not assume any responsibility under the 1931 Convention for their colonies.

To create the most comprehensive assessment of global requirements, the Supervisory Body was empowered⁸⁵ to produce estimates for all countries, including those not adhering to the 1931 Convention. That stipulation was unique among international regimes of that time.⁸⁶

Illicit drug trafficking

The preamble to the 1931 Convention did not make any direct reference to the suppression of illicit traffic in drugs, including illicit traffic in drugs by sea, which was quite substantial in those days. Nevertheless, as part of its purpose, the 1931 Convention directly made attacks on illicit traffic in drugs.⁸⁷ After three decades of haggling, states had delineated the boundary between licit drug traffic and the illicit one.

A special administration had to be created for the purpose of regulating, supervising and controlling the trade in licit drugs, and the suppression of illicit traffic. Detailed information concerning of illicit trafficking, such as names of the shipping agents, routes used by smugglers and names of ships in which drugs had been shipped illicitly should be communicated among the signatories, through the offices of the Secretary-General of the League of Nations.

The suppression of illicit drug trafficking was, therefore, dependant on a uniform standard administration and the willingness of states to supply data. Even now, in the twenty-first century, exchanging that type of intelligence is a major problem,⁸⁸ let alone in 1931. The expected effect of these provisions was the limitation of the sources of illicit drug traffic and the methods employed by the illicit drug traffickers.

⁸³ The Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs was signed at Geneva on 13 July 1931 and entered into force on 9 July 1933, LNTS Vol. CXXXIX, p. 301; LN Doc. 455.M.1931.XI, 26 August 1931.

⁸⁴ The preamble of the 1931 Convention.

⁸⁵ See Article 14 of the 1931 Convention.

⁸⁶ McAllister (2000), p. 97.

⁸⁷ Articles 15 and 23 of the 1931 Convention.

⁸⁸ See the study Secure Communication for the Exchange of Intelligence, EU-Study, Barbados, 15 May 1997.

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Applicability of the 1931 Convention

All of those provisions were applicable only to the contracting powers of the 1931 Convention. Needless to say, the incidence of illicit drug traffic was more prevalent among non-signatories. The 1931 Convention came into force quickly because various countries and the League of Nations thought it could provide a useful model for arms-control negotiations. The League of Nations even prepared a report explaining how principles set out in the 1925 Convention and the 1931 Convention could be applied to disarmament issues.⁸⁹

2.3.5. The 1931 Agreement

Suppression of opium smoking in the Far East

In the second half of 1931, a conference was held at Bangkok to address opium smoking in the Far East. It was a fulfillment of promises by the contracting parties made under Article 12 of the 1925 Agreement to review the position of the use of opium for smoking.⁹⁰ The 1931 Agreement⁹¹ was only concerned with the suppression of opium smoking in the Far East; it was therefore only a regional treaty on one issue.

In the 1931 Agreement, a variant of the Dutch *régie system*⁹² was adopted by the other signatory states to transfer that successful system to other countries and colonies in the Far East.⁹³ Part of the Dutch *régie system* was the reduction of prices of drugs in order to compete on the international drug market, but the sources of potential illicit supply from other parts of the world were a threat to this domestic plan. Interestingly, the Dutch delegate pointed out during the conference at Bangkok in 1931 that since the rationing and licensing system resulted in an increase in smuggling, it had been ultimately repealed. He therefore suggested that, in view of differing circumstances in different countries, the decision of when to introduce a system of licensing and rationing of opium should be left to each government.

The United States and China did not sign the 1931 Agreement, because the total prohibition of opium was not discussed. The only thing that had been prohibited in the 1931 Agreement was the smoking of opium by persons under 21 years of age. The American representative stated that:

“While prepared to lend all practicable aid to measures directed toward suppression of the destructive vice, the Government of the United States is not prepared to follow a line similar to, and concurrent with, that followed by other Governments so long as those Governments elect to retain the monopoly system and are not willing to attempt prohibition.”⁹⁴

It can be stated that this is a rather weak and limited agreement. The key effect of the conference at Bangkok in 1931, however, was that it convinced the United States that a firmer approach was needed to combat raw material production and illicit trafficking.⁹⁵

⁸⁹ McAllister (2000), pp. 110-111.

⁹⁰ The preamble of the 1931 Agreement.

⁹¹ The Agreement Concerning the Suppression of Opium Smoking was signed at Bangkok on 20 November 1931 and entered into force on 22 April 1937, LNTS Vol. CLXXVII, p. 373.

⁹² See above, Section 2.2.2.

⁹³ Prohibiting the use of opium proved not to be more successful than the government monopoly, see McAllister (2000), p. 107.

⁹⁴ LN Doc. C.577.M284.1932. XI, p. 24.

⁹⁵ Taylor (1969), p. 275-279; McAllister (2000), p. 106.

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2.3.6. The 1936 Convention

General

The 1936 Convention⁹⁶ is an interesting one when seen from the aspect of the suppression of illicit traffic in drugs, including the illicit traffic in drugs by sea. We shall therefore dwell a while longer on this convention. Illicit traffic in narcotic drugs during the period before the Second World War was mainly facilitated by the lack of cooperation among national authorities and by differences between national criminal jurisdiction systems.⁹⁷

All treaties discussed above dealt primarily with the regulation of legitimate drug activities in order to suppress the use of, and illicit trafficking in drugs. Implementing the 1925 Convention, the 1925 Agreement and the 1931 Convention had caused a significant rise in international illicit drug trafficking, especially by increasingly sophisticated and well-organized syndicates.⁹⁸ The Opium Advisory Committee had reported innumerable cases of clandestine traffic in drugs between 1929 and 1936.⁹⁹

Terminology in the 1936 Convention

Drugs

The 1936 Convention was a global one and the term narcotic drugs was deemed to mean the drugs and substances covered by the previous conventions and agreements,¹⁰⁰ not including the process whereby raw opium is obtained from the opium poppy.¹⁰¹

Traffic

The term traffic was not defined in the 1936 Convention, but Article 2 (a) of the 1936 Convention contains all the elements that would later form the definition of traffic in the 1988 Convention.¹⁰²

Criminalization of illicit drug trafficking

Despite the fact that the League of Nations tried to establish a distinction between licit and illicit trade in narcotic drugs, and thereby tried to take preventive measures against the latter type of trade, the 1936 Convention was the first direct attempt to suppress illicit traffic in dangerous drugs, and to make the offence punishable. In the previous treaties, illicit traffic in narcotic drugs was indirectly recognized as a criminal offence and therefore punishable.¹⁰³

Drug officials reasoned that disrupting distribution networks would eliminate addiction by cutting off users from illicit sources of supply. In addition to negotiating bilateral agreements, governments considered a treaty that would impose uniform penalties on traffickers, punish those who facilitated smuggling into foreign jurisdictions, and enhance extradition arrangements.¹⁰⁴

⁹⁶ The Convention for the Suppression of the Illicit Trafficking in Dangerous Drugs, was signed at Geneva on 26 June 1936 and entered into force on 26 October 1939, LNTS Vol. CXC VIII, p. 299; LN Doc. C.286(1).M.174 (1).1936.XI, 1 January 1937.

⁹⁷ Bayer and Ghodse (1999).

⁹⁸ Meyer and Parssinen (1998), Chapter 2.

⁹⁹ See the Reports of the Advisory Committee on Traffic in Opium and Other Dangerous Drugs to the Council on the Work of the Twentieth, Twenty-first and Twenty-second Sessions, LN Docs. C.253.M.125.1935.X, C.278.M.168.1936.XI and C.285.M.186.1937.XI.

¹⁰⁰ Article 1 of the 1936 Convention.

¹⁰¹ Article 2 of the 1936 Convention.

¹⁰² See Section 3.1.3. of this study.

¹⁰³ Regulations promoting the licit trade in a commodity imply that an illicit trade exists.

¹⁰⁴ McAllister (2000), p. 120.

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Law enforcement and illicit drugs

Based on initiatives by the International Criminal Police Commission – the forerunner of the International Criminal Police Organization (INTERPOL) – negotiations had begun in 1930 to develop a treaty to stem the illicit drug traffic and punish traffickers harshly through criminal sanctions.¹⁰⁵ The International Criminal Police Commission advised the Opium Advisory Committee, a sub-committee of the League of Nations, and was a member of the Committee of Experts that prepared the draft for the Conference for Adoption of a Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, held in Geneva from 8-26 June 1936.¹⁰⁶ So, a major role was directed to the law enforcement agencies that wanted to obtain a legal framework, national and international to counter illicit trafficking of drugs by apprehending the smugglers.

In general, a change of pro-active control of the licit drug trade into repressive actions against illicit drug traffickers could be revealed.

International cooperation

Article 3 of the 1936 Convention is a fundamental one. In that article, the High Contracting Parties with extra-territorial jurisdiction in the territory of another High Contracting Party, undertook to enact the necessary legislation for punishing their nationals who were found guilty within that territory of any offence specified in Article 2 of the 1931 Convention, at least as severely as if the offence had been committed in their own territory.

Article 9 of the 1936 Convention represented another innovation in international law in respect of combating illicit trafficking of drugs. Offences relating to illicit traffic in drugs were reclassified as extraditable crimes, even though such offences had neither been previously so treated, nor mentioned in the extradition treaties to that point.

Pursuant to Article 11 of the 1936 Convention, each of the High Contracting Parties was required to set up a central office for the supervision and coordination of all operations necessary to prevent the illicit traffic in narcotic drugs. Direct communication between those central offices was expected to guarantee international cooperation by forming an international counter-drug network

Weakness of the 1936 Convention

Despite its ambitions, the 1936 Convention was considered too weak as it had only been signed by fifteen states. The United States refused to sign the 1936 Convention because of a fear that it might have to weaken its own domestic criminal-control system, already in place, in order to comply with the 1936 Convention. The United States considered the 1936 Convention ineffective and impractical in some aspects and inadequate in other ways.¹⁰⁷ The convention never gained widespread acceptance as most countries interested in targeting drug traffickers concluded their own bilateral treaties.¹⁰⁸

Attempt to implement the principle of universality

One of the reasons that the 1936 Convention was considered too weak was the failure in applying the principle of universality. The desire was for all states to impose severe penalties, punish all kinds of participation in drug-related criminal acts and apply the principle of uni-

¹⁰⁵ Taylor (1969), pp. 288-298.

¹⁰⁶ Records of the Conference for Suppression of the Illicit Traffic in Dangerous Drugs, LN Doc. C.341. M.216. 1936.XI, June 1936.

¹⁰⁷ Records of the Conference for Suppression of the Illicit Traffic in Dangerous Drugs, LN Doc. C.341. M.216. 1936.XI, June 1936, pp. 174 *et seq.*

¹⁰⁸ McAllister (2000), p. 123; Taylor (1969), pp. 296-297.

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versality in their criminal law dealing with drug offences. All persons, whether citizen of foreigner should be punished when they committed crimes in any part of the world and offenders should be considered as subject to extradition in appropriate cases.¹⁰⁹

The 1936 Convention tried to obligate the High Contracting Parties to adopt these principles in their criminal justice system. It is difficult to implement the adoption of uniform legal sanctions and principles of criminal law on an international basis, however. This is due to differences in national characteristics, in religious, moral, social and economic circumstances, and also to different criminological theories. The 1936 Convention had therefore to limit itself to the formulation of general principles that may seem vague. Besides that, all states have to become party to the convention, to apply the principle of universality.

Loopholes

The 1936 Convention also contained loopholes¹¹⁰ intended to secure the adherence of countries that otherwise would not have been willing to become parties. The provisions of the 1936 Convention proved to be too general for the most pro-control governments and too specific for those wishing to avoid further obligations.

2.4. The United Nations period

2.4.1. The framework of the United Nations concerned with international drug control

The framework of the United Nations relevant for the suppression of illicit drug trafficking will be described below.

The Economic and Social Council of the United Nation (ECOSOC)

The Economic and Social Council of the United Nations¹¹¹ took over, *inter alia*, the functions of the Council and the Assembly of the League of Nations concerning control of narcotic drugs. The Opium Advisory Committee of the League of Nations ceased to exist. The governments' signatories to the various narcotic treaties concluded before the Second World War, were transferred to the appropriate agencies of the United Nations.

The Commission on Narcotic Drugs (CND)

In 1946, ECOSOC created the Commission on Narcotic Drugs,¹¹² and entrusted it with the power and functions that had been exercised by the League of Nations' Opium Advisory Committee. This commission is the central policy-making body within the United Nations' system for dealing with all drug-related matters. The commission analyses the world drug problem and develops proposals to strengthen international drug control. Functionally it is a horizontal body, with a wide and varied range of functions, assisted by some specialized agencies such as the World Health Organization (WHO) and INTERPOL.

The approach of the Commission on Narcotic Drugs is inter-disciplinarily, embracing medicinal, scientific, economic and social aspects of the drug problem. The novelty of the commission's work lies in its attempts to make the drug treaties universal by inducing non-parties to

¹⁰⁹ Article 8 of the 1936 Convention.

¹¹⁰ Articles 14 and 15 of the 1936 Convention.

¹¹¹ The Economic and Social Council (ECOSOC), under the overall authority of the General Assembly, coordinates the economic and social work of the United Nations and the United Nations family of organizations.

¹¹² Resolution of the first session of the Economic and Social Council, Official Records, ECOSOC, 1st session (1946), Vol. I, p. 68; see UN General Assembly, 1st session, Plenary Meeting (1946), Official Records, Vol. 4, pp. 986 *et seq.*

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observe its recommendations and decisions.¹¹³ The Commission on Narcotic Drugs has no legislative function, but nevertheless, provides the background for legislation.

The International Narcotics Control Board (INCB)

The 1961 Convention¹¹⁴ abolished the Permanent Central Board and the Supervisory Body of the League of Nations, when the International Narcotics Control Board came into being. The International Narcotics Control Board is the independent and quasi-judicial control body for the implementation of the United Nations drug treaties. It was established in 1968 by the 1961 Convention. The International Narcotics Control Board is independent of governments as well as of the United Nations; its thirteen members serve as experts as private persons. The functions of the International Narcotics Control Board are the administration of the Estimates System¹¹⁵ and the Statistical Returns,¹¹⁶ and taking measures to ensure the execution of the drug control treaties.

The International Narcotics Control Board is not only a watchdog of the international drug control system, it also administers that system. The authority to administer the system has been strengthened by it having been empowered to impose sanctions upon recalcitrant countries, regardless of whether they are party to the United Nations drug treaties or not. One of the sanctions is the possibility of an embargo.¹¹⁷

The Commission on Narcotic Drugs and the International Narcotics Control Board are expert bodies on the same level and both accountable to ECOSOC.¹¹⁸ The difference is that the Commission on Narcotic Drugs is the central policy-making body for drug related problems, while the International Narcotics Control Board is a more of an administrative, implementation body.

The World Health Organization (WHO)

The 1948 Protocol¹¹⁹ empowered the World Health Organization with the technical functions of defining new drugs; this organization took the place of the League's Health Committee.

The United Nations Drug Control Program (UNDCP)

In 1991, the UN General Assembly established the Fund of the United Nations International Drug Control Programme (UNDCP) and expanded the mandate of the Commission on Narcotic Drugs to enable it to function as the governing body of UNDCP. The United Nations Office on Drugs and Crime (UNODC) is the umbrella organization that makes up the UNDCP and the Centre for International Crime Prevention (CICP). The UNODC is the principal United Nations' body charged with carrying out international drug control responsibilities. The UNDCP works to educate the world about the dangers of drug abuse. It aims to strengthen international action against drug production, trafficking and drug-related crime through alternative development projects, crop monitoring and anti-money laundering programs. UNDCP also provides accurate statistics through the Global Assessment Program and

¹¹³ See the preamble and Articles 3 and 8 of the 1961 Convention.

¹¹⁴ *Idem*.

¹¹⁵ Article 19 of the 1961 Convention.

¹¹⁶ Article 20 of the 1961 Convention.

¹¹⁷ See below, Section 2.4.4. of this study.

¹¹⁸ Articles 8 and 9 of the 1961 Convention, Articles 17 and 18 of the 1971 Convention and Articles 21 and 22 of the 1988 Convention.

¹¹⁹ See below, Section 2.4.3. of this study.

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helps to draft legislation and to train judicial officials as a part of its Legal Assistance Program.¹²⁰

2.4.2. The 1946 Protocol

All of the changes in responsibility and organization described above meant that amendments were required to all existing international multilateral drug control treaties. Those amendments were concluded in the 1946 Protocol,¹²¹ which did not make any major change in the contents of the previous international drug treaties. Primarily it substituted the names of new institutions for the corresponding old ones, and made certain obvious amendments that had become necessary to make provisions of a convention applicable under the new situation. It was, in fact, a link-protocol.

2.4.3. The 1948 Protocol

General

The experts who prepared the 1948 Protocol¹²² were not law enforcement officials like those who had prepared the 1936 Convention, but experts such as physicians and others with a sociology or public health background. The law enforcement experts were afraid that if the main drug control apparatus was a large health or social-issues organization – such as the World Health Organization (WHO) or the United Nations Educational, Scientific and Cultural Organizations (UNESCO) – etiology and treatment might take precedence over prohibition. Although control remained principally with ECOSOC, via the Commission of Narcotic Drugs, the WHO – in particular its Drug Dependence Expert Committee – became responsible for deciding what substances should be placed under control.¹²³ The 1948 Protocol brought specific synthetic opiates not covered by previous treaties under international control.

Adherence to the 1948 Protocol

The 1948 Protocol was by no means an exception to the general attitude prevailing among nations in binding themselves to an international instrument. The protocol also bore evidence of general lack of desire of nations to bind themselves to an international instrument and this found expression in their hesitancy in accepting the territorial clause, which had been adopted by a vote of 33 to 8, with 12 abstentions.¹²⁴ That amended clause stated that states might declare that the protocol extend to all or any of the territories for which they had internationally responsibility.¹²⁵ States therefore had no legal obligation to extend the protocol to their territories. Article 9 of the 1948 Protocol is the generally used denunciation clause dating from the League of Nations period, which stated that any state party could denounce the protocol after five years.

¹²⁰ See the Secretary-General's Bulletin: Organization of the United Nations Office on Drugs and Crime, ST/SGB/2004/6, 15 March 2004. See for more detailed information the UNODC website: www.unodc.org (visited Fall 2006).

¹²¹ The Protocol Amending the Agreements, Conventions and Protocols on Narcotic Drugs concluded at The Hague on 23 January 1912, at Geneva on 11 February 1925 and 19 February 1925 and 13 July 1931, at Bangkok on 27 November 1931, and at Geneva on 26 June 1936, was signed at Lake Success, New York on 11 December 1946 and entered into force on that date, UNTS Vol. 12, p. 179.

¹²² The Protocol Bringing under International Control Drugs Outside the Scope of the Convention of 13 July 1931 for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, as amended by the Protocol signed at Lake Success, New York, on 11 December 1946, was signed at Paris, on 19 November 1948 and entered into force on 1 December 1949, UNTS Vol. 44, p. 277.

¹²³ Article 1 of the 1948 Protocol.

¹²⁴ A/C.3/SR. 87, pp. 5-6.

¹²⁵ Article 8 of the 1948 Protocol.

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2.4.4. The 1953 Protocol

An attempt at prohibition-based drug control

In the late 1940s, it became clear that the large number of international drug treaties, with their different types and levels of control, had become confusing and unwieldy. The Commission on Narcotic Drugs recommended to the ECOSOC that existing treaties be consolidated into one document, which would also be an opportunity to bring in more stringent prohibition-based controls.¹²⁶

The UN opium monopoly

That plan was sidelined for a decade when the Commission on Narcotic Drugs proposed the creation of an international opium monopoly to attempt to end the illicit trade and guarantee the licit opium supply. Under that plan the United Nations would have been the only agency authorized to buy and sell opium for international trade. After many conferences where the proposal was very fully and carefully considered, however, the Commission on Narcotic Drugs and the ECOSOC came to the conclusion that the present world situation was not favorable to such a solution, and presented instead a scheme for limiting the production of opium by indirect means.¹²⁷ It was the latter plan that became the 1953 Protocol.¹²⁸

Due to the Cold War, the United States and Europe were stockpiling large quantities of opium for medical use. These countries feared that a monopoly as proposed by the Commission on Narcotic Drugs would be restrictive and lead to higher prices.

A new opium protocol was suggested as an interim solution until the treaties could be consolidated. A plenipotentiary conference was approved by ECOSOC and the United States seized the new initiative as an opportunity to impose strict global controls on opium production.¹²⁹ It may be observed that in drafting the 1953 Protocol, the usual pattern of the previous drug treaties was followed.

Two interesting provisions

A novelty in this protocol was the embargo. When it appeared that excessive quantities of opium were accumulating¹³⁰ in any country or territory, or that there was a danger of any country or territory becoming a center of illicit drug traffic, the International Narcotics Control Board was authorized to recommend to the parties an embargo on the import of opium, the export of opium, or both from the country or territory concerned, either for a designated period or until the International Narcotics Control Board was satisfied.¹³¹ Another remarkable feature of the 1953 Protocol was that it made a provision for its universal application. Article 13 of the protocol provided that:

The Board may also, if possible, take measures....., in respect of states which are not Parties to this Protocol, and in respect of territories to which, under Article 20, this Protocol does not apply.

¹²⁶ ECOSOC approved the recommendations in two resolutions: E/RES/1948/159 II D (VII) of 3 August 1948, and 246 D (IX) of 6 July 1949.

¹²⁷ Lindt (1953), p. 47.

¹²⁸ The Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium was signed at New York on 23 June 1953 and entered into force on 8 March 1963, UNTS Vol. 456, p. 3.

¹²⁹ McAllister (2000), pp. 172-179.

¹³⁰ This means above the official quote stated in the import certification and export authorization as described above.

¹³¹ Articles 8 and 9 of the 1953 Protocol.

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Application of the 1953 Protocol

The practical merits of the 1953 Protocol cannot be evaluated on the basis of the protocol itself, because it never became a vital international instrument. Rather, it must be considered as a forerunner of the provisions of the 1961 Convention.¹³² Drafting and adopting the 1961 Convention was facilitated by the existence of the 1953 Protocol because some of the latter's provisions could be incorporated into the text of the 1961 Convention, and it was possible to avoid an international opium monopoly or an international inspection system which had been debated for several years during the development of the 1953 Protocol.

2.4.5. The 1961 Convention

General

The 1961 Convention¹³³ has played a central formative role in the creation of the prohibitionist international drug control system. It was a continuation and expansion of the legal infrastructure developed between 1909 and 1953. The process of consolidation of the existing international drug control treaties into one instrument began in 1948, but it would take until 1961 before a workable third draft was ready to be presented for discussion at a plenipotentiary conference.¹³⁴ That conference began on 24 January 1961 in New York and was attended by 73 countries.

Objectives of the 1961 Convention

The objectives of the 1961 Convention embrace a considerable number of areas. Some of those objectives were new, some of them were reparative or an extended version of the objectives of the previous drug treaties. The objectives of the 1961 Convention were: codification of the existing multilateral conventions on drugs, simplification of the international control machinery, extension of the control system to include cultivation of drugs such as cannabis and coca leaves, and adoption of appropriate measures for the treatment and rehabilitation of drug addicts. The narcotic drugs were classified within four schedules¹³⁵ according to levels of danger and control.

Synthesis of previous agreements

Article 44 of the 1961 Convention superseded the previous drug treaties but the principle foundations of the previous drug treaties remained in place in the 1961 Convention. Only the 1936 Convention remained in force on its own and was not included in the consolidation. The import certification and export authorization system created by the 1925 Convention continued. Parties were required to license all manufacturers, traders and distributors, all drug-related transactions had to be documented.

The limitation system of the 1931 Convention, including the administration of the estimates was still in force, as was the statistics system. All parties were required to submit estimates of their drug requirements and statistical returns on the production, manufacture, use, consumption, import, export, and stock build-up of drugs.¹³⁶ The administration was done by a newly created body. The 1961 Convention streamlined the United Nations' drug-related supervisory bodies. The Permanent Control Board and Supervisory Body from the League of Nations were combined into a newly created organ, the International Narcotics Control Board (INCB),

¹³² See below, Section 2.4.5. of this study.

¹³³ The Single Convention on Narcotic Drugs, 1961, including Schedules, Final Acts and Resolutions, was signed at New York on 30 March 1961 and entered into force on 13 December 1964, UNTS 520, p. 151.

¹³⁴ Goodrich (1960).

¹³⁵ Schedules I, II, III and IV, UNTS 520, p. 151.

¹³⁶ Articles 19 and 20 of the 1961 Convention.

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designed to monitor application of the 1961 Convention and to administer the system of estimates and statistical returns submitted annually by parties.

The narcotics regime of the League of Nations devoted the 1936 Convention entirely to illicit traffic in drugs. It was primarily a rigid provision of this convention that had made it unacceptable to many states. Nevertheless, the 1936 Convention was considered to be ideal, in terms of the efforts of the League of Nations to suppress the illicit traffic in narcotic drugs, and therefore, even though the 1961 Convention has made more flexible provisions concerning that problem, it was appreciated that states that had already adhered to the 1936 Convention would be allowed to continue enjoying the benefits accruing from that convention.

Illicit drug trafficking

Definition

The 1961 Convention defines illicit traffic as cultivation or trafficking contrary to the provisions of the convention. Article 35 of the 1961 Convention deals with illicit traffic, but only encourages international cooperation and establishing a local agency in order to cooperate.

Criminalization

The 1961 Convention built on the trend of requiring states to develop increasingly punitive domestic criminal legislation. Subject to their constitutional limitations, states were to adopt distinct criminal offences, punishable preferably by imprisonment, for drug-related crimes.

Furthermore, the granting of extradition was considered desirable,¹³⁷ pursuant to Article 36 of the 1961 Convention. That article constitutes the criminal justice provisions related to illicit traffic and largely corresponded to those in the 1936 Convention.¹³⁸ Article 36 of the 1936 Convention contains elaborate criminal-justice provisions dealing with various substantive and procedural aspects of the criminal code and its role with regard to drug control. It is however clear, from the context of Article 36(1) that the 1961 Convention itself differentiates between minor and major offences.

Parties are therefore obliged to make only serious drug offences subject to adequate punishment. It is understood that the provisions of Article 35 of the 1961 Convention were to be subject to the provisions of the criminal law of the party concerned on questions of jurisdiction, and that nothing contained in that article was to affect the principle that the offence that it refers to was to be defined, prosecuted and punished in conformity with the domestic law of any party.

The 1961 Convention chiefly provided some regulatory measures for licit trade and traffic only, on the assumption that the control of licit trade and traffic in narcotic drugs would automatically suppress the illicit trade and traffic in them. Consequently, some apparent gaps were left in the 1961 Convention, which may encourage illicit traffic in narcotic drugs. These gaps were caused, *inter alia*, by the fact that states were only obliged to implement any of the provisions of Article 36 of the 1961 Convention when their constitutional, legal and administrative systems permitted.

¹³⁷ In the 1936 Convention, extradition had an obligatory character.

¹³⁸ Article 9 of the 1936 Convention was terminated and replaced by Article 36(2) of the 1961 Convention, unless one of the parties stated that Article 9 of the 1936 Convention remained in force. The 1936 Convention remained in force among the parties, unless one of the parties denounced it. E.g. the Netherlands denounced the 1936 Convention, when ratifying the 1961 Convention, Staatsblad 111 (1964).

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Evaluation of the 1961 Convention

The functioning and provisions of the 1961 Convention were analyzed by the International Narcotic Control Board and the United Nations Drug Control Program on request of the General Assembly, in order to evaluate the functioning of the international drug control system. One of the main findings was that the 1961 Convention had been successful in preventing the diversion of narcotic drugs from legal sources toward illicit channels so that black markets were no longer supplied by legally manufactured narcotic drugs.¹³⁹

It should be emphasized that the provisions of the 1961 Convention were intended to prevent diversion but were not aimed at combating illicit traffic in clandestinely produced or manufactured drugs, which became a large-scale organized criminal activity after the adoption of the 1961 Convention.

2.4.6. The 1971 Convention

Control of psychotropic substances

The 1961 Convention deals with narcotic drugs.¹⁴⁰ Psychotropic substances are not mentioned in the schedules of the 1961 Convention. In the 1960s, drug abuse exploded around the world, most notably in developed Western nations.¹⁴¹ The increase was especially noticeable in the pervasive use and availability of synthetic, psychotropic substances created since World War II, such as amphetamines, barbiturates and LSD. Some substances became essentially consumer goods, resulting in many people becoming addicted. Most of these drugs were not subject to international control, and because national systems of regulation differed widely, trafficking and smuggling flourished.

Throughout the 1960s the Commission on Narcotic Drugs and the World Health Organization debated the issue of control of psychotropic substances at regular meetings and made various recommendations to member states concerning the national control of particular substances, including stimulants, sedatives and LSD. The Commission on Narcotic Drugs drafted a treaty that became the basis for negotiations at the plenipotentiary conference convened at Vienna on 11 July 1971, the conference that resulted in the 1971 Convention.¹⁴²

Narcotic drugs versus psychotropic substances

Controversy during the negotiations in 1961

During the negotiations of the 1961 Convention, it was possible to divide states into five groups with their own agendas. Those groups were: the organic or producer states, the manufacturing states, the strict-control states, the weak-control states and the neutral states.¹⁴³ The organic group included producers of organic raw material for drugs. Those countries were against strong controls, national or international, because of the expected financial loss. Although essentially powerless to confront the prohibition philosophy, they effectively forced compromise in negotiations by working together to dilute the 1961 Convention with exceptions, loopholes and deferrals.

¹³⁹ E/INCB/1994/1.

¹⁴⁰ See the definition in Section 1.4.1. of this study.

¹⁴¹ Kusevic (1977), pp. 35-53; McAllister (2000), pp. 218-220; Musto (1999), Chapter 1; Bruun et al. (1975), Chapter 16; Inglis (1975), Chapter 13.

¹⁴² The Convention on Psychotropic Substances, including the Final Act and Resolutions, and the Schedules, was signed at Vienna on 21 February 1971 and entered into force on 16 August 1976, UN Doc. E/CNF. 58/7.

¹⁴³ McAllister (1992), p. 148.

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Controversy during the negotiations in 1971

During the 1971 Convention negotiations, two main groups could be identified. One group, the manufacturing group, comprised primarily developed nations with powerful pharmaceutical industries and active psychotropic markets. The other group consisted of developing countries, supported by socialist countries, with few or no psychotropic manufacturing facilities, predominately the organic group of the 1961 Convention negotiations.

The manufacturing group adopted the traditional arguments of the organic group: weak controls, national as opposed to international controls, national sovereignty taking precedence over a strong supranational United Nations' body. The justification for these positions was that strict controls would be difficult to implement and would cause financial loss.

The organic group, on the other hand, pushed hard for strict controls, similar to those they had been forced to accept under the 1961 Convention.¹⁴⁴

The 1961 Convention compared with the 1971 Convention

Compared with the 1961 Convention the general tone of the 1971 Convention was less harsh, and it implied that abuse of certain, though not all, psychotropic drugs was not as serious a problem as addiction to narcotic drugs in general.¹⁴⁵ In the 1961 Convention, the derivatives of narcotic drugs were mentioned in the respective schedules; in the 1971 Convention the derivatives were not mentioned in the schedules, so every new derivative of psychotropic substances, which are constantly being created by the pharmaceutical industry, has to be negotiated if it is to fall within the treaty regime.

Another significant difference is the absence of annually reporting the estimates to the International Narcotics Control Board: how much of a particular substance controlled under the convention will be needed for the next year? This system of reporting is one of the pillars of international drug control of the 1961 Convention; in the 1971 Convention, it is totally excluded.

Those shortcomings discussed above, omissions in the reporting of derivatives and estimates, were largely corrected during the following years by the Commission on Narcotic Drugs and the International Narcotics Control Board. Organic states were asked to submit psychotropic information and statistics not required by the 1971 Convention, and the derivatives were put in the schedules by the World Health Organization. The provisions not concluded in the 1971 Convention were therefore corrected through a quiet recourse to customary international law.

Demand reduction

A step forward in the fight against illicit drugs was the addressing of the demand side of the drug problem in the 1971 Convention. Article 20 of the 1971 Convention was almost a milestone as it introduced the concepts of public education and prevention into the international legal drug control infrastructure.

An important and new element was incorporated in the criminal justice provisions of the 1971 Convention; Article 22(1)(b) stipulates an alternative for conviction or punishment: measures of treatment, education, after-care, rehabilitation and social reintegration. The 1971 Convention therefore established a link between criminal law and other measures against drug abuse for the first time.

¹⁴⁴ Kusevic (1977), p. 39.

¹⁴⁵ See the difference in language in both preambles.

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Illicit drug trafficking

The term traffic is described in Article 1 of the 1971 Convention, where it means the manufacture of or traffic in psychotropic substances contrary to the provisions of the 1971 Convention. The provisions relating to international trade and traffic in psychotropic substances in the 1971 Convention are closely modeled on those of the 1961 Convention, but these provisions did not evolve in the decade between both treaties. Although the 1961 Convention distinguishes between an import certificate and an export authorization (see Section 2.4.5.), the 1971 Convention does not: only export authorization was concluded upon. Article 21 of the 1971 Convention that deals with action against illicit traffic corresponds to Article 35 of the 1961 Convention.

The provisions in Article 21 of the 1971 Convention state that illicit traffic in psychotropic substances cannot be applied to non-parties to the convention, who may very well be engaged in illicit traffic in these substances. Article 22 of the 1971 Convention contains, in essence, criminal justice provisions concerning psychotropic substances that are more or less similar, and most identical, to those contained in Article 36 of the 1961 Convention dealing with narcotic drugs.

2.4.7. The 1972 Protocol

Enhancing the 1961 Convention

ECOSOC took the initiative to enhance the 1961 Convention.¹⁴⁶ The conference that had been called by the ECOSOC, took place from 6 to 25 March 1972 and was attended by the representatives of 97 states; five states sent observers and the conference was also attended by the WHO, INCB and INTERPOL.¹⁴⁷ This initiative of ECOSOC was strongly supported by the United States. President Nixon had just declared the War on Drugs and one of the instruments was the strengthening of the 1961 Convention.

The role of the INCB

The main goal of the 1972 Protocol,¹⁴⁸ which amended the 1961 Convention, was to expand the role of the International Narcotics Control Board in the control of licit and illicit opium production and in illicit drug trafficking in general. The backbone of the 1972 Protocol consists of provisions enhancing the powers of the International Narcotics Control Board, especially in relation to illicit traffic. The functions of the International Narcotics Control Board were extended to prevention of production and manufacture of, and trafficking in illicit drugs.

The 1972 Protocol amending the 1961 Convention can be considered the first response to the increased illicit cultivation and illicit trafficking of narcotic drugs. It was expected that strengthening the respective obligations of parties and expanding the role of the International Narcotics Control Board would lead to a greater efficacy of national efforts in the suppression of such illicit activities and to better cooperation among national expansion in trafficking.

The provisions of the 1972 Protocol were, however, unable to counteract the further increase in illicit cultivation, production and manufacturing trends. It was only in 1988 that the international community realized the necessity of undertaking more concentrated action and the im-

¹⁴⁶ Resolution 1577 (L) of 21 May 1971.

¹⁴⁷ Commentary on the Protocol Amending the Single Convention on Narcotic Drugs 1961, E/CN.7/588, New York (1976), pp. 21 *et seq*; Yearbook of the United Nations (1972), p. 397.

¹⁴⁸ The Protocol Amending the Single Convention on Narcotic Drugs, 1961, was signed at Geneva on 25 March 1972 and entered into force on 8 August 1975, UN Doc. E/CONF. 63/9.

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portance of developing new methods of combating the activities of organized criminal drug smuggling cartels.

2.5. Conclusions

The relevance of the present chapter is the contribution to the examination of the development of general drug control from the beginning until the specific maritime drug-interdiction treaties examined in the next chapters of this study.

Throughout the nineteenth century, individuals at all levels of society on various continents used opium and cocaine in various forms and mixtures for primarily palliative and tranquilizing purposes. Medical and legal control over such drugs was minor, and knowledge of addiction and abuse was limited at best. Due to drug problems in the Far East and the spillover to the western world around 1900, and under the influence of pressure groups, some steps were taken in the area of international drug control.

The history of international drug control can be divided into three eras: before the League of Nations period, during the League of Nations period and during the United Nations period. The development of the international drug control system has been a continuous and incremental process and there are no clear demarcation lines between the three historical periods.

2.5.1. The pre-League of Nations period

The 1909 Shanghai Resolutions were a first weak step on the path towards international drug control. The 1912 Convention was the next step and the best possible achievement in those days. The 1912 Convention did not come into force until 1919, but it should be borne in mind that it was not only the non-cooperative attitude of some nations, and the inherent defects in the treaty, but also the low degree of intensity of drug-addiction as a social problem that largely eclipsed the efforts of international drug control.

2.5.2. The League of Nations period

The creation of the League of Nations in 1919 following World War I presented the international community with a centralized body for the administration of drug control. Until then it had been done by the government of the Netherlands, as had been concluded in the 1912 Convention. Under the auspices of the League of Nations, the 1925 Agreement, Convention and Protocols, the 1931 Agreement and Convention and the 1936 Convention were concluded.

Within two decades, seven conferences were convened in order to get drugs under international control. Import control systems, limitations on manufacture and distribution, prohibiting smoking drugs and suppressing illicit traffic in drugs were the attempts of the international society to control narcotic drugs. Despite all of those efforts, the abuse of illicit drugs did not come to a standstill.

Some of those treaties did not have more than eight participants and others did not enter into force until a long time later. The failure to achieve absolute or near-absolute universality, an attempt of the League of Nations, was to a great extent self-induced or deliberate, inasmuch as it ignored the question of participation of non-members, or of states with reservations laid down.¹⁴⁹ Universality can only be achieved if all states are party to the treaties (see Section 8.7.2.).

¹⁴⁹ Chatterjee (1981), p. 200.

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2.5.3. The United Nations period

Following the Second World War, the drug-control bodies and functions of the League of Nations were folded into the newly formed United Nations. All of those changes in responsibility and organization meant that amendments were required to all existing international drug treaties. Such amendments were concluded in the 1946 Protocol. The 1948 and 1953 Protocols were two weak protocols that tried to enhance international drug control. The 1953 Protocol did not come into force due to insufficient ratification. The 1961 Convention consolidated the international drug control system under the United Nations into one key drug control document. The 1972 Convention represents a weakening of the control structure because of the influence of European and North America pharmaceutical interest throughout the negotiations.

In conclusion, it can be stated that treaties to control drugs represented a great stride in international cooperation. Treaty provisions came into force to limit the manufacture and regulate distribution of drugs. Those drug-control treaties did not constitute a legal obligation to limit the production of opium, coca leaves and cannabis to medical and scientific needs, however. That was a serious gap in the control system because a considerable part of the existing production continued to flow into the illicit trade and also to become available to clandestine manufacturers.

The only attempt to prohibit traffic in illicit drugs was the 1936 Convention, which after all had not been successful either, due to provisions that were too weak and too restricted.

At the end, we can conclude that the offence of illicit drug trafficking, including illicit drug trafficking at sea, has not been firmly addressed in the treaties examined above. It therefore became apparent that the existing international drug control treaties must be complemented by concentrated and coordinated international action and new, more efficient methods of combating organized illicit drug traffic. The adoption of the 1988 Convention, dealing with illicit drug interdiction in stead of licit drug control, should be considered as a response to this situation. That convention will be examined in the next chapter.

Annex

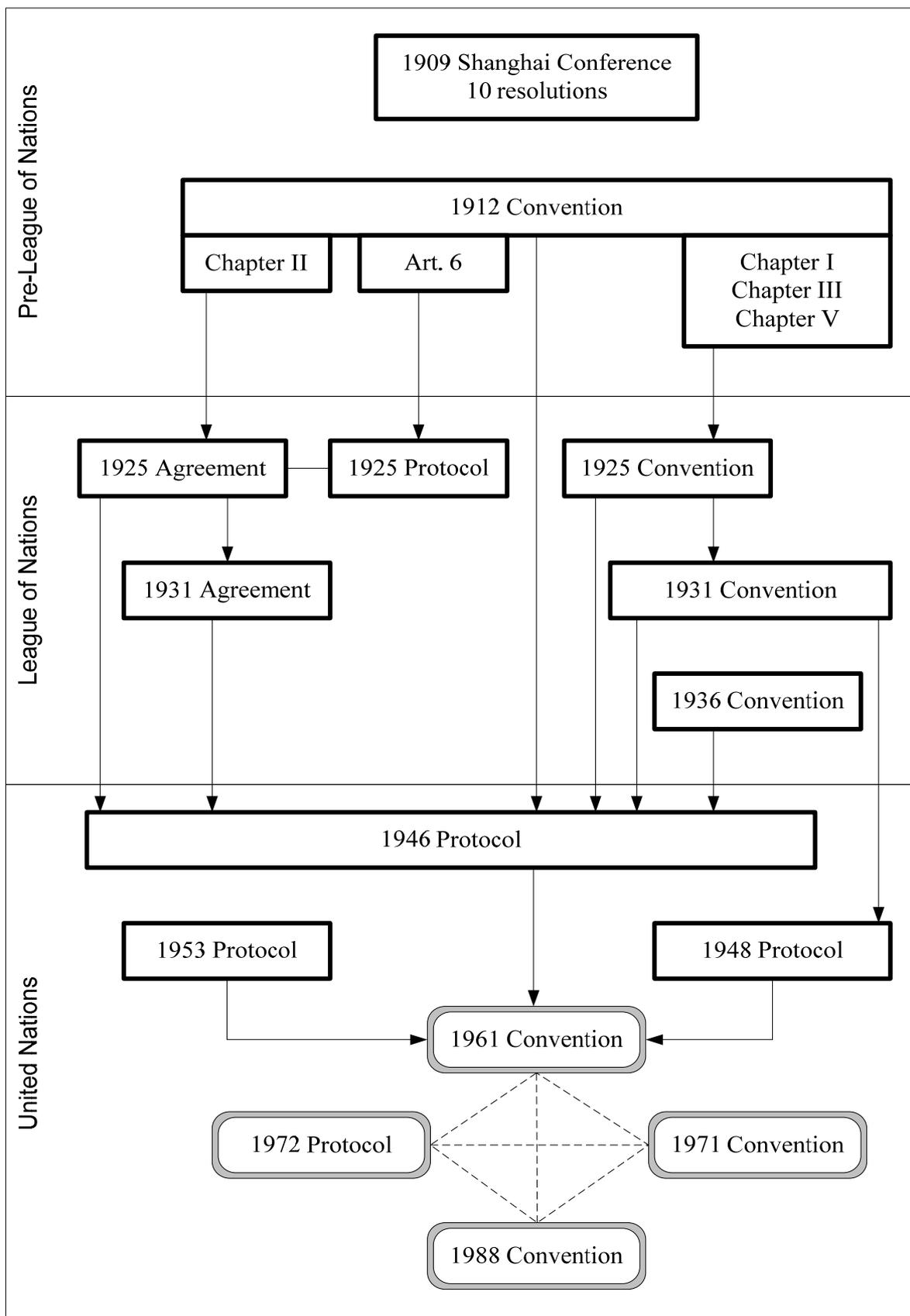


Figure 2-2 Historical overview of the drug-control treaties (treaties framed in grey are still in force)

CHAPTER 3

GENERAL FRAMEWORK OF INTERNATIONAL LAW FOR MARITIME DRUG INTERDICTION

3.1. Introduction

3.1.1. General

The previous chapter dealt with international licit drug-control treaties in general, including licit drug trafficking. Licit drugs imply the existence of illicit drugs, as well as the traffic in illicit drugs. The present chapter will deal with the interdiction of illicit drug trafficking at sea, as part of the interdiction of illicit drug trafficking in general. Maritime drug interdiction will be examined from the point of view of a coastal state and from the point of view of an intervening state. More specifically, this chapter will examine when coastal states and intervening states have authority to exercise its enforcement jurisdiction regarding to illicit drug trafficking at sea.

The first section of the present chapter briefly addresses the 1982 United Nations Convention on the Law of the Sea,¹ and, more in detail, the development of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances², including some relevant general provisions, because this convention is the most important general agreement for maritime drug interdiction.

The subsequent sections of the chapter survey the scope and extent of coastal state and intervening-state authority over maritime drug trafficking in various maritime zones and over ships under specific regimes. Specific provisions of the LOSC and the 1988 Convention are examined and discussed in detail in the respective sections of this chapter.

In subsequent parts of this study, the authority of a coastal state and of an intervening state will be examined in respect of specific law-making maritime drug-interdiction agreements.

As the terms ‘authority’ and ‘intervening state’ are frequently used in the present study it is deemed to be necessary to define and explain those terms.

Authority

Authority refers to the competence of a state to enforce its jurisdiction under international law. In the present study, authority is used to express the legal right of states to exercise their enforcement jurisdiction. In general, in respect of illicit drug trafficking at sea. Coastal-state

¹ The United Nations Convention on the Law of the Sea (LOSC) was signed at Montego Bay, Jamaica on 10 December 1982 and came into force on 16 November 1994, UNTS Vol. 1833, p. 3; as at 20 March of 2007 the status was 157 Signatories and 153 Parties. See the Annex to Chapter 8 of the present study. See for a detailed overview of states that have signed or ratified the Convention also www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm (visited April 2007). See for a more detailed discussion on the LOSC: www.un.org/Depts/los/index.htm (visited Fall 2006).

² United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances was signed at Vienna, on 20 December 1988 and came into force on 11 November 1990, E/CONF.82/15, Corr. 1 and Corr. 2. As at 20 March 2007 the status was: 187 Signatories and 183 Parties.

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authority and intervening-state authority means authority over vessels suspected of illicit drug trafficking. That authority may be exercised without the authorization of any other state.

For the present chapter, authority is based upon the general framework of international law, i.e. the four 1958 United Nations Geneva Conventions,³ the 1982 United Nations Convention on the Law of the Sea, as well as the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, and customary international law.

Warships are excluded from the authority of coastal states and intervening states, because those ships enjoy immunity under the law of the sea.⁴

Intervening state

The terms 'flag state' and 'coastal state' are commonly used terms in the international law of the sea, the term 'intervening state' is not; therefore that term is discussed in detail.

Sovereignty has come to signify the legal identity of a state in international law. In general, states have the duty not to intervene in the internal affairs of another sovereign state. The non-intervention principle is spelt out in Article 2.4. of the UN Charter. The norm is non-intervention, unless a state grants permission to do so. Therefore, in general, when a state wants to intervene in another state it needs authorization to do so.

Intervention in the present study means to stop, visit and search a foreign flag vessel suspected to be engaged in illicit maritime drug trafficking, followed by detaining the suspects in order to bring them to justice. That intervention may be carried out by a competent coastal⁵ state or an intervening state. An intervention, within the framework of maritime law enforcement and based upon international agreements.

For the present study, intervening states are states, - other than flag states or competent coastal states -, that act to exercise authority over maritime drug trafficking in the relevant maritime zones or over ships under the regimes examined in this chapter. Some of the provisions of the general framework of international law for maritime drug interdiction may be applicable to states which are in a position to become intervening states.

The term 'intervening state' has been used in various maritime drug-interdiction treaties. That term has not been similarly defined in those treaties, however (see the Annex to Chapter 7 of this study). Those deviant terms will be examined as well in the appropriate parts of this study.

In accordance with international law, the intervention is carried out by warships or other ships, which are clearly marked and identifiable as being on government service, or, in any case, by authorized officials operating from official ships.⁶

³ The Convention on the Territorial Sea and the Contiguous Zone, UNTS Vol. 516, p. 205; the Convention on the High Seas, UNTS Vol. 450, p. 11; the Convention on Fishing and Conservation of the Living Resources of the High Seas UNTS Vol. 559, p. 285; the Convention on the Continental Shelf, UNTS Vol. 499, p. 311. The 1982 United Nations Convention on the Law of the Sea has superseded these conventions for those states that became party to the 1982 LOSC. For more details regarding the 1958 Geneva Conventions, see the Work of the International Law Commission, 5th ed. (1996), pp. 46 *et seq.*

⁴ Article 95 LOSC.

⁵ A component coastal state means a coastal state that enforces its jurisdiction in waters under its sovereignty.

⁶ See Article 110 LOSC.

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3.1.2. The United Nations Convention on the Law of the Sea

The United Nations Convention on the Law of the Sea (hereinafter the LOSC or the Convention) is “possibly the most significant legal instrument of this century” according to the United Nations’ Secretary General.⁷ Some authors consider the Convention to be the constitution of the oceans.⁸ The United Nations’ regime for the sea is already almost universally accepted, and is moving steadily closer to universal participation.⁹

One of the important elements of the Convention is the division of the ocean into various zones with a view to the exercise of jurisdiction. The definition of maritime zones and the allocation of jurisdiction therein are important themes of the LOSC. The maritime zones are determinative for law enforcement at sea in general and maritime drug interdiction in particular. For law enforcement at sea, including maritime drug interdiction, the maritime zones can be divided into three categories of jurisdictional zones: maritime zones under the sovereignty of a coastal state, maritime zones under the functional jurisdiction of a coastal state and maritime zones beyond the jurisdiction of coastal states. Further on in this chapter the maritime zones relevant for suppressing illicit drug trafficking at sea will be discussed briefly, while some provisions of the LOSC, regarding maritime drug interdiction for a specific maritime zone, will be surveyed in detail.

The LOSC, the four 1958 Geneva Conventions and customary international law addresses more maritime zones than those listed above, such as: the Exclusive Fishery Zone, the Continental Shelf, the Area and Designated Areas. As those maritime zones have little or no relevance for maritime drug interdiction, they will therefore not be examined in this study.

3.1.3. The 1988 Convention

General

Throughout the 1980s, there was an increasing awareness of the global drug problem, and a new global initiative was determined to be necessary. That stemmed primarily from the fact that the two pillars of the multilateral system - the 1961 Convention as amended by the 1972 Protocol, and the 1971 Convention - were inadequate to deal with the complex issues raised by modern international drug trafficking.¹⁰ While those conventions focused primarily on controlling the production of licit drugs and the prevention of their diversion into the illicit market place, they were widely seen as containing insufficient provisions for effective international cooperation in law enforcement. Until the 1988 Convention, law enforcement was not widely considered to be an instrument for suppressing the abuse of illicit drugs or for suppressing illicit drug trafficking at sea.

This section starts with the development of the 1988 Convention. Below, some relevant provisions of that agreement will be examined, including definitions, offences and assertions of jurisdiction. Article 17 of the 1988 Convention entitled: ‘Illicit traffic by sea’, which is important for this study, will be examined in detail further on, when the scope and extent of intervening-state authority over maritime drug trafficking in waters beyond the jurisdiction of coastal states is discussed.

⁷ Opening speech of the United Nations’ Secretary General during the first International Seabed Authority Assembly in Kingston, Jamaica, Press Release SEA, 17 November 1994.

⁸ Robertson (1992), p. 40; Koh (1982). See the United Nations, Oceans: the Source of Life, United Nations Convention on the Law of the Sea, 20th Anniversary (1982-2002), text available on: www.un.org/depts/los/convention_agreements/convention_20years/oceansourceoflife.pdf (visited Fall 2006).

⁹ Churchill and Lowe (1999), p. 22.

¹⁰ Gilmore (1991), pp. 183-192.

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Development

In December 1978, the UN General Assembly adopted the first resolution that dealt with illicit traffic in narcotic drugs and psychotropic substances.¹¹ Many more resolutions would follow before the 1988 Convention was signed.¹² Profound alarm was also expressed at the seriousness of the global drug problem in the Quito Declaration against Narcotic Drugs,¹³ the New York Declaration against Drug Trafficking and the Illicit Use of Drugs¹⁴ and the Lima Declaration.¹⁵ The unanimous adoption of the UN General Assembly Resolution 39/141 on 14 December 1984, including the annexed Draft Convention against Traffic in Narcotic Drugs and Psychotropic Substances and Related Activities, is seen as the start of the 1988 Convention. This resolution requested ECOSOC to ask the Commission on Narcotic Drugs to prepare a Draft Convention as a matter of priority. One of the aspects of the problem that had to be considered was the part that had not been envisaged in existing international instruments: the use of law enforcement instruments to reduce illicit drug trafficking, more specifically international cooperation in law enforcement. On 14 February 1986, the Commission on Narcotic Drugs adopted by consensus a resolution¹⁶ that identified fourteen points in a Draft Convention. In those fourteen points, reference was made for the first time to the question of the illicit traffic of drugs at sea. The formulation was:

Strengthening mutual cooperation among states in the suppression of illicit drug trafficking on the high seas.¹⁷

The Commission on Narcotic Drugs considered that Draft Convention and the governments' comments¹⁸ on it at its 32nd session in February 1987. An open-ended intergovernmental expert group was established to review the working document and, where possible, to reach agreement on the articles of the Draft Convention.¹⁹

In 1988, ECOSOC decided to convene a Review Group to review the draft texts of certain articles and the Draft Convention as a whole to achieve overall consistency in the text to be submitted to the conference.²⁰ That conference, the United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances met at Vienna from 25 November to 20 December 1988. The 1988 Convention was adopted by the conference on 19 December 1988 and opened for signature the following day. Of the 106 states participating in the conference, 43 signed the 1988 Convention on 20 December 1988.

¹¹ Resolution 33/168 of 20 December 1978.

¹² See Resolutions 35/195 of 15 December 1980, 36/132 of 14 December 1981, 36/168 of 16 December 1981, 37/168 of 17 December 1982, 37/198 of 18 December 1982, 38/93 and 38/122 of 16 December 1983, 39/141 of 14 December 1984, 40/120, 40/121 and 40 of 13 December 1985 and 41/126 of 4 December 1986.

¹³ A/39/407, Annex, 11 August 1984.

¹⁴ A/39/551 and Corr. 1 and 2, Annex, 1 October 1984.

¹⁵ A/40/544, Annex, 29 July 1985.

¹⁶ Resolution 1 (S-IX), E/CN.7/1986/2, 14 February 1986.

¹⁷ The UN Draft Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances: A report on the Status of the Draft Convention, 101st Congress, 1st Session, Senate, Committee Print, S. Pr. 100-64, p. 4.

¹⁸ A systematic analysis of the replies of the governments can be found in E/CN.7/1986/2 and E/CN.7/1987/2/Add.1.

¹⁹ See the report of the open-ended intergovernmental expert group meeting on the preparation of a Draft Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, E/CN.7/1988/2, 23 October 1987.

²⁰ Resolution ECOSOC 1988/8 of 25 May 1988.

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General framework of international law for maritime drug interdiction

Provisions of the 1988 Convention relevant to illicit drug traffic at sea

General

In this section, some provisions of the 1988 Convention that are related to illicit drug trafficking at sea will be described, excluding the provisions laid down in Article 17, which will be described separately later on.

The ninth paragraph of the preamble of the 1988 Convention constitutes recognition of the need to improve international cooperation in the suppression of illicit traffic by sea. While Article 108 LOSC imposes a general obligation on states to cooperate in this area, it was considered necessary to elaborate more detailed provisions in the specific context of the 1988 Convention. That concern is primarily dealt with in Article 17 of the 1988 Convention.

Definitions

Some of the terms used in the 1988 Convention had already been defined under the 1961 or the 1971 Conventions. Other terms defined under the earlier conventions, although used in the present convention, were not defined in the 1988 Convention. In such cases, definitions from the earlier conventions apply to the terms used in the 1988 Convention, all the more so since Article 3(1)(a)(i) of the 1988 Convention establishes an explicit link with the provisions of the 1961 and 1971 Conventions. The definitions of the Convention can be found in Article 1.

Definition of illicit (drug) traffic

An important definition for the present study is 'illicit traffic'. The definition can be found in Article 1(m), it reads:

'Illicit traffic' means the offences set forth in article 3, paragraphs 1 and 2, of this Convention.

The term illicit traffic can also be found in the title of the 1988 Convention. For the first time in the UN drug control treaties, illicit traffic was defined in a broad way. Although article 2(a) of the 1936 Agreement did not define illicit traffic, the aim of this agreement was to suppress illicit traffic. That article enumerated the elements that now together formed the definition of illicit traffic in Article 1 and 3 of the 1988 Convention.

In the 1961 Convention illicit traffic means cultivation or trafficking in drugs contrary to the provisions of that convention.²¹ The term trafficking is not further specified. In the 1988 Convention the definition of illicit traffic refers to the offences set out in Article 3(1) and (2). That article is entitled: 'Offences and Sanctions' and enumerates many offences, from production to exportation - in paragraph 1 - and the possession, purchase and cultivation for personal use - in paragraph 2. Illicit traffic therefore includes the possession of illicit drugs for personal use.

The definition of illicit traffic is a compromise which was made during the conference. The definition should be read in combination with the opening words of Article 1 of the convention, which states that, in general the definitions apply throughout the convention except where the context requires otherwise. That is relevant for illicit traffic, which term can be found at various places in the convention.

²¹ Article 1(1)(l) of the 1961 Convention.

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During the negotiations, many of the delegations insisted on a broad definition of the term illicit traffic.²² Nevertheless, many of the detailed provisions of the 1988 Convention do not use the term illicit traffic, with its broad definition, but refer instead to ‘offences established in accordance with Article 3(1)’. That formulation was used to limit obligations arising under those provisions to more serious offences, as opposed to offences of possession, purchase or cultivation for personal consumption, which were recognized as less serious in nature.²³

In the list of definitions in Article 1 of the 1988 Convention, no reference is made to illicit drug traffic at sea, which is considered to be a sub-set of the offences mentioned in Article 3 of the convention. The term ‘illicit traffic’ in the context of Article 17 - Illicit traffic by sea - encompasses also the possession of illicit drugs for personal consumption. It should be taken in consideration that stopping and searching a suspect vessel on the high seas that is only suspected of being engaged in an offence mentioned in Article 3(2), - personal consumption -, is not always effective due to big potential commercial losses; therefore the implementation of Article 3(2) should be carried out prudently.²⁴ In support can be stated that some of the offences described in Article 3(1)(2) of the 1988 Convention can only with difficulty be seen as traffic in the generally accepted meaning of that term. In international law, ‘traffic’ often refers to a ‘commercial activity, involving import and export’, or ‘trade’. That is a much narrower definition.²⁵ The multilateral drug-interdiction treaties, to be examined in Chapter 4 of the study, exclude the offences laid down in Article 3(2) - minor offences.²⁶

Offences

Article 3 of the 1988 Convention enumerates the offences and is central to the promotion of the goals of that Convention as set out in the preamble. The article reads:

Article 3 Offences and sanctions

1. Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally:
 - a.
 - i. The production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention;
 - ii. The cultivation of opium poppy, coca bush or cannabis plant for the purpose of the production of narcotic drugs contrary to the provisions of the 1961 Convention and the 1961 Convention as amended;
 - iii. The possession or purchase of any narcotic drug or psychotropic substance for the purpose of any of the activities enumerated in (i) above;
 - iv. The manufacture, transport or distribution of equipment, materials or of substances listed in Table I and Table II, knowing that they are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;
 - v. The organization, management or financing of any of the offences enumerated in (i), (ii), (iii) or (iv) above;
 - b.

²² Explanatory Memorandum to the approval of the Treaty of the United Nations against trafficking in narcotic drugs and psychotropic substances signed on 20 December 1988 at Vienna, 22 080 (R 1406), no. 3, 1990 – 1991, p. 7. See Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, E/CN.7/590, United Nations, New York (1998), p. 34.

²³ Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, E/CN.7/590, United Nations, New York (1998), p. 117.

²⁴ Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, E/CN.7/590, United Nations, New York (1998), p. 82.

²⁵ Mutz (2000); The Oxford English Dictionary, 2nd edition, Clarendon Press, Oxford (1989).

²⁶ See the Annex to Chapter 7 of the study.

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- i. The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph (a) of this paragraph, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions;
 - ii. The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such an offence or offences;
 - c. Subject to its constitutional principles and the basic concepts of its legal system:
 - i. The acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such offence or offences;
 - ii. The possession of equipment or materials or substances listed in Table I and Table II, knowing that they are being or are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;
 - iii. Publicly inciting or inducing others, by any means, to commit any of the offences established in accordance with this article or to use narcotic drugs or psychotropic substances illicitly;
 - iv. Participation in, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counseling the commission of any of the offences established in accordance with this article.
2. Subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption²⁷ contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.
3. Knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 of this article may be inferred from objective factual circumstances.
4.
 - a. Each Party shall make the commission of the offences established in accordance with paragraph 1 of this article liable to sanctions which take into account the grave nature of these offences, such as imprisonment or other forms of deprivation of liberty, pecuniary sanctions and confiscation.
 - b. The Parties may provide, in addition to conviction or punishment, for an offence established in accordance with paragraph 1 of this article, that the offender shall undergo measures such as treatment, education, aftercare, rehabilitation or social reintegration.
 - c. Notwithstanding the preceding subparagraphs, in appropriate cases of a minor nature, the Parties may provide, as alternatives to conviction or punishment, measures such as education, rehabilitation or social reintegration, as well as, when the offender is a drug abuser, treatment and aftercare.
 - d. The Parties may provide, either as an alternative to conviction or punishment, or in addition to conviction or punishment of an offence established in accordance with paragraph 2 of this article, measures for the treatment, education, aftercare, rehabilitation or social reintegration of the offender.
5. The Parties shall ensure that their courts and other competent authorities having jurisdiction can take into account factual circumstances which make the commission of the offences established in accordance with paragraph 1 of this article particularly serious, such as:
 - a. The involvement in the offence of an organized criminal group to which the offender belongs;
 - b. The involvement of the offender in other international organized criminal activities;
 - c. The involvement of the offender in other illegal activities facilitated by commission of the offence;
 - d. The use of violence or arms by the offender;
 - e. The fact that the offender holds a public office and that the offence is connected with the office in question;
 - f. The victimization or use of minors;

²⁷ Emphasizes in this article are added by the author.

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- g. The fact that the offence is committed in a penal institution or in an educational institution or social service facility or in their immediate vicinity or in other places to which school children and students resort for educational, sports and social activities;
 - h. Prior conviction, particularly for similar offences, whether foreign or domestic, to the extent permitted under the domestic law of a Party.
6. The Parties shall endeavor to ensure that any discretionary legal powers under their domestic law relating to the prosecution of persons for offences established in accordance with this article are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.
7. The Parties shall ensure that their courts or other competent authorities bear in mind the serious nature of the offences enumerated in paragraph 1 of this article and the circumstances enumerated in paragraph 5 of this article when considering the eventuality of early release or parole of persons convicted of such offences.
8. Each Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with paragraph 1 of this article, and a longer period where the alleged offender has evaded the administration of justice.
9. Each Party shall take appropriate measures, consistent with its legal system, to ensure that a person charged with or convicted of an offence established in accordance with paragraph 1 of this article, who is found within its territory, is present at the necessary criminal proceedings.
10. For the purpose of co-operation among the Parties under this Convention, including, in particular, co-operation under articles 5, 6, 7 and 9, offences established in accordance with this article shall not be considered as fiscal offences or as political offences or regarded as politically motivated, without prejudice to the constitutional limitations and the fundamental domestic law of the Parties.
11. Nothing contained in this article shall affect the principle that the description of the offences to which it refers and of legal defenses thereto is reserved to the domestic law of a Party and that such offences shall be prosecuted and punished in conformity with that law.

Article 3 of the 1988 Convention requires parties to legislate as may be necessary to establish a modern code of criminal offences relating to the various aspects of illicit drug trafficking and to ensure that such illicit activities are dealt with as serious offences by each state's judiciary and prosecutorial authorities.

Paragraph 4 of Article 3 deals with the sanctions of drug-related offences. It has to be noted that this paragraph uses the wording 'grave nature' and only makes a reference to paragraph 1 of Article 3. Paragraphs 5, 7, 8 and 9 are also limited to the offences listed in paragraph 1 of Article 3, the serious ones. According to paragraph 2 of Article 3, drugs for personal consumption can be considered as a minor offence. There is apparently a difference in character between the offences defined in the two paragraphs.

Serious offences

The criminalization and punishment of illicit traffic is one of the basic features of the convention, and action under paragraph 1 of Article 3 is mandatory for all parties. In that paragraph, the most serious international drug trafficking offences are specified. Those offences are production, manufacture, extracting, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substances contrary to the provisions of the 1961 Convention as amended by the 1972 Protocol. The manufacture, transport or distribution of precursors²⁸ is prohibited by Article 3(1)(a)(iv) of the 1988 Convention.

Each party must adopt such measures as may be necessary to establish those criminal offences under its domestic laws, when committed intentionally. These measures should be subject to the state's constitutional principles and basic concepts of its legal system. The obligation for a

²⁸ Substances that are used in or for the illicit cultivation, production or manufacture of illicit drugs; see Section 1.3.5. of this study.

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party to establish drug-related criminal offences under its domestic laws has therefore been loosened by clauses about constitutional principles, concepts of legal system and the wording or description of the drug-related offences. Although some delegations at the conference expressed dissatisfaction with the language of the safeguards in Article 3(1)(c), the text gained general acceptance.²⁹

All of these offences have to be committed intentionally to be considered criminal. Proposals to include culpable offences were not accepted during the conference. Paragraph 3 of Article 3 of the 1988 Convention states that knowledge, intent or purpose is required as an element of an offence. It is the opinion of the author that individual parties are, however, free to provide in their domestic law that reckless or negligent conduct should be punishable, or indeed to impose strict liability without proof of any fault element, because the 1988 Convention does not exclude that possibility.

Minor offences

Paragraph 2 of Article 3 deals with the possession, purchase or cultivation of drugs for personal consumption. Those are offences as well, but are safeguarded by a clause referring to constitutional principles and the basic concepts of a party's legal system. That paragraph also has to be read in conjunction with paragraph 11 of the same article, which states that those offences shall be prosecuted and punished in conformity with national laws.

Jurisdiction

Given the uncertainty and controversy surrounding the issue of the limits imposed by rules of customary international law on the right of states to legislate with extraterritorial effect, it was felt that it would be appropriate to regulate the issue of prescriptive jurisdiction in a specific treaty provision. That is the function of Article 4 of the 1988 Convention,³⁰ which reads:

Article 4 Jurisdiction

1. Each Party:
 - a. Shall take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when:
 - i. The offence is committed in its territory;
 - ii. The offence is committed on board a vessel flying its flag or an aircraft which is registered under its laws at the time the offence is committed;
 - b. May take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when:
 - i. The offence is committed by one of its nationals or by a person who has his habitual residence in its territory;
 - ii. The offence is committed on board a vessel concerning which that Party has been authorized to take appropriate action pursuant to article 17, provided that such jurisdiction shall be exercised only on the basis of agreements or arrangements referred to in paragraphs 4 and 9 of that article;
 - iii. The offence is one of those established in accordance with article 3, paragraph 1, subparagraph (c)(iv), and is committed outside its territory with a view to the commission, within its territory, of an offence established in accordance with article 3, paragraph 1.
2. Each Party:
 - a. Shall also take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when the alleged offender is present in its territory and it does not extradite him to another Party on the ground:

²⁹ Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, E/CN.7/590, United Nations, New York (1998), p. 72.

³⁰ *Idem*, p. 100.

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- i. That the offence has been committed in its territory or on board a vessel flying its flag or an aircraft which was registered under its law at the time the offence was committed; or
 - ii. That the offence has been committed by one of its nationals;
- b. May also take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when the alleged offender is present in its territory and it does not extradite him to another Party.
3. This Convention does not exclude the exercise of any criminal jurisdiction established by a Party in accordance with its domestic law.

In the preamble to the 1988 Convention, the contracting parties have stressed that an objective of the convention was to deal especially with the problem of illicit traffic of drugs and to cover aspects not envisaged in the previous treaties, thereby reinforcing and supplementing the provisions of the 1961 Convention. It can therefore be assumed that the provisions of the 1988 Convention concerning jurisdiction replace the provisions concerning jurisdiction of the 1961 Convention, insofar illicit drug trafficking, including illicit drug trafficking at sea are concerned.

Mandatory jurisdiction provisions

When, pursuant to Article 3(1) of the 1988 Convention, a state has established criminal offences, that state shall take such measures as may be necessary, pursuant to paragraph 1(a)(i) of Article 4, to establish jurisdiction over any such offences committed in its territory. In order to eliminate possible loopholes that could be used by illicit drug traffickers, and given the practical importance of eliminating illicit drug trafficking at sea, parties should consider whether existing legislation adequately covers offences committed in waters under their sovereignty, because that is part of their territory as mentioned in Article 4(a)(i). Jurisdiction shall also be established when such an offence is committed on board a vessel flying its flag at the time the offence is committed. As most states already extend the obligations of their criminal justice system to ships flying their flag, significant additional action is unlikely to be required.³¹

It can be stated that Article 4(1)(a) deals with the mandatory establishment of prescriptive jurisdiction by parties over offences committed in their territory, including the waters under their sovereignty, and aboard vessels flying its flag. Paragraph 2(a)(i) of Article 4 states that each party shall³² establish jurisdiction over offences committed by an offender who is present in its territory and if that party does not, on the ground that the offence has been committed on board a vessel flying its flag at the time the offence was committed, or if the offence has been committed by one of its nationals, extradite the alleged offender to another party. In that event, the case has to be submitted to the party's competent authorities for the purpose of prosecution.³³

Optional jurisdiction provisions

Paragraph 1(b)(i) of Article 4 of the 1988 Convention covers the option that states have of asserting jurisdiction over extraterritorial offences committed by nationals of that state. Paragraph 1(b)(ii) of that article gives the second permissive basis for the establishment of jurisdiction. It relates to the consensual interdiction of a foreign flag vessel while exercising freedom of navigation beyond the territorial sea. It is important to note that such assertion of ju-

³¹ The Netherlands: Article 3 Criminal Code; Netherlands Antilles and Aruba: Article 3 Criminal Code; United Kingdom: Merchant Shipping Act 1995 (c.21).

³² Emphasis added.

³³ Article 6(9)(a) of the 1988 Convention.

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jurisdiction over offences taking place on foreign flag ships on the high seas, though optional, will in fact be needed to make a reality of the provisions of Article 17 of this Convention.³⁴

Contrary to Article 36(2)(a)(iv) of the 1961 Convention, Article 4(2) of the 1988 Convention no longer specifies that the jurisdiction of the state where the offender is arrested, depends on whether the offender has been to trial in another state before for the same offence in the past. The question is whether customary international law would prohibit international double jeopardy, the *ne bis in idem* principle. Moreover, Article 4(2) of the 1988 Convention does not stipulate that the state claiming jurisdiction would have to apply or take into consideration any law other than its own.

It can be stated that Article 4(1)(b)(ii) deals with the optional rather than mandatory establishment of prescriptive jurisdiction by parties over offences committed on board vessels of another state party who authorized an intervention pursuant Article 17 of this convention.

Jurisdiction over stateless vessels

While Article 4 of the 1988 Convention treats the issue of a party's jurisdiction in respect of offences taking place on board its own flag vessels and on those of other parties, it remains silent about the assumption of legislative powers over stateless vessels³⁵ involved in the illicit traffic in narcotic drugs and psychotropic substances. According to the opinion of the author, the absence of specific treatment of this topic is somewhat curious, given the fact that Article 17(2) of the 1988 Convention concerns requests for assistance in suppressing the use of such vessels when engaged in illicit drug trafficking. International practice has since identified this as a matter requiring attention, given the extent to which stateless vessels have in fact been used by trafficking networks.³⁶

In conclusion, it can be stated that Article 4 of the 1988 Convention defines the obligation of states to assert prescriptive jurisdiction over offences committed aboard vessels flying their flag and the possibility for states to assert prescriptive jurisdiction over offences committed aboard vessels flying the flag of another state party. Article 17 of the 1988 Convention provide for enforcement jurisdiction (see below Section 3.3.5. of this study).

3.2. Scope and extent of coastal-state authority over maritime drug trafficking

3.2.1. General

In this section, the scope and extent of the authority of a coastal state to prescribe and enforce its jurisdiction over maritime drug trafficking will be examined. Authority here refers to the competence of a coastal state to prescribe and enforce its jurisdiction under international law. Coastal state authority over maritime drug trafficking means authority over vessels suspected of illicit drug trafficking. That authority may be exercised without the authorization of any other state.

For this chapter, that authority is based upon the general framework of international law, i.e. the 1958 UN Geneva Conventions, the 1982 United Nations Convention on the Law of the Sea, the 1988 Convention, and customary international law (see Section 3.1.1. of this study).

³⁴ Gilmore (1991), pp. 183–192.

³⁵ For an examination of stateless vessels see Section 3.3.5. of this study.

³⁶ Recommendation no. 13 of the Working Group on Maritime Cooperation, endorsed by the CND in its resolution 8 (XXXVIII), E/1995/25.

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Coastal-state authority will be surveyed for all relevant maritime zones and international straits, and for ships flying its flag, foreign flag ships and stateless ones suspected of illicit drug trafficking; ships under specific regimes as laid down in the LOSC will be examined as well. The LOSC, the 1958 Conventions and customary international law addresses more maritime zones such as the Exclusive Fishery Zones (EFZ), the Continental Shelf (CS), the Area and Designated Areas; those zones are essentially irrelevant for maritime drug interdiction and are therefore not examined in this study.

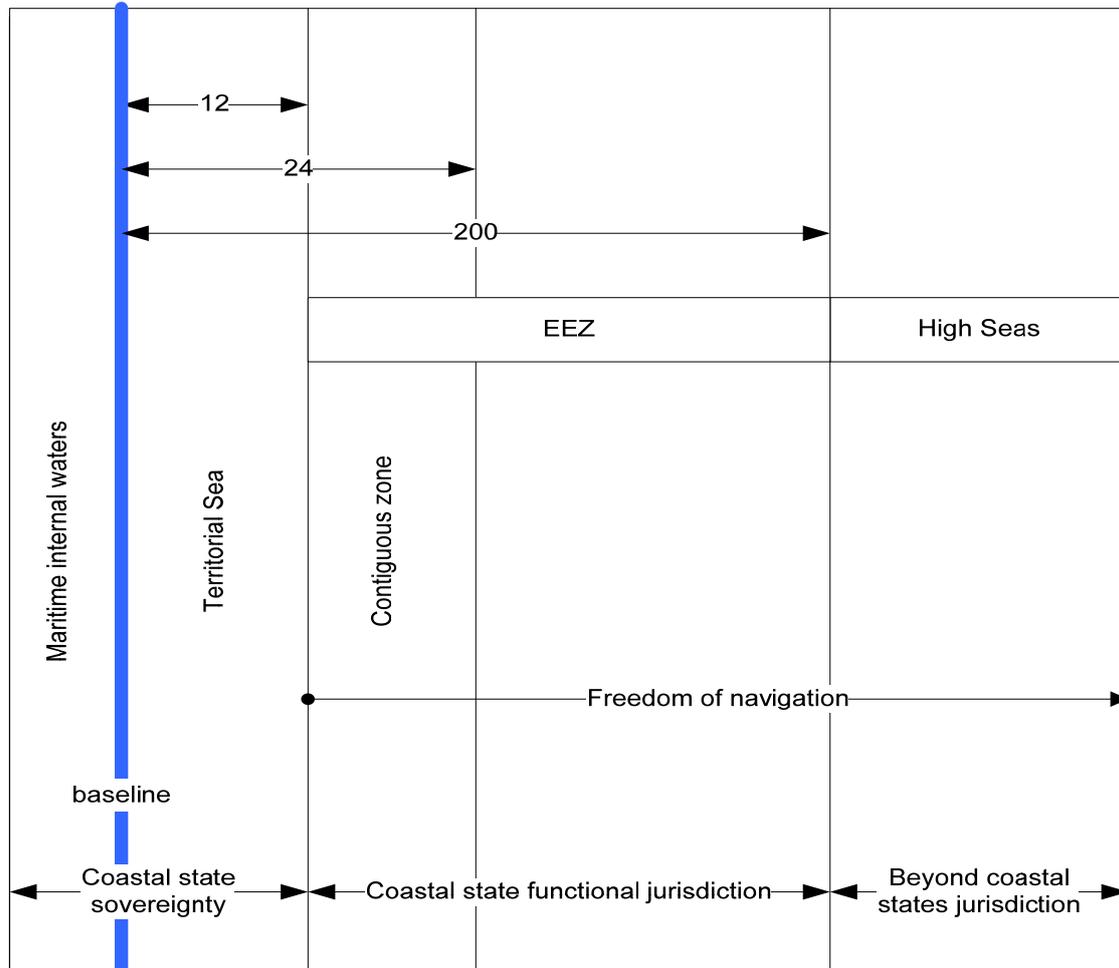


Figure 3-1 Maritime jurisdictional zones relevant for maritime drug interdiction

Figure 3-1 shows the maritime jurisdictional zones relevant for maritime drug interdiction, as can be found in the LOSC. The Convention deals with additional maritime zones, but as those zones are essentially irrelevant for maritime drug interdiction they are not shown in the figure above. The baseline is the origin for the measurement of the breath of the territorial sea, the contiguous zone and the EEZ.

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WATERS UNDER THE SOVEREIGNTY OF A COASTAL STATE AND INTERNATIONAL STRAITS

3.2.2. Maritime internal waters

General

Waters on the landward side of the baseline³⁷ form part of the internal waters of that state.³⁸ Maritime internal waters are the part of the internal waters that are in open connection with the ocean. The internal waters are part of the maritime territory of a coastal state. Third states have no general rights in those waters. These waters are in principle subject to the national law of the coastal state, including illicit drug trafficking.

Exceptions to the authority of a coastal state in maritime internal waters?

Three possible exceptions to the authority of a coastal state over maritime drug trafficking in maritime internal waters are described below.

Internal economy of a ship

Ships are self-contained units, falling under a comprehensive body of laws of their flag state that apply to them in the maritime internal waters of a foreign coastal state, and under a system for the enforcement of those laws by the ship's master. Matters relating to the internal economy of the ship tend in practice to be left to the authorities of the flag state.³⁹ State practice appears to be that coastal states will assert jurisdiction over foreign flag ships when offences affect the peace or good order of the coastal state.⁴⁰

Pursuant to Chapter 1 of this study it can be stated that illicit drug trafficking at sea is an international criminal activity⁴¹ or a crime under international law that can affect the good order of the coastal state. The illicit traffic of drugs is not an element of the internal economy of the ship, and therefore subject to the jurisdiction of a coastal state.

Innocent passage through maritime internal waters

For purposes of international law, it must be emphasized that the distinction between maritime internal waters and the territorial sea is important, in spite of the fact that the legal interests of the coastal state constitute sovereignty in either case. No right of innocent passage for foreign flag vessels exists in the case of maritime internal waters, apart from treaty provisions.⁴² There is one exception: the right of innocent passage applies where the establishment of a straight baseline has the effect of enclosing, as internal waters, areas that had not previously been considered as such.⁴³ The relevance of this exception for the scope and extent of coastal-state authority over maritime drug trafficking in maritime internal waters will be described below under the head of the territorial sea.

Involuntary entering into maritime internal waters

Thus far we have examined ships that have voluntarily entered the maritime internal waters of a coastal state. Ships driven into maritime internal waters by *force majeure* or distress are

³⁷ Low-water line along the coast as marked on large-scale charts officially recognized by the coastal state, Article 5 LOSC. See for straight baselines Article 7 LOSC.

³⁸ Article 8 LOSC.

³⁹ Restatement of the Law Third: Foreign Relations Law of the United States (1987), American Law Institute, §512.

⁴⁰ See O'Connell (1984), p. 735.

⁴¹ Declaration on the Control of Drug Trafficking and Drug Abuse, General Assembly Resolution 31/142 (1984)

⁴² Brownlie (1998), p. 118; Churchill and Lowe (1999), p. 61.

⁴³ Article 8 LOSC.

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given a degree of immunity from the coastal state jurisdiction by international law.⁴⁴ It is most unlikely that illicit drug trafficking would be considered to be protected by this immunity. Such a vessel is, in general, therefore not exempt from the jurisdiction of the coastal state, but it is for the national court to determine, in accordance with international law, the legal consequences flowing from such a situation.⁴⁵

3.2.3. Archipelagic waters

The LOSC contains a new feature in international law, which is the regime for archipelagic states. The waters between the group of islands forming that state and enclosed by archipelagic baselines are declared archipelagic waters.⁴⁶ Archipelagic waters are an area *sui generis* and an integral part of the territory of an archipelagic state. The archipelagic state has sovereignty in its archipelagic waters, subject to the rules of innocent passage or archipelagic sea lanes passage⁴⁷ (see Section 3.2.5. of this study).

The archipelagic state may also designate internal waters within its archipelagic waters.⁴⁸ The territorial sea, contiguous zone and EEZ,⁴⁹ are measured from the archipelagic baseline and have the same scope and extent as respectively examined in this study.

3.2.4. Territorial sea

General

Every state has the right to establish the breadth of a belt of water round its territory up to a limit not exceeding 12 nautical miles, measured from the baseline. This belt is referred to as the territorial sea.⁵⁰ The territorial sea is part of the maritime territory of the coastal state, with third states' rights, called innocent passage. In principle, the coastal state is entitled to enforce its entire body of national legislation within the territorial sea.

Innocent passage

The LOSC deals extensively with the issue of innocent passage in the territorial sea. Article 17 LOSC provides that 'ships of all states, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea', and Article 18 LOSC specifies that such passage 'shall be continuous and expeditious'. The right of innocent passage is, however, subject to the important qualification that a vessel cannot engage in any act that is 'prejudicial to the peace, good order or security of the coastal state'. Article 19 LOSC describes a number of acts which would render passage to be prejudicial to the peace, good order or security of the coastal state. With respect to vessels exercising the right of innocent passage, therefore, the coastal state is, in general, limited in its authority. The relevant question here is whether the coastal state is limited in its authority over maritime drug trafficking.

Article 27 LOSC Criminal jurisdiction on board a foreign flag ship

General

The LOSC provides for the authority, *in casu* for the enforcement of general criminal jurisdiction in some circumstances, under Article 27 LOSC. The existence of general enforcement jurisdiction clearly presupposes the existence of general legislative jurisdiction.⁵¹ As Article

⁴⁴ Churchill and Lowe (1999), p. 68.

⁴⁵ Judgment of the European Court, Case C-286/90, 24 November 1992.

⁴⁶ Part IV LOSC.

⁴⁷ Article 49 LOSC.

⁴⁸ Article 50 LOSC.

⁴⁹ Article 48 LOSC.

⁵⁰ Article 3 LOSC.

⁵¹ Churchill and Lowe (1999), p. 95.

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27 LOSC is fundamental to the suppression of illicit drug trafficking in the territorial sea, that article will be examined in some detail. The text of article 27 LOSC reads:

Article 27 Criminal jurisdiction on board a foreign flag ship

1. The criminal jurisdiction of the coastal State should not be exercised on board a foreign flag ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases:
 - a. if the consequences of the crime extend to the coastal State;
 - b. if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;
 - c. if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or
 - d. if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.⁵²
2. The above provisions do not affect the right of the coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters.
3. In the cases provided for in paragraphs 1 and 2, the coastal State shall, if the master so requests, notify a diplomatic agent or consular officer of the flag State before taking any steps, and shall facilitate contact between such agent or officer and the ship's crew. In cases of emergency this notification may be communicated while the measures are being taken.
4. In considering whether or in what manner an arrest should be made, the local authorities shall have due regard to the interests of navigation.
5. Except as provided in Part XII or with respect to violations of laws and regulations adopted in accordance with Part V, the coastal State may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters.

Article 27 LOSC deals with the exercise of criminal jurisdiction by a coastal state in relation to offences committed on board a foreign flag ship passing through the coastal state's territorial sea. The article provides that a coastal state should not exercise its criminal jurisdiction over acts occurring on board a ship in innocent passage through its territorial waters except under the limited circumstances listed in this article. It also provides that such criminal jurisdiction may not be exercised on board a foreign flag ship in innocent passage for a crime committed before the ship entered the territorial sea. There are, therefore, two restrictions on the territorial jurisdiction of the coastal state. Those restriction will be examined and discussed further on in this section. Article 27 LOSC can be considered as an attempt to establish a reasonable balance between the criminal jurisdiction of the coastal state and the right of innocent passage.

History

Some international lawyers stated that a ship was a portion of the territory whose flag it flies, even when at sea. Logically, that theory excluded the application of coastal state's law to the ship when it entered that coastal state's territorial sea. The conclusion that the ship constituted an enclave within that territorial sea was indefensible for practical reasons, and so arose the question of reconciling two apparently incompatible criteria of legal competence: the coastal state law and the ship's flag state law.⁵³

The League of Nations Conference for the Codification of International Law (The 1930 Hague Conference)⁵⁴ dealt, *inter alia*, with the territorial sea, the contiguous zone and the

⁵² Emphasis added.

⁵³ O'Connell (1984), p. 735

⁵⁴ LN Doc. C.351(b).M.145(b).1930, p. 217.

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high seas. This conference did not result in any agreements, only draft articles. One of those draft articles obliged foreign flag ships to comply with the laws and regulations enacted in conformity with international usage by the coastal state.⁵⁵

The International Law Commission (ILC) proposed draft articles on the matter, which followed the 1930 Hague Conference draft articles in excluding as a matter of law coastal state rights of enforcement except in certain circumstances where enforcement was permitted. As the International Law Commission noted in commenting on its draft article of the Convention on the Territorial Sea and Contiguous Zone, in the case of the criminal offences committed on board a ship:

“In such a case a conflict of interests occurs; on the one hand, there are the interests of shipping, which should suffer as little interference as possible; on the other hand, there are the interests of the coastal state, which wishes to enforce its criminal law throughout its territory. The coastal state’s authority to bring the offenders before its courts (if it can arrest them) remains undiminished, but its power to arrest persons on board ships which are merely passing through the territorial sea is limited to the cases enumerated in this article.”⁵⁶

The result of the 1958 United Nations Law of the Sea Conference I (UNCLOS I) was that coastal states should not enforce their laws in respect of crimes committed on ships passing under the regime of innocent passage, unless the consequences extended to the coastal state, or disturbed the peace or the good order of the coastal state, or to suppress illicit drug trafficking at sea. Until then, the last mentioned exception was not evident in state practice, but was added by the UNCLOS I. See Article 19 Convention on the Territorial Sea and Contiguous Zone.

Enforcement jurisdiction was, under the Convention on the Territorial Sea and Contiguous Zone, excluded as a matter of international law in only one case: where a crime was committed before the ship entered the territorial sea and the ship is merely passing through the sea without entering maritime internal waters. It can be stated that this exclusion is not relevant for illicit drug trafficking at sea, because that offence commences for the coastal state when a foreign drug-smuggling vessel enters the coastal state’s territorial sea.

Coastal states were expressly given the right to take enforcement measures in respect of crimes committed on ships passing through the territorial sea after leaving maritime internal waters, and the Convention on the Territorial Sea and Contiguous Zone implied retaining the right that stems from their sovereignty, to enforcement jurisdiction over ships not engaged in innocent passage in the territorial sea.

By and large, the provisions of Article 19 of the Convention on the Territorial Sea and Contiguous Zone, which was the predecessor of Article 27 LOSC, have stood the test of time. One special reference has been added to Article 27 LOSC: psychotropic substances in the more modern formulation.⁵⁷ With the exception of the addition of psychotropic substances, Article 27 LOSC repeats almost verbatim Article 19 of the Convention on the Territorial Sea

⁵⁵ Draft Article 6.

⁵⁶ Report of the International Law Commission covering the work of its eighth session, A/3159, Article 20, Commentary, para. (1), II YB ILC (1956), pp. 253, 275.

⁵⁷ Sea Bed Committee Report 1973, p. 21, A/CONF.62/WP/REV.1/Part II, RSNT (1976), Article 26, V Off. Rec. pp. 151, 157.

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and the Contiguous Zone, with the addition in paragraph 5 of specific cross-references to Part V and Part XII of the LOSC.

Illicit drug trafficking

Paragraph 1 of Article 27 LOSC is important for this study; that paragraph deals with illicit traffic in narcotic drugs or psychotropic substances in the territorial sea. It lists the circumstances under which a coastal state may exercise its criminal jurisdiction on board a foreign flag ship passing through its territorial sea under the regime of innocent passage. It specifically provides that such jurisdiction may be exercised only in those cases, the list is exhaustive and includes illicit drug trafficking. In addition, paragraph 2 confirms the coastal state's authority to stop and search a suspect vessel passing through the territorial sea after leaving the maritime internal waters of the coastal state.

Safeguards

Paragraph 5 of Article 27 contains some additional safeguards for ships exercising the right of innocent passage (see above). Paragraph 5 says that, with the exception of two situations, described below, the coastal state may not take steps on board foreign flag ships exercising the right of innocent passage. The first exception concerns Part XII of the LOSC, which deals with the protection and preservation of the marine environment. The reference to Part V of the LOSC is the second exception. It deals with the coastal states' sovereign rights in the EEZ. The effect of those two exceptions is to extend the criminal jurisdiction of a coastal state in accordance with those relevant provisions. On the other hand, paragraph 5 only safeguards crimes that must have been committed before the ship entered the territorial waters. This does not include illicit drug trafficking, because that offence starts, for the coastal state that enforces its jurisdiction, when the illicit drug trafficker enters the territorial sea.

A coastal state may therefore take steps on board vessels, sailing in the territorial sea of the coastal state and suspected of illicit drug trafficking, to conduct any investigation in connection with that crime. That includes coastal state's ships, foreign flag ships and stateless ones.

Mandatory versus optional enforcement

It can be noted that Article 27(1) employs the phrase 'should not be exercised',⁵⁸ whereas Article 27(5) uses 'may not take any steps'.⁵⁹ The different formulations may reflect the different jurisdiction of the nature of the zones in which the alleged criminal offence takes place. Where the alleged offence has taken place aboard a vessel during its passage through the territorial sea, the coastal state, by virtue of its sovereignty over that area, would therefore be entitled to exercise its jurisdiction. The coastal state, however, is urged in Article 27(1) not to exercise jurisdiction except in the four cases specified, including illicit drug trafficking. The underlying policy is to favor innocent passage and thereby freedom of international trade and navigation, unless there are significant reasons to displace it by the demands of criminal justice. In the situation envisaged in Article 27(5), on the other hand, the alleged offence will have taken place beyond the waters under sovereignty of the coastal state. In that case it is therefore proper that the more mandatory phrase 'may not' should be employed to indicate a clear prohibition against exercise of the coastal state's jurisdiction. See also Article 28 LOSC.⁶⁰

⁵⁸ Emphasis added.

⁵⁹ Nordquist (1995), p. xliiii, for a note on the use of the word 'shall'. See Churchill and Lowe (1999), p. 97.

⁶⁰ Brown (1994), p.64.

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3.2.5. Ships under regimes applicable in international straits or archipelagic sea lanes

General

A strait is, in geographical terms, a narrow natural passage or arm of water connecting two larger bodies of water. In general, the legal definition of strait is codified in Article 37 LOSC, which expressly specifies this definition's two elements: firstly, straits that are used for international navigation, and secondly that this navigation finds place in straits between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. The EEZ was now added to that definition, which in the 1958 Convention on the Territorial Sea and the Contiguous Zone (based on the Corfu Channel Case⁶¹) referred only the two parts of the high seas.

It is the legal status of the water constituting the straits and their use by international shipping, that determines the rights of coastal states and flag states.⁶² This legal status is *sui generis*.⁶³

Although the area of many international straits is formed by territorial seas they are surveyed separately because of the complexity relevant to the suppression of illicit drug trafficking and because of the fact that passages through straits form a different regime.

Several kinds of international straits can be recognized. Firstly, more than 120 major straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.⁶⁴ In those straits the regime of transit passage is applicable (see below).⁶⁵ Secondly, we can recognize straits excluded from the application of the regime of transit passage as mentioned under Article 38(1)(a) LOSC, and straits between a part of the high seas or an EEZ and the territorial sea of a foreign state (dead-end straits), as mentioned under Article 38(1)(b) LOSC; in those straits the regime of non-suspendable innocent passage is applicable (see below).⁶⁶ Thirdly, in a number of straits the passage is, under Article 35(c) LOSC, regulated in whole or in part by long-standing international conventions. Finally, we can recognize straits used for international navigation, but there exist through the straits a route through the high seas or through an EEZ of similar convenience with respect to navigational characteristics; in those routes the freedom of navigation apply (Article 36 LOSC).⁶⁷

In general, the LOSC establishes five types of passage that a ship might exercise in the respective international straits, they are: innocent passage, non-suspendable innocent passage, transit passage, archipelagic sea lanes passage and high seas passage. Innocent passage has been surveyed in Section 3.2.4. of this study, while high seas passage as referred to in Article 36 LOSC, concerning straits that posses high seas or EEZ routes, will be discussed in Section 3.3.5. of this study; the nature of the three remaining regimes is examined below.

The scope and extent of coastal-state authority in international straits will be examined in accordance with the applicable regimes. These are non-suspendable innocent passage and transit passage. As the archipelagic sea lanes passage is, in principle, the same as transit passage, it will be described in this section as well.

⁶¹ The Corfu Channel Case, ICJ Reports, 9 April 1949, p. 4.

⁶² Churchill and Lowe (1999), p. 102.

⁶³ Bruël (1947), pp. 38, 39; O'Connell (1982), p. 327.

⁶⁴ Article 37 LOSC.

⁶⁵ Article 38 LOSC.

⁶⁶ Article 45 LOSC.

⁶⁷ See for a detailed research on straits Jia (1998) and Yturriaga (1991), part 1.

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Regime of non-suspendable innocent passage in international straits

In straits used for international navigation that are excluded from the application of the transit passage regime, or straits that are between the high seas or an EEZ and the territorial sea of another state, the non-suspendable regime of innocent passage shall apply, state Articles 38(1) and 45 LOSC. That regime is in accordance with Part II, section 3 of the LOSC. That implies that Article 27 LOSC is applicable to ships enjoying the non-suspendable right of innocent passage. The provisions of Article 27 LOSC have been discussed in Section 3.2.4. above.

Regime of transit passage in international straits

A 12-mile territorial sea placed under national jurisdiction of riparian coastal states' over 120 strategic passages, such as the Strait of Gibraltar (8 miles wide and the only open access to the Mediterranean), the Strait of Malacca (20 miles wide and the main sea route between the Pacific and Indian Oceans), the Strait of Hormuz (21 miles wide and the only passage to the oil-producing areas of the Persian Gulf) and Bab el Mandeb (14 miles wide, connecting the Indian Ocean with the Red Sea). The compromise that emerged at UNCLOS III⁶⁸ is a new concept that combines the legally accepted provisions of innocent passage through territorial waters and freedom of navigation on the high seas. The new concept, transit passage, required concessions from both sides.

Transit passage is defined in Article 38 LOSC as “the exercise in accordance with the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait”, and such passage “shall not be impeded or suspended”. Ships are required to proceed without delay through the strait, and to refrain from the actual or threatened force against a bordering state, or from any activities other than those associated with their normal modes of continuous and expeditious transit unless such activities are made necessary by *force majeure* or by distress.

Coastal-state authority over ships under the regime of transit passage

In keeping with the supremacy of transit passage over the coastal state's sovereignty in international straits, coastal states' authority is, in general, limited. Article 42 LOSC is the only enabling article that empowers coastal states to adopt laws and regulations relating to transit passage; the article reads:

Article 42 Laws and regulations of States bordering straits relating to transit passage

1. Subject to the provisions of this section, States bordering straits may adopt laws and regulations relating to transit passage through straits, in respect of all or any of the following:
 - a. the safety of navigation and the regulation of maritime traffic, as provided in article 41;
 - b. the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait;
 - c. with respect to fishing vessels, the prevention of fishing, including the stowage of fishing gear;
 - d. the loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary laws and regulations of States bordering straits.
2. Such laws and regulations shall not discriminate in form or in fact among foreign flag ships or in their application have the practical effect of denying, hampering or impairing the right of transit passage as defined in this section.
3. States bordering straits shall give due publicity to all such laws and regulations.
4. Foreign flag ships exercising the right of transit passage shall comply with such laws and regulations.
5. The flag State of a ship or the State of registry of an aircraft entitled to sovereign immunity which acts in a manner contrary to such laws and regulations or other provisions of this Part shall bear international responsibility for any loss or damage which results to States bordering straits.

⁶⁸ The Third United Nations Conference on the Law of the Sea resulting in the LOSC in 1982, see the GA Resolution C (XXV), 17 December 1970.

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Paraphrasing this article, it would mean firstly, pursuant to Article 42(1), that coastal states can prescribe laws for safety of navigation and regulation of maritime traffic only for those sea lanes and traffic-separation schemes established in accordance with Article 41 LOSC.

Secondly, under Article 42(1)(b), coastal states may adopt national pollution control laws limited to those giving effect to MARPOL 73/78,⁶⁹ i.e. the applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances.

Thirdly, adoption of fishing and smuggling laws.

Foreign flag ships under the regime of transit passage

The right of transit passage can be considered as the freedom of navigation for the sole purpose of transit. It was founded on the customary principle of the freedom of the high seas, from which, however, it differs as a simple right of passage.⁷⁰ On the high sea a vessel may navigate at random, while a ship under the regime of transit passage only is allowed to transit continuously and expeditiously through an international strait. The right of transit passage can be seen as a right akin to freedom of the high seas but for one purpose only,- that of continuous and expeditious transit,⁷¹ but it should be borne in mind that it is a transit through the waters under the sovereignty of a coastal state.

Apart from the right to implement international safety and pollution standards, coastal states may legislate for passing vessels only in respect of fishing and the taking on board or putting overboard of any commodity, currency or person in violation of local custom, fiscal, immigration or sanitary regulations, according to Article 42 LOSC. Those specific laws include illicit drug trafficking. Taking illicit drugs on board or putting them overboard is therefore prohibited and a violation of those provisions can be prosecuted by the coastal state, but transporting illicit drugs by a foreign flag ship through a strait under the regime of transit passage is a matter of dispute.

The LOSC is silent on the question of the enforcement of laws other than those mentioned in Article 42 LOSC. Accordingly the general territorial sea rules apply,⁷² under which enforcement may only be exercised where the good order of the territorial sea or coastal waters is disturbed. But the LOSC also provides for the exercise of enforcement jurisdiction over ships enjoying the right of transit passage in case of pollution.⁷³ That may be evidence that the enforcement jurisdiction in transit passage must be confined to this case, notwithstanding the wider powers of the coastal state enjoyed under the territorial regime. If that latter interpretation should prove correct, a ship involved in illicit drug trafficking could exercise transit passage through a strait that is situated in territorial waters without the coastal state exercising enforcement jurisdiction.

Another opinion states that due to the enormous problem illicit drugs cause to society, just like maritime pollution, a coastal state should be empowered to exercise enforcement jurisdiction in its own territorial sea when a strait is located in these waters. In case of illicit drug trafficking in this situation, the right of transit passage should cease immediately. There is, how-

⁶⁹ International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78). See www.imo.org/Conventions (visited Fall 2006).

⁷⁰ Jia (1998), p. 213. See Article 38(2) LOSC, which uses the term 'the exercise of the freedom of navigation..... for transit'.

⁷¹ Brown (1994), p. 89.

⁷² Article 34 LOSC.

⁷³ Article 233 LOSC.

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ever, a general duty to comply with all laws made within the legislative competence allowed under the LOSC to straits states.⁷⁴ On the other hand, the LOSC does not provide the applicability of Article 27 LOSC, which constitutes criminal jurisdiction over illicit drug trafficking on board a foreign flag vessel enjoying the right of innocent passage in the territorial sea.

It cannot be denied that there is an ambiguity concerning the scope of strait state's enforcement jurisdiction. It can be stated that when a coastal state wants to board and search a suspect vessel under the regime of transit passage in its territorial sea, it needs the authorization of the flag state of the suspect vessel. That is based on the fact that transit passage is derived from the principle of freedom of navigation, as stated in Article 38(2) LOSC and has been discussed above.⁷⁵

On the other hand, it is interesting to note that law enforcement officers of various states, especially in the Caribbean, are not aware of the fact that permission of the flag state is needed to stop and search a foreign vessel suspected of illicit drug trafficking navigating in the territorial sea but under the regime of transit passage. That law enforcement practice of the last twenty years became apparent after some very limited research under different law enforcement offices and is supported by the experience of the author. It has to be stated that no comprehensive scientific research has been carried out into that law enforcement practice, because this is beyond the scope of the present study.⁷⁶

Regime of archipelagic sea lanes passage

Article 53 LOSC provides that archipelagic states can establish sea lanes and stipulates that they should be suitable for the continuous and expeditious passage of foreign flag ships through its archipelagic waters and the adjacent territorial sea. In the archipelagic sea lanes the regime of archipelagic sea lanes passage is applicable. That regime evolved as an attempt to balance the territorial integrity and national security of the archipelagic states with the right of transit through passageways which would fall within the archipelagic waters.

If an archipelagic state does not designate archipelagic sea lanes, the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation. Using an archipelagic sea lane is not mandatory. An archipelagic state cannot, like straits under Article 44 LOSC, suspend the right of archipelagic sea lanes passage,⁷⁷ but it can under Article 53(7) LOSC substitute other sea lanes for any archipelagic sea lanes.

Archipelagic sea lanes passage is essentially the same as transit passage through straits which are used for international navigation. The rights and duties of archipelagic states and other states are under Article 54 LOSC the same, *mutatis mutandis*, as the rights and states bordering international straits and other states in respect of transit passage.⁷⁸

⁷⁴ Churchill and Lowe (1999), p. 109.

⁷⁵ See Soons (2004), p. 10. This is US practice as well: see the USCG Maritime Law Enforcement Manual, COMDTINST M16247.1C. (2003). See for US Coast Guard policy about Authority and Jurisdiction, including Transit Passage: www.uscg.mil/d9/grudet/units/scs/ppt/sess5/le/authjur (visited Fall 2006).

⁷⁶ The author worked with law enforcement officers for a long period, mainly in the Caribbean region. The very limited research, by interview and some questionnaires was done under law enforcement officers of various states; therefore, it is no more than an indication.

⁷⁷ Guidance for ships transiting archipelagic waters, IMO, SN/Circ. 206, January 1999.

⁷⁸ Munavar (1995), p. 172.

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Differences between transit passage and archipelagic sea lanes passage

Navigation

There are some differences between the two regimes. Article 38(2) LOSC relating to transit passage through straits used for international navigation refers to 'freedom of navigation' through straits, while Article 53(3) LOSC concerning archipelagic sea lanes passage refers to 'rights of navigation'. The term 'freedom of navigation' has the connotation of the freedom of the high seas while 'rights of navigation' implies a more limited competence of foreign flag ships than they would exercise under 'freedom of navigation'.⁷⁹

In archipelagic sea lanes, the right of navigation is qualified under Article 53(3) LOSC with the words 'normal mode of navigation' which is not the case with respect to transit passage under Article 38(2) LOSC, where there is no classification of how vessels would transit. It is difficult to accept this as a difference, however, since Article 39(1)(c) LOSC clearly implies a 'normal mode of transit' for transit passage through straits used for international navigation.⁸⁰ Such 'normal mode' in both passages means that submarines may be submerged (Article 20 LOSC) and that launching, landing or taking aboard of any aircraft is permitted (Article 19(2)(e) LOSC).

Passage

Article 53(3) LOSC refers to 'unobstructed' passage through archipelagic sea lanes, while Article 38(1) LOSC relating to transit passages states that passage through straits used for international navigation should not be 'impeded'. Neither of these terms is further defined in the LOSC, but it has been suggested that the term 'unimpeded' may be subject to more liberal interpretation than the term 'unobstructed'.

Archipelagic sea lanes are restricted by a series of continuous axis lines and navigational restrictions for ships. Such restrictions do not exist in the straits regime.

It can be stated that the differences mentioned above between archipelagic sea lanes passage and transit passage do not effect the scope and extent of coastal-state authority over maritime drug trafficking, because none of the mentioned differences affects directly the authority of the coastal state.

WATERS UNDER FUNCTIONAL JURISDICTION OF A COASTAL STATE

3.2.6. Contiguous zone

General

The contiguous zone is a zone of sea contiguous to and seaward of the territorial sea, which may extend up to 24 nautical miles from the baseline from which the breadth of territorial sea is measured.⁸¹ In addition to their right to enforce their domestic legislation within their territorial seas, coastal states may in the contiguous zone exercise control necessary to prevent or punish infringements of certain laws and regulations. The contiguous zone is located in the EEZ or in the high seas. The freedom of navigation is applicable to the contiguous zone.

⁷⁹ Djalal (1990), p. 127.

⁸⁰ See Articles 39 and 53 LOSC.

⁸¹ Article 33 LOSC. See Article 303 LOSC about archeological and historical objects found in the Contiguous Zone.

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Many coastal states have established a contiguous zone. One of the reasons for establishing such a zone is the problem of traffic in narcotic drugs, requiring coastal states to take additional measures to prevent drug smuggling.⁸² The rights and obligations and the exercise of jurisdiction of the coastal state under the LOSC, which are fully protected under Article 17(11) of the 1988 Convention, include the coastal state's right to exercise jurisdiction in its contiguous zone in order to prevent and punish infringements of its customs and fiscal laws and regulations.⁸³

As it is broadly relevant to coastal-state authority over maritime drug trafficking, the LOSC provisions will be discussed fully. The provisions can mainly be found in Article 33 LOSC.

Article 33 LOSC Contiguous Zone

General

The direct predecessor of Article 33 LOSC is Article 24 of the Convention on the Territorial Sea and the Contiguous Zone, the language of which was reiterated in the language of Article 33 LOSC, which reads:

Article 33 Contiguous Zone

1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:
 - a. prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
 - b. punish infringement of the above laws and regulations committed within its territory or territorial sea.
2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.

Some explanation about Article 33 LOSC can be found in the commentary prepared by the International Law Commission in 1956.⁸⁴ In 1956, the International Law Commission placed the draft article about the contiguous zone in the part of the high seas, but at UNCLOS I⁸⁵ it was moved to the present place, without any change in the status of those waters.

Historical review of the term control in Article 33 LOSC

An interpretation of the text of Article 24 of the Convention on the Territorial Sea and Contiguous Zone is that the rights exercisable by the coastal state are in fact not so much rights, as powers – which the coastal state may lawfully exercise if it can, but which foreign flag vessels are not fundamentally obliged to submit to, except in so far as they must.⁸⁶ In the view of Fitzmaurice, it is control, not jurisdiction that is exercised. The power is primarily that of a policeman, rather than that of an administrator or of a judge.⁸⁷

An incoming ship in the contiguous zone cannot breach rules that are applicable to the territorial sea. Therefore, when a ship is in the contiguous zone, it cannot, *ex hypothesi*, at this stage

⁸² Report of the Secretary-General to the General Assembly, A/47/512, 5 November 1992, para. 21.

⁸³ Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, United Nations, E/CN.7/590, New York (1998), p. 327.

⁸⁴ Nordquist (1993), p. 274; Report of the International Law Commission covering the work of its eighth session (A/3159), Article 66, Commentary, para's 1-8, II YB ILC (1956), pp. 253, 294.

⁸⁵ The First United Nations Conference on the Law of the Sea was convened in Geneva from 24 February to 27 April 1958 resulting in the adoption of the four 1958 Geneva Conventions.

⁸⁶ Fitzmaurice (1959), pp. 73, 112. See Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, United Nations, E/CN.7/590, New York (1998), p. 327 para 17.10.

⁸⁷ *Idem*, p. 113.

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have committed an offence within the territory of the coastal state. That is why the ship cannot be stopped or searched in the contiguous zone. Conducting the vessel to the port under escort should be excluded as well. In case this may seem to be unduly restrictive, it must be observed that only in insisting on such limitations is it possible to prevent coastal states from treating the contiguous zone as virtually equivalent to territorial sea.

Brownlie does not agree with Fitzmaurice's interpretation. He states that the majority of states at UNCLOS III did not intend to restrict rights in the contiguous zones, as hitherto understood, by establishing the distinction between control and jurisdiction.⁸⁸

A different interpretation of the nature of preventive control is that the coastal state may exercise whatever control is necessary to prevent infringements of its laws and regulations, so-called 'necessary control'.⁸⁹ A power so described is clearly a very broad one and would certainly entitle the coastal state to stop and search a vessel, its cargo, personnel and papers. Necessary control would also seem to embrace a directive to the vessel to make for port or the compulsory escort of the vessel to a port when weather conditions or other circumstances made a thorough search unpractical.

Legal review of the term control in Article 33 LOSC

An issue is whether, in connection with its endeavors to prevent and punish infringements of the four types of laws specified in Article 33 LOSC, a coastal state's authority is limited to the exercise of control, as opposed to the jurisdictional exercises of prescription and enforcement. Control is evidently not coincident with generalized and plenary sovereign activity. Furthermore, it has been argued that such control is more limited semantically than jurisdiction.

In a legal setting, the word control means: "power or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee": the ability to exercise restraining or directing influences over something. On the other hand, jurisdiction generally connotes: "the right and power to command, decide, rule or judge".⁹⁰ In a legal setting, jurisdiction is generally considered to have a weightier connotation, in its more common usage in context of the nature, source of authority and scope of judicial power or its frequent international law usage as connoting prescriptive or enforcement authority.

Contextual review of the term control of Article 33 LOSC in respect of preventive control

A contextual review provides some support for the contention that use of the word control indicates that the authority provided in Article 33 LOSC is relatively limited. Control might be compared to the powers generally attributed by Article 2 LOSC over the whole sphere of the territorial sea. It categorically provides, without qualification, that the sovereignty of a coastal state extends, beyond its land territory and internal waters to an adjacent belt of sea, described as the territorial sea. This is supplemented by Article 21 LOSC, which also categorically authorizes the coastal state, in that sea, to adopt laws and regulations in respect of a large number of matters, including one set which is identical to the list in Article 33 LOSC. Article 60(2) LOSC gives the coastal state jurisdiction with regards to customs, fiscal, health, safety and immigration laws and regulations connected with artificial islands, installations and structures in the EEZ, in which the contiguous zones is located.

⁸⁸ Brownlie (1998), p. 202.

⁸⁹ Brown (1994), p. 134.

⁹⁰ See for the interpretation of Article 33 LOSC the Separate Opinion of Judge Laing, *M/V Saiga Case* (No. 2), International Tribunal for the Law of the Sea, 1 July 1999, www.un.org/depts/los/ (visited Fall 2006).

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Two other contextual provisions are Articles 94 and 303 LOSC. Paragraph 1 of the former states that the duties of flag states are ‘effectively to exercise jurisdiction and control in administrative, technical and social matters’ Paragraph 2 provides that every state shall maintain a register of ships and assume jurisdiction under its internal law in respect of the above-mentioned matters. In that context, control has a limited administrative connotation.

Next, Article 303 LOSC provides that to control traffic in archaeological and historical objects found at sea, the coastal state may, in applying Article 33 LOSC, presume that their removal from the seabed in the contiguous zone without its authority would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article. By itself, Article 33 LOSC evidently does not authorize control in respect of such traffic taking place within the contiguous zone.⁹¹

Contextual review of the term control of Article 33 LOSC in respect of punitive control

Punitive control pursuant to Article 33(1)(b) LOSC is of a totally different nature. Such control will be directed against foreign flag ships after they have violated the laws and regulation in the territory or territorial sea of the coastal state. Punitive control comprises all executive powers necessary to ensure that the offending persons on board the illicit drug-trafficking ship will be punished. While it may be that there is no obligation placed on the foreign flag ship to submit to the punitive controlling powers, there are certainly no limitations upon the arresting powers of the coastal state.

The ordinary meaning of Article 33 LOSC is that the power of the coastal state to punish infringement of the coastal state’s laws, committed outside territorial sea but within the contiguous zone, is not generally permissible in relation to vessels merely located in the contiguous zone and not proven to have some relevant connection with territorial areas. Again, a contextual analysis is useful.

Notwithstanding the broad ambit of the authority vested in coastal states over territorial areas by Articles 2 and 21 LOSC, Article 27(1) LOSC states that in the territorial sea the coastal state can exercise criminal jurisdiction in or over a foreign flag ship exercising innocent passage only in precisely defined situations, mostly where there are direct effects on the coastal state (see Section 3.2.4. of this study).

More relevant, according to paragraph 5, criminal jurisdiction cannot be exercised in or over such ships during such passage for offenses committed before the ship entered the territorial sea. It might be argued that Article 33 LOSC could not have been intended to provide more authority relating to the identical conduct in respect of which Article 27 requires restraint.

It can be stated that the foregoing contextual survey rather suggests that Article 33 LOSC control is of a limited nature.

Nexus requirement of Article 33 LOSC

Article 33(1) LOSC authorizes preventive control and punitive control. At first sight, preventive control pursuant to Article 33 (1)(a) is a rather peculiar kind of control. This kind of control will clearly be exercisable only in relation to incoming vessels bound for the coastal state. Turning to the issue of the nexus requirement, it ineluctably follows that even if control is the only type of action that might be taken against a foreign flag vessel, the power to prescribe such exercises of control cannot be categorically deemed to be excluded. Control can be un-

⁹¹ Nordquist (1993), p. 275.

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dertaken *de facto* or pursuant to prescription for the prevention of conduct occurring or due or intended to occur in the contiguous zone which is likely to infringe the coastal state's laws within its territorial areas, including maritime internal waters or the territorial sea.

According to the ordinary meaning of its words, however, Article 33 LOSC does not authorize the prescription of customs and the specified other types of laws and regulations for conduct occurring inside the contiguous zone itself and not due or intended to occur in the aforementioned territorial areas. Nexus is a prerequisite.

Article 33 LOSC and illicit drug trafficking

The relevance of Article 33 LOSC for the suppression of illicit drug trafficking lies in paragraph 1 (a) and (b), which states that the coastal state may exercise the control necessary to prevent and to punish infringements of customs, fiscal, immigration or sanitation laws. Although illicit drug trafficking is not defined in the LOSC, it is considered part of one of these laws.⁹² Coastal states can therefore exercise control in their contiguous zone to prevent or punish illicit drug trafficking. It should be noted that, in case of illicit drug trafficking, the coastal state may only act against foreign flag ships in its contiguous zone if the illicit drugs are coming from or destined for its own territory, and not if the ship carrying them is merely transiting through the contiguous zone,⁹³ then the high seas freedom of navigation prevails.

The nexus requirement is, according to the experience of the author for over 20 years in the field of maritime drug interdiction, not general practice. The practice of many states appears to be that suspect vessels located in the contiguous zone may be apprehended and brought to justice.⁹⁴ That practice is based on the fact that the nexus requirement of the suspect vessel in a contiguous zone is deemed to be present; in court the suspect may argue the opposite. In due time it is not inconceivable that this practice will become customary international law. Research into specific lawsuits in various states all over the world is beyond the scope of the present study, however.

3.2.7. EEZ

General

The exclusive economic zone (EEZ) cannot extend more than 200 nautical miles seaward from the baseline. In the EEZ, a coastal state has sovereign rights to explore and exploit, conserve and manage natural resources.⁹⁵ Other states retain under the Articles 58 and 87 LOSC high seas freedoms of navigation in the EEZ. According to the law of the sea, the suppression of illicit drug trafficking in the EEZ does not fall under the sovereign rights of the coastal state.

Attempts to expand coastal-state authority in the EEZ

Some states have tried to expand the scope and extent of coastal state authorization to interdict illicit drug trafficking in the EEZ. During the LOSC negotiations, Peru submitted a pro-

⁹² Churchill and Lowe (1999), p. 139.

⁹³ Soons (2004), p. 10. See the Explanatory Memorandum in respect of the designation of a Contiguous Zone of the Kingdom of the Netherlands, No. 3, 29 533 (R 1758), Parliamentary Year 2003-2004. See also the US Presidential Proclamation No. 7219 64 F.R. 48,701, The Contiguous Zone of the United States, Washington, 2 August 1999. See further the USCG Maritime Law Enforcement Manual, COMDTINST M16247.1C. (2003). See for US Coast Guard policy about Authority and Jurisdiction, including Contiguous Zone: www.uscg.mil/d9/grudet/units/scs/ppt/sess5/le/authjur (visited Fall 2006).

⁹⁴ An official website of the US states: the Contiguous Zone is a zone within the US may enforce customs, fiscal, immigration and sanitary laws and regulations, www.csc.noaa.gov/opis/html/summary/cz.htm (visited Fall 2006).

⁹⁵ Article 56 LOSC.

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posal twice to the effect that when a ship suspected of illicit drug trafficking is encountered in the EEZ of a coastal state, that state shall be requested to cooperate in suppressing such traffic.⁹⁶ Those proposals were not adopted (see also Section 3.3.5. of this study).

During the signing of the 1988 Convention, Brazil and Jamaica made declarations that the consent of the coastal state is necessary if a flag state under Article 17 of the 1988 Convention authorizes another state to stop and search in the coastal state's EEZ one of its vessels suspected of illicit drug trafficking. The member states of the European Union have objected to Brazil's declaration as being contrary to international law. It is very doubtful whether the coastal state has a general right to assert unilateral enforcement jurisdiction in respect of narcotics throughout the EEZ.⁹⁷

WATERS BEYOND THE JURISDICTION OF COASTAL STATES

3.2.8. High seas

General

High seas⁹⁸ are the ocean beyond the EEZ in which no state has any sovereign claims. The high seas are those parts of the sea that are not included in the EEZ, in the territorial sea or in the maritime internal waters of a state, or in the archipelagic waters of an archipelagic state. Ships of all states are free to navigate the high seas, but this freedom must be exercised with due regard for the interests of other states in their exercise of the freedom of the high seas.

Exclusive flag state jurisdiction

A ship must sail only under one flag and the flag state will normally have exclusive jurisdiction over its ships on the high seas.⁹⁹ The legal regime of the high seas has therefore traditionally been characterized by the dominance of the principles of free use and the exclusivity of flag state jurisdiction, in sharp contrast to the powers of coastal states over their territorial waters. The exclusiveness of flag state jurisdiction is not absolute. It admits several exceptions, in which third states share legislative or enforcement jurisdiction, or both, with the flag state. These exceptions are, piracy, unauthorized broadcasting, slave trading, hot pursuit, major pollution incidents, and rights under treaties; illicit drug trafficking is not such an exception.

3.2.9. Right of hot pursuit

General

The scope and extent of coastal-state authority over foreign flag ships may be extended to the EEZ or the high seas by the application of the right of hot pursuit. Hot pursuit may commence in the maritime zones described in Article 111(1) LOSC and may be continued in waters beyond the waters under the sovereignty of a coastal state, including the high seas; moreover it can be exercised over fleeing drug smugglers, which is why the subject is discussed in this part of this study. Although the right of hot pursuit may be applicable in the Contiguous Zone and the EEZ, in this study the subject is located under the heading 'Waters beyond the Jurisdiction of Coastal States', which is analogous to the LOSC that placed the right of hot pursuit under the heading 'High Seas'.

⁹⁶ C2/Blue Paper (1975), Provisions 174B, Reproduced in IV Platzöder, pp. 139-145; A/CONF.62/WP.8/Part II, ISNT (1975) Article 96, IV Off. Rec., pp. 137, 166; Nordquist (1995), p. 238.

⁹⁷ Churchill and Low (1999), p. 171.

⁹⁸ Part VII LOSC.

⁹⁹ Article 92 LOSC.

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The doctrine of the right of hot pursuit is one of the restrictions of the principle of the freedom on the high seas and, on the other hand, a right of the coastal state for an effective protection of its territories. The right of hot pursuit can be found in Article 111 LOSC. The relevant text of that article reads:

Article 111 Right of hot pursuit

1. The hot pursuit of a foreign flag ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign flag ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign flag ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone. If the foreign flag ship is within a contiguous zone, as defined in article 33, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.
2. The right of hot pursuit shall apply mutatis mutandis to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal State applicable in accordance with this Convention to the exclusive economic zone or the continental shelf, including such safety zones.
3. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State.
4. Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship is within the limits of the territorial sea, or, as the case may be, within the contiguous zone or the exclusive economic zone or above the continental shelf. The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign flag ship.

History and rationale

The right of hot pursuit became customary international law¹⁰⁰ at the beginning of the twentieth century. In the nineteenth century, Hall had already understood the rationale of the right of hot pursuit. He expressed it as follows:

”When a vessel, or some one on board her, while within foreign territory commits an infraction of its laws she may be pursued into the open sea, and there arrested. It must be added that this can only be done when the pursuit is commenced while the vessel is still within its territorial waters or has only just escaped from them. The reason for the permission seems to be that pursuit under these circumstances is a continuation of an act of jurisdiction which has been begun, or which but for the accident of immediate escape would have been begun, within the territory itself, and that it is necessary to permit it in order to enable the territorial jurisdiction to be efficiently exercised.”¹⁰¹

The right of hot pursuit is therefore an act of necessity, institutionalized and delimited by state practice.¹⁰² In the 1920s, the right of hot pursuit appeared in bilateral and multilateral treaties;¹⁰³ in combination with other treaties between the USA, Japan and Chile, these agreements set a pattern which has found modern expression in the Anglo-American agreements on the interdiction of unlawful traffic in the Caribbean.¹⁰⁴

¹⁰⁰ See the case of *I'm Alone* (Canada v. US), III Reports of International Arbitral Awards (1935), 1609.

¹⁰¹ Hall (1880), p. 309; Hall (1909).

¹⁰² Brownlie (1998), p. 243.

¹⁰³ For example the Convention for the Suppression of the Contraband Traffic in Alcoholic Liquors, Helsinki, 19 August 1925, LNTS 75 134.

¹⁰⁴ Churchill and Lowe (1999), p. 134.

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In its present form, the right of hot pursuit had appeared in Anglo-American practice in the first half of the nineteenth century, and it was not until the Hague Conference for the Codification of International Law¹⁰⁵ of 1930 that there was sufficient evidence of general recognition by states.¹⁰⁶ Article 11 of the regulations adopted by the Second Committee of the 1930 Hague Conference¹⁰⁷ provided the basis for the draft adopted by the International Law Commission.¹⁰⁸ This draft article with some amendment became Article 23 of the Convention of the High Seas.¹⁰⁹ Article 111 LOSC was based on Article 23 of the Convention of the High Seas.

UNCLOS III

At UNCLOS III, the focal point of discussion concerned the application and exercise of the right of hot pursuit in new areas of extended coastal state jurisdiction.¹¹⁰ Proposals were submitted with text that would have extended the application of the right of hot pursuit to violations of coastal state's laws and regulations applicable in its EEZ.¹¹¹ Other proposals were submitted with text that would have allowed starting the right of hot pursuit in the EEZ of the coastal state in respect of violations of the laws and regulations of the state. Those proposals also provided for the right of hot pursuit ceasing when a ship entered the EEZ of its flag state or that of a third state.¹¹² All proposals were discussed at different sessions and in various consultative groups.

The Convention on the High Seas provisions were brought up to date in light of modern technological developments.¹¹³ At the tenth session of UNCLOS III in 1981, the article was put into its final form in the Draft Convention.¹¹⁴

Constructive presence

Paragraph 4 of Article 111 LOSC places conditions on when hot pursuit may commence. Hot pursuit is not deemed to have begun unless the pursuing ship is satisfied by such practicable means as are available that the ship pursued, or one of its boats or other craft working as a team and using the ship pursued as a mother ship, is within the limits of the territorial sea, within the contiguous zone or the EEZ. A foreign flag vessel may therefore be treated as if it were actually located at the same place as any other craft with which it is cooperatively engaged in the violation of law. That doctrine, known as constructive presence,¹¹⁵ is most commonly used in cases involving mother ships, which use contact boats to smuggle drugs into coastal state's waters.

In order to establish constructive presence for initiating hot pursuit, and exercising law enforcement authority, there must be a foreign flag vessel serving as a mother ship beyond the maritime area over which the coastal state may exercise maritime law enforcement jurisdiction, there must be a contact boat in a maritime area over which that state may exercise juris-

¹⁰⁵ LN Doc. C.230.M.117.1930.V. I, pp. 123–130.

¹⁰⁶ Brownlie (1998), p. 243.

¹⁰⁷ The issue of hot pursuit was considered by the Second Committee (Territorial Waters) in the context of the right of passage. See the Committee's Report, Appendix 1, Article 11, LN Doc. C.230.M.117.1930.V.I, pp. 123–130.

¹⁰⁸ Yearbook ILC (1956), ii, pp. 284–285.

¹⁰⁹ A/CONF.13/L.53, Article 23 (1958), corresponds to Article 47 of the ILC's draft articles.

¹¹⁰ Nordquist (1995), p. 252.

¹¹¹ A/CONF.62/C.2/L.66, III Off. Rec. (1974), p. 235.

¹¹² A/CONF.62/C.2/L.68, third article, III Off. Rec. (1974), p. 235.

¹¹³ Second Committee, 31st meeting (1974), para. 63, II Off. Rec., p. 236.

¹¹⁴ A/CONF.62/L.78, 2002 Draft Convention (1981), Article 111, XV Off. Rec., pp.172, 192.

¹¹⁵ Araunah (1888), p. 133.

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diction and committing an act subjecting it to such jurisdiction and there must be good reason to believe that the two vessels are working as a team to violate the laws of that coastal state.¹¹⁶

The other provisions of Article 111 LOSC are of a general nature and do not specifically constitute provisions for maritime drug interdiction. The provisions state when the right of hot pursuit arises, where it terminates, by whom it can be exercised, as well as the conditions and safeguards on the right of hot pursuit.¹¹⁷

It can be concluded that the right of hot pursuit is an extension of coastal-state authority in waters beyond the waters under its sovereignty or beyond the waters under its functional jurisdiction.

3.3. Scope and extent of intervening-state authority over maritime drug trafficking

3.3.1. General

In this section, the scope and extent of the authority of an intervening state to prescribe and enforce its jurisdiction over maritime drug trafficking will be examined. Authority here refers to the competence of an intervening state to prescribe and enforce its jurisdiction under international law. Intervening-state authority over maritime drug trafficking means authority over vessels suspected of illicit drug trafficking. That authority may be exercised without the authorization of any other state. For this chapter, that authority is based upon the general framework of international law, i.e. general treaties, such as the four 1958 Geneva Conventions, the 1982 United Nations Convention on the Law of the Sea, the 1988 Convention, and customary international law (see Section 3.1.1. of this study). This authority will be examined for all relevant maritime zones, international straits, and for ships flying the flag of the intervening state, foreign flag ships and stateless ones suspected of illicit drug trafficking.

WATERS UNDER THE SOVEREIGNTY OF A COASTAL STATE AND INTERNATIONAL STRAITS

3.3.2. Maritime internal waters, archipelagic waters and territorial sea

In the maritime internal waters, archipelagic waters or territorial sea of a foreign coastal state, the intervening-state authority over maritime drug trafficking cannot be exercised over any ship without the authorization of that coastal state (see Sections 3.2.2., 3.2.3. and 3.2.4. of this study).

3.3.3. Ships under regimes applicable in international straits or archipelagic sea lanes

Regime of non-suspendable innocent passage in international straits.

The right of non-suspendable innocent passage applies to certain straits. That regime is in accordance with Part II, section 3 of the LOSC. This implies that Article 27 LOSC is applicable to ships enjoying the non-suspendable right of innocent passage; the coastal state has authority over suspect vessels enjoying that right of innocent passage. The intervening-state authority over maritime drug trafficking cannot be exercised over any ship under that regime without the authorization of the coastal state.

¹¹⁶ Sunilla and Solayaman (1986), p. 216; Hegelsom and Roach (1997), pp. 3-7, 3-8.

¹¹⁷ Poulantzas (2002); Nordquist (1995), p. 256-259; Kwiatkowska (1991), pp. 153-187; Araunah (1888), p. 133; Churchill and Lowe (1999), p. 215; Report of the International Law Commission covering the work of its eighth session, A/3159, Article 47 Commentary, para. (2)(f), II YB ILC (1956), p. 285.

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Regimes of transit passage and archipelagic sea lanes passage

In straits where transit passage is applicable, coastal-state authority can not be exercised over foreign flag ships merely transiting, although those areas are part of the territorial sea. Archipelagic sea lanes passage is essentially the same as transit passage (see Section 3.2.5. of this study). The Convention is silent about what state should have authority over suspect ships merely transiting in those areas. It is disputable whether an intervening state can exercise its authority over its flag ships suspected of illicit drug trafficking merely transiting under the regime of transit passage or archipelagic sea lanes passage. No provision nor customary international law constitutes authority to a state to exercise its authority over a ship under the above mentioned regimes.

It can be stated that intervening state authority over maritime drug trafficking can be exercised over ships flying its flag merely transiting under one of both regimes, based on the exclusive flag state jurisdiction, but the authorization of the coastal state through whose territorial sea or archipelagic waters the suspect vessel transits is required. When an intervening state wants to stop and board a suspect non-flag ship merely passing under the above mentioned regimes, the coastal state must render authorization to do so.

WATERS UNDER FUNCTIONAL JURISDICTION OF A COASTAL STATE

3.3.4. Contiguous zone and EEZ

The coastal-state authority in the contiguous zone as examined above does not influence the intervening state authority in this maritime zone. Article 108 LOSC (see below) is applicable in the EEZ, including the contiguous zone when established, in accordance with Article 58(2) LOSC. The obligation to cooperate in suppressing illicit traffic in narcotic drugs and psychotropic substances therefore applies in the EEZ as well as on the high seas.

The scope and extent of intervening-state authority over maritime drug trafficking in the contiguous zone or in the EEZ is the same as the scope and extent of intervening-state authority over maritime drug trafficking on the high seas. This is examined below.

WATERS BEYOND THE JURISDICTION OF COASTAL STATES

3.3.5. High seas

General

Interdictions of foreign flag vessels on the high seas, unless authorized by the flag state, are in general illegal under international law, not only for members of the Convention, but due to the customary international law status likely achieved, for any state. Some exceptions will be examined below.¹¹⁸

In this section, provisions for maritime drug interdiction on the high seas are surveyed. The most relevant provisions for the present chapter can be found in Article 108 LOSC, and Article 17 of the 1988 Convention. The articles are discussed below in full after the paragraphs concerning the right of visit as laid down in Article 110 LOSC and stateless vessels.

Article 110 LOSC Right of Visit

As have been stated above, the principle on the high seas is that a state may only take measures against a foreign flag ship without the authorization of the flag state when this is clearly

¹¹⁸ See Section 8.6.3. of this study.

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permitted by a rule of international law. Article 110 LOSC enumerates a list of exceptions to that principle, not including illicit drug trafficking.

Article 110 LOSC could have been a relevant article for the scope and extent of intervening-state authority over maritime drug interdiction as well. At the fourth session of UNCLOS III in 1976, during the article-by-article discussion of the ISNT/Part II, suggestions were made to reinstate the right of visit in respect of ships suspected of engaging in illicit traffic in narcotic drugs and psychotropic substances. That suggestion did not reach the status of proposal.

At the seventh session of UNCLOS III in 1977, Peru repeated its proposal to amend paragraph 1 of this article to allow a right of visit when a ship was suspected of engaging in illicit traffic in narcotic drugs and psychotropic substances. This proposal was not accepted. In 1980 and 1982, Peru had renewed its earlier proposals concerning a right of visit for suspected trafficking in narcotic drugs or psychotropic substances. None of Peru's suggestions concerning the right of visit for suspected illicit drug trafficking vessels were accepted.¹¹⁹

Stateless vessels

Some ships have, as a matter of international law, no nationality.¹²⁰ The LOSC does not provide a definition of stateless vessels, but stipulates in article 92(2) that:

A ship which sails under the flags of two or more States, using them according to convenience, (...) may be assimilated to a ship without nationality.

The consequences of statelessness are not spelt out in the Convention, but a growing number of states have adopted measures to arrest and prosecute a stateless vessel. While such action is most likely to take place on the high seas, states should therefore ensure that they have in place domestic legislation in place that allows them to take enforcement action against stateless vessels on the high seas as well as within the waters under their sovereignty.

When a ship has not been validly immatriculated by any international person or when a valid immatriculation has lapsed without a new allocation having been acquired, one can speak of a stateless ship.¹²¹ On the high seas, statelessness will not, of itself, entitle any state to assert jurisdiction over them, for there is not always any recognized basis upon which jurisdiction could be asserted over stateless ships on the high seas.¹²²

A view is that a stateless vessel enjoys the protection of no state, which implies that if jurisdiction were asserted, no state would be competent to complain of a violation of international law.¹²³ Meyers concludes that any state which wants to stop and search a stateless ship on the high seas, will have to be sure of its grounds before taking action. When in doubt, the best course to follow is to abstain.

¹¹⁹ A/CONF.62/WP.8/Part II, ISNT (1975), Article 96, IV Off. Rec., pp.137, 166; A.CONF.62/WP.10/Rev. 1, ICNT/Rev.1 (1979), Article 110, Reproduced in II Platzöder 3, p. 57; A/CONF.62/WP.10/Rev. 2, ICNT/REV.2 (1980), Article 110, Reproduced in II Platzöder, pp. 179, 233; Nordquist (1995), p. 246. See Section 3.2.7 of this study.

¹²⁰ Churchill and Lowe (1999), p. 213.

¹²¹ Meyers (1967), p. 309.

¹²² Churchill and Lowe (1999), p. 214.

¹²³ The case *Naim Molvan v. A.G. for Palastine* (1948), AC 531, Annually Digest, 15 (1948), p. 115; O'Connell (1984), p. 756; McDougal and Burke (1986), p. 1085.

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Another view appears to be that there is a need for some jurisdictional nexus in order that intervening-state authority can be extended to those aboard a stateless ship and enforce the laws against them.¹²⁴ Such a nexus exists in favor of all states in relation to piracy and in relation to certain specially affected states as regards unauthorized broadcasting. Some states, notably the USA, have made a similar claim in relation to drug trafficking, which is regarded as constituting a grave threat to targeted states of importation.¹²⁵

The LOSC and the 1988 Convention are silent about claims related to illicit drug trafficking. It must be noted that Article 4 of the 1988 Convention is silent about asserting jurisdiction over stateless vessels on the high seas, in spite of a recommendation of the UN's Commission of Narcotic Drugs (see also Section 3.1.2. of this study).¹²⁶

The reason for visiting a suspect stateless vessel is that a suspicion exists that the ship is without nationality. The suspiciousness of statelessness is the trigger pursuant to Article 110 LOSC, not the suspiciousness of illicit drug trafficking. The purpose of the right to visit a ship is to verify that ship's nationality. If suspicion remains after the examination of the ship's papers, then a further examination on board the ship may be carried out. When the suspiciousness of statelessness remains after this search or evidence of statelessness has been found, a search for illicit drugs can be executed. When illicit drugs have been found, the ship may be arrested and brought to court in the intervening state, because any state may apply its domestic laws to a stateless vessel. If no violation of that law is found then no further interference beyond the initial boarding is warranted.¹²⁷

It can be stated that both arguments, statelessness and suspicion of illicit drug trafficking, in combination with state practice constitute intervening-state authority over stateless ships on the high seas suspected of illicit drug trafficking. The statelessness as the reason to stop and examine the vessel's papers, and the suspicion as the reason to search the vessel for illicit drugs.

Article 108 LOSC Illicit traffic in narcotic drugs or psychotropic substances by sea

General

In general terms, illicit traffic in drugs was only governed by the 1961 and the 1971 Conventions. Article 108 LOSC incorporates in the general law of the sea relevant aspects of the international control of traffic in narcotic drugs and psychotropic substances. The text of the article reads:

Article 108 Illicit traffic in narcotic drugs or psychotropic substances

1. All States shall cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions.
2. Any State which has reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic in narcotic drugs or psychotropic substances may request the cooperation of other States to suppress such traffic.

¹²⁴ Churchill and Lowe (1999), p. 214.

¹²⁵ Churchill and Lowe (1999), p. 214. See Chapter 8.6.3. of this study.

¹²⁶ Lee and Hayashi (1996): Article 17(2) of the 1988 Convention places a ship without nationality and a flag ship in one provision. This has been interpreted that these ships are the same category, thereby implying that the flag state can take the same enforcement measures with respect to stateless ships as it can with respect to ships flying its flag.

¹²⁷ Meijers (1967), pp. 318–321.

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Article 108(1) LOSC encourages cooperation in the suppression of illicit traffic in narcotic drugs and psychotropic substances on the high seas. It sets out a general obligation for all states to cooperate in suppressing illicit traffic in narcotic drugs and psychotropic substances that is contrary to international conventions. Paragraph 2 of Article 108 LOSC provides a rationale for initiating cooperation between states by establishing that a state may request the cooperation of other states if it has reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic.

History

The Convention on the High Seas, concluded in 1958, did not make any direct provision for the suppression of drug trafficking, nor did it refer to it as grounds for exercising the right of visit by a foreign warship. Consequently, any such right of visit would have to be justified under the reference in Article 22(1) of the Convention on the High Seas, to powers conferred by treaty. Before the 1988 Convention, no such provision was included in any of the general treaties on the drug trade.

UNCLOS III

In 1971, Malta addressed the subject of transporting illicit drugs at a session of the Sea-Bed Committee.¹²⁸ At the 1972 session of the Sea-Bed Committee, the importance of addressing the issue of traffic in narcotic drugs warranted its inclusion in the list of subjects and issues to be dealt with by the Third United Nations Conference Law of the Sea.¹²⁹ In 1974, a proposal by nine West European states¹³⁰ set out the following interesting provision:

Any state, which has reasonable grounds for believing that a vessel is engaged in illicit traffic in narcotic drugs, may, whatever the nationality of the vessel but provided that its tonnage is less than 500 tons, seize the illicit cargo. The state, which carried out this seizure, shall inform the state of nationality of the vessel in order that the latter state may institute proceedings against those responsible for the illicit traffic.

That proposal would have authorized seizures in illicit drugs from foreign flag ships of less than 500 tons on the high seas without the authorization of the flag state. Introducing that proposal, the representative of France explained that the provision was included to prevent ships of small tonnage from discharging illicit cargo before entering ports.¹³¹ The proposal created universal jurisdiction over illicit drug trafficking on the high seas, only limited by the size of the vessel.

At the third session in 1975, a separate provision on the suppression of traffic in narcotic drugs was not included in the consolidated text.¹³² Several delegations expressed concern about the effect that such provision might have on the freedom of navigation, fearing that states might use it as a pretext for abuse or harassment.¹³³

¹²⁸ The Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction, Resolution of the GA 2467 of 21 December 1968. One of the tasks of that committee was to prepare draft treaty articles on some subjects and issues, A/AC.138/53, Article 16, reproduced in SBC Report 1971, pp. 105, 123.

¹²⁹ SBC Report 1972, p. 5; Vol. I, p. 32.

¹³⁰ A/Conf.62/C.2/L.54 (1974), Article 21bis, III Off. Rec., pp. 229-230. The Western European states were: Belgium, Denmark, France, the Federal Republic of Germany, the Netherlands and the United Kingdom.

¹³¹ Second Committee, 42nd meeting para 2, II Off. Rec. (1974), p. 292

¹³² A/CONF.62/WP.8/Part II, ISNT (1974), Article 94, IV Off. Rec., pp. 137, 166.

¹³³ Oxman (1984), pp. 761, 829.

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At the sixth session in 1977, the provision was renumbered in the Informal Single Negotiation Text (ISNT) as Article 108. The phrase “[a]nd psychotropic substances” was added during the fourth session in 1976. That brought the LOSC in line with the 1971 Convention.

At the seventh session in 1978, Peru suggested placing Article 108 in a new section: ‘Provisions applicable to the exclusive economic zone and the high seas’.¹³⁴

Peru also suggested the following text:

When a ship suspected of engaging in illicit traffic in narcotic drugs or psychotropic substances is encountered in the exclusive economic zone of a state, that state shall be requested to cooperate in suppressing such traffic.

That would have expanded the coastal state’s obligation under the article to include illicit traffic in the EEZ. Peru repeated its proposal in 1980.¹³⁵ The proposal was not accepted.

Scope of the provisions of Article 108 LOSC

The formulation of Article 108 LOSC does not empower a state to interfere with a foreign flag vessel on the high seas without the consent of the flag state and it envisages that a request for cooperation should come from the flag state rather than from a third state that suffers from the illicit traffic of narcotic drugs and psychotropic substances. It is a one-way street.

It is not possible for a foreign state that has information or maybe evidence that a ship is engaged in illicit drug trafficking, to stop and board that vessel on the high seas. It has to ask the flag state to request the cooperation of the foreign state to bring the drug smugglers to justice. The LOSC does not offer the option for the foreign state to offer its cooperation to the flag state. The initiative for the cooperation lies with the flag state.

So, only few powers exist in the case of ships suspected of illicitly trafficking in narcotic and psychotropic substances, despite the worldwide drug problem and the obligations on states to cooperate in suppressing illicit drug trafficking. In addition to the limited powers that have been granted, the flag state must have reasonable grounds for suspecting that its own ships are engaged in illicit drug trafficking.

Maritime counter-drug cooperation

Article 108 LOSC addresses the growing need for maritime cooperation between states in efforts to suppress illicit traffic on the high seas in narcotic drugs and psychotropic substances. Article 108 LOSC, in combination with Article 58(2) LOSC, recognizes that beyond areas of territorial jurisdiction maritime counter-drug cooperation is essential for effective control of illicit traffic in narcotic drugs and psychotropic substances.¹³⁶

Article 108 LOSC does not provide any enforcement mechanism to complement that obligation. That will presumably be a matter for bilateral or multilateral agreements as part of cooperative efforts of states.¹³⁷

¹³⁴ C.2/Informal Meeting/9 (1978), Article 108, Peru. Reproduced in V. Platzöder, pp. 66, 67.

¹³⁵ C.2/Informal Meeting/64 (1980), Article 108, Peru. Reproduced in V. Platzöder, pp. 66, 67.

¹³⁶ Nordquist (1995), p. 228.

¹³⁷ *Idem*, p. 230.

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Article 17 of the 1988 Convention: Illicit traffic by sea

General

We have examined the establishment of the 1988 Convention above, including some especially relevant provisions. In this section Article 17 of that agreement is surveyed in detail, because this article can be considered as the beginning of maritime drug interdiction under treaty law.

Article 17 contains innovative law enforcement provisions designed to promote international cooperation in the interdiction of vessels engaged in illicit drug trafficking by sea. Despite the importance of drug smuggling at sea, the earlier conventions on drug trafficking contained no express provisions on the topic.¹³⁸

Although opinion was initially against making specific reference to the question of boarding vessels flying foreign flags in any revision of the 1961 Convention,¹³⁹ it was the view of the Commission on Narcotic Drugs that a provision should be included in what became the 1988 Convention and an article on the subject was included in the earliest drafts. The current text is a considerably developed version of the text included in those drafts.

In essence, Article 17 of the 1988 convention reflects existing international law in that it allows a party to consent to, a vessel flying its flag being intercepted by another state on the high seas where such a vessel is suspected of being involved in illicit drug traffic. Article 17 of the 1988 Convention reads:

Article 17 Illicit traffic by sea

1. The Parties shall co-operate to the fullest extent possible to suppress illicit traffic by sea, in conformity with the international law of the sea.
2. A Party which has reasonable grounds to suspect that a vessel flying its flag or not displaying a flag or marks of registry is engaged in illicit traffic may request the assistance of other Parties in suppressing its use for that purpose. The Parties so requested shall render such assistance within the means available to them.
3. A Party which has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying marks of registry of another Party is engaged in illicit traffic may so notify the flag state, request confirmation of registry and, if confirmed, request authorization from the flag state to take appropriate measures in regard to that vessel.
4. In accordance with paragraph 3 or in accordance with treaties in force between them or in accordance with any agreement or arrangement otherwise reached between those Parties, the flag state may authorize the requesting state to, *inter alia*:
 - a. Board the vessel;
 - b. Search the vessel;
 - c. If evidence of involvement in illicit traffic is found, take appropriate action with respect to the vessel, persons and cargo on board.
5. Where action is taken pursuant to this article, the Parties concerned shall take due account of the need not to endanger the safety of life at sea, the security of the vessel and the cargo or to prejudice the commercial and legal interests of the flag state or any other interested state.
6. The flag state may, consistent with its obligations in paragraph 1 of this article, subject its authorization to conditions to be mutually agreed between it and the requesting Party, including conditions relating to responsibility.
7. For the purposes of paragraphs 3 and 4 of this article, a Party shall respond expeditiously to a request from another Party to determine whether a vessel that is flying its flag is entitled to do so, and to requests for authorization made pursuant to paragraph 3. At the time of becoming a Party to this Convention, each Party shall designate an authority or, when necessary, authorities to receive and respond to

¹³⁸ Gilmore (1991). See Section 2.5. of this study.

¹³⁹ Report of the Expert Group on the Functioning, Adequacy and Enhancement of the Single Convention on Narcotic Drugs (1961), E/CN.7/1983/2/Add.1, para 4.

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such requests. Such designation shall be notified through the Secretary-General to all other Parties within one month of the designation.

8. A Party which has taken any action in accordance with this article shall promptly inform the flag state concerned of the results of that action.
9. The Parties shall consider entering into bilateral or regional agreements or arrangements to carry out, or to enhance the effectiveness of, the provisions of this article.
10. Action pursuant to paragraph 4 of this article shall be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.
11. Any action taken in accordance with this article shall take due account of the need not to interfere with or affect the rights and obligations and the exercise of jurisdiction of coastal states in accordance with the international law of the sea.

The 1988 Convention aims at improving international cooperation in the suppression of illicit traffic by sea.¹⁴⁰ Article 17 of that convention is primarily a framework for procedures designed to provide maximum opportunities for parties to obtain enforcement jurisdiction with the consent of the flag state. For the system to be truly effective, however, provisions also had to be made in respect of prescriptive jurisdiction. That is the function of Article 4 of the 1988 Convention, as we have seen above.

Pursuant to Article 17(1), the 1988 Convention imposes an obligation on states to cooperate to the fullest extent possible in suppressing illicit drug trafficking by sea. That formulation is an improvement of Article 108 LOSC.¹⁴¹ For the first time, Article 17(1) required cooperation ‘to the fullest extent possible’. Parties have to ensure that Article 17 is implemented in accordance with the international law of the sea,¹⁴² which is customary international law reflected in the provisions of the LOSC.¹⁴³

The term ‘on the high seas’

In 1986, when the Draft Convention became available, the text of Article 12 of the Draft Convention was the foundation of Article 17 of the 1988 Convention. Paragraph 3 of Article 12 of the Draft Convention was one of the most discussed and controversial phrases.¹⁴⁴ It stated:

“A party which has reasonable grounds to believe that a vessel is engaged in illicit traffic and is on the high seas¹⁴⁵ as defined in Part VII of the United Nations Convention of the Law of the Sea may board, search and seize such a vessel if:

- a. The vessel is registered under its laws; or
- b. That Party seeks and receives permission from the Party of registry; or
- c. The vessel is not displaying a flag or markings of registry.”

When the text of Article 12 of the Draft Convention was circulated to governments for consideration, a number of problem areas were identified.¹⁴⁶ The definition of high seas might be interpreted as waters outside nation’s contiguous zones and EEZ, which would exclude large sea-areas from the operation of Article 12(3). In the 1987 Interim Partial Redraft of Article 12 the expression ‘high sea’ was replaced by the words ‘beyond the external limits of the territo-

¹⁴⁰ The preamble of the 1988 Convention.

¹⁴¹ This article reads: “All states shall cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions.”

¹⁴² This phrase was adopted by an amendment of Mexico, E/CONF.82/3, annex IV.

¹⁴³ Executive Report 101-15, 101st Congress, 1st Session, Senate, p. 95.

¹⁴⁴ See the Official Records of the United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vol. I, E.94.XI.5, New York (1994).

¹⁴⁵ Emphasis added.

¹⁴⁶ Gilmore (1991), pp. 183-192.

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rial sea of any state'.¹⁴⁷ The text Article 12 of the 1987 Interim Partial Draft remained intact and was eventually considered at the 10th special session of the Commission on Narcotic Drugs early 1988.

In the mean time, in 1987, a UN Conference on Drug Abuse and Illicit Trafficking was held. At the end of that UN conference, the Comprehensive Outline of Future Activities in Drug Abuse Control was adopted.¹⁴⁸ That paper pointed out that it was necessary to ensure vigorous enforcement of the law in order to reduce the drug problem and that cooperation among national agencies within each country and among countries is vital to achieving the objective. From 27 June to 8 July 1988, Article 12 of the Draft Convention was subject of some discussion by the Review Group¹⁴⁹ for the Plenipotentiary Conference. Other sources also made suggestions to amend Article 12,¹⁵⁰ but the Commission on Narcotic Drugs decided to forward the Draft Article 12 to the plenipotentiary conference for due consideration.

The core of the problem was that many representatives had reservations with regard to the phrase 'beyond the external limits of the territorial sea', which the Expert Group had substituted for the phrase 'on the high seas' as defined in Part VII of the LOSC. In the view of many representatives, the adoption of that wording could imply that third states would be attributed certain rights in the EEZ which were not contemplated in the LOSC, and upset the delicate balance between the rights of a coastal state and third states in the EEZ.

Several representatives placed on record their interpretation of Article 12 of the Draft Convention, which in their view was not in conflict with the provisions of the LOSC. They considered that attempts to interpret the provisions of that convention were beyond the scope of the mandate in the Review Group.¹⁵¹

After the usual process of consultations, studies and sub-committees, a conference was set in motion. The UN Conference for the Adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances was held at Vienna from 25 November to 20 December 1988. The Second Committee of the conference considered the text of Draft Article 12. The focus was again on paragraph 3 of this article that now stated:

Without prejudice to any rights provided under general international law, a Party, which has reasonable grounds for believing that a vessel that is beyond the external limits of the territorial sea of any state¹⁵² and is flying the flag of another Party is engaged in illicit traffic, may, if that Party has received prior permission from the flag state, board, search and, if evidence of illicit traffic is discovered, seize such a vessel.

This draft paragraph was not a consensus text, and the conference offered an opportunity of reassessing the article in an endeavor to reach agreement.¹⁵³ The main problem was the definition of the maritime area to which this article of the convention would apply. The phrase 'beyond the external limits of the territorial sea' was again subject to differing interpretations.

¹⁴⁷ Report of the open-ended Intergovernmental Expert Group Meeting on the Preparation of a Draft Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, E/CN.7/1988/2, 23 October 1987, p.28.

¹⁴⁸ Report of the International Conference on Drug Abuse and Illicit Trafficking, A/CONF. 13/12, United Nations, New York (1987).

¹⁴⁹ Report of the Review Group on the Draft Convention, E/CONF82/3, 20 July 1988, p.58.

¹⁵⁰ UN Doc. DND/DCIT/9 (1988), pp. 46-48, 60-63.

¹⁵¹ Report of the Review Group on the Draft Convention, E/CONF82/3, 20 July 1988, p.72.

¹⁵² Emphasis added.

¹⁵³ Committee II: Summary Records of the 25th meeting, UN Doc. E/CONF.82/C.2/SR.25, p. 2.

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EEZ

‘Beyond the external limits of the territorial sea’ included the EEZ. In the view of some states, Brazil and India amongst them, that meant that the coastal state lost some of its jurisdiction in this zone. These states were concerned about the fact that other states would get rights in the EEZ of coastal states not granted explicitly or implicitly under customary law or the LOSC. The rights and freedoms enjoyed by other states in the EEZ of coastal states were specified in Article 58 LOSC, and it was not obvious that boarding, searching and seizure of vessels suspected of illicit traffic were freedoms associated with navigation or uses of the sea related to those freedoms.¹⁵⁴ That view was held by a small minority of the conference.

The view of the majority was that Article 58 LOSC stated explicitly that, in the EEZ, all states enjoyed freedom of the high seas as set out in Article 87 LOSC. The convention thus preserved traditional rights and freedoms of the sea within the EEZ: the draft of paragraph 3 of Article 17 of the 1988 Convention did not undermine the LOSC or represent any encroachment on the EEZ concept. The view of the USA was that the paragraph did not grant a general law enforcement right in the EEZ, nor did international law authorize a coastal state to prevent other states from prohibiting narcotic trafficking in the EEZ.¹⁵⁵

Final text

Due to the difficulties in respect of the jurisdiction that should be exercised in various maritime zones, the question of the wording of, *inter alia*, Article 12 (3) of the draft text, an informal working group was installed and informal consultations were held in order to facilitate the progress of this article.¹⁵⁶ They came with a new text that was based on three premises: Article 12 was needed, the concerns that had been raised had to be met, and Article 12 had to be conform entirely with international law.¹⁵⁷ The final text is reflected in the final Article 17(3) of the 1988 Convention; maritime zones were not longer mentioned in the article. The phrase ‘vessels exercising freedom of navigation in accordance with international law’ is now used. Article 17(3) of the 1988 Convention should be read in conjunction with Article 17(11) of the convention. This latter paragraph was designed to ensure that no detrimental effect on those rights and obligations resulted from the exercise of the rights and obligations in the article.¹⁵⁸

Thus, freedom of navigation came instead of the concept of maritime zones. For a good understanding of Article 17(3), some states, the Netherlands among them,¹⁵⁹ supported by the United Kingdom,¹⁶⁰ made a statement for the record, which stated that freedom of navigation meant a vessel navigating beyond the external limits of the territorial sea.¹⁶¹

¹⁵⁴ Committee II: Summary Records of the 17th meeting, UN Doc. E/CONF.82/C2/SR17, pp. 2, 8; UN Doc. DND/DCIT/9 (1988), p. 63.

¹⁵⁵ Committee II: Summary Records of the 18th meeting, UN Doc. E/CONF.82/C2/SR18, p. 2.

¹⁵⁶ Proceedings of Committee II, E/CONF82/C.2/L.13/ADD.11, 15 December 1988.

¹⁵⁷ Committee II: Summary Records of the 29th meeting, UN Doc. E/CONF.82/C2/SR 29, p. 2.

¹⁵⁸ Committee II: Summary Records of the 29th meeting, UN Doc. E/CONF.82/C2/SR 29, p. 11.

¹⁵⁹ Explanatory Memorandum to the approval of the Treaty of the United Nations against Trafficking in Narcotic Drugs and Psychotropic Substances, signed on 20 December 1988 at Vienna, 22 080 (R 1406), no. 3, Parliamentary Year 1990 – 1991, p. 24.

¹⁶⁰ Official Records of the United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 25 November to 20 December 1988, Vol. II, Summary Records of Plenary Meetings, 7th Plenary Meeting, E.91.XI.1, para. 80.

¹⁶¹ British Yearbook of International Law (1988), pp. 528-529.

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Assistance requested by and rendered to flag states

Paragraph 2 of Article 17 of the 1988 Convention develops the text of paragraph 2 of Article 108 LOSC. The latter provision stated that states may request the cooperation of other states; rendering that assistance is not mentioned. Pursuant to Article 17(2), the situation in which cooperation may be requested has been expanded. Requested parties are obliged to assist flag states with maritime drug interdiction within the means available to them. The requested party alone is responsible for assessing whether it possesses the relevant means in each case.

Spectrum of assistance

The types of assistance that may be requested by the flag state in order to suppress illicit drug trafficking of one of its vessels are not specified. The assistance may relate to boarding and searching the vessel and taking appropriate action if the suspicion of illicit drug trafficking is confirmed. The assistance, however may also relate to other measures, such as, trying to locate a vessel at sea, and when located, to track and monitor the vessel until further notice. The assistance may consist of measures in the harbor, such as preventing unloading or facilitating the presence of the law enforcement officials of the flag state on board the pursuing vessel of the requested state.

As a matter of fact, Article 17(2) is a framework for assistance between the requesting flag state and the state that renders assistance.

Requesting authorization of a flag state

Request for conformation of nationality

The first step towards requesting authorization under paragraph 3 of Article 17 will be to confirm the registry and hence the nationality of the suspect vessel. To that end, it is essential for each state to maintain a register¹⁶² containing information on vessels authorized to fly its flag and that such register should be readily accessible to the competent authority designated to handle requests made pursuant to Article 17. Certain countries may need to upgrade their domestic systems in this regard, to ensure that the information is available in a form that will allow prompt response to requests.¹⁶³ Good channels of communications are also necessary for the request for confirmation of registry.¹⁶⁴

Request for authorization to act

The word ‘authorization’ in Article 17 (3) of the 1988 Convention was deliberately used in the final version. It was used to stress the positive nature of the decision and of the action that the flag state had to take with regard to its vessel in the exercise of its sovereignty.¹⁶⁵

Reasonable grounds, the base for the authorization request, as mentioned in that article, are mostly the result of information-gathering and sharing the intelligence with other parties in order to increase cooperation in general and maritime counter-drug cooperation in particular.¹⁶⁶

¹⁶² Article 94(2)(a) of the 1988 Convention. See the United Nations Convention on Conditions for Registration of Ships, signed at Geneva on 7 February 1986, Doc. TD/RS/CONF/19/Add.1.

¹⁶³ Hegelsom and Roach (1997), p. ix; Report EU Exports Group, 6879/3/96, DG H II, April 1996.

¹⁶⁴ CND Resolution 43/5, 15 March 2000.

¹⁶⁵ Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, United Nations, E/CN.7/59, New York (1998), p.327

¹⁶⁶ Article 9(1) (a) and (b) (iii) of the 1988 Convention.

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An interesting suggestion of the US during the negotiations of the 1988 Convention was a provision that would encourage those parties with insufficient resources to adequately protect their territory from use by traffickers to request assistance from other parties with available resources by authorizing boarding, search, and seizing vessels suspected of trafficking even though located in their territorial sea or inland waters.¹⁶⁷ That suggestion was not acted upon.

It has to be borne in mind that Article 17(2) deals with 'requesting assistance'; here the requested state acts. Article 17(3) deals with 'requesting authorization to act'; here the requesting state is acting.

Rendering authorization by the flag state

The flag state, in the exercise of its sovereignty, has complete discretion to grant or refuse the requested authorization, i.e., is to decide whether to allow another party to act against its vessel. Reasons for denying a request for appropriate measures might be a strict schedule for large passenger liners or other commercial interests. Large passenger liners can be searched at the next port of call as well.

While Article 17 of the 1988 Convention does not require reasons to be given when an authorization is denied, it would be within the spirit of the convention to indicate, in appropriate cases, the basis for the decision taken. In the opinion of the author, it might even be appropriate to institute a policy whereby no request would be refused without prior consultations between the relevant competent national authorities, because during this consultation the requesting state may explain its request there where necessary, which may result into a positive respond on the request instead of a refuse. It has to be noted that Article 17 of the 1988 Convention is a framework for maritime drug interdiction.

Conditions to the granted authorization

Paragraph 6 of Article 17 authorizes the flag state to subject its decision to permit interdiction to conditions to be mutually agreed between it and the requesting party, including conditions relating to responsibilities. Although such conditions are to be mutually agreed with the requesting state, the reality is that the flag state, not being obliged to grant its authorization, can define the terms on which it is prepared to grant it. The temporary waiver of jurisdiction by the flag state only can be exercised by its own conditions.

The flag state however, should use the right to subject its authorization to conditions with caution and moderation, if the full potential of Article 17 is to be realized. When the flag state imposes conditions and an intervention based on Article 17 subsequently takes place, the conditions are binding on the intervening state and failure to comply may trigger international liability. Conditions can be any of a wide range of issues, such as which state will bear the costs, restrictions in the use of information or evidence obtained, a time slot for the right of visiting and boarding, and the use of force. Conditions relating to responsibilities, by virtue of paragraph 6 of Article 17 the 1988 Convention, may be the agreement on jurisdiction and choice of law in respect of any claim for compensation.

¹⁶⁷ The UN Draft Convention Against illicit Traffic in Narcotic Drugs and Psychotropic Substances: A Report on the Status of the Draft Convention, 101st Congress, 1st Session, Senate, Committee Print, S. Pr. 100-64, p. 62.

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The authorization process

In order to be in a position to respond promptly, the requested flag state will need to be provided with sufficient relevant information on the facts of the case. The Working Group on Maritime Cooperation has suggested using a standard format.¹⁶⁸

Paragraph 7 of Article 17 of the 1988 Convention stems from Article 4 of the preliminary draft and is intended to facilitate expeditious responses from states from which information or authorization is sought under paragraphs 3 and 4 of Article 17. The opportunity of taking effective measures may be lost if there are delays in responding to requests for conformation of registry and requests for authorization to take action. Speedy decision-making and efficient communications are therefore essential.

Designated competent authorities

All countries, including land-locked states that have authorized vessels to fly their flags, are potential recipients of requests for information or authorization made in accordance with paragraph 3 and 4 of Article 17. Consequently, paragraph 7 of that article requires each party to designate an authority or authorities to receive and respond to such requests. That designation must be transmitted to the United Nations Secretary General, who will notify all other participating states. The United Nations publishes that essential contact.¹⁶⁹

Parties are encouraged to consider the possibility of establishing a mechanism to respond to requests, such as to ensuring availability at all times, subject to national procedures, and to work towards maintaining adequate telephone, facsimile and other possible communications links with the competent authorities of other parties.¹⁷⁰ They could also ensure that competent authorities have valid delegated power to authorize boarding the flag vessels of the country concerned. Since an authorization to board a vessel may require the approval of more than one governmental department, there should be an established procedure for obtaining the necessary approvals quickly. Model requests for registration or boarding, model authorization for boarding and model forms for transmitting follow-up information can prevent considerable loss of time.¹⁷¹ It may be noted that this vital exchange of information between two states does not go via diplomatic channels, but directly between the designated competent authorities.¹⁷²

Types of actions

Paragraph 4 of Article 17 of the 1988 Convention repeats in essence the second part of Article 12(3) of the preliminary draft, dealing with the types of action interfering states may take when interdicting illicit drug trafficking. The structure of this paragraph was intended to highlight the disjunctive nature of the various steps that might be taken against the vessel: boarding, searching and when evidence of illicit drugs was found, any further action.¹⁷³ The para-

¹⁶⁸ Reports of the meetings of the Working Group on Maritime Cooperation, held at Vienna from 19-23 September 1994 and from 20-24 February 1995, and its report E/CN.7/1995/13, which was endorsed by the CND at its 38th session.

¹⁶⁹ Competent National Authorities under the International Drug Control Treaties in: ST/NAR.3/1999/1(E/NA).

¹⁷⁰ CND Resolution 43/5, 15 March 2000.

¹⁷¹ Informal open-ended working group on maritime cooperation against illicit drug trafficking by sea, UNDCP/2000/MAR.2, 6 November 2000, p. 2.

¹⁷² See GA Resolution S-20/4 C July 1998. See also Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, United Nations, New York E/CN.7/590 (1998), p. 332.

¹⁷³ Committee II: Summary Records of the 29th meeting, UN Doc E/CONF82/C2/SR 29, p. 2.

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graph indicates some of the measures that the requesting state may be authorized to take by the flag state. This list is not limitative as indicated by the words *inter alia*.¹⁷⁴

Execution of actions

The language of Article 17(10) of the 1988 Convention is identical to and is intended to have the same meaning as that of Articles 107 and 115(5) LOSC.¹⁷⁵ That paragraph was inserted in order to restrict the types of ships that could properly be used in maritime drug interdiction operations. Ships suspected of illicit drug trafficking at sea, may only be stopped and searched by warships or other ships clearly marked and identifiable as being on government service and authorized to that effect.

Given the fact that authorized operations constitute an exception to the norm of exclusive flag state jurisdiction, states should be cautious and reduce the possibility of misunderstanding on the part of operators of their flag vessels. The operators should be informed that states other than flag states may be authorized to board vessels exercising freedom of navigation and that there is an obligation to comply with the instructions given by a boarding team from an authorized intervening state

Safeguards during actions

Paragraph 5 of Article 17 does not reflect a text from an article of the preliminary draft. It was raised as a concern by delegations during the conference.¹⁷⁶ That paragraph requires states taking action under this article to take ‘due account’ of a number of factors, including safety of life at sea, the security of the vessel and its cargo, and the interests of the flag state.

It should be noted that, in certain cases, some prejudice to legitimate commercial interests may be inevitable if, for instance, a vessel is stopped or delayed. Paragraph 5 can be considered as a safeguard for the commercial interests, but there is no absolute language, recognition that some prejudice to legitimate commercial interests may be inevitable if the onward progress of the vessel is halted or delayed.

Paragraph 11 of Article 17 can be considered as a safeguard as well. That paragraph refers to the right and obligations and the exercise of jurisdiction of the coastal state beyond the territorial sea in accordance with the international law of the sea. This paragraph has been described above in conjunction with paragraph 3 of Article 17 of the 1988 Convention.

Information of the flag state after actions of the intervening state

Paragraph 8 of Article 17 was drawn from Article 6 of the preliminary draft. Paragraph 8 obliges the intervening state to promptly inform the flag state of the results of any action taken. This is to allow a good feedback in respect of the actions taken and to prevent uncertainties about the jurisdictions. This paragraph underlines the authority of the flag state over actions taking place with respect to its vessel. At a more practical level, it makes for good relations between the relevant authorities that information should be promptly exchanged.¹⁷⁷

¹⁷⁴ Committee II: Summary Records of the 29th meeting, UN Doc E/CONF82/C2/SR 29, p. 11.

¹⁷⁵ Executive Report 101-15, 101st Congress, 1st Session, Senate, p. 97.

¹⁷⁶ See the Official Records of the United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vol. I, New York (1994).

¹⁷⁷ Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, United Nations, E/CN.7/590, New York (1998), p.332.

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Follow up of Article 17 of the 1988 Convention

Paragraph 9 of Article 17 requires parties to the 1988 Convention to consider entering into bilateral and multilateral agreements. The clear intention of this article was to build on the success of earlier agreements, the best known of which is the agreement between the US and the UK of 13 November 1981.¹⁷⁸ These bilateral and multilateral agreements as referred to in Article 17(9) are part of the present study and will be examined in Chapters 4, 5 and 6 of this study.

3.4. Conclusions

3.4.1. Scope and extent of coastal-state authority over maritime drug trafficking

The general framework of international law for maritime drug interdiction consists of treaties, such as the four 1958 Geneva Conventions, the 1982 United Nations Convention on the Law of the Sea, the 1988 Convention, and customary international law.

In the waters under its sovereignty, a coastal state can exercise its authority over ships suspected of maritime drug trafficking, regardless of whether the ship is under the regime of innocent passage. That includes ships flying its flag, foreign flag ships and stateless ones. That jurisdiction is based upon the territorial principle. The present position under customary international law reflected in treaties is that coastal-state authority in these waters is, in principle, complete where illicit drug trafficking is concerned.

Two exceptions are: foreign flag ships merely transiting under the regime of transit passage or archipelagic sea lanes passage. These ships can only be boarded and searched by the coastal state with authorization of the flag state.

Beyond the territorial sea, freedom of navigation exists. Within those maritime zones only the flag state has jurisdiction over its vessels. In waters beyond the territorial sea, the scope and extent of coastal-state authority over maritime drug trafficking can be exercised over own ships and stateless ones. Foreign flag ships are excluded.

Two exceptions: in the contiguous zone, if established, maritime law enforcement actions may be taken against foreign flag vessels when suspected of illicit drug trafficking. A nexus is required. The second exception is the right of hot pursuit.

3.4.2. Scope and extent of intervening-state authority over maritime drug trafficking

In waters under the sovereignty of a coastal state, the scope and extent of intervening-state authority over maritime drug trafficking is very limited.

In waters beyond the territorial sea, intervening-state authority over maritime drug trafficking can be exercised over ships flying its flag and stateless ships. In those maritime zones, foreign flag vessels are exempted from exercising of intervening-state authority over maritime drug trafficking. Authorization of the flag state is required to enforce jurisdiction.

¹⁷⁸ Gilmore (1991), pp. 183-192. See Chapter 6.3.2. of this study.

CHAPTER 4

MULTILATERAL MARITIME DRUG-INTERDICTION TREATIES IN EUROPE

4.1. Introduction

4.1.1. General

As stated in Chapter 1 of the present study, the regions in the world most threatened by illicit drug trafficking at sea are the United States and Europe. Those regions are the main markets for cocaine and cannabis transported by sea.

In the present chapter, the most relevant multilateral maritime drug-interdiction treaties for Europe will be examined: the 1995 Agreement, the 2002 Draft Convention, and some relevant parts of the 1997 Convention (see the respective sections below). In Chapter 5, the situation and the leading multilateral maritime drug-interdiction treaty in the Caribbean region will be discussed. Bilateral maritime drug-interdiction treaties covering both regions will be examined in Chapter 6.

In examining the provisions of those treaties, a distinction will be made between general, jurisdictional and operational provisions. The sequence of all provisions examined will be the same in Chapters 4, 5 and 6, in order to be able to compare all individual provisions in Chapter 7 of this study.

In Chapter 8, of this study the specific framework formed by the maritime drug-interdiction treaties examined in the Chapters 4, 5 and 6 is compared with the general framework of international law for maritime drug interdiction as examined in Chapter 3 of this study.

At the end of the present chapter, some conclusions will be drawn regarding the examined agreements.

4.1.2. Drugs in Europe

Illicit drugs are quite a threat to Europe. There is a growing concern in many European states surrounding the wider impact of illicit drug use.¹ Analysis of drugs seizures carried out by the European customs administrations reveals that the vast majority of drugs seized, were seized as the result of operations at sea.²

In Europe, a distinction must be made between the European Union and the Council of Europe. Those organizations are the most relevant organizations regarding illicit drug trafficking at sea. Both organizations are separately involved in the suppression of illicit drug trafficking, including the suppression of illicit drug trafficking at sea. Overlaps between both organizations regarding maritime drug interdiction will be examined as well. The drug interdiction mechanisms of both organizations will be discussed briefly.

¹ Annual Report 2005: the state of the drugs problem in Europe, European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), Luxembourg, 24 November 2005, p.11-16.

² Council Document 8937/01 ENFOCUSTOM 26, Brussels, 23 May 2001.

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Drug interdiction and the Council of Europe

General

The Council of Europe comprises 46 democratic states of Europe. The most important institutions of the Council of Europe are the Committee of Ministers, the Secretary General and the Parliamentary Assembly.

Combating illicit trafficking in drugs within the Council of Europe has been assigned to the Co-operation Group to Combat Drug Abuse and Illicit Trafficking in Drugs (the Pompidou Group). In 1971, the French Prime Minister established the Pompidou Group,³ which met in the framework of the Council of Europe. The Pompidou Group was set up to provide a forum for exchanging views and concerting action in Western Europe in response to the growing drug problem. It had no formal status until 1980, when the Pompidou Group became part of the Council of Europe. The purpose of the Pompidou Group is to study the problems of drug abuse and illicit trafficking in narcotic drugs from a multi-disciplinary point of view. For co-operation to combat illicit drug trafficking within the Council of Europe see its Work Programme 2004 – 2006.⁴

(Drug-interdiction) Treaties within the Council of Europe

Treaties are prepared and negotiated within the institutional framework of the Council of Europe. Negotiation culminates in a decision of the Committee of Ministers establishing *ne varietur* the text of the proposed treaty. It is then agreed to open the treaty for signature by member states of the Council. Treaties, however, are not statutory acts of the organization. Their legal status is simply that of the expression of the will of those states that may become parties thereto, as manifested *inter alia*, by the signature and ratification of the treaty.

Following the practice instituted by the Committee of Ministers of the Council of Europe in 1965, explanatory reports have been published on some of the treaties. Those reports, prepared by a committee of experts instructed to elaborate the European convention or agreement in question and published with the authorization of the Committee of Ministers, might facilitate the application of the provisions of the respective treaties, although they do not constitute instruments providing an authoritative interpretation of those treaties.

The 1995 Agreement, examined in the present chapter, was concluded within the Council of Europe (see Section 4.2. of this study).

Drug interdiction and the European Union

General

Drugs were barely discussed within the legal framework of the European Union (EU) until the 1990s. There was no mention of drugs either in the Treaty of Rome, which laid the foundation for the European Union,⁵ or in the Single European Act.⁶ Outside the treaties, however, drugs were discussed from time to time, and several bodies took initiatives in the area before the Maastricht Treaty⁷ entered into force in 1993.⁸

³ Benyon (1993), pp. 177-179.

⁴ Pompidou Group, Work Programme 2004-2006, P-PG/Minconf (2003) 4, Strasbourg, 17 October 2003.

⁵ Treaty Establishing the European Community as Amended by Subsequent Treaties, Rome, 25 March 1957, entered into force on 1 January 1958, Staatsblad 1957, 493.

⁶ Official Journal 169, 29/6/1987.

⁷ The Treaty on European Union, which was signed at Maastricht on 7 February 1992, and entered into force on 1 November 1993, created the political union among the member states and brought about considerable changes

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The EU and all its member states are party to the LOSC, and to the three drug-control conventions, including the 1988 Convention. These conventions have been incorporated into what is known as the EU's legal foundation. This means that all acceding countries also have to become party to those conventions.

The three-pillar system

After the Maastricht summit in 1991, the Maastricht Treaty (also known as the EU Treaty) introduced the three-pillar principle. The first pillar consists of the European Community, from before the EU Treaty. The legal basis for the competence of the EU on drug-related issues in the first pillar is constituted by Article 152 of the EU Treaty, which deals with public health and drug-demand reduction programs.

The second pillar covers the Common Foreign and Security Policy. In the field of drugs, it covers discussions of international instruments, such as the international conventions related to the UN's drug control treaties⁹ and the contacts with the UN Commission on Narcotic Drugs and with the United States. The Dublin Group, an informal consultative drug-prevention platform whose participants are Western donors to multilateral and bilateral drug programs, also operates within the second pillar.

The third pillar relates to cooperation in the realm of Justice and Home Affairs. Drug issues are discussed in various groups and committees.¹⁰ One of those groups is the Customs Cooperation Working Group, which prepares, at a technical level, the matters to be discussed by the Committee of Permanent Representatives (COREPER)¹¹ and the Council.

The Horizontal Working Party on Drugs

An important cross-pillar working group is the Horizontal Working Party on Drugs, which was launched in 1997 as a working group answerable to COREPER.¹² The Horizontal Working Party on Drugs' responsibilities are very wide-ranging. As the central group dealing with drug-related issues, it sees every relevant document. Over time, the Horizontal Working Party on Drugs has gradually moved from a coordinating to a policy-making role.¹³ The Horizontal Working Party on Drugs intensified the relation between the Caribbean region and the European Union. The Madrid European Council of December 1995 adopted a proposal to enhance cooperation with the Caribbean region. That proposal was worked out by a working group of the Horizontal Working Party on Drugs and produced later on, *inter alia*, the 2003 Agreement. The Caribbean is the region in which international cooperation is furthest advanced, including consultations with the UNDCP and the United States. At the Madrid summit in

to the existing treaties. This treaty created the European Union, a concept comprising the European Communities (which had also been amended to the term European Community on the same occasion), as well as other forms of cooperation, Official Journal C340, 10 November 1997, pp. 145-172.

⁸ Report drawn up by the Committee of Enquiry into the Drugs Problem in the Member States of the Community, EP Document A2-114/86; European Council resolution on concerted action to tackle the drug problem, no. C283/80, 10 November 1986; Boekhout van Solinge (2002), p. 25; Lindt (1995); Coney (1992), p. 3; Rest and Visser (1996), p. 169.

⁹ All countries wanting to have an association with the EU must sign the UN drug control treaties. Any failure to do so prompts the EU to issue a formal reminder of this condition through the Presidency. See Boekhout van Solinge (2002), pp. 54, 110. See also *supra* note 15, the EU Drugs Strategy (2005-2012), p. 17

¹⁰ The Article 36 Committee, the Multidisciplinary Group on Organized Crime, Police Cooperation, Customs and the Europol Group.

¹¹ The member states' Ambassadors to the European Union.

¹² Communications from the Commission to the European Parliament and the Council on Coordination on Drugs in the European Union, COM (2003), 681 final, Brussels, 12 November 2003.

¹³ Boekhout van Solinge (2002), p. 51.

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1995, a proposal was also made to incorporate the drug problem into the EU's foreign policy in future.¹⁴

The present EU Drug Strategy 2005-2012¹⁵ was prepared by the Horizontal Working Party on Drugs. That drug strategy is a plan of the Council of the European Union. The European Commission presented a document of its own, the European Union Drugs Action Plan (2005-2008).¹⁶ That document also claims to give a comprehensive overview of the European Union's drug-related activities for that period.

The existence of those two documents has done little to clarify matters. The relationship between the two documents is quite unclear. Both institutions of the European Union stated with satisfaction that the Horizontal Working Party on Drugs acts as the centralized cross-pillar forum and has the leadership in the consultations about drug-related matters.¹⁷

The 1997 Convention and the 2002 Draft Convention, examined in the present chapter, are both agreements concluded within the framework of the European Union (see the Sections 4.3. and 4.4 of this study, respectively).

4.2. The 1995 Agreement

4.2.1. General

One of the treaties that have been concluded for the European region is the Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, referred to in this study to as the 1995 Agreement.¹⁸ It sets up a basis for international maritime counter-drug cooperation between parties, defines rules with regard to competent authorities, rules governing the exercise of jurisdiction, proceedings, authorized measures, responsibilities for enforcement measures, and other general rules. The 1995 Agreement has been concluded by the Council of Europe.

4.2.2. Preparations for the 1995 Convention

History

In March 1989, an *ad hoc* group of experts of the Pompidou Group concluded that any regional agreement regarding drug interdiction at sea should be complementary to Article 17 of the 1988 Convention and should therefore contain substantive regulatory provisions aimed at

¹⁴ *Idem*, p. 92.

¹⁵ EU Drug Strategy (2005-2012), CORDROGUE 77, SAN 187, ENFOPOL 178, RELEX 564, Council of the European Union, 15074/04, Brussels, 22 November 2004.

¹⁶ Communication from the Commission to the European Parliament and the Council on a EU Drugs Action Plan (2005-2008), {SEC(2005)2016}, COM (2005), 0045 final, Brussels, 14 February 2005.

¹⁷ European Union, the Council, Draft Report on Drugs and Drug-related Issues to the Vienna European Council (1998a), p. 17; European Commission, Communication from the Commission to the Council and Parliament with a view to establishing a common European Union platform for the Special Session of the UN General Assembly on the international cooperation in the fight against drugs (1999).

¹⁸ The Agreement on Illicit Traffic by Sea, Implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, was opened for signature by the member states of the Council of Europe that have already expressed their consent to be bound by the 1988 Convention, on 31 January 1995 at Strasbourg, and entered into force on 1 May 2000, ETS no. 156. The text of the 1995 Agreement can be found in the Annex to the study. Status as of 8 May 2007 is 9 Signatories and 11 Ratifications.

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facilitating the implementation of this convention.¹⁹ It should be noted that this conclusion came some months after of the signing of the 1988 Convention.

During its meeting in September 1991 the *ad hoc* group of experts of the Pompidou Group drew up an inventory of the different legal instruments that would be useful as reference material for the preparation of a regional agreement.²⁰ During that meeting, the *ad hoc* group of experts of the Pompidou Group discussed the way ahead and how such an agreement should be composed.²¹ The first draft of the 1995 Agreement²² was presented by the delegation of the United Kingdom during the meeting of the *ad hoc* group of experts of the Pompidou Group in Strasbourg from 19 to 21 June 1992.²³

The Committee of Experts

The European Committee on Crime Problems (CDPC) operates under the authority of the Committee of Ministers of the Council of Europe. During fall of 1992, that committee installed the Committee of Experts on the Implementation of Article 17 of the 1988 Convention (PC-NU).²⁴ The PC-NU held its first meeting at the Council of Europe's headquarters in Strasbourg from 23 to 25 November 1992. The PC-NU examined and commented upon documents prepared by the *ad hoc* group of experts of the Pompidou Group and the United Kingdom delegation, in particular the draft agreement implementing Article 17 of the 1988 Convention and an Explanatory Note.²⁵

The PC-NU drafted a number of amendments to the draft agreement.²⁶ During the second meeting of the PC-NU in Strasbourg, from 1 to 3 February 1993, some of the experts raised the question of whether the agreement would be an implementation of Article 17 of the 1988 Convention or whether the agreement should become autonomous. In that context, one expert raised the question of whether the future instrument should be limited to drug trafficking or if, on an optional basis, arms trafficking, for instance, could be relevant for the agreement. A provisional text proposal was discussed.²⁷

The European Committee on Crime Problems held a preliminary exchange of views on the draft agreement at its plenary session in June 1993. During that meeting, the European Committee on Crime Problems decided that the agreement should be a complementary approach to Article 17 of the 1988 Convention, and decided as well that the present (draft) agreement should not extend to offences other than those mentioned in the 1988 Convention.²⁸

¹⁹ Draft Report of a Working Group on Drugs Trafficking in International Waters of the Pompidou Group, held in Paris, 26-27 June 1990, PC-NU (92) 4, Strasbourg, 17 November 1992, p. 2.

²⁰ Preparation of a Regional Agreement, PC-NU (92) 5, Strasbourg, 17 November 1992.

²¹ Draft Report of the Pompidou Group's Working Group, held in Paris, 19-20 September 1991, PC-NU (92) 6, Strasbourg, 17 November 1992.

²² P-PG (92) 14, Strasbourg, 11 December 1992.

²³ Draft Report of the meeting of the Pompidou Group's Working Group, held in Strasbourg, 19-21 May, PC-NU (92) 9, Strasbourg, 17 November 1992.

²⁴ Specific Terms of Reference, PC-NU (92) 1, Strasbourg, 30 October 1992. See Explanatory Report on the Agreement on Illicit Traffic by Sea, Implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, ETS No. 156, para. 4.

²⁵ Preparatory Material on a Council of Europe Agreement on the Implementation of Article 17 of the 1988 UN Convention, PC-NU (92) 10 and PC-NU (92) 11, Strasbourg, 17 November 1992.

²⁶ Summary Report of the first meeting of the PC-NU, PC-NU (92) 15, Strasbourg, 1 December 1992.

²⁷ Any state may declare that subject to reciprocity, it will apply the provisions of this agreement *mutatis mutandis* to such serious offences as it may specify in declaration, Summary Report of the second meeting, Annex II, Article 2:3, PC-NU (93) 3, Strasbourg, 11 February 1993.

²⁸ Extract of the Summary Report of the 42nd Session of the CDPC, PC-NU (93) 9, rev., Strasbourg, 2 September 1993.

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The last meeting of the PC-NU was held in November 1993 and the draft agreement was handed over to the European Committee on Crime Problems. The final draft agreement was submitted to the Committee of Ministers in June 1994. The committee approved the text of the agreement and decided to open it for signature on 31 January 1995. The 1995 Agreement shall be open for signature by member states of the Council of Europe that have already expressed their consent to be bound by the 1988 Convention. The 1995 Agreement entered into force on 01 May 2000. After the entering into force, non-member states of the Council of Europe may, under circumstances, become party to the 1995 Agreement as well. For parties to the 1995 Agreement see the Annex to Chapter 8 of this study.

4.2.3. General provisions of the 1995 Agreement

General

In this section, the general provisions of the 1995 Agreement will be discussed. A short interpretation, relevant for this study, will precede the description of the subjects.

Definitions

Definition is a word or phrase expressing the essential nature of a thing as understood by the parties to an agreement. Definitions apply throughout an agreement, except where otherwise expressly indicated or where the context requires otherwise.

In Article 1 of the 1995 Agreement, a few definitions are provided. Those definitions should be considered as an addition to the definitions of the 1988 Convention, and that the definitions in Article 1 of the 1988 Convention should therefore apply to the 1995 Agreement. The terminology of the 1995 Agreement is in conformity with the terminology of the 1988 Convention, in order to minimize the possibility of confusion and to harmonize the two legal instruments.²⁹

Intervening state

Article 1(a) reads:

‘Intervening State’ means a State Party which has requested or proposes to request authorization from another Party to take action under this Agreement in relation to a vessel flying the flag or displaying the marks of registry of that other State Party.

In 1995, the term ‘intervening state’ is a new one in the international law of the sea. It was not used in either the LOSC or in the 1988 Convention. The 1995 Agreement defines an intervening state as the state party that actually may take action at the request of, or authorized by another state that is party to this agreement. Some of the provisions of the 1995 Agreement may be applicable to states which are in a position to become intervening States, if the flag State authorizes an intervention. This situation is covered by the expression ‘proposes to request’ action under the agreement. Such States may be considered ‘potential’ intervening States.³⁰

²⁹ See the preamble of the 1995 Agreement and the Explanatory Report on the Agreement on Illicit Traffic by Sea, Implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, ETS No. 156, para. 17.

³⁰ Explanatory Report on the Agreement on Illicit Traffic by Sea, Implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, ETS No. 156, para. 18.

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In the present study, intervening states are defined as states, other than flag states or competent coastal states, that act to exercise their authority over maritime drug trafficking in the relevant maritime zones or over ships under the regimes applicable in international straits or archipelagic sea lanes.³¹ In the present section the more restricted definition of the 1995 Agreement will be used unless otherwise stated or indicated.

Preferential jurisdiction

Article 1(b) reads:

‘Preferential jurisdiction’ means, in relation to a flag State having concurrent jurisdiction over a relevant offence with another State, the right to exercise its jurisdiction on a priority basis, to the exclusion of the exercise of the other State’s jurisdiction over the offence.

This is a common definition, and can be found in other treaties as well.³²

Offences

Article 1(c) reads:

‘Relevant offence’ means any offence of the kind described in Article 3, paragraph 1, of the 1988 Convention.

In the 1995 Agreement, the same definition of offences is used as in Article 3(1) of the 1988 Convention. It is considered highly unlikely, however, that some of the offences, such as cultivation and financing, from the 1988 Convention would be committed on board vessels on the high seas.

It should be noted that possession of illicit drugs for personal use is not included in the definition of relevant offences.³³ It is supposed to be such a minor crime, that no state should request authorization to stop and board a vessel in such a case.

Vessel

Article 1(d) reads:

‘Vessel’ means a ship or any other floating craft of any description, including hovercraft and submersible craft.

The 1995 Agreement uses the term ‘vessel’, in conformity with the 1988 Convention. Vessel means a ship or any other floating craft of any description, including hovercraft and submersible craft. The step of defining ‘vessel’ for the 1995 Agreement was specifically intended to make it clear that the term includes hovercrafts and submersible craft.³⁴ In the LOSC the terms ‘ship’ and ‘vessel’ are used.³⁵ The term ‘vessel’ is broader than the term ‘ship’.³⁶ Vessel includes other types of craft which under national law might not be entitled to fly a flag but which might still be used for illicit drug trafficking at sea. In the present study, the terms ‘vessel’ and ‘ship’ are both used and have the same meaning.

³¹ See Section 3.1.1. of this study.

³² See the Annex to Chapter 7 of the study.

³³ This offence is defined in Article 3(2) of the 1988 Convention, which is not applicable to the present agreement.

³⁴ Summary Report of the second meeting, PC-NU (93) 3, Strasbourg, 11 February 1993, p. 3.

³⁵ Part I to Part VII of the LOSC uses in general the term ‘ship’. Part XII of the LOC uses in general the term ‘vessel’.

³⁶ The Oxford English Dictionary, 2nd edition, Clarendon Press, Oxford (1989).

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Territory

It should be noted that the term territory was not defined in the 1995 Agreement. A definition would have made it clear that where the term appears in Articles 10, 11 and 30, in the context of a vessel being taken into the territory of a state, these articles apply from the moment the vessel crosses the outer limit of the territorial sea.³⁷

Principles

Principles are universal and fundamental rules or codes of conduct that apply in the context of the treaty. Principles of the 1995 Agreement can be found in Article 2. That article refers to Article 17(1) of the 1988 Convention that states that parties shall cooperate to the fullest extent possible to suppress illicit drug traffic by sea, in conformity with the international law of the sea. Article 17 of the 1988 Convention and other relevant provisions of this convention acted as a constant frame of reference for the 1995 Agreement. Article 2 of the 1995 Agreement reads:

Article 2 General principles

1. The Parties shall co-operate to the fullest extent possible to suppress illicit traffic in narcotic drugs and psychotropic substances by sea, in conformity with the international law of the sea.
2. In the implementation of this Agreement the Parties shall endeavor to ensure that their actions maximize the effectiveness of law enforcement measures against illicit traffic in narcotic drugs and psychotropic substances by sea.
3. Any action taken in pursuance of this Agreement shall take due account of the need not to interfere with or affect the rights and obligations of and the exercise of jurisdiction by coastal States, in accordance with the international law of the sea.
4. Nothing in this Agreement shall be so construed as to infringe the principle of non bis in idem, as applied in national law.
5. The Parties recognize the value of gathering and exchanging information concerning vessels, cargo and facts, whenever they consider that such exchange of information could assist a Party in the suppression of illicit traffic in narcotic drugs and psychotropic substances by sea.
6. Nothing in this Agreement affects the immunities of warships and other government vessels operated for non-commercial purposes.

The wording of paragraph 1 of Article 2 is analogous with that in Article 17(1) of the 1988 Convention. According to the Explanatory Report of the 1995 Agreement³⁸ that context was intended to reflect the cooperative spirit in which the agreement was negotiated and to serve as a guiding principle both in its practical application and in its formal interpretation. Furthermore, Article 2 of the 1995 Agreement creates the legal basis for taking action that is not expressly mentioned in other provisions of the agreement. Similar provisions can be found in other treaties concluded by the Council of Europe.³⁹

Paragraph 2 of Article 2 of the 1995 Agreement exhorts state parties to ensure that their national law will be enacted in the spirit of the 1995 Agreement and that the measures to be taken shall maximize the suppression of illicit drug traffic by sea.

Maritime counter-drug cooperation

Paragraph 5 of Article 2 of the 1995 Agreement deals with one of the pillars of maritime counter-drug cooperation. It describes one way of implementing the principle of cooperation,

³⁷ Comments on the Draft Agreement of the delegation of the United Kingdom, PC-NU (93) 21, Strasbourg, 28 October 1993, p.2.

³⁸ Explanatory Report of the Agreement on Illicit Traffic by Sea Implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, ETS no. 156 (1995).

³⁹ Article 1(1) of the European Convention on Mutual Assistance in Criminal Matters, Strasbourg, 20 April 1959, ETS no. 30.

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by agreeing to exchange information spontaneously.⁴⁰ Gathering and exchanging information concerning vessels, cargo and facts, is the trigger for maritime law enforcement actions. A state that is not aware of the fact that vessels, involved in illicit drug trafficking, enter its national waters is not able to suppress this illicit drug trafficking by sea. This paragraph may be taken as a legal basis, where such is needed, for a state party that needs an explicit legal basis for the exchange of information. The mere exchange of information may not create any obligation for an intervening state party; it just places that state party in a better position to decide to apprehend a suspect ship.⁴¹

Warships

The relevance of paragraph 6 of Article 2 of the 1995 Agreement is that warships and other government vessels operated for non-commercial purposes would carry out some of the actions taken under this agreement. The immunity of warships and other government vessels operated for non-commercial purposes⁴² cannot be lost by actions taken on the basis of the 1995 Agreement. The ships mentioned are not subject to the enforcement jurisdiction of a foreign state, because of the immunity that they enjoy under customary international law.

Geographical scope

Scope is the geographic or territorial area in which suspect vessels can be stopped and searched. Unless a different intention arises from the treaty or is otherwise established, a treaty is binding upon each party in respect of all of its territory.⁴³ In some cases, however, the territorial scope of the rules laid down by a treaty - the territory or extraterritorial location in which the situation and facts governed by such rules may arise - must be identified. Each treaty shall define its territorial scope. Otherwise, it may be difficult to ascertain the parties' intention, especially for areas where status has not been clearly defined, such as, for example, in the case of the Netherlands Antilles and Aruba, or the Overseas Territories of the United Kingdom and the United States.

The 1995 Agreement stipulates in Article 29 that states may specify the territory or territories in respect of which its consent to be bound to the 1995 Agreement shall apply. The article reads:

Article 29 Territorial application

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories in respect of which its consent to be bound to this Agreement shall apply.
2. Any State may, at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend its consent to be bound by the present Agreement to any other territory specified in the declaration. In respect of such territory the Agreement shall enter into force on the first day of the month following the expiry of a period of three months after the date of receipt of such declaration by the Secretary General.
3. In respect of any territory subject to a declaration under paragraphs 1 and 2 above, authorities may be designated under Article 17, paragraphs 1 and 2.
4. Any declaration made under the preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the expiry of a period of three months after the date of receipt of such notification by the Secretary General.

⁴⁰ See Article 10 of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Strasbourg, 8 November 1990, ETS no. 141.

⁴¹ Summary Report of the second meeting, PC-NU (93) 3, Strasbourg, 11 February 1993, p. 4.

⁴² Articles 95 and 96 LOSC, Articles 8 and 9 Convention of the High Seas.

⁴³ Article 29 Vienna Convention 1969.

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The geographical scope of the 1995 Agreement is worldwide but, in principle, beyond the territorial waters of any party.⁴⁴ The illicit drug trafficker should be in waters beyond the territorial sea of any state when stopped and boarded on request of the flag state and when all other actions that directly influence the right of freedom of navigation are carried out.

For other actions, which do not interfere with freedom of navigation, the location is not relevant. For exercising surveillance by electronic means, the illicit drug trafficker can be in any maritime zone.

4.2.4. Jurisdictional provisions of the 1995 Agreement

Jurisdiction

In broad terms, jurisdiction refers to the power and authority of a state to legislate, adjudicate and enforce its laws (see also Section 1.6. of this study). In the 1995 Agreement, jurisdiction is described in Article 3, which reads:

Article 3 Jurisdiction

1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the relevant offences when the offence is committed on board a vessel flying its flag.
2. For the purposes of applying this Agreement, each Party shall take such measures as may be necessary to establish its jurisdiction over the relevant offences committed on board a vessel flying the flag or displaying the marks of registry or bearing any other indication of nationality of any other Party to this Agreement. Such jurisdiction shall be exercised only in conformity with this Agreement.
3. For the purposes of applying this Agreement, each Party shall take such measures as may be necessary to establish its jurisdiction over the relevant offences committed on board a vessel which is without nationality, or which is assimilated to a vessel without nationality under international law.
4. The flag State has preferential jurisdiction over any relevant offence committed on board its vessel.
5. Each State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, or at any later date, by a declaration addressed to the Secretary General of the Council of Europe, inform the other Parties to the agreement of the criteria it intends to apply in respect of the exercise of the jurisdiction established pursuant to paragraph 2 of this article.
6. Any State which does not have in service warships, military aircraft or other government ships or aircraft operated for non-commercial purposes, which would enable it to become an intervening State under this Agreement may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe declare that it will not apply paragraphs 2 and 3 of this Article. A State which has made such a declaration is under the obligation to withdraw it when the circumstances justifying the reservation no longer exist.

Prescriptive jurisdiction

In accordance with the 1988 Convention, paragraph 1 of Article 3 of the 1995 Agreement requires each state to establish jurisdiction over relevant offences taking place on board vessels flying its flag. Paragraphs 2 and 3 of Article of the 1995 Agreement are an addition to the 1988 Convention. These paragraphs oblige each party to establish its prescriptive jurisdiction over the same offences when committed on board vessels of all other parties or on board stateless vessels. The exercise of that jurisdiction shall be in accordance with the agreement.

Article 4(1)(b)(ii) of the 1988 Convention does not impose any obligation on states to establish prescriptive jurisdiction; the 1995 Agreement does. That jurisdiction is needed for a potential intervening state when it has been authorized to intervene. The 1995 Agreement therefore makes a significant improvement here by requiring that the national law of each partici-

⁴⁴ Summary Report of the fifth meeting, PC-NU (93) 15, Strasbourg, 28 September 1993, p. 2.

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pating state provide for the creation of a jurisdictional base over relevant offences committed on board vessels of all other parties.⁴⁵

Article 3 of the 1995 Agreement says that for the purpose of applying the agreement measures should be taken to establish jurisdiction over relevant offences committed on board a vessel. It can be stated that for the application of the 1995 Agreement, it is not necessary for the vessel to be directly involved or exclusively engaged in illicit traffic. It would be sufficient if one member of the crew uses the vessel for committing any of the relevant offences.

Preferential and concurrent jurisdiction

Concurrent jurisdiction exists where two or more states simultaneously have jurisdiction over a specific case. Preferential jurisdiction means the right to exercise jurisdiction on a priority basis where concurrent jurisdiction over a specific case exists. In principle, the flag state has preferential jurisdiction over its ships exercising freedom of navigation. That preferential jurisdiction can be transferred or surrendered to an intervening state.

Pursuant to the Agreement, two parallel forms of jurisdiction can exist: preferential and concurrent. Paragraph 4 of Article 3 gives a flag state preferential jurisdiction over offences committed on board of one of its vessels, including cases when the intervention has been done, on request, by a foreign state. That preferential jurisdiction is in accordance with the LOSC and customary international law. Another state party can exercise concurrent jurisdiction to be able to pursue the aim of this agreement. That concurrent jurisdiction can be used as a legal basis for the possible prosecution in the intervening state of the suspect drug traffickers. The exercise of the concurrent jurisdiction of the intervening state would be suspended when the flag state is exercising its preferential jurisdiction and can be revived when the flag state has expressly renounced the exercise of its preferential jurisdiction. It must be noted that only enforcement jurisdiction may be suspended.

It can be stated that, according to Article 14 of the 1995 Agreement, the general rule is that the intervening state will prosecute relevant offences, but it remains possible for the flag state, for reasons of policy, to prosecute the suspects. The flag state has to be active to achieve its preferential jurisdiction. When the flag state stays passive, the intervening state will bring the suspects to justice. The article reads:

Article 14 Exercise of preferential jurisdiction

1. A flag State wishing to exercise its preferential jurisdiction shall do so in accordance with the provisions of this article.
2. It shall notify the intervening State to this effect as soon as possible and at the latest within fourteen days from the receipt of the summary of evidence pursuant to Article 13. If the flag State fails to do this, it shall be deemed to have waived the exercise of its preferential jurisdiction.
3. Where the flag State has notified the intervening State that it exercises its preferential jurisdiction, the exercise of the jurisdiction of the intervening State shall be suspended, save for the purpose of surrendering persons, vessels, cargoes and evidence in accordance with this Agreement.
4. The flag State shall submit the case forthwith to its competent authorities for the purpose of prosecution.
5. Measures taken by the intervening State against the vessel and persons on board may be deemed to have been taken as part of the procedure of the flag State.

The flag state must notify the intervening state that it wants to exercise its preferential jurisdiction as soon as possible and no more than fourteen days from the receipt of the summary or

⁴⁵ Gilmore (1996), pp. 3-16.

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more of the evidence pursuant to Article 13 of this agreement. This article will be examined further on.

The time of notification is quite short, because the suspect persons need to know whom they are being prosecuted by.⁴⁶ During the negotiations, several delegations were in favor of four days from the receipt of the summary.⁴⁷ It should be noted that the French delegation would like to see a shorter time period than fourteen days.⁴⁸ When the time of notification is too short, the flag state may feel the need to exercise its preferential jurisdiction automatically, a possibility which is not always in the interest of the good administration of justice. In the meantime, until the flag state notifies the intervening state, the jurisdiction of the intervening state is exercised. If the flag state does not notify the intervening state, the jurisdiction of the intervening state is deemed to be exercised. Failure to act within the time frame of the fourteen-days rule therefore constitutes an implied waiver of the exercise of preferential jurisdiction.

Referring to the different forms of jurisdictions, the preferential one and the concurrent one, it would, in principle, be possible under certain national laws for a drug smuggler to be prosecuted twice, which is prohibited by international legal principles.⁴⁹ That is why the *non bis in idem* principle is mentioned in the agreement. Paragraph 4 of Article 2 of the 1995 Agreement (see above under Principles) is simply a reminder that the principle exists and that, for instance, the provisions in the agreement concerning concurrent jurisdiction would leave the principle unaffected.⁵⁰

Reservations on jurisdiction

Paragraph 5 of Article 3 of the 1995 Agreement allows states to inform the other states of the criteria it intends to apply in respect of the exercise of the jurisdiction established pursuant to paragraph 2 of this article. It is the opinion of the author that this declaration should not limit the obligation to establish jurisdiction mentioned in paragraph 2 of Article 3; this would be contrary the context of that article.

Austria and Hungary have declared that they will not apply paragraphs 2 and 3 of Article 3 for the reasons provided for in paragraph 6 of this article.⁵¹ That paragraph provides the reservation for land-locked states that Austria and Hungary used. It should be too much of a legislative burden when land-locked states, which do not have intervening assets, establish jurisdiction as under paragraph 2 and 3 of Article 3.

Stateless vessels

A stateless vessel or a vessel without nationality is a vessel not legitimately registered in a register of ships of any one state pursuant to Article 94 LOSC, or a vessel flying no flag, and refusing to show a flag when called upon to do so in a proper manner. In Article 17(2) of the 1988 Convention, vessels flying the flag of the state they are registered in and stateless vessels are linked together in one paragraph.

⁴⁶ See Article 5(3) of the Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 04 November 1950, ETS no. 005: a suspect should be brought promptly before a judge.

⁴⁷ Summary Report of the second meeting, PC-NU (93) 3, Strasbourg, 11 February 1993, p. 8.

⁴⁸ Comments by the French delegation during the last consultation round, PC-NU (94)(4), Strasbourg 21 April 1994.

⁴⁹ Article 2 of the Seventh Protocol to the Convention for the Protection of Human Right and Fundamental Freedoms, concluded by the Council of Europe, Strasbourg, 22 November 1984, ETS no. 117.

⁵⁰ Summary Report of the fifth meeting, PC-NU (93) 15, Strasbourg, 28 September 1993, p.2.

⁵¹ List of declarations made with aspect to the 1995 Agreement, ETS no. 156.

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In the 1995 Agreement, the two kinds of vessels are separated and described respectively in Article 4 and 5 of the agreement. That separation is because the flag state will have an ongoing responsibility for authorizing actions and will continue to have the right of exercising its preferential jurisdiction on board vessels flying its flag. A requesting state has no similar rights in respect of stateless vessels.⁵² Article 5 of the 1995 Agreement reads:

Article 5 Vessels without nationality

1. A Party which has reasonable grounds to suspect that a vessel without nationality, or assimilated to a vessel without nationality under international law, is engaged in or being used for the commission of a relevant offence, shall inform such other Parties as appear most closely affected and may request the assistance of any such Party in suppressing its use for that purpose. The Party so requested shall render such assistance within the means available to it.
2. Where a Party, having received information in accordance with paragraph 1, takes action it shall be for that Party to determine what actions are appropriate and to exercise its jurisdiction over any relevant offences which may have been committed by any persons on board the vessel.
3. Any Party which has taken action under this article shall⁵³ communicate as soon as possible to the Party which has provided information, or made a request for assistance, the results of any action taken in respect of the vessel and any persons on board

The text from Article 17(2) of the 1988 Convention, upon which the text of Article 5 of the 1995 Agreement is based, has been changed into the more orthodox terminology of the international law of the sea in describing the vessels that this article applies to. The text now uses the direct term ‘vessel without nationality’ where it used to be the indirect indication of ‘a vessel without displaying a flag or without marks of registry’. In addition to the 1988 Convention, the party most closely affected is mentioned. This can be the potential intervening state or the next state of call for the vessel of the illicit drug trafficker.

Paragraph 2 of Article 5 deals with the situation where a state has received information from another state about a vessel without nationality. The former state has to decide whether it will intervene and by what means. That state has to exercise its jurisdiction based on information from the informing state. Paragraph 3 of Article 5 completes the international maritime counter-drug cooperation by linking the feedback to the informing or requesting state. This article departs from Article 17(2) of the 1988 Convention, in that it is expressed in terms of a duty⁵⁴ (shall) to communicate information to other affected parties, as opposed to a request⁵⁵ in Article 17 of the 1988 Convention, requiring to take action to suppress the use of the vessel for illicit trafficking. It is believed that this departure is justified in terms of the international law of the sea concerning the position of stateless vessels.⁵⁶

Authorization

General

Authorization means investing a party with legal power. That can be done in advance by treaties or on an *ad hoc* basis. The word ‘authorize’ is used to stress the positive nature of the decision and of the action that the flag state, in the exercise of its sovereignty, must take with regard to its vessel. Authorization creates no obligations: the decision of a flag state to act

⁵² Proposal to split the article was done by the United Kingdom, PC-NU (93) 16, Strasbourg, 30 September 1993.

⁵³ Emphasis added

⁵⁴ Emphasis added.

⁵⁵ Emphasis added

⁵⁶ Comments on the Draft Agreement by the delegation of the United Kingdom, PC-NU (93) 21, Strasbourg, 28 October 1993, p. 4.

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against one of its vessels is entirely the prerogative of the flag state.⁵⁷ It has to be borne in mind that the problem of state responsibility has to be taken in consideration, when a flag state authorizes a foreign state to intervene with ships flying the flag of the first state.⁵⁸

In general, two ways of dealing with the requirement of flag state authorization can be determined. Firstly, that prior authorization to stop and board a vessel could be contained in a treaty on a permanent basis. That was the approach that, in somewhat modified forms, lay at the heart of the 2002 Draft Convention (see below Section 4.4.). Secondly, authorization could be required from the flag state in each case. Here, two principal variants presented themselves: that failure to respond to a request in a timely fashion would constitute tacit consent and that express authorization could be required.

Article 6 of the 1995 Agreement, which may reasonably be considered as the cornerstone provision, reflects the core of the whole agreement. Article 6 reads:

Article 6 Basic rules on authorization

Where the intervening State has reasonable grounds to suspect that a vessel, which is flying the flag or displaying the marks of registry of another Party or bears any other indications of nationality of the vessel, is engaged in or being used for the commission of a relevant offence, the intervening State may request the authorization of the flag State to stop and board the vessel in waters beyond the territorial sea of any Party, and to take some or all of the other actions specified in this Agreement. No such actions may be taken by virtue of this Agreement, without the authorization of the flag State.

The article states that as long as no authorization exists, the intervening state will have no right to stop and board a foreign flag vessel by virtue of the agreement, even when that state has good reasons for believing that the vessel of another state is engaged in illicit drug trafficking. The article follows the conservative approach of authorization, in conformity with the 1988 Convention.

Conditioned authorization

Special conditions on the authorization are mentioned in Article 8(1) of the 1995 Agreement, which reads:

Article 8 Conditions

1. If the flag State grants the request, such authorization may be made subject to conditions or limitations. Such conditions or limitations may, in particular, provide that the flag State's express authorization be given before any specified steps are taken by the intervening State.

When the conditions cannot be mutually agreed between the parties, then authorization is deemed not to have been granted. The conditions of the flag state should be based on principles embodied within the legal system of both states.

Applicable law

Applicable law is the law and regulations that have to be applied to drug-related offences in various maritime zones when law enforcement officials exercise jurisdiction. Actions taken by the intervening state are governed by the rules of customary international law, the law of the sea, the 1988 Convention, the law of the intervening and of the flag state, and of course by the 1995 Agreement, including the mutually agreed conditions.

⁵⁷ UN Doc. E/CONF82/C2/SR29, p. 2.

⁵⁸ See the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the ILC on the Work of its Fifty-third Session, UN GAOR, 56th Session, Supp. No 10, UN Doc A/56/10 (2001), p. 43.

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It must be noted that any action under the present agreement is governed by the law of the intervening state, including international law as applied by that state, pursuant to Article 11(1) of the 1995 Agreement, which reads:

Article 11 Execution of actions

1. Actions taken under Articles 9 and 10 shall be governed by the law of the intervening State.

This implies that when the intervention takes place on the territory of the flag state, i.e. the suspect vessel, the law of the intervening state governs the measures that must be taken after evidence has been found of illicit drug trafficking.

Offences

Offences in this study are the illegal acts or crimes related to narcotic drugs and psychotropic substances. The offences described in the 1995 Agreement are in accordance with those mentioned in Article 3(1) of the 1988 Convention. Possession of illicit drugs for personal use is therefore not included, because that provision is laid down in Article 3(2) of the 1988 Convention.

Suspicion

Suspicion means being suspected of or suspecting drug-related crimes. The reasonable grounds mentioned in Article 6 of the 1995 Agreement (see above) are the same as in the LOSC and in the 1988 Convention. These reasonable grounds may be classified by an intelligence agency. Suspicion may be based on gathered intelligence.

In Article 17 of the 1988 Convention the term ‘reasonable grounds.... [e]ngaged in illicit traffic’ is used. In the 1995 Agreement that term has been expanded to read: ‘reasonable grounds[e]ngaged in or being used for the commission of a relevant offence’. This new term is an addition to, not a deviation from, the 1988 Convention. For example, the position of a mother ship when unloading illicit drugs into smaller boats in order to beach these illicit drugs is now also covered by the agreement.⁵⁹

Evidence

Evidence is specific information or materials used by a tribunal to arrive at the truth. The essence of preferential jurisdiction is that the flag state has to determine whether it or the intervening state will assume jurisdiction. To make such a determination, the flag state requires a summary of the evidence discovered, pursuant to Article 13(1). A summary is the minimum of evidence, more is allowed as well. Article 13 of the 1995 Agreement contains some provisions about evidence. The article reads:

Article 13 Evidence of offences

1. To enable the flag State to decide whether to exercise its preferential jurisdiction in accordance with the provisions of Article 14, the intervening State shall without delay transmit to the flag State a summary of the evidence of any offences discovered as a result of action taken pursuant to Article 9. The flag State shall acknowledge receipt of the summary forthwith.
2. If the intervening State discovers evidence which leads it to believe that offences outside the scope of this Agreement may have been committed, or that suspect persons not involved in relevant offences are on board the vessel, it shall notify the flag State. Where appropriate, the Parties involved shall consult.
3. The provisions of this Agreement shall be so construed as to permit the intervening State to take measures, including the detention of persons, other than those aimed at the investigation and prosecution of relevant offences, only when:
 - a. the flag State gives its express consent; or

⁵⁹ Summary Report of the fifth meeting, PC-NU (93) 15, Strasbourg, 28 September 1993, p. 3.

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- b. such measures are aimed at the investigation and prosecution of an offence committed after the person has been taken into the territory of the intervening State.

Paragraph 2 of Article 13 of the 1995 Agreement deals with the problem of what the situation will be, if evidence is found that does not relate to illicit drug trafficking, or is not a relevant offence according to this agreement, and is therefore beyond the scope of this agreement. In that event, the intervening state has to consult the flag state and depending on the circumstances, those consultations will lead to mutual legal assistance under applicable treaties in force between the two parties. Otherwise, the consultations have to create a solution to this problem of jurisdiction. Paragraph 3 of Article 13 of the 1995 Agreement is a rule of specialty -in addition to the general rule in Article 10(3) of the 1995 Agreement- which states that persons not suspected of illicit drug trafficking, shall be released (see below).

A suspect person does not have to answer questions or to provide any information that could incriminate him.⁶⁰ That is emphasized in paragraph 2 of Article 9 of the present agreement which reads:

Article 9 Authorized actions

2. Any action taken under paragraph 1 of this article shall be without prejudice to any right existing under the law of the intervening State of suspected persons not to incriminate themselves.

Extradition

Extradition is the surrender of an alleged criminal by one state to another one having jurisdiction to try the charge. One should bear in mind that in the region described, many multilateral and bilateral extradition treaties and other mutual legal assistance treaties are in force. The most common and traditional treaty is the list treaty, which contains a list of crimes, including drug-related crimes, for which a suspect will be extradited.

Article 15 of the 1995 Agreement that deals with extradition, *casu quo* surrender, is very detailed; it reads:

Article 15 Surrender of vessels, cargoes, persons and evidence

1. Where the flag State has notified the intervening State of its intention to exercise its preferential jurisdiction, and if the flag State so requests, the persons arrested, the vessel, the cargo and the evidence seized shall be surrendered to that State in accordance with the provisions of this Agreement.
2. The request for the surrender of arrested persons shall be supported by, in respect of each person, the original or a certified copy of the warrant of arrest or other order having the same effect, issued by a judicial authority in accordance with the procedure prescribed by the law of the flag State.
3. The Parties shall use their best endeavors to expedite the surrender of persons, vessels, cargoes and evidence.
4. Nothing in this Agreement shall be so construed as to deprive any detained person of his right under the law of the intervening State to have the lawfulness of his detention reviewed by a court of that State, in accordance with procedures established by its national law.
5. Instead of requesting the surrender of the detained persons or of the vessel, the flag State may request their immediate release. Where this request has been made, the intervening State shall release them forthwith.

Article 15 provides for a system of surrender instead of using the instrument of extradition. The obligations of the intervening state are stated in this article. When the flag state exercises its preferential jurisdiction, the intervening state should surrender the arrested person and the ship and cargo to the flag state. It is the opinion of the author that the intervening state's en-

⁶⁰ Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 04 November 1950, ETS no. 005.

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forcement jurisdiction is only temporary, until the flag state notifies the intervening state that it will exercise its preferential jurisdiction. For that reason, extradition is not necessary and surrendering suspect persons is enough.

The principle of surrender is complementary to the principle of preferential jurisdiction of the flag state. Paragraph 2 of Article 15 gives a detailed prescription of the documents that are needed to support the surrender of suspect persons. Those documents must be issued by the judicial authorities in accordance with the procedures of the law of the flag state.

Suspect persons who have been arrested by the intervening state under the law of the intervening state can turn to a court to challenge the lawfulness of their detention. By virtue of public international law, they have the right to do so.⁶¹

Paragraph 4 of Article 15 refers to the rights of any detained person. They will always have the right to have the lawfulness of their detention decided by a court, dependent on whether the flag state has exercised its preferential jurisdiction. Article 15(4) of the 1995 Agreement has been proposed by the United Kingdom. The reason for doing so was that surrender to the flag state without providing a person with any opportunity to challenge his or her detention and to surrender that person while being held in the territory of the intervening state would constitute a breach of obligations under the European Convention of Human Rights.⁶²

Article 15 of the 1995 Agreement tries to foresee all kinds of situations that could arise in the practical operation of the agreement, but, in paragraph 5 of this article, an exceptional safety valve has been built in. That paragraph can only be used in extreme circumstances, such as, for instance, in relation to a state's own nationals or to protect the interests of the owners or operators of the vessel.⁶³

Capital punishment

The duty to surrender individuals by the intervening state, pursuant to Article 15 of the 1995 Agreement, is subject to one major exception, which is contained in Article 16 of that agreement, reading:

Article 16 Capital punishment

If any offence for which the flag State decides to exercise its preferential jurisdiction in accordance with Article 14 is punishable by death under the law of that State, and if in respect of such an offence the death penalty is not provided by the law of the intervening State or is not normally carried out, the surrender of any person may be refused unless the flag State gives such assurances as the intervening State considers sufficient that the death penalty will not be carried out.

When the relevant offences are punished with the death penalty in the flag state, and such an offence is not punished with capital punishment in the intervening state, then the surrender of any person may be refused. Article 16 of the 1995 Agreement was also proposed by the United Kingdom in view of the fact that the principle is well accepted in extradition agreements.⁶⁴ This article breaks with the principle of preferential jurisdiction. The article is based on Article 11 of the European Convention on Extradition.⁶⁵

⁶¹ Article 5 Convention for the Protection of Human Rights and Fundamental Freedoms.

⁶² Proposal by the United Kingdom, PC-NU (93) 13, Strasbourg, 20 September 1993.

⁶³ Summary Report of the fifth meeting, PC-NU (93) 15, Strasbourg, 28 September 1993, p. 6.

⁶⁴ Comments on the Draft Agreement by the delegation of the United Kingdom, PC-NU (93) 21, Strasbourg, 28 October 1993, p.10.

⁶⁵ The European Convention on Extradition was signed at Paris on 13 December 1957, and entered into force on 18 April 1960, ETS no. 24.

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It must be noted that most Western European states, in time of peace, have abandoned capital punishment, but non-member states of the Council of Europe, which possibly can apply capital punishment to illicit drug traffickers, can be invited to this agreement.⁶⁶

Extradition of nationals

Paragraph 2 of Article 8 of the 1995 Agreement is intended to facilitate the practical application of the 1995 Agreement in relation to special circumstances. The paragraph reads:

Article 8 Conditions

2. Each State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by declaration addressed to the Secretary General of the Council of Europe declare that, when acting as an intervening State, it may subject its intervention to the condition that persons having its nationality who are surrendered to the flag State under Article 15 and there convicted of a relevant offence, shall have the possibility to be transferred to the intervening State to serve the sentence imposed.

When a suspect person is a national of the intervening state and the flag state exercises its preferential jurisdiction the intervening state can meet with some difficulties in surrendering its nationals.

It should be noted that most of the parties are signatories to the Convention on the Transfer of Sentenced Persons,⁶⁷ so most cases of transferring persons would probably operate under that convention, or in accordance with the *ad hoc* arrangements between the parties. When acting as an intervening state, a state has the right for persons having their nationality, to be transferred to the intervening state to serve the sentence imposed by the vessel's flag state.⁶⁸

Surrender assets

The surrender of the vessel and its cargo has also been covered in Article 15 (see above). That is less complicated than the surrender of persons. The only prerequisite is that both parties shall use their best endeavors to expedite vessel and cargo.

4.2.5. Operational provisions of the 1995 Agreement

Assistance

According to Article 4 of the 1995 Agreement, flag states may request assistance from another state party to stop and board one of the flag state's ships. That implies authorization for the non-flag state to act on board a suspect ship flying the flag of the requesting state. Article 4 reads:

Article 4 Assistance to flag States

1. A Party which has reasonable grounds to suspect that a vessel flying its flag is engaged in or being used for the commission of a relevant offence, may request the assistance of other Parties in suppressing its use for that purpose. The Parties so requested shall render such assistance within the means available to them.

⁶⁶ Article 28 of the 1995 Agreement.

⁶⁷ The Convention on the Transfer of Sentenced Persons was signed at Strasbourg on 21 march 1983, ETS, no. 112.

⁶⁸ Cyprus has used this right of reservation. In accordance with Article 8(2) of the agreement, the Republic of Cyprus declared that when acting as an intervening state it may subject its intervention to the condition that persons having its nationality who are surrendered to the flag state under Article 15 of the agreement and there convicted of a relevant offence, shall have the possibility to be transferred back to the Republic of Cyprus to serve the sentence imposed. See the list of declarations made with respect to the 1995 Agreement, ETS no. 156.

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2. In making its request, the flag State may, *inter alia*, authorize the requested Party, subject to any conditions or limitations which may be imposed, to take some or all of the actions specified in this Agreement.
3. When the requested Party agrees to act upon the authorization of the flag State given to it in accordance with paragraph 2, the provisions of this Agreement in respect of the rights and obligations of the intervening State and the flag State shall, where appropriate and unless otherwise specified, apply to the requested and requesting Party, respectively.

The requested assistance might cover quite a spectrum of actions, ranging from providing information, or looking for the geographical position of the vessel, to boarding and searching the vessel, and even to arresting suspects. The requesting flag state must specify the kind of assistance it needs and, although that state is not restricted in the types of assistance it can request, it must be kept in mind that the state receiving the request will decide whether to render the assistance or not. That depends, *inter alia*, on the resources available to the requested state. In making that determination, economic factors could properly be taken into consideration.⁶⁹

Article 4(2) of the 1995 Agreement, which deals with requesting assistance by the flag state, is the implementation of Article 17(2) of the 1988 Convention. This latter article states that conditions, which must be consistent with the obligations of Article 17(1) of the 1988 Convention, can be mutually agreed between both states. This paragraph states that parties should cooperate to the fullest extent possible to suppress illicit traffic by sea. Paragraph 2 of Article 4 states that if the requested state renders assistance it must respect any conditions imposed by the requesting state. Furthermore, when intervening, the requested state is not obliged to exercise its jurisdiction in respect of offences discovered during its intervention. In fact, it is, in principle, a matter for the requesting flag state to decide on the appropriate action that should follow any intervention that it has initiated.

In the author's opinion, that the conditions mentioned in Article 4 of the 1995 Agreement should not restrict, in general, the suppression of illicit drug trafficking, because that is contrary to the aim of strengthening mutual cooperation among states in the suppression of illicit drug trafficking on the high seas. These conditions can be related to other subjects like damages, jurisdiction over crew-members of various nationalities, or to civil proceedings or other elements.

When a vessel flies the requesting state's flag, it is entitled to enjoy the protection of that state. Article 4(3) of the 1995 Agreement assimilates the requesting flag state and the requested state when the latter actually intervenes on board the vessel of the requesting flag state. The provisions of the 1995 Agreement will then apply, where appropriate and unless otherwise specified, to both states.

Competent authorities

Pursuant to Article 17(7) of the 1988 Convention, every state party should have an authority or, when necessary, authorities to receive and respond to requests for authorization to stop and board a suspect vessel flying its flag. The implementation of Article 17(7) of the 1988 Convention can be found in Article 17 of the 1995 Agreement. That article, along with national law, is the legal foundation for the designation and the powers of two competent authorities. The article reads:

⁶⁹ Council of Europe Doc, CCPC (94) 22, Addendum, 27 June 1994, p. 32.

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Article 17 Competent authorities

1. Each Party shall designate an authority, which shall be responsible for sending and answering requests under Articles 6 and 7 of this Agreement. So far as is practicable, each Party shall make arrangements so that this authority may receive and respond to the requests at any hour of any day or night.
2. The Parties shall furthermore designate a central authority which shall be responsible for the notification of the exercise of preferential jurisdiction under Article 14 and for all other communications or notifications under this Agreement.
3. Each Party shall, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, communicate to the Secretary General of the Council of Europe the names and addresses of the authorities designated in pursuance of this article, together with any other information facilitating communication under this Agreement. Any subsequent change with respect to the name, address or other relevant information concerning such authorities shall likewise be communicated to the Secretary General.

Operational point of contact

The first authority designated by virtue of Article 17(1) of the 1995 Agreement shall have operational responsibility. That paragraph states that, as far as practicable, the operational authority should be accessible on a 24-hours-a-day, seven-days-a-week basis, so, while desirable, it is not mandatory. The requesting operational authority sends the request and the operational counterpart should respond to the request if a suspect vessel is entitled to fly the flag of the requested state.

The agreement does not exclude a potential intervening vessel to act as an authority by virtue of Article 17. The potential intervening vessel should be able to address itself to the operational authority of another party, instead of using its own operational authority as a relay. The direct procedure will save time, which is essential in the case of stopping and boarding a suspected illicit drug trafficker. The above-mentioned procedure is to get operational information, not authorization.

Central authority

The authority, to decide whether an intervention is authorized, will be held by a second, more central authority. That central authority decides on preferential jurisdiction as well. The central authority is responsible for the communication or notifications as well.

The distinction between the operational authority and the central authority is considered to be a fundamental one. That distinction can be very important due to different legal systems.⁷⁰

As demonstrated by Article 17 (3) of the 1995 Agreement, some provisions on competent authorities are very detailed. That article deals with addresses, and even changes of addresses of competent authorities, and all of those details must be transmitted to the Secretary General of the Council of Europe. The Secretary General of the Council of Europe will notify all other parties of those authorities. Even the alternative communications channels are dealt with. For the overview of all authorities in accordance with Article 17 of the 1995 Agreement, see the list of declarations made up with respect to this agreement.⁷¹

Request

Contents of request

Article 21 of the 1995 Agreement is the specification of Article 6 of the same agreement, it reads:

⁷⁰ Comments on Article 17 by the Spanish delegation, PC-NU (93) 17, Strasbourg, 25 October 1993.

⁷¹ List of declarations made with respect to the 1995 Agreement, ETS no. 156.

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Article 21 Content of request

A request under Article 6 shall specify:

- a. the authority making the request and the authority carrying out the investigations or proceedings;
- b. details of the vessel concerned, including, as far as possible, its name, a description of the vessel, any marks of registry or other signs indicating nationality, as well as its location, together with a request for confirmation that the vessel has the nationality of the requested Party;
- c. details of the suspected offences, together with the grounds for suspicion;
- d. the action it is proposed to take and an assurance that such action would be taken if the vessel concerned had been flying the flag of the intervening State.

The article was drafted to streamline international maritime counter-drug cooperation. It deals with the contents of the request for authorization. Details of the vessel are quite relevant, because an intervention, -stopping and boarding a foreign suspect vessel-, is a constraint on the right of freedom of navigation. The grounds for suspicion, the good reasons to believe that a vessel is engaged in illicit drug trafficking, must be specified to the flag state and the decision of whether or not to authorize an intervention will be taken on the basis of that information. Those grounds of suspicion must include the details of the relevant offences; it must be specific, rather than a vague prescription. That is more than the legal qualifications of the relevant offences.

The provision of Article 21(d) is called ‘double enforceability *in concreto*’. An intervening state should not use other conditions or criteria if a vessel of another state is involved.⁷² The discretionary powers of the intervening state should not be interpreted in a different way if a vessel of another flag state is suspected of illicit drug trafficking. The objective of that article is not to create exact equivalence of treatment for both flag state vessels and foreign ones, which due to different judicial systems is not an option, but every state has to strive to equality in treatment application.

Form of request

Due to the complicated nature of communications,⁷³ requests must be formalized and put into formats. Article 19 of the 1995 Agreement contains provisions about the form of the request, the article reads:

Article 19 Form of request and languages

1. All communications under Articles 4 to 16 shall be made in writing. Modern means of telecommunications, such as telefax, may be used.
2. Subject to the provisions of paragraph 3 of this article, translations of the requests, other communications and supporting documents shall not be required.
3. At the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, any Party may communicate to the Secretary General of the Council of Europe a declaration that it reserves the right to require that requests, other communications and supporting documents sent to it, be made in or accompanied by a translation into its own language or into one of the official languages of the Council of Europe or into such one of these languages as it shall indicate. It may on that occasion declare its readiness to accept translations in any other language as it may specify. The other Parties may apply the reciprocity rule.

Article 19 of the 1995 Agreement was drafted to simplify the vital communications, to gain time in sending formats and to avoid miscommunication between the authorities of different states. The formats satisfy the provisions of paragraph 1 of Article 19, which states that all communications should be made in writing. That is also important for saving evidence and the subsequent proceedings before a court.

⁷² Summary Report of the fourth meeting, PC-NU (93) 8, Strasbourg, 14 May 1993, p. 4.

⁷³ See below under Communications.

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Paragraph 3 of Article 19, which deals with the language to be used in making a request, is not unusual in the legislation of the Council of Europe.⁷⁴ If a state exercises its right to receive a request in its own language, it could hamper the process, due to the time that is lost in translating the request. Only one state has reserved its right to do so.⁷⁵

Response on the request

When no response has been received from the flag state, the potential intervening state has no authorization to intervene, even when it has evidence of illicit drug trafficking. A discussion took place of whether it was appropriate to attach a legal consequence to a non-response within the four-hour time limit, and to expressly state that no response would be deemed as constituting a refusal of the request for authorization. That would amount to contrary tacit authorization.

The experts however, considered that it was not appropriate to insert such an explicit provision, since the philosophy of the present agreement was that, in the absence of consent, the intervening state would not have authorization to stop and board the vessel by virtue of the agreement. It might also create confusion since the intervening state might, under the international law of the sea, have the possibility of intervening, for instance for purposes of verifying the flag.⁷⁶

Authentication and legislation

Article 20 speaks about restrictions on transmitting documents. The article reads:

Article 20 Authentication and legalization

Documents transmitted in application of this Agreement shall be exempt from all authentication and legalization formalities.

No restriction of official formalities may be applicable on the exchange of requests and responses. That would slow down the process between all the authorities. A convention has been concluded in the Council of Europe⁷⁷ that deals with this matter, but not all parties of the Council of Europe have ratified that convention yet.

Communications

Communications mean ship-to-shore *vice versa* and shore-to-shore *vice versa*. Ship-to-shore *vice versa* is mainly a national issue. International shore-to-shore is more political.

In addition to the written means of communication mentioned in Article 19(1), see above, email by Internet can be used as well. Oral requests may precede the written request, especially in the event of urgency.

The requirement of written communication is restricted to the Articles 4 to 16 of the 1995 Agreement, according to Article 19(1) of the 1995 Agreement (see above under Form of request). That implies that exchanging information related to Article 2 of this agreement, often the legal ground for good reasons to believe a vessel is suspected of illicit drug trafficking, can be done orally.⁷⁸

⁷⁴ Article 25 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.

⁷⁵ Cyprus reserved the right to require that requests, other information and supporting documents sent to it be made or accompanied by a translation into the English language, which is one of the official languages of the Council of Europe. See list of declarations with respect to the 1995 Agreement, ETS no. 156.

⁷⁶ Summary Report of the second meeting, PC-NU (93) 3, Strasbourg, 11 February 1993, p. 6.

⁷⁷ The European Convention on the Abolition of Legalisations of Documents Executed by Diplomatic Agents or Consular Officers was signed at London on 7 July 1968, ETS no. 63.

⁷⁸ Summary Report of the fourth meeting, PC-NU (93) 8, Strasbourg, 14 May 1993, p. 4.

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The Agreement does not create obligations to respond favorably to a request for authorization, but it creates an obligation for good and rapid communication. First of all, to acknowledge immediately the receipt of a request for authorization and secondly to communicate the response, either positive or negative, to the request. The communication should not be an obstacle, legal or practical, for the exchange of requests and responses.

Channels of communication

The words ‘transmit without delay’ used in Article 13 of the present agreement, indicate that the information should pass via ship’s communication. The speed of the information transfer is relevant for the exercise of the preferential jurisdiction of the flag state. It is clear that diplomatic channels are not mandatory for communication, but they can be used for reasons of convenience. When direct communications, according to Article 18, are not practicable, other channels of communications are advised, that article reads:

Article 18 Communication between designated authorities

1. The authorities designated under Article 17 shall communicate directly with one another.
2. Where, for any reason, direct communication is not practicable, Parties may agree to use the communication channels of ICPO-Interpol or of the Customs Co-operation Council.

This is not a new thing in the Agreement. The 1988 Convention mentions different channels of communication as well.⁷⁹ The language used in the present agreement is virtually standard in a number of Council of Europe Conventions.⁸⁰ On several occasions, several delegations expressed hesitation as to the opportunity of retaining the reference in the text to Interpol as a possible channel of communication: if Interpol is to be mentioned, other international law enforcement agencies should be mentioned as well.⁸¹ The European Committee on Crime Problems requested the committee PC-NU to take the interest in that instrument into account in its future work.⁸²

Communication between suspect vessel and the owner or operator

The master of the suspect vessel that has been boarded may inform the owner or operator of the vessel, according to Article 11(4), which reads:

Article 11 Execution of action

4. The master of a vessel which has been boarded in accordance with this Agreement shall be entitled to communicate with the authorities of the vessel's flag State as well as with the owners or operators of the vessel for the purpose of notifying them that the vessel has been boarded. However, the authorities of the intervening State may prevent or delay any communication with the owners or operators of the vessel if they have reasonable grounds for believing that such communication would obstruct the investigations into a relevant offence.

That communication can be of some importance for the investigation, however, especially when the owner or operator takes part in illicit drug trafficking, which is quite normal when small non-commercial vessels such as go-fasts are engaged in illicit drug trafficking. In that case the communication between the master of the vessel and the owner or operator can be delayed until the communication no longer places the investigation under jeopardy. The law of the intervening state is governing here.

⁷⁹ See article 7(8) of the 1988 Convention, where the channels of communications of the International Criminal Police Organization (ICPO) are advised.

⁸⁰ See <http://www.interpol.int/Public/ICPO/LegalMaterials/FactSheets/FS14.asp> (visited Fall 2006)

⁸¹ Summary Report of the third meeting, PC-NU (93) 5, Strasbourg 22 March 1993; Summary Report of the fourth meeting, PC-NU (93) 8, Strasbourg, 14 May 1993, p. 3.

⁸² Extract of the Summary Report of the 42nd session of the CDCP, Strasbourg, PC-NU (93) 9, rev., 2 September 1993.

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Information for owners and masters

Article 22 speaks about information from the government of a member state for the owner and master about the provisions of the Agreement. The article reads:

Article 22 Information for owners and masters of vessels

Each Party shall take such measures as may be necessary to inform the owners and masters of vessels flying their flag that States Parties to this Agreement may be granted the authority to board vessels beyond the territorial sea of any Party for the purposes specified in this Agreement and to inform them in particular of the obligation to comply with instructions given by a boarding party from an intervening State exercising that authority.

Under the principle of information, flag states must inform the masters or owners of vessels flying their flag about the provisions of the 1995 Agreement. The way that information may be given is not specified. The Explanatory Report of the 1995 Agreement states that in addition to the standard channels, public newspapers or other media can inform the masters and owners.

Confidentiality

Article 24 speaks about confidentiality of communications, it reads:

Article 24 Confidentiality

The Parties concerned shall, if this is not contrary to the basic principles of their national law, keep confidential any evidence and information provided by another Party in pursuance of this Agreement, except to the extent that its disclosure is necessary for the application of the Agreement or for any investigations or proceedings.

When evidence and information generated during the process of maritime counter-drug cooperation are not to be used for the application of the 1995 Agreement, they shall be kept confidential by both the intervening state and the flag state, but this should not be contrary to their national law.

Timeslot

Timeslot is the maximum time between a request for authorization by an intervening state and the response to it by the flag state. The smaller that timeslot, the better the chance to stop and board a suspect ship. Article 7 of the 1995 Agreement speaks about the decision on the request for authorization, more in particular the time between the request and respond, the timeslot. The article reads:

Article 7 Decision on the request for authorization

The flag State shall immediately acknowledge receipt of a request for authorization under Article 6 and shall communicate a decision thereon as soon as possible and, wherever practicable, within four hours of receipt of the request.

Article 7 of the 1995 Agreement is the implementation of a part of Article 17(7) of the 1988 Convention. The latter article states that a state shall respond expeditiously to a request from another state to determine whether a vessel flying its flag is entitled to do so, and to requests for authorization made pursuant to paragraph 3 of Article 17 of the 1988 Convention. Article 7 of the 1995 Agreement only refers to the request for authorization.

The term ‘expeditiously’ has been defined more concretely in this article. It now states that a decision on the request must be made as soon as possible, but within four hours from the time of receipt. That four-hour period is the maximum time. A rapid reaction to a request increases

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the chance of a successful intervention with an illicit drug trafficker on the high seas, especially in respect of smaller, non-commercial vessels, such as the so-called 'go-fasts'.

Actions

Actions can be described as engagements between law enforcement officials and illicit drug traffickers. Article 9 of the 1995 Agreement implements Article 17(4) of the 1988 Convention, it reads:

Article 9 Authorized actions

1. Having received the authorization of the flag State, and subject to the conditions or limitations, if any, made under Article 8, paragraph 1, the intervening State may take the following actions:
 - i.
 - a. stop and board the vessel;
 - b. establish effective control of the vessel and over any person thereon;
 - c. take any action provided for in sub-paragraph ii of this article which is considered necessary to establish whether a relevant offence has been committed and to secure any evidence thereof;
 - d. require the vessel and any persons thereon to be taken into the territory of the intervening State and detain the vessel there for the purpose of carrying out further investigations;
 - ii. and, having established effective control of the vessel:
 - a. search the vessel, anyone on it and anything in it, including its cargo;
 - b. open or require the opening of any containers, and test or take samples of anything on the vessel;
 - c. require any person on the vessel to give information concerning himself or anything on the vessel;
 - d. require the production of documents, books or records relating to the vessel or any persons or objects on it, and make photographs or copies of anything the production of which the competent authorities have the power to require;
 - e. seize, secure and protect any evidence or material discovered on the vessel.
2. Any action taken under paragraph 1 of this article shall be without prejudice to any right existing under the law of the intervening State of suspected persons not to incriminate themselves

Article 17(4) of the 1988 Convention enumerates the types of actions that may be taken by the intervening state after receiving authorization from the flag state. That enumeration is definitely not exhaustive: more types of actions are possible, and more details can be conceived among the types of actions as the term '*inter alia*' is used in this provision. In Article 17(4) of the 1988 Convention, the alternatives are only indicated as options for action⁸³ (see also Section 3.3.5. of this study). On the contrary, the actions enumerated under Article 9(1) of the 1995 Agreement are apparently exhaustive.

After a suspect vessel has been stopped, boarded and searched, and evidence confirming the suspicion has been found, measures must be taken to seize, secure and protect the evidence and to detain the persons on board. Moreover, the vessel must be detained.

Execution of actions

Actions must be executed or carried out by official representatives of a state. Paragraph 2 of Article 11 states that certain actions 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.⁸⁴ The relevant paragraphs of the article read:

Article 11 Execution of actions

1. Actions taken under Articles 9 and 10 shall be governed by the law of the intervening State.

⁸³ Committee of Experts, Summary Report of the fourth meeting, PC-NU (93) 8, Strasbourg, 14 May 1993.

⁸⁴ This is standard international practice, as reflected in Article 111(5) LOSC.

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2. Actions under Article 9, paragraph 1 a, b and d, 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.

These specific actions can be found under Article 9(1)(a)(b)(d), see above. The actions are stopping and boarding a vessel, establishing effective control and requiring the vessel to be taken into the territory of the intervening state in order to carry out further investigations. Can the other actions under Article 9 of the 1995 Agreement be carried out by non-law enforcement officials? That is what Article 11(2) implies, but the governing principle is that the law of the intervening state will govern the actions taken, states Article 11(1). Normally, all actions taken under Article 9 will be carried out by law enforcement officials, but Article 11(2) is an addition to this principle.

Enforcement measures

Article 10(2) states that when evidence has been found, the intervening state must notify the flag state of any arrest of persons or the detention of the vessel. The agreement is silent about the authority that must be notified, but the competent authority, mentioned above, will be the appropriate authority.⁸⁵ Article 10 reads:

Article 10 Enforcement measures

1. Where, as a result of action taken under Article 9, the intervening State has evidence that a relevant offence has been committed which would be sufficient under its laws to justify its either arresting the persons concerned or detaining the vessel, or both, it may so proceed.
2. The intervening State shall, without delay, notify the flag State of steps taken under paragraph 1 above.
3. The vessel shall not be detained for a period longer than that which is strictly necessary to complete the investigations into relevant offences. Where there are reasonable grounds to suspect that the owners of the vessel are directly involved in a relevant offence, the vessel and its cargo may be further detained on completion of the investigation. Persons not suspected of any relevant offence and objects not required as evidence shall be released.
4. Notwithstanding the provisions of the preceding paragraph, the intervening State and the flag State may agree with a third State, Party to this Agreement, that the vessel may be taken to the territory of that third State and, once the vessel is in that territory, the third State shall be treated for the purposes of this Agreement as an intervening State.

Paragraph 3 of Article 10 of the 1995 Agreement lays down basic criteria for the intervening state, in accordance with public international law.⁸⁶ The general rule is that persons not suspected of relevant offences shall be released.

Third state

The agreement creates the possibility of escorting the illicit drug trafficking vessel to the territory of a third state party to finish the process of detaining and handing over arrested persons, according to paragraph 4 of Article 10. That third state also becomes an intervening party: from a certain point, it will take over all the measures that must be taken to bring the arrested persons to court and to deal with the detained ship. The position of the original intervening state remains the same in relation to the actions it carried out before it handed the detained ship over to the third state.

Safeguards

Safeguards are necessary to restrict the power of the law enforcement officers in order to protect specific interests. Those officials shall take due account of the need not to endanger the

⁸⁵ See Article 17 of the 1995 Agreement.

⁸⁶ Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 04 November 1950, ETS no. 005.

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safety of life at sea or the security of the vessel and cargo and not to prejudice any commercial or legal interest. Other safeguards are references to the principles of international law in general and of the law of the sea in particular.

Jurisdictional

In Article 17(11) of the 1988 Convention, the same wording can be found as in paragraph 3 of Article 2 of the 1995 Agreement. For the 1988 Convention Article 17(11) was an addition to Article 17(3) of that convention.⁸⁷ Article 2(3) of the 1995 Agreement reads:

Article 2 General Principles

3. Any action taken in pursuance of this Agreement shall take due account of the need not to interfere with or affect the rights and obligations of and the exercise of jurisdiction by coastal States, in accordance with the international law of the sea.

Article 2(3) of the 1995 Agreement is a safeguard for the rights and obligations of the jurisdiction of a coastal state. It is a form of a 'non-derogation' provision that takes care of rights and obligations and the exercise of jurisdiction of coastal states. It was designed to ensure that the provisions of the present agreement will not affect any rights or obligations as set out in the LOSC.

Operational

Article 12 of the 1995 Agreement is the implementation of Article 17(5) of the 1988 Convention. Article 12 speaks about operational safeguards, it reads:

Article 12 Operational safeguards

1. In the application of this Agreement, the Parties concerned shall take due account of the need not to endanger the safety of life at sea, the security of the vessel and cargo and not to prejudice any commercial or legal interest. In particular, they shall take into account:
 - a. the dangers involved in boarding a vessel at sea, and give consideration to whether this could be more safely done at the vessel's next port of call;
 - b. the need to minimize any interference with the legitimate commercial activities of a vessel;
 - c. the need to avoid unduly detaining or delaying a vessel;
 - d. the need to restrict the use of force to the minimum necessary to ensure compliance with the instructions of the intervening State.
2. The use of firearms against, or on, the vessel shall be reported as soon as possible to the flag State.
3. The death, or injury, of any person aboard the vessel shall be reported as soon as possible to the flag State. The authorities of the intervening State shall fully co-operate with the authorities of the flag State in any investigation the flag State may hold into any such death or injury.

Article 12 of the 1995 Agreement gives more details that the intervening state should take due notice of, but this short list in Article 12(1)(a)(b)(c)(d) is not exhaustive. The article is a practical one and is applicable to the entire agreement. The article refers not only to commercial and legal interests as Article 17(5) of the 1988 Convention does. The article does not limit its scope of application.

Law enforcement officials

The officials of the intervening state are protected by paragraph 3 of Article 11 of the 1995 Agreement; this paragraph reads:

Article 11 Execution of action

3.
 - a. An official of the intervening State may not be prosecuted in the flag State for any act performed in the exercise of his functions. In such a case, the official shall be liable to prosecution in the inter-

⁸⁷ See Section 3.3.5. of this study.

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vening State as if the elements constituting the offence had been committed within the jurisdiction of that State.

- b. In any proceedings instituted in the flag State, offences committed against an official of the intervening State with respect to actions carried out under Articles 9 and 10 shall be treated as if they had been committed against an official of the flag State.

When the official of the intervening state is an alleged perpetrator of an offence, he will be prosecuted by his own state. That is the most natural procedure for prosecuting, the more so because the actions of law enforcement officials are governed by the law of the intervening state, the state the official is working for. When the official is a victim of an offence, he should not only be protected by his own law but also by the law of the flag state. That official will enjoy the best possible protection, by either the law of his own state or the law of the flag state.

Restrictions on use of information

The use and transmission of information can be restricted, according to Article 23, which reads:

Article 23 Restriction of use

The flag State may make the authorization referred to in Article 6 subject to the condition that the information or evidence obtained will not, without its prior consent, be used or transmitted by the authorities of the intervening State in respect of investigations or proceedings other than those relating to relevant offences.

Such a safeguard on the use of information is limited to investigations or subsequent proceedings. It does not therefore cover use of information for purposes of so-called pro-active investigation or intelligence purposes. The application of Article 23 of the 1995 Agreement is not mandatory for states. The provisions constitute conditions that the flag state can submit to the intervening state before granting the intervening state's request. The restriction is only related to non-relevant offences. Should investigations or proceedings be related to relevant offences, it would be possible to use the information without the prior consent of the flag state. The restriction of the article is not contrary to the general principle laid down in the 1988 Convention that parties shall cooperate to the fullest extent possible to suppress illicit traffic in narcotic drugs and psychotropic substances by sea.⁸⁸

Proportionality

Article 12(1) of the 1995 Agreement (see above) takes due regard of the principle of proportionality. If an action can be carried out with less risk, it should be. All the alternatives must be taken into account; there should be a balance between the actions necessary to apprehend illicit drug traffickers and the interest of other parties, such as the owners or the operators.

Circumstances on the high seas are relevant to this matter. Bad weather will prevent an intervening state from stopping and boarding a suspect vessel, but that vessel must be directed to a safe place, where it can be searched. That may be in the next port of call or at a location where the bad weather is less disruptive. Safety at sea should be an overriding concern. The master of a vessel is responsible for his crew, passengers, cargo and vessel. He should have a say in the decision of the intervening state when trying to board the vessel, especially when damage can be expected.

⁸⁸ Summary Report of the fourth meeting, PC-NU (93) 8, Strasbourg, 14 May 1993, p. 5.

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Use of force

The use of force examined in this study refers to police powers; that is the power of a state to use physical force in order to coerce suspect persons to obeying that state's laws. In this study, it is the use of force during maritime law enforcement operations to actually coerce compliance with the laws of the coastal state or the intervening state. Maritime law enforcement operations are not related to the use of force among states, the *jus ad bellum*, which is a totally different regime.⁸⁹

Actions of law enforcement officials may be accompanied by the use or threat of force. Force implies the whole spectrum of using force against a suspect vessel and suspect persons, including the use of firearms. Ultimately, the force used can be deadly. Stopping a vessel might mean that the state might be obliged to intimidate the vessel to stop, to pursue it if it does not stop,⁹⁰ and to use any proportional and available means, including the use of firearms to stop it.

Paragraph 1(d) of Article 12 of the 1995 Agreement (see above) states that the use of force must be limited to the minimum necessary. The use of force was not mentioned in the 1988 Convention. The intention of paragraph 1(d) is not to alter the rules of international law.⁹¹ Rather, it was to emphasize the exceptional character of any action of this kind and to serve as a reminder that international law in general provides that the use of force should, as a last resort, be reasonable and proportional in view of the circumstance of the case.⁹²

As is the case with other actions, the use of force shall be governed by the law of the intervening state. The law enforcement officials shall operate under the instructions of the intervening state.

Firearms

The use of force includes the use of firearms, according to paragraph 2 Article 12 of the 1995 Agreement (see above). When firearms are used, it should be immediately reported to the flag state by the intervening state. That means the actual firing of firearms, not the threat of such use. Threat may also be used preventively by the law enforcement officers in order to protect themselves. That is quite a normal and quite-accepted procedure.⁹³

When the use of firearms is allowed, then the possibility of using firearms to disable a vessel, so-called disabling fire, should be taken into consideration. Warning shots and shots across the bow to stop an illicit drug trafficker must be reported to the flag state. Such actions may be used as evidence in court.

Paragraph 3 of Article 12 (see above) states that death and injury, when they occur during the intervention, must be reported to the flag state. Minor injuries are not included in this obligation to report. When the flag state wants to investigate severe accidents, the intervening state has to cooperate fully. It is the opinion of the author that, i.e. law enforcement officers of the

⁸⁹ See for the *jus ad bellum*, Article 2(4) and Article 51 of the UN Charter; here an armed attack is the subject. See also the Fisheries Jurisdiction Case (Spain v. Canada), ICJ, no. 96, 4 December 1998, p. 28-30. See further Gill (1992).

⁹⁰ Summary Report of the second meeting, PC-NU (93) 3, Strasbourg, 11 February 1993, p. 7.

⁹¹ Gilmore (1996), pp. 3-16.

⁹² Council of Europe Doc. CDPC (94), Addendum, 27 June 1994, p. 40.

⁹³ Maritime Drug Law Enforcement Training Guide; Reference Guide for Implementing Article 17, United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, United Nations, New York (1999), p. II.1.

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intervening state should be allowed to testify as witnesses in any enquiry or proceedings in the flag state.

4.3. The 1997 Convention

4.3.1. General

The 1997 Convention,⁹⁴ also known as the 1997 Convention (Naples II) was concluded at Brussels in 1997. The 1997 Convention (Naples II) builds on an earlier convention for custom cooperation, the 1967 Naples Convention.⁹⁵ The 1997 Convention does not deal specifically with the suppression of illicit drug trafficking, but it does contain some relevant articles dealing with border crossing, including borders of the territorial sea, by law enforcement officials of coastal states. Those provisions deal, inter alia, with maritime drug trafficking. That is why those provisions of the 1997 Convention are examined.

The objective of the 1997 Convention is to regulate particular forms of cooperation involving cross-border action for the prevention, investigation and prosecution of specific violations of both the national legislation of member states and community customs regulations. National legislation includes laws prohibiting the import and export of psychotropic substances and narcotic drugs.⁹⁶ The geographical scope of the 1997 Convention is the European continent, but can be extended to other parts of the world.⁹⁷

History

The forerunner of the 1997 Convention, the 1967 Naples Convention, arose as a result of recognizing the cooperation among customs administrations would help to ensure accuracy in collecting customs duties and other import and export charges and improve the effectiveness of preventing, investigating and prosecuting contraventions of customs laws.

The need to develop a new agreement to update the 1967 Naples Convention in the light of the Single Market and the abolition of routine customs controls at internal border was recognized.⁹⁸ Since the Maastricht Treaty entered into force, customs cooperation has become a high priority under Title VI of the Treaty on European Union.

⁹⁴ The Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on Mutual Assistance and Cooperation between Customs Administrations, was signed at Brussels on 18 December 1997, Official Journal C 24, 23 January 1998. The relevant text of this treaty can be found in the Annex to this study. See the Naples II Convention Handbook, Part I, II, II, on www.consilium.eu.int/cms3_fo/showPage.asp?id=988&lang=nl&mode=g (Fall 2006).

⁹⁵ The Convention of the Member States of the European Economic Community on the provision of mutual assistance by their customs authorities, signed at Rome on 7 September 1967.

⁹⁶ Explanatory Report on the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on Mutual Assistance and Cooperation Between Customs Administrations. Text approved by the Council on 28 May 1998, Official Journal C189, 17 June 1998, pp. 0001-0018.

⁹⁷ On 11 January 2002, on the Dutch side of the island of Sint Maarten, France and the Kingdom of the Netherlands (including the Netherlands Antilles) signed a convention on assistance and customs cooperation in the Caribbean region, particularly on the island of Sint Maarten. That convention consists principally of extending the technical provisions of the 1997 Convention to this area.

⁹⁸ Explanatory Report on the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on Mutual Assistance and Cooperation Between Customs Administrations. Text approved by the Council on 28 May 1998, Official Journal C189, 17 June 1998, pp. 0001-0018.

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4.3.2. Some relevant provisions of the 1997 Convention

General

Title IV of the 1997 Convention sets out special forms of cooperation for detecting, investigating and prosecuting customs infringements. One special form of cooperation is hot pursuit across borders, including across borders between waters under the sovereignty of coastal states. Member states may declare some or all of the provisions in certain specified articles of Title IV to be non-binding, including the provision on hot pursuit.⁹⁹

Articles 19 and 20 (see below under Principles), which are relevant for the suppression of illicit drug trafficking, including illicit drug trafficking at sea, are included in Title IV of the treaty. Those provisions are examined in the present section of this study.

Definitions

Article 4 of the 1997 Convention contains a set of definitions of terms used in the convention. The most relevant definitions for this study will be discussed.

Law enforcement agencies are defined in a particular manner. The definition in Article 4(7) reads:

Article 4 Definitions

7. 'Customs administrations': Member States' customs authorities as well as other authorities with jurisdiction for implementing the provisions of this Convention.

Customs administrations are defined as including member states' customs authorities as well as other authorities with jurisdiction for implementing the provisions of this convention. This is an open definition and includes all national law enforcement agencies.

The competences of customs authorities vary widely between member states, and this definition allows other law enforcement agencies (such as the police) to apply the provisions of this convention, where they are competent to act in relation to customs infringements, including illicit drug trafficking, as defined in Article 4(1) and 4(2) of the 1997 Convention, that read:

Article 4 Definitions

1. 'national customs provisions': all laws, regulations and administrative provisions of a Member State the application of which comes wholly or partly within the jurisdiction of the customs administration of the Member State concerning:
 - cross-border traffic in goods subject to bans, restrictions or controls, in particular pursuant to Articles 36 and 223 of the Treaty establishing the European Community,
 - non-harmonized excise duties;
2. 'Community customs provisions':
 - the body of Community provisions and associated implementing provisions governing the import, export, transit and presence of goods traded between Member States and third countries, and between Member States in the case of goods that do not have Community status within the meaning of Article 9(2) of the Treaty establishing the European Community or goods subject to additional controls or investigations for the purposes of establishing their Community status,
 - the body of provisions adopted at Community level under the common agricultural policy and the specific provisions adopted with regard to goods resulting from the processing of agricultural products,

⁹⁹ See for declarations the Official Journal C189, 17 June 1998. See also the, non-official, Naples II Convention Handbook, Part I, II, II, on www.consilium.eu.int/cms3_fo/showPage.asp?id=988&lang=nl&mode=g (Fall 2006).

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- the body of provisions adopted at Community level for harmonized excise duties and for value-added tax on importation together with the national provisions implementing them.

The close relationship among law enforcement agencies such as customs and police is encouraged by the Council of the European Union. The Council is convinced that a high degree of cooperation between police and customs and, where appropriate, other law enforcement agencies at the national level would contribute to increased effectiveness and efficiency in the fight against drug trafficking at the European level.¹⁰⁰

Principles

Article 19 sets out general principles relating to special forms of cooperation. For this study, it is relevant that the article makes clear that the special forms of cross-border cooperation described in Title IV of the 1997 Convention will only be allowed in relation to the enumerated violations including illicit traffic in narcotic drugs and psychotropic substances and precursors.¹⁰¹ Article 19 reads:

Article 19 Principles

1. Customs administrations shall engage in cross-border cooperation in accordance with this Title. They shall provide each other with the necessary assistance in terms of staff and organizational support. Requests for cooperation shall, as a rule, take the form of requests for assistance in accordance with Article 9. In specific cases referred to in this Title, officers of the applicant authority may engage in activities in the territory of the requested State, with the approval of the requested authority. Coordination and planning of cross-border operations shall be the responsibility of the central coordinating units in accordance with Article 5.
2. Cross-border cooperation within the meaning of paragraph 1 shall be permitted for the prevention, investigation and prosecution of infringements in cases of:
 - a. illicit traffic in drugs and psychotropic substances,¹⁰² weapons, munitions, explosive materials, cultural goods, dangerous and toxic waste, nuclear material or materials or equipment intended for the manufacture of atomic, biological and/or chemical weapons (prohibited goods);
 - b. trade in substances listed in Tables I and II of the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances and intended for the illegal manufacture of drugs (precursor substances);¹⁰³
 - c. illegal cross-border commercial trade in taxable goods to evade tax or to obtain unauthorized State payments in connection with the import or export of goods, where the extent of the trade and the related risk to taxes and subsidies is such that the potential financial cost to the budget of the European Communities or the Member States is considerable;
 - d. any other trade in goods prohibited by Community or national rules.
3. The requested authority shall not be obliged to engage in the specific forms of cooperation referred to in this Title if the type of investigation sought is not permitted or not provided for under the national law of the requested Member State. In this case, the applicant authority shall be entitled to refuse, for the same reason, the corresponding type of cross-border cooperation in the reverse case, where it is requested by an authority of the requested Member State.
4. If necessary under the national law of the Member States, the participating authorities shall apply to their judicial authorities for approval of the planned investigations. Where the competent judicial authorities make their approval subject to certain conditions and requirements, the participating authorities shall ensure that those conditions and requirements are observed in the course of the investigations.
5. Where officers of a Member State engage in activities in the territory of another Member State by virtue of this Title and cause damage by their activities, the Member State in whose territory the damage was caused shall make good the damage, in accordance with its national legislation in the same way as it would have done if the damage had been caused by its own officers. That Member State will be reim-

¹⁰⁰ Council Resolution on the drawing up of police/customs agreements in the fight against drugs, 96/C375/01, Official Journal C375, 12 December 1996, pp. 0001-0002.

¹⁰¹ Chemicals that can be used in illicit drug manufacturing. See Article 19(2)(b) of the 1997 Convention. See also Chapter 3.1.2. of this study.

¹⁰² Emphasis added.

¹⁰³ Idem.

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bursed in full by the Member State whose officers have caused the damage for the amounts it has paid to the victims or to other entitled persons or institutions.

6. Without prejudice to the exercise of its rights vis-à-vis third parties and notwithstanding the obligation to make good damages according to the second sentence of paragraph 5, each Member State shall refrain, in the case provided for in the first sentence of paragraph 5, from requesting reimbursement of the amount of damages it has sustained from another Member State.
7. Information obtained by officers during cross-border cooperation provided for in Articles 20 to 24 may be used, in accordance with national law and subject to particular conditions laid down by the competent authorities of the State in which the information was obtained, as evidence by the competent bodies of the Member State receiving the information.
8. In the course of the operations referred to in Articles 20 to 24, officers on mission in the territory of another Member State shall be treated in the same way as officers of that State as regards infringements committed against them or by them.

Hot pursuit

Hot pursuit as known, in general, under custom international law was discussed in Chapter 3.2. of this study. States may not claim jurisdiction over the high seas. In the limited circumstance of a hot pursuit, however, a coastal state that chases into the high seas a foreign flag ship that has transgressed its laws within waters under its sovereignty may enforce its laws on the high seas. That right of hot pursuit ceases as soon as the vessel pursued enters the territorial sea of its own state or of a third state.

The provision in Article 20 of the 1997 Convention differs from the hot pursuit discussed in the previous chapter. Under Article 20, hot pursuit may proceed into the waters under sovereignty of another member state. Article 20 of the 1997 Convention, which relates to hot pursuit, not only on land but also at sea, reads:

Article 20 Hot pursuit

1. Officers of the customs administration of one of the Member States pursuing in their country, an individual observed in the act of committing one of the infringements referred to in Article 19(2) which could give rise to extradition, or participating in such an infringement, shall be authorized to continue pursuit in the territory of another Member State without prior authorization where, given the particular urgency of the situation, it was not possible to notify the competent authorities of the other Member State prior to entry into that territory or where these authorities have been unable to reach the scene in time to take the pursuit. The pursuing officers shall, not later than when they cross the border, contact the competent authorities of the Member State in whose territory the pursuit is to take place. The pursuit shall cease as soon as the Member State in whose territory the pursuit is taking place so requests. At the request of the pursuing officers, the competent authorities of the said Member State shall challenge the pursued person so as to establish his identity or to arrest him. Member States shall inform the depositary of the pursuing officers to whom this provision applies; the depositary shall inform the other Member States.
2. The pursuit shall be carried out in accordance with the following procedures, defined by the declaration provided for in paragraph 6:
 - a. the pursuing officers shall not have the right to apprehend;
 - b. however, if no request to cease the pursuit is made and if the competent authorities of the Member State in whose territory the pursuit is taking place are unable to intervene quickly enough, the pursuing officers may apprehend the person pursued until the officers of the said Member State, who must be informed without delay, are able to establish his identity or arrest him.
3. Pursuit shall be carried out in accordance with paragraphs 1 and 2 in one of the following ways as defined by the declaration provided for in paragraph 6:
 - a. in an area or during a period, as from the crossing of the border, to be established in the declaration;
 - b. without limit in space or time.
4. Pursuit shall be subject to the following general conditions:
 - a. the pursuing officers shall comply with the provisions of this Article and with the law of the Member State in whose territory they are operating; they shall obey the instructions of the competent authorities of the said Member State;

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- b. when the pursuit takes place on the sea, it shall, where it extends to the high sea or the exclusive economic zone, be carried out in conformity with the international law of the sea as reflected in the United Nations Convention on the Law of the Sea, and, when it takes place in the territory of another Member State, it shall be carried out in accordance with the provisions of this Article.¹⁰⁴
 - c. entry into private homes and places not accessible to the public shall be prohibited;
 - d. the pursuing officers shall be easily identifiable, either by their uniform or an armband or by means of accessories fitted to their means of transport; the use of civilian clothes combined with the use of unmarked means of transport without the aforementioned identification is prohibited; the pursuing officers shall at all times be able to prove that they are acting in an official capacity;
 - e. the pursuing officers may carry their service weapons, save (i) where the requested Member State has made a general declaration that weapons may never be carried into its territory or (ii) where specifically decided otherwise by the requested Member State. When officers of another Member State are permitted to carry their service weapons, their use shall be prohibited save in cases of legitimate self-defense;
 - f. once the pursued person has been apprehended as provided for in paragraph 2(b), for the purpose of bringing him before the competent authorities of the Member State in whose territory the pursuit took place he may be subjected only to a security search; handcuffs may be used during his transfer; objects carried by the pursued person may be seized;
 - g. after each operation mentioned in paragraphs 1, 2 and 3, the pursuing officers shall present themselves before the competent authorities of the Member State in whose territory they were operating and shall give an account of their mission; at the request of those authorities, they must remain at their disposal until the circumstances of their action have been adequately elucidated; this condition shall apply even where the pursuit has not resulted in the arrest of the pursued person;
 - h. the authorities of the Member State from which the pursuing officers have come shall, when requested by the authorities of the Member State in whose territory the pursuit took place, assist the enquiry subsequent to the operation in which they took part, including legal proceedings.
5. A person who, following the action provided for in paragraph 2, has been arrested by the competent authorities of the Member State in whose territory the pursuit took place may, whatever his nationality, be held for questioning. The relevant rules of national law shall apply *mutatis mutandis*.
 - a. If the person is not a national of the Member State in whose territory he was arrested, he shall be released no later than six hours after his arrest, not including the hours between midnight and 9 a.m., unless the competent authorities of the said Member State have previously received a request for his provisional arrest for the purposes of extradition in any form.
 6. On signing this convention, each Member State shall make a declaration in which it shall define, on the basis of paragraphs 2, 3 and 4, the procedures for implementing pursuit in its territory. A Member State may at any time replace its declaration by another declaration, provided the latter does not restrict the scope of the former. Each declaration shall be made after consultations with each of the Member States concerned and with a view to obtaining equivalent arrangements in those States.
 7. Member States may, on a bilateral basis, extend the scope of paragraph 1 and adopt additional provisions in implementation of this Article.
 8. When depositing its instruments of adoption of this Convention, a Member State may declare that it is not bound by this Article or by part thereof. Such declaration may be withdrawn at any time.

History of the provision hot pursuit

This convention was originally designed to describe the situation on land, not at sea. Hot pursuit into a foreign territorial sea must be carried out in accordance with the provisions of Article 20 of the 1997 Convention. That article therefore merits a closer look. The text of Article 20(4)(b) was proposed by the Finnish delegation¹⁰⁵ and was discussed during the negotiations. During the discussion, the point was raised that this provision was not in accordance with Article 111(3) LOSC, describing hot pursuit. The Finnish delegation stated that, in the absence of any territorial limitations in the text, it is understood that Article 20(4)(b) was meant to cover hot pursuit over the borders of the territorial sea of another state, not only where the territorial seas of two member states meet each other, but also the entry into the territorial sea of another member state when that occurred from a starting position in a maritime zone be-

¹⁰⁴ Emphasis added.

¹⁰⁵ Document handed out during the meeting of the Customs Cooperation Working Group, 11 November 1997; the document is on file with the author.

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yond the sovereignty of coastal states, i.e. from the high seas or from an EEZ. The Finnish delegation considered that there was no conflict between the proposed provision and the LOSC.

The conclusion that was agreed to was that hot pursuit that started in a territorial sea could be continued in the territorial sea of another member state, even when the pursuit has also traversed EEZ or high seas during the pursuit. Finland wanted this situation explicitly laid down in the convention.¹⁰⁶ Reference to the EEZ was added by the British delegation.¹⁰⁷

Contents of the provision hot pursuit

The interesting part of Article 20(4)(b) is the latter part, which deals with hot pursuit into the territory of another member state. That includes the waters under sovereignty of that state, including the maritime internal waters, the territorial sea, and, when applicable, the archipelagic waters. The article provides that law enforcement officers from one member state shall be empowered without prior authorization, to continue to pursue into another member state's territory, an individual observed in the act of committing or participating in one of the infringements referred to in Article 19(2) of this convention. For the present study, the core of Article 20 is that law enforcement officers are pre-authorized to enter into the territorial waters of another member state when in hot pursuit.

Paragraph 1 of Article 20 states that a pursuit can also continue in situations when it is not possible to notify the other member state. The pursuit may occur without prior authorization, if the urgency of the situation makes prior notification impossible or where the competent authorities of the other member state have been unable to reach the scene in time to take over the pursuit. Apparently when notifying the other member state during a hot pursuit, and given the particular urgency of the situation, authorization is provided automatically. When there is no particularly urgent situation given, notification provides prior authorization.

On the other hand, no later than when they cross the border, the pursuing officers must, contact the competent authorities of the member state in whose territory the pursuit is to take place in, and the latter member state may at any time request that the pursuit be ceased. The pursuing officers have no right to apprehend the individual but may, if not requested to cease hot pursuit, apprehend him in order to hand him over to the competent or suitable authorities of the member state whose territory, including the waters under its sovereignty, the pursuit took place in. The article speaks about individuals. At sea, that term must be extended or transferred into a vessel, the vehicle on which the individual finds himself. From a legal perspective, that is comparable to an automobile driven by an individual suspect in a land situation.

It can be stated that in order to apprehend the suspect individual on board a vessel at sea, the vessel may be stopped, boarded and searched in order to secure the evidence; otherwise it is nearly impossible to apprehend the suspect individual and to take the illicit drugs off the market, which is contrary the Preamble of the 1997 Convention. Disposition of the vessel, cargo and apprehended individual must be in accordance with the instructions of the member state whose borders were crossed during the hot pursuit. That state has preferential jurisdiction in its own territory, including waters under its sovereignty.

¹⁰⁶ EU Document 12030/97, Jur. 373, ENFOCUSTOM 62, 11 November 1997.

¹⁰⁷ EU Document 12353/97, ENFOCUSTOM 65; Report of the COREPER, part 2, 18/19 November 1997.

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Applicable law during hot pursuit

The convention is silent about the law that applies when a foreign law enforcement officer apprehends a suspect individual after a hot pursuit, regardless of whether the suspect is on board a vessel. When foreign law enforcement officers have stopped, boarded and searched a vessel with a suspect individual embarked, and have found evidence of illicit drug trafficking it is therefore, due to the convention, not certain under what law that action has taken place.

It is the opinion of the author that when a person has been arrested by a member state pursuant to Article 20, the relevant rules of its national law are applicable, regardless of the nationality of the arrested person.

Restrictions on hot pursuit

Article 20 states that hot pursuit is restricted inasmuch as the pursuing individual must have been observed in the act of illicit drug trafficking and there must be a particular urgency to the situation. More restrictions to hot pursuit can be made pursuant to Article 20(8).¹⁰⁸

It has to be noted, that this prior authorization is only for coastal states, because it is a continuing of a hot pursuit from the territorial sea of a coastal state into the neighboring territorial sea. That means that land-locked states are, in principle, excluded from that prior authorization.

4.4. The 2002 Draft Convention

4.4.1. General

In 2002, the Kingdom of Spain submitted a proposal to the European Union for a multilateral maritime drug-interdiction treaty, in this study referred to as the 2002 Draft Convention.¹⁰⁹

The Spanish delegation to the Customs Cooperation Working Party presented the 2002 Draft Convention. The draft convention was drawn up on the basis of Article 34 of the Treaty of the European Union. The 2002 Draft Convention complied fully with the objectives and guidelines laid down in the European Union Action Plan to Combat Drugs¹¹⁰ (2000-2004).¹¹¹

In 2004, the European Parliament has submitted its position on the 2002 Draft Convention to the European Council and the European Commission. The European Parliament has suggested a series of amendments.¹¹² The European Parliament did not propose restrictions on the pro-

¹⁰⁸ Denmark made a reservation for Article 20(4)(b). Denmark declares that it accepts the provisions of Article 20, subject to the following conditions: In case of a hot pursuit exercised by the customs authorities of another member state at sea, such pursuit may be extended to Danish territorial waters, only if the competent Danish authorities have received prior notice thereof. See the Official Journal C189, 17 June 1998.

¹⁰⁹ The 2002 Draft Convention Established by the Council in Accordance with Article 34 of the Treaty on European Union, on the Suppression by Customs Administrations of Illicit Drug Trafficking on the High Seas, Council of the European Union, ENFOCUSTOM 2, 5382/02, Brussels, 4 February 2002; Preparatory Acts pursuant to Title VI of the Treaty on European Union, Official Journal C45/06, 19 December 2002, pp. 8-12. The text of this draft convention can be found in the Annex to this study.

¹¹⁰ The European Union Action Plan to Combat Drugs (2000-2004), COM (1999), 239 final, Brussels, 26 May 1999, is the predecessor of the European Action Plan on Drugs (2005-2008) mentioned above. See 9283/00 CORDROGUE 32, 7 June 2000.

¹¹¹ ENFOCUSTOM 5, 5563/02, Brussels, 23 January 2002, p. 3.

¹¹² See the European Parliament legislative resolution on the initiative of the Kingdom of Spain with a view to adopting a Council Act establishing, in accordance with Article 34 of the Treaty on European Union, the Convention on the suppression by customs administrations of illicit drug trafficking on the high seas (5382/2002 – C5-0249/2003 – 2003/0816(CNS)) P5_TA-PROV(2004)0134, Texts Adopted at the Sitting of Tuesday 9 March 2004, Part One, P5-TA-Prov(2004)-3-09, PE 342.484.

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visions of the 2002 Draft Convention; on the contrary, the parliament proposed extending the scope of the agreement.

Context

The 2002 Draft Convention, when concluded as a treaty, may supplement and reinforce application of the LOSC, the 1988 Convention, the 1995 Convention and the 1997 Convention (Naples II) discussed above. The initiator of the 2002 Draft Convention considered these treaties as the international legal framework for maritime drug interdiction.¹¹³ The objective of the initiative of the Kingdom of Spain was to provide the member states with a convention that strengthens cooperation between the European Union's customs administrations in the fight against illicit drug trafficking, by extending the possibilities for immediate action on the high seas, with prior authorization, against a member state's vessels, for which *ad hoc* authorization is at present required.

The 2002 Draft Convention would allow actions to be taken on the high seas against a vessel flying another member state's flag when there are suspicions that it is engaged in illicit drug trafficking, without it being necessary to obtain *ad hoc* authorization of the flag state.

It must be noted that, inasmuch as special cooperation between European Union member states is regulated on land and within the territorial waters of a member state, law enforcement officials of one member state can, in certain cases, take action within the territory, including the waters under sovereignty, of another member state without *ad hoc* authorization.¹¹⁴ It can therefore be seen that the paradox may arise that a state vessel flying the flag of a member state may board, *inter alia*, a vessel flying the flag of another member state within the latter's territorial waters, but may not do so on the high seas, which from the point of view of sovereignty would be less intrusive.

4.4.2. General provisions of the 2002 Draft Convention

General

In this section the general provisions of the 2002 Draft Convention will be examined, including the definitions. At the time of writing, the articles of the 2002 Draft Convention had not yet been subject of consultations or negotiations. Individual comments of states had been requested but not yet received.

Definitions

Article 1 contains a few definitions of terms which are used in the draft convention.

Vessel

The definition in Article 1(a) reads:

‘vessels’ means any structure or floating craft operating on the high seas suitable for the carriage of goods and/or persons, including hovercraft, non-displacement craft and submersibles.

The proposed definition of vessel is broad, it consists of two elements: the structure and the area. It is interesting to see that ‘vessels’ means any structure operating on the high seas; apparently when operating in the waters under sovereignty of a coastal state, it is not embraced by the definition.

¹¹³ ENFOCUSTOM 9, 7096/02, 13 March 2002.

¹¹⁴ See the relevant provisions in the 1997 Convention (Naples II) in Section 4.3. of the study.

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Intervening state

The definition in Article 1(b) reads:

‘intervening state’ means the Member State party to this Convention which has taken action under this Convention against a vessel flying the flag or holding the registration of another Member State party to this Convention.

The term ‘intervening state’ and has been used before, e.g. in the 1995 Agreement.¹¹⁵ In Section 6.2.2. of this study, the ‘right of intervention by another state’ is examined. In this study the term ‘intervening state’ is used as defined and explained in Section 3.1. of this study.

Preferential jurisdiction

The definition in Article 1(c) reads:

‘preferential jurisdiction’ means that where both Member States party to this Convention have concurrent jurisdiction over a relevant offence, the flag State has the right to exercise its own jurisdiction to the exclusion of the jurisdiction of the other State.

The definition states that when more member states have concurrent jurisdiction over a relevant offence on board a vessel, the flag state has the right to exercise its own jurisdiction to the exclusion of the jurisdiction of the other states. That is known as preferential jurisdiction. This provision conforms to the international law of the sea

Customs authorities

The definition in Article 1(e) reads:

‘customs authorities’ mean the authorities responsible for implementing the customs rules and also the other authorities given the responsibility of implementing the provisions of this Convention. To this end, each Member State shall forward to the other Member States and to the Council General Secretariat the list of competent authorities appointed for the purpose of implementing this Convention.

The term ‘customs authorities’ means the authorities responsible for implementing the customs rules and also other authorities given the responsibility of implementing this convention. In this section, these authorities shall be addressed as ‘law enforcement agencies’. The names of those duly authorized law enforcement agencies and competent authorities should be forwarded to the other member states and to the General Secretariat of the Council. It should be noted that customs authorities in the European Union operate minimally if at all on the high seas. Operations at sea are normally carried out by coast guard vessels or warships.

Principles

The principles of the 2002 Draft Convention can be found in the preamble to that agreement. The main principle is to make it possible to take immediate action without prior authorization when a suspect foreign flag vessel is encountered on the high seas. Another principle is that the 2002 Draft Convention shall strengthen the 1967 and the 1997 Conventions (Naples I and II). Besides that the LOSC and the 1988 Convention should be taken into account.

Objective

The objective of the 2002 Draft Convention can be found in Article 2, which reads:

Article 2 Objective

¹¹⁵ See Section 4.2.3. of this study.

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The customs authorities of the Member States of the European Union shall cooperate to the fullest extent possible to suppress illicit trafficking in narcotic drugs and psychotropic substances by sea, in conformity with the International Law of the Sea.

It is the same as the objective of the 1988 Convention, and the text of Article 17(1) of the 1988 Convention has been taken over almost verbatim. It should be noted that the term ‘sea’ is used now rather than the term ‘high seas’ (see also above under Article 1(a)).

Geographical scope

Article 5(2) of the 2002 Draft Convention (see below under Jurisdiction) states that this treaty is applicable outside the territorial waters of a member state. That implies that it is applicable to suspect vessels exercising freedom of navigation in accordance with international law.

4.4.3. Jurisdictional provisions of the 2002 Draft Convention

Jurisdiction

Article 5 of the 2002 Draft Convention, dealing with jurisdiction, reads:

Article 5 Jurisdiction

1. Save as provided for in the Convention on mutual assistance and cooperation between customs administrations, Member States shall exercise sole jurisdiction in relation to offences committed in their territorial and national waters including situations where offences originated or are due to be completed in another Member State.
2. As regards the offences described in Article 3 and committed outside the territorial waters of a Member State, the Member State under whose flag the vessel was flying and on board which or by means of which the offence was committed shall exercise the preferential jurisdiction.

This proposed provision sets out to make it clear which member state has exclusive or preferential jurisdiction over offences committed, depending on whether the vessel in question is within the territorial waters or outside them. Reference is made to the 1997 Convention (Naples II) when the offence has been committed in the territorial waters.

Preferential jurisdiction

Article 8(1) of the 2002 Draft Convention provides that the member state with preferential jurisdiction over the vessel that is subject of action may surrender that jurisdiction in favor of the state taking action, with the aim of facilitating prosecution and subsequent investigations.

Surrender jurisdiction

Article 8 of the 2002 Draft Convention deals with the surrender of jurisdiction, it reads:

Article 8 Surrender of jurisdiction

1. Each Member State shall have preferential jurisdiction over its vessels but may surrender it in favor of the intervening State.
2. Before taking initial proceedings, the intervening State shall forward to the flag State — by fax if possible or other means — a summary of the evidence assembled pertaining to all the relevant offences committed, to which the flag State shall respond within one month stating whether it will exercise its jurisdiction or surrender it and possibly asking for further information should it deem it necessary.
3. If the time limit referred to in paragraph 2 has lapsed without any decision being notified, the flag Member State shall be deemed to have surrendered its jurisdiction.
4. If the State whose flag is being flown by the vessel surrenders its preferential jurisdiction, it shall send the other Member State the information and documents in its possession. Should it decide to exercise its jurisdiction, the other State shall transfer to the preferential State the documents and evidence it has assembled, the *corpus delicti* and the persons detained.
5. Urgent mandatory judicial proceedings to be completed, such as the request to waive the exercise of preferential jurisdiction, shall be governed by the law of the intervening State.

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6. Surrender of detained persons shall not be subject to formal extradition proceedings; an order for detention of the person concerned or an equivalent document shall suffice, provided that the fundamental principles of each Party's legal system are observed. The intervening State shall certify the length of time spent in detention.
7. The length of time for which a person was deprived of his liberty in one of the Member States shall be deducted from the penalty imposed by the State having exercised its jurisdiction.
8. Without prejudice to the general powers of Member States' Ministries of Foreign Affairs, any communication provided for in this Convention shall, as a rule, pass through their Ministries of Justice.

Paragraph 2 of Article 8 states that the flag state must respond within one (1) month as to whether it will exercise its jurisdiction or surrender its jurisdiction to the intervening state. When that time limit has elapsed without any decision being communicated by the flag state, that state shall be deemed to have surrendered its jurisdiction over the vessel.

Paragraph 4 of Article 8 states that the state that does not exercise its jurisdiction shall send all relevant information and documents in its possession to the member state, which exercises its jurisdiction. Persons detained, the *corpus delicti* and all evidence must be transferred to the state exercising its preferential jurisdiction. The article is silent about detaining the vessel and personnel during that time. The period of detention of suspect personnel can conflict with the period of one (1) month of paragraph 2 of Article 8 of the 2002 Draft Convention. Pursuant to Article 7(5) of the 2002 Draft Convention the court of the intervening member state will supervise the rights of the detained personnel.

Authorization (Right of representation)

Article 6 of the 2002 Draft Convention describes the authorization to stop, board and search a suspect vessel of another member state. The article reads:

Article 6 Right of representation

1. Where there are good grounds to suspect that one of the offences referred to in Article 3 has been committed, each Member State shall allow the other Member States a right of representation, which shall give legitimacy to action taken by ships or aircraft belonging to their respective customs administrations against vessels from another Member State.
2. In exercising the right of representation referred to in paragraph 1, official ships or aircraft may give pursuit, stop and board the vessel, examine documents, identify and question the persons on board and inspect the vessel and, should their suspicions be confirmed, seize the drugs, detain the persons alleged to be responsible and escort the vessel to the nearest or most suitable port where it shall be detained prior to being returned, informing — beforehand if possible or immediately afterwards — the State whose flag was being flown by the vessel.
3. This right shall be exercised in accordance with the general provisions of international law.

Right of representation

The core of the 2002 Draft Convention is international maritime drug interdiction with almost no legal restriction, as laid down in Article 6, named 'Right of representation'. This term is not a common one in public international law, therefore it will be defined for the present study.

Representation can be defined as the state or condition of serving as an official delegate or agent. Right of representation can also be defined as the right of a non-flag state party to take measures in relation to a suspect vessel of a flag state party on the high seas without first seeking authorization. The right of representation gives legitimacy to actions taken by a law enforcement vessel of a non-flag state party against suspect vessels of a flag-state member state.

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Prior authorization to take action against suspect vessels of another member state is therefore provided for by this article. The right of representation, described in Article 6 of the 2002 Draft Convention does not permit action against warships or official non-commercial public vessels.

Article 6 speaks about good reasons to suspect that one of the offences referred to in Article 3 of the 2002 Draft Convention has been committed. When these good reasons are present, each member state shall allow the other member states the right of representation.

Applicable law

The 2002 Draft Convention is silent about the applicable law during an intervention. The intervening state, the state that does the actual stopping and searching of the vessel, is the state that triggers the action, based on good grounds for suspicion. Law enforcement officials are the actual intervening persons. It is therefore clear, in the opinion of the author, that the law of the intervening state will govern during the action taken, until the request to waive the exercise of preferential jurisdiction has been officially answered in the negative, at which time the law of the flag state will again apply.

Offences

The offences, whose repression will be facilitated by the 2002 Draft Convention, are specified in Article 3 of the 2002 Draft Convention, which reads:

Article 3 Offences

Each Member State shall adopt the measures necessary to classify as an offence in its national law, and penalize, offences on board vessels or by means of any other craft or floating medium not excluded from the scope of this Convention under Article 4 thereof, involving the possession for distribution, transport, transshipment, storage, sale, manufacture or processing of narcotic drugs or psychotropic substances as defined in the relevant international instruments.

The article also states that those offences must be classified as such and penalties must be provided for in each member state's national legal system. These offences are the possession for distribution, transport, transshipment, storage, sale, manufacture or processing of drugs on board a vessel.

Suspicion

Article 6 (see above under Authorization) deals with suspicion. The term used in the present treaty is 'good grounds to suspect'. This term is not further defined or explained.

Evidence

Paragraph 2 of Article 8 (see above under Surrender jurisdiction) states that the intervening state shall forward to the flag state a summary of the evidence assembled pertaining to all relevant offences committed. According to this summary of evidence the flag state can take the decision whether to surrender its preferential jurisdiction or not.

Extradition

Paragraph 6 of Article 8 (see above under Surrender jurisdiction) is an extradition provision on its own. That paragraph states that detained persons shall not be subjected to formal extradition proceedings. An informal extradition proceeding has been drafted in the paragraph. An order for detention or an equivalent document shall suffice.

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4.4.4. Operational provisions of the 2002 Draft Convention

Communication

Paragraph 8 of Article 8 (see above under surrender jurisdiction) says that, as a rule, the communication provided for in the 2002 Draft Convention, shall pass through the Ministry of Justice. This is mainly communication about surrendering jurisdiction and evidence. The competent authority for this convention is therefore the Ministry of Justice, but other competent authorities can relay the communication that must be passed through the Ministry of Justice.¹¹⁶

Maritime counter-drug cooperation

Paragraph 2 of Article 6 (see above under Authorization) is maritime counter-drug cooperation in optima forma. When a member state has good intelligence with regard to illicit drug trafficking, it can stop, board, search and detain the foreign suspect ship, persons and cargo. Not even prior notification is necessary, let alone authorization. The flag member state may be informed beforehand or shall be informed immediately after the actions taken by the intervening state.

Actions

Article 6 enumerates more actions than only stopping and boarding a suspect vessel. A quite complete list of actions is described in that article. The actions start with the pursuit of the vessel and ends with the escorting of the vessel to the most suitable harbor, including informing the flag state of the actions taken. Other actions are not excluded by the provision in Article 6.

Execution of actions

Paragraph 1 of Article 6 (see above under Authorization) speaks about actions taken by ships belonging to law enforcement agencies. Inasmuch as warships of the national navies do not belong to the law enforcement agencies in the majority of the member states of the European Union, that generally excludes warships. Navy personnel are not, in general, law enforcement officers.

Paragraph 2 of the same article, refers to ‘official ships’, however. Inasmuch as warships are official ships of a member state, warships are included in that reference. The internal inconsistency in this regard in this article will probably be corrected when the first round of consultations takes place.

Safeguards

Article 7 of the 2002 Draft Agreement speaks about safeguards, it reads:

Article 7 Safeguards

1. Where action has been taken pursuant to Article 6, due account shall be taken of the need not to endanger the safety of life at sea or the security of the vessel and cargo, or to prejudice the commercial and legal interests of the flag State or the commercial interests of third parties.
2. In any case, should the action have been taken without adequate grounds for carrying out the operation, the Member State which carried it out shall be held responsible for damage and losses incurred unless the action was taken at the request of the flag State.
3. A vessel's period of detention shall be reduced to the absolute minimum and the vessel returned to the flag State or given the right to free passage as soon as possible.
4. Persons detained shall be guaranteed the same rights as those enjoyed by nationals, especially the right to have an interpreter and be assisted by a lawyer.

¹¹⁶ Articles 7, 9 and 17 of the 1988 Convention.

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5. The period of detention shall be subject to supervision by the courts and to the time limits laid down by the law of the intervening Member State.

In paragraph 1 of Article 7 of the 2002 Draft Convention, a series of safeguards in accordance with Article 17(5) of the 1988 Convention has been set out. In addition, paragraph 2 of Article 7 of the 2002 Draft Convention says that a vessel that has been stopped and searched without adequate grounds for carrying out the operation can claim damages and losses against the intervening state, unless the intervention took place at the request of the flag state, in which case the flag state can be held liable for damage and losses incurred. When no evidence of illicit drug trafficking has been found after a suspect vessel has been searched, the right of free passage must be granted as soon as possible, says paragraph 3 of Article 7.

Paragraph 4 of Article 7 states that personnel detained during the intervening action shall be guaranteed the same rights as those enjoyed by nationals of the intervening state and that an interpreter and lawyer must be available according to the national law of the intervening state. Pursuant to paragraph 5 of Article 7, courts shall supervise the period of detention and the time limits of the detentions are subject to the national law of the intervening state.

4.5. Conclusions

4.5.1. The 1995 Agreement

Comparing the 1995 Agreement with the 1988 Convention it can be stated that, in a number of respects, the 1995 Agreement clearly meets the goal stated in its preamble. The key word in comparing both treaties is progress. Details have been described in a more concrete manner and the clarity including the issues of assistance to flag states, has been addressed. The actions in respect of stateless vessels have been added.

The provisions in Article 3 of the 1995 Agreement are a great step forward to asserting prescriptive criminal jurisdiction to drug-related offences taking place on board both vessels of a foreign flag state and stateless vessels. Progress was also made in the field of communication, the gathering of information, enforcement measures and the execution of the actions.

The 1995 Agreement is a complete and adequate treaty, because maritime counter-drug cooperation is only restricted by the need to obtain authorization of the flag state to search and board one of its ships on the high seas.

4.5.2. The 1997 Convention (Naples II)

In the 1997 Convention, special cooperation among European Union member states is regulated within the waters under their respective sovereignty. It can be stated that Article 20 of the 1997 Convention authorizes law enforcement officers of one member state to continue a hot pursuit of a suspect individual into the territorial sea of another member state without prior approval where urgency demands it. That is quite a step from the point of view of sovereignty.

4.5.3. The 2002 Draft Convention

It should be borne in mind that the 2002 Draft Convention is still a draft, and has not been discussed in detail by the EU-Commission or by the member states of the EU. But due to the far reaching provisions in that draft agreement it has been examined in the present study.

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Where there are grounds to suspect that a drug-related offence has been committed on board a vessel of a member state on the high seas, each member state will allow other member states the right of representation, thereby giving the law enforcement authorities of other member states the right to intercept the suspect vessel. In exercising that right, maritime counter-drug cooperation in optima forma has been achieved, when looked at from the point of view of the law enforcement agencies.

In conclusion, it can be stated that the 2002 Draft Convention, when concluded as a treaty, may constitute cooperation to the fullest extent possible to suppress illicit drug traffic on the high seas, as mentioned in Article 17(1) of the 1988 Convention.

4.5.4. General

The European Union and the Council of Europe are separately involved in (maritime) drug interdiction. The Council of Europe concluded the 1995 Agreement, which has worldwide potential, but beyond the territorial sea of any party. The EU's 1997 Convention is, in general, restricted to waters under sovereignty of the state parties, while the EU's 2002 Draft Convention has not (yet) been concluded. That means that, at the time of writing, there is no overlap among the three treaties examined.

The interrelationship among the treaties examined and the general framework of international law for maritime drug-interdiction will be surveyed in detail in the Chapters 7 and 8 of this study.

CHAPTER 5

MULTILATERAL MARITIME DRUG-INTERDICTION TREATY IN THE CARIBBEAN REGION

5.1. Introduction

In the first section of Chapter 5, the situation in the Caribbean region will be discussed. This situation is relevant as a background for concluding maritime drug-interdiction treaties in that region. Thereafter, the leading multilateral maritime drug-interdiction treaty for the Caribbean region will be examined. The preparations of that treaty will be dealt with, followed by an analysis of and a commentary on the provisions of the treaty. The examined treaty is discussed in terms of general, jurisdictional and operational provisions, pursuant to the provisions described in Section 4.1. of this study. At the end of the present chapter, some conclusions will be drawn, including some general conclusions about multilateral maritime drug-interdiction treaties that were examined and discussed in this and the previous chapter.

5.2. The Caribbean region

5.2.1. Geography

The Caribbean region is strategically located between some of the major drugs-producing countries on the continent of South America and the drugs-consuming countries in Europe and the United States. The vast Caribbean basin is a region of considerable variation with four major languages and a variety of juridical systems. The Caribbean region comprises the Caribbean Sea, Western Atlantic Ocean adjacent to the Caribbean Sea and the land areas located therein.

5.2.2. Regional difficulties

Many governments in the Caribbean region face difficulties in making their criminal justice systems more effective.¹ Many factors, some of which are immutable, and some of which require political solutions, have been identified as being intimately linked with the drug problem in the Caribbean region. The EU Experts Group (see Section 5.3.1. of this study) identified major historical, socio-economic and political factors that inhibit finding a solution to illicit drug trafficking in this region. These factors are, *inter alia*, the geographic and topographic situation, the different legal, governmental and administrative systems, the linguistic diversity and the vulnerable economic situation, democratic imbalance and lack of political will.

In the view of that EU Expert Group, some other weaknesses and gaps have been identified as well. In the field of maritime drug interdiction, a plethora of uncoordinated information/ intelligence-gathering systems, the inability of communicating between islands and even within the same island, and a general lack of trust among law enforcement officials have been indicated.

¹ Report of the Regional Meeting on Drug Control Cooperation in the Caribbean, UNDCP, Barbados, May 1996.

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The legal foundation of maritime drug interdiction was also a matter of concern. The absence of appropriate legislation or deficiencies within existing legislation, a lack of close harmonization and the effective application of such legislation, as well as the inadequacies of various judicial systems have been especially significant in obstructing the successful prosecution of drug offenders.

5.2.3. Maritime conveyance

While the primary market for the drugs is the US mainland and, to a lesser extent, Western Europe, the dangers to the Caribbean island nations whose shores are used to ship, transit, store, stash, or launder the proceeds of drugs are immense.² Cocaine that is manufactured or warehoused in the Caribbean region is subsequently moved via maritime means to the mainland of the United States. In total more than 800 metric tons of cocaine is transshipped annually through the wider Caribbean to the US and Europe.³ In addition, hundreds of tons of cannabis are transported through the Caribbean.

The most frequently encountered method of drug trafficking in the Caribbean region is by go-fast. In the Caribbean region, traffickers choose that type of vessel for more than 80 per cent of shipments. A typical 30-to-50 foot, multi-engine boat that carries 500 to 1,500 kilograms of cocaine in each trip, and often outrun law enforcement vessels.⁴ The close proximity of some countries, such as Venezuela to Trinidad and to the islands of Curacao, Aruba and Bonaire, or the British Virgin Islands to the US Virgin Islands and Puerto Rico allows the transport of drugs from one country, and therefore jurisdiction, to another to be completed by go-fast in a matter of minutes.⁵ Small local fishing boats and pleasure vessels are used for illicit drug trafficking as well. Another technique of illicit drug trafficking is the system of airdrops. A small airplane drops floatable packages of illicit drugs close to small waiting boats, which pick-up those packages and transport them to the island in order to transfer or stash them.

The complexity of the problem of illicit drug trafficking needs inter- and intra-island cooperation and coordination. To give maritime drug interdiction an international legal foundation, it is necessary to implement Article 17 of the 1988 Convention for the Caribbean region. This is what the 2003 Agreement intends to do.

5.3. Development of the 2003 Agreement

5.3.1. Preparations for the 2003 Agreement

History

It was only in the 1980s and early 1990s that the international community as such effectively started to understand and react to the threat of organized crime and its relationship with illegal drug trafficking. Until then, most countries in the Caribbean region had been combating the drug problem on a national basis. In its 1992 Report, the West Indian Commission, the body tasked to consider the future of the Caribbean, stated:

² Maritime Counter-Drug Cooperation in the Caribbean (Maritime Study), Barbados, 15 May 1997, p. 2-5.

³ Data from the Joint Interagency Task Force – East (JIATF-E), Key West, Florida; this is a United States' governmental organization for suppressing illicit drug trafficking.

⁴ Statement of the Commander of the Coast Guard Atlantic Area on the Drug Smuggling Problem in the Caribbean before the Subcommittee on Criminal Justice Oversight Committee on the Judiciary United States Senate, 09 May 2000.

⁵ In the north-east part of the Caribbean region several hubs of bordering territorial seas exist.

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“Nothing poses greater threats to civil society in CARICOM⁶ countries than the drug problem. The damage to democratic society itself from the drug problem is as great a menace as any dictator’s repression. CARICOM countries are threatened today by an onslaught from illegal drugs as crushing as any military repression.”

Regional Security System

The Regional Security System (RSS), a cooperation of seven Eastern Caribbean States, played two important roles during the preparation of the 2003 Agreement; a role as model and a role as initiator. The RSS is therefore discussed in detail in this section. The RSS is designed as a framework for security cooperation in the Eastern Caribbean. The goal of the RSS as it relates to the drug problem is to rid the Caribbean of the problem, or indeed hinder the use of the islands as transshipment points of drug trafficking.

The Regional Security System was created out of a need for collective response to security threats, that were impacting on the stability of the region in the late 1970s and early 1980s. In October 1982, four members of the Organization of Eastern Caribbean States, namely Antigua and Barbuda, Dominica, St. Lucia and St. Vincent and the Grenadines signed a Memorandum of Understanding (MOU) with Barbados to provide for “mutual assistance on request”. St. Kitts and Nevis joined after gaining independence in September 1983 and Grenada in January 1985. The MOU was updated in 1992 and the RSS acquired juridical status in March 1996 under a treaty that was signed at St. Georges, Grenada.⁷ The Council of Ministers of the member states is the supreme decision-making body of the RSS.

The 1982 MOU, although including also traditional military tasks, already emphasized the need for military assistance relating to civilian tasks, such as, *inter alia*, combating illicit drug trafficking. The 1992 version of the MOU updates the promotion of cooperation among member states in national emergencies, search and rescue and law enforcement, including maritime drug interdiction. Of direct relevance to maritime drug interdiction, the parties to the RSS treaty express their commitment to enact legislation by which law enforcement officials of one member state are bestowed the same duty and privileges as officials of the state in which they are operating.

The RSS Treaty

In the field of maritime drug interdiction, some interesting provisions can be found in the RSS Treaty. During maritime counter-drugs operations, coast guard vessels of other member states can be deemed to be vessels of the member state in whose territorial sea the operations are taking place. The RSS includes a regional coast guard component, a system of pooling resources, operating in a single jurisdiction: the jurisdiction of all member states together. Article 14 Treaty Establishing the Regional Security System deals about coast guards, it reads:

Article 14 Coast Guard

1. Coast guard vessels of Member States shall, during operations on behalf of the System or training exercises arranged by the System, fly the RSS flag in addition to their national flags; and during such opera-

⁶ Caribbean Community (CARICOM) was established by the Treaty of Chaguaramas on 4 July 1973 at Chaguaramas, Trinidad and Tobago, and came into force on 1 August 1973, text available on: www.caricom.org/jsp/community/original_treaty-text.pdf (visited Fall 2006). The objectives are economic cooperation through the Caribbean Single Market and Economy, coordination of foreign policy among the independent member states and common services and cooperation in functional matters such as health, education and culture.

⁷ Treaty Establishing the Regional Security System (1996), signed at Grenada on 5 March 1996, text available on: www.state.gov/t/ac/csbm/rd/4367.htm (visited Fall 2006).

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tions or training exercises, personnel of the vessels' complement shall wear RSS badges of rank or other designation appropriate to their appointments as set out in the Annex to this Treaty.

2. A coast guard vessel referred to in paragraph (1) shall, during such operations or training exercises, be deemed to be a vessel of the Member State in whose territorial sea or exclusive economic zone the operations or training exercises are taking place.

This provision allows the units of the RSS acting together and give the RSS the capability of encountering illicit drug traffickers threats that might overwhelm individuals state. Joint planning and cooperation greatly enhances the effectiveness of the organization. Furthermore by pooling scarce manpower and equipment resources, economic savings are achieved while ensuring improved maritime drug interdiction.

The member states of the RSS have the right of hot pursuit within each other's territorial sea. This provision is laid down in Article 4 Treaty Establishing the Regional Security System reading:

Article 4 Purposes and Functions of the RSS

1. The purposes and functions of the RSS are to promote co-operation among the Member States in the prevention and interdiction of traffic in illegal narcotic drugs, in national emergencies, search and rescue, immigration control, fisheries protection, customs and excise control maritime policing duties, natural and other disasters, pollution control, combating threats to national security, the prevention of smuggling, and in the protection of off-shore installations and exclusive economic zones.
2. In order to achieve the purposes of this Treaty, the Member States
 - a. separately and jointly shall, by means of self-help and mutual aid, maintain and develop their individual and collective capacity to assist one another, and
 - b. agree that service personnel of one Member State taking part in operations in another Member State or in the territorial sea or exclusive economic zone of that other Member State shall have all the rights, powers, duties, privileges and immunities conferred on service personnel of the second mentioned Member State by the laws of that State.
3. The interests of one Member State are the interests of the others; and accordingly the Member States shall have the right of "hot-pursuit"⁸ within each other's territorial sea and exclusive economic zone.
4. The Member States shall consult together whenever, in the opinion of any of them, the democratic institutions territorial integrity, political independence or security of any of them is threatened.
5. The Member States agree that an armed attack against one of them by a third State or from any other source is an armed attack against them all, and consequently agree that in the event of such an attack, each of them, in the exercise of the inherent right of individual or collective self defense recognized by Article 51 of the Charter of the United Nations, will determine the measures to be taken to assist the State so attacked by taking forthwith, individually or collectively, any necessary action, including the use of armed force, to restore and maintain the peace and security of the Member State.
6. Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council of the United Nations. Such measures shall be terminated when the security Council has taken the measures necessary to secure and maintain peace in the Member State.

This right of hot pursuit is an addition to the provisions of Article 111 LOSC, which forbids continuing a hot pursuit into a foreign territorial sea.⁹ That provision about hot pursuit in the RSS Treaty is very worthwhile for maritime drug interdiction, because the illicit drug traffickers cannot flee anymore into a relatively safe territorial sea of another member state.

For specific types of training and operations, the jurisdictions of seven separate island states have been assimilated into a single RSS jurisdiction, which also has its own flag that is flown during training and operations of the RSS. Article 11 Treaty Establishing the Regional Security System, dealing with jurisdiction, reads:

⁸ Emphasis added.

⁹ See Section 3.2.9: hot pursuit under the LOSC. See also Section 4.3.2: hot pursuit under the 1997 Convention.

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Article 11 Jurisdiction

1. When service personnel of one Member State are within the jurisdiction of another Member State, they shall respect the laws, customs and traditions of that other Member State.
2. The Service Authorities of one Member State have, within another Member State or on board any vessel or aircraft of that other State, the right to exercise all such criminal and disciplinary jurisdiction over the service personnel of the first-mentioned Member State, as are conferred on the Service Authorities of that State by the laws of that State, including the right to repatriate personnel to their own state for trial and sentencing.
3. The Courts of one Member State have jurisdiction over service personnel of another Member State with respect to offences that are committed by the service personnel of that other Member State within the first-mentioned Member State and punishable by the law of the first-mentioned member State.
4. Where the Courts of one Member State and the Service Authorities of another member State have the right to exercise jurisdiction in respect of an offence, the Service Authorities of that other Member State have the primary right to exercise jurisdiction if:
 - a. the offence is committed by a member of the service personnel of that other member State against the property or security of that other Member State or against the property or person of another member of the service personnel, or
 - b. the offence arises out of an act or omission occurring in the course of official duty by a member of the service personnel of that other Member State.
5. In any case other than those mentioned in paragraphs (2), (3) and (4), the Member State within which the offence is committed has the primary right to exercise jurisdiction, but where the State with the primary right decides not to exercise jurisdiction, it shall notify the appropriate authorities of the other State as soon as practicable.

It can be stated that although the RSS Treaty was not established as a multilateral maritime drug-interdiction treaty, it can be considered as a very big step forward in the legal aspects of maritime drug interdiction. Seven individual states combine their assets and even more important from a legal point of view, their individual prescriptive and enforcement jurisdiction into one large jurisdiction.

De facto

At present, as opposed to the fairly developed disaster relief system, the RSS does not have a standing operational capability with regard to maritime drug interdiction. Because of capability limitations of member states, the RSS has had to rely on foreign material and political support. The original foreign benefactors were the United States, Great-Britain, and Canada, operating on a bilateral basis with member countries. But given the geopolitical changes, budget pressures, and other factors identified earlier, the level of support has diminished over the years. At the same time, RSS member states themselves have been experiencing economic difficulties, preventing them from fulfilling their financial obligations to the RSS, thereby aggravating the dependency problem. The combined effect of this reduced foreign support and the delinquency of member states can only serve to compromise the operational readiness of the RSS, and consequently, its ability to rise to the challenge of helping to cope with threats and apprehensions in the region.¹⁰

The US has concluded a bilateral Shiprider Agreement¹¹ with all seven member states of the RSS. A protocol to amend and update the Shiprider Agreements was submitted to each state in April 2003. The protocol would permit a law official from any RSS member state aboard a US law enforcement vessel to authorize boarding and searching of any suspect vessel in the

¹⁰ RSS Staff, Roles of the Regional Security System in the East Caribbean (1986), pp. 5-7; Griffith (1992), pp. 465-75.

¹¹ See Section 6.3.4. of this study.

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waters under sovereignty of any RSS member state. Only Antigua and Barbuda has signed the protocol.¹²

Due to those misgivings, the regional coast guard incorporated under the aegis of the RSS remains in many respects subordinate to the national coast guards. Each island has expressed the desire to retain national discretion over how the regional coast guard should be used.¹³

RSS and the 2003 Agreement

The relevance of the RSS to the establishment of the 2003 Agreement is the fact that the RSS was requested to develop a plan for a framework to oversee all the maritime aspects of drug interdiction with respect to the development of sub-regional coast guards. One of the aspects was the establishment of a multilateral maritime drug-interdiction agreement. The Barbados Plan of Action (see below) says that in addition to continuing work on the harmonization of laws, the development of a comprehensive legal framework should be developed covering the entire Caribbean region, similar to what is already being done under the Regional Security System, has been proposed.

Start of the 2003 Agreement

In November 1995, aware of the menace posed by drug trafficking to his nation, the Prime Minister of Barbados called upon the United Kingdom to augment assistance to the Caribbean region. The government of the United Kingdom wrote a letter echoing the concerns of the Prime Minister of Barbados to the Heads of Government of the European Union, suggesting that the European Union increase its assistance to the Caribbean. The Netherlands reacted positively, stressing the fact that France, the United Kingdom and the Netherlands had special responsibilities for their dependent territories and associated states in respect to the Caribbean and should act in concert with the United States.

Reports, plans and studies

Meeting in Madrid in December 1995, the Heads of Government of the European Union decided to call for two reports,¹⁴ one report for the Latin America area and the other for the Caribbean region. The second report, from a group of experts dispatched to the Caribbean region, is a concise but comprehensive report on drug control in the region.¹⁵ Among other issues, the latter report, issued in April 1996, addressed law enforcement, drug information and intelligence. The principal conclusion was that there was a lack of cooperation in all respects among states. That lack of cooperation and coordination, exacerbated by sensitivities over national sovereignty, corruption, an absence of trust, an inability or unwillingness to share information with one another, the lack of harmonization in legislation and ineffective mechanisms, was being exploited effectively by the drug traffickers to their benefit.¹⁶

The lack of cooperation between the Caribbean region and the states with special interest in the region became the primary concern for representatives at the regional meeting sponsored by UNDCP/EU held in May 1996 at Bridgetown, Barbados.¹⁷ That Regional Meeting on

¹² See the International Narcotics Control Strategy Report 2003, Bureau for International Narcotics and Law Enforcement Affairs, Washington, March 2004, p. 21.

¹³ Morris (1994), p. 32.

¹⁴ Madrid European Council, 15 and 16 December 1995, nr. 00400/95.

¹⁵ The Caribbean and the Drug Problem, Report EU Experts Group, April 1996, 6879/3/96, DG H II, JV/dp.

¹⁶ The Caribbean and the Drug Problem, Report EU Experts Group, April 1996, 6879/3/96, DG H II, JV/dp, p. 51.

¹⁷ See the Report of the Regional Meeting on Drug Control Cooperation in the Caribbean, UNDCP, Barbados, May, 1996.

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Drug Control and Coordination in the Caribbean recognized that trafficking of illicit drugs from South America to Europe and North America was the main problem facing the Caribbean region. In addition, that meeting considered that the transit of illicit drugs was undermining and threatening the democracy that is fundamental to the maintenance of peace and security in the region. To counter that threat, the meeting agreed to the Barbados Plan of Action,¹⁸ which would incorporate the findings and recommendations from its deliberations. The Barbados Plan of Action was launched in May 1996.

The European Union, in conjunction with Caribbean partners and the United States, subsequently carried out a number of feasibility studies in the area of law enforcement to implement the Barbados Plan of Action. Feasibility studies were completed in the areas of regional maritime cooperation,¹⁹ called the Maritime Study, and in the area of secure communication and intelligence.²⁰ More studies were completed, but they are not relevant for the present study, because they did not examine subjects related to maritime drug interdiction.

In accordance with the Barbados Plan of Action, it was recognized that while numerous bilateral agreements²¹ had been concluded in the region, a regional approach to maritime cooperation was essential to enhance the effectiveness of interdiction efforts. In addition, it was felt that bilateral agreements in the region should be merged into a regional agreement.²²

It was also recognized that mere presence at sea is not a replacement for effective maritime cooperation and that particular consideration should be given to the critical role of international inter-agency cooperation. The need to move beyond mere *ad hoc* counter-drug interdiction was the primary motive for embarking on regional maritime cooperation in the Caribbean. It is, however, evident that other fields of law enforcement would also benefit from the cooperative and coordinated arrangements developed for drug interdiction.

The Maritime Study of 1997 set the stage for the progressive development of effective maritime counter-drug cooperation in the Caribbean. In that Maritime Study, the concept of the consolidation of numerous bilateral agreements into a regional agreement was supported. The diversity in legal systems and existing law gaps in the international arrangements in the region led to the feeling that a comprehensive regional agreement, in respect of cooperation in suppressing illicit drug trafficking by sea, based on the 1988 Convention, should be adopted as soon as possible.

Consultations and negotiations

In an effort to move from the conceptual level, the Maritime Study concluded a draft agreement.²³ That draft agreement was the first concrete step on the road to the 2003 Agreement.²⁴ In Santo Domingo, Dominican Republic, the second UNDCP Regional Meeting on Drug Control Coordination in the Caribbean to Review the Progress made in the Implementation of

¹⁸ Plan of Action for Drug Control Coordination and Cooperation in the Caribbean, in the Report of the Regional Meeting on Drug Control Cooperation in the Caribbean, UNDCP, Barbados, May 1996.

¹⁹ The Maritime Study, Barbados, 15 May 1997.

²⁰ Secure Communications for the Exchange of Intelligence, Barbados, 15 May 1997.

²¹ The US Shipriders Agreements, see Section 6.3.4. of this study.

²² Report of the Secretary General of the United Nations, A/51/645, 1 November 1996, para 267.

²³ Annex G to the Maritime Study (1997).

²⁴ The Agreement Concerning Cooperation in Suppressing Illicit Maritime and Aeronautical Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area, in this study referred to as the 2003 Agreement, was signed at San José (Costa Rica) on 10 April 2003, Trb. 2003-82, 2004-54. The agreement can be found in the Annex to this study.

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the Barbados Plan of Action was held on 8-9 December 1997.²⁵ That meeting endorsed the Maritime Study and one of the recommendations of the meeting was to encourage the adoption of the draft agreement. At the meeting, all participating nations were specially invited to support the initiative of the Netherlands,²⁶ in close cooperation with the Netherlands Antilles and Aruba, to organize consultations to assess the prospects of reaching consensus on that draft agreement implementing Article 17 of the 1988 Convention.

In March 1998, on Curacao, the Netherlands in partnership with the Netherlands Antilles and Aruba, hosted regional consultations among Caribbean partners and also including France, Canada, the United Kingdom and the United States, on the viability and eventual adoption of the proposed instrument. During that first round of consultations, several states indicated that some of the provisions of the draft agreement needed further clarification and, perhaps, amendment to be compatible with existing national legislations.

In October 1999, a second regional consultation meeting was held on Aruba. During that meeting, the participants were given the opportunity to elaborate even further and to discuss the comments received after the Curacao meeting and shared national and regional experiences with maritime interdiction of drugs in the recent past.

In 2000, two sub-regional consultation meetings were held, one on Martinique in May and one in Santo Domingo, Dominican Republic in September. Those sub-regional conferences provided the opportunity for legal experts and maritime counter-drug officials to meet and discuss the revision of the draft agreement article by article. That approach provided the delegates with a forum to examine measures required to reach consensus for the implementation of the agreement with regard to the legal and operational practicality.

A preparatory meeting was held on the island of Curacao in November 2000. The first round of negotiations was held in San Jose, Costa Rica from 4 to 8 November 2001. That state became a co-sponsor of the draft agreement, along with the Kingdom of the Netherlands. A revised text of the agreement was prepared, based on the discussion that took place during the series of consultations and the preparatory meeting, and on comments received during bilateral discussions. The second round of negotiations took place on Aruba in April 2002. The conference was chaired jointly by the Kingdom of the Netherlands, Costa Rica and CARICOM.

Throughout the process, additional bilateral meetings were held with several countries, organizations and agencies, including UNDCP, CARICOM,²⁷ Caribbean Customs Law Enforcement Committee (CCLEC), and the Association of Caribbean Chiefs of Police (ACCP). Another recommendation of the Maritime Study, in addition to the recommendation to enter into a multilateral maritime drug-interdiction treaty, was the establishment of a Project Management Office (PMO) in the Caribbean region,²⁸ in order, *inter alia*, to encourage and advocate the draft agreement.

²⁵ See the Santo Domingo Declaration against Drugs, UNDCP, Santo Domingo, 9 December 1997.

²⁶ The draft agreement was drawn up by the US and the Dutch member of the working group that produced the Maritime Study (1997). The Ministry of Defense of the Kingdom of the Netherlands adopted this draft agreement in order to bring it forward.

²⁷ A CARICOM working group has commented the draft agreement. This comment was not officially published; it is on file with the author.

²⁸ The PMO operated from 1 January 1998 until 1 January 2002. The PMO was staffed by senior naval officers and law enforcement officials from several nations.

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The last round of negotiations was held during a conference at San Jose, Costa Rica in the spring of 2003. The draft text was still subject to changes. At the end of the conference the 2003 Agreement was adopted, it was opened for signature on 10 April 2003. Eight states signed the agreement on that day. Later on, other states signed the treaty. For a list of participants see the Annex to Chapter 8 of this study.

Parallel development of plans

In addition to the Barbados Plan of Action, another plan was concluded in the area of maritime counter-drug cooperation. US President Clinton signed the Caribbean/USA Bridgetown Plan of Action in May 1997.²⁹ That plan recognized the need for greater cooperation among security forces in the Caribbean region. It also recognized that successful mechanisms, strategies, initiatives and working cooperation already exist. It noted with satisfaction the commitment to the RSS and the cooperation between the Caribbean region and the European Union.

The plan further stipulated that the Caribbean states, through CARICOM, would work towards the conclusion of regional agreements in specified areas of mutual interest. The numerous drugs-related bilateral cooperation agreements were to be consolidated into a regional agreement that would include all Caribbean states, as well as the countries with regional interests.

One of the objectives of the 2003 Agreement was to complement existing bilateral or (sub) regional agreements and arrangements.³⁰

5.4. Contents of the 2003 Agreement

5.4.1. General

The first draft agreement can be found in the Maritime Study under Annex G. The comments and proposed changes are derived from various non-papers, comments and documents that have not yet been published, and verbal comments during the conferences, sub-regional and bilateral meetings.³¹ In addition to those documents the personal notes of the author, who participated as a member of the Netherlands' delegation during the majority of the meetings and conferences, are used.

The 2003 Agreement is an implementation of Article 17 of the 1988 Convention.³² The phrase 'desiring to increase their cooperation to the fullest extent in the suppression of illicit traffic by sea in accordance with the 1982 United Nations Convention on the Law of the Sea and in respect of the principle of rights and freedom and overflight it asserts', is a reference to Article 17(1) of the 1988 Convention and Article 87(1)(a)(b) LOSC. A delegation proposed a reference to the Barbados Plan of Action in the preamble. That proposal was supported by a CARICOM working group. The UNDCP representative offered what became the present text as an alternative: the recalling to the Regional Meeting held on Barbados in 1996, to trace the origins of the 2003 Agreement. Other delegations supported this proposal.

Inasmuch as the United States had vetoed the entry of one of the Caribbean island states to the Caribbean Customs Law Enforcement Council (CCLEC) a reference to that forum was not appreciated by all delegations.

²⁹ Caribbean/United States Summit, Partnership for Prosperity and Security in the Caribbean, Bridgetown Declaration of Principles, Bridgetown, Barbados, 10 May 1997.

³⁰ Summary of Consultations, Curacao, 28 March 1998.

³¹ Documents are on archive with the author of this study.

³² The preamble of the 2003 Agreement.

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5.4.2. General provisions of the 2003 Agreement

Definitions

Article 1 of the 2003 Agreement contains more than ten definitions. One may reasonably assume that the definitions not mentioned in the agreement are the same as the definitions in the 1988 Convention. Terms such as ‘narcotic drugs and psychotropic substances’ cannot be interpreted differently than the definitions of the 1988 Convention. Article 1(a)(b) of the 2003 Agreement, containing these definitions, refers directly to the 1988 Convention.

Law enforcement

Article 1 defines some law enforcement entities, it reads:

- a. ‘law enforcement authority’ means the competent law enforcement entity or entities identified to the Depositary by each Party which has responsibility for carrying out the maritime or air law enforcement functions of that Party pursuant to this Agreement.
- b. ‘law enforcement officials’ means the uniformed and other clearly identifiable members of the law enforcement authority of each Party.
- c. ‘law enforcement vessels’ means vessels clearly marked and identifiable as being on government service, used for law enforcement purposes and duly authorized to that effect, including any boat and aircraft embarked on such vessels, aboard which law enforcement officials are embarked.

The definitions of ‘law enforcement authority’, ‘law enforcement officials’ and ‘law enforcement vessels’ are an addition to the 1988 Convention. Those definitions are the implementation of Article 17(10) of the 1988 Convention, which states that actions pursuant to Article 10(4) of the 1988 Convention shall be carried out only by warships, or other ships clearly marked and identifiable as being on government service and authorized to that effect.

Waters of a party

Article 1(h) defines the waters of a party, it reads:

- h. ‘waters of a Party’ means the territorial sea and the archipelagic waters of that Party.

The draft text of the agreement also defined the internal waters as the waters of a party. Some delegations expressed their concern about the inclusion of maritime internal waters under this definition, particularly rivers, since it would open the entire landmass of the South American continent to operations under this agreement.

Caribbean Area

The Caribbean Area is defined in Article 1(j), which reads:

- j. ‘Caribbean area’ means the Gulf of Mexico, the Caribbean Sea and the Atlantic Ocean west of longitude 45-degrees West, north of latitude 0-degrees (the Equator) and south of latitude 30-degrees North, with the exception of the territorial sea of States not Party to this Agreement.

In the draft of this agreement the term ‘in the Caribbean area’ was used, this has been changed into ‘in and over the waters of the Caribbean area’. Several delegations expressed concern that the draft formulation of ‘in the Caribbean area’ might be interpreted to include both waters and landmasses. These delegations urged that the scope of the agreement be more specifically set out so that it clearly excludes landmasses. During the consultations the definition of the Caribbean Area became more specified. The definition is now concrete with longitudinal and latitudinal coordinates.

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It must be noted that countries located in Central America and South America are parties to this agreement as well, inasmuch they constitute the western borders of the Caribbean Area. It is clear from the map that the present agreement is applicable to the EEZ of states. A request by a South American state to change the eastern border at 45 degrees West to 55 degrees West to exclude its EEZ was not endorsed.

Suspect vessel

The definition of suspect vessel can be found in Article 1(l) that reads:

1. 'suspect vessel' means any vessel in respect of which there are reasonable grounds to suspect that it is engaged in illicit traffic.

This definition conforms to the definition in other multilateral maritime drug-interdiction treaties.

Principles

Some of the principles can be found in the Preamble of the 2003 Agreement, others in Article 11 of the treaty.

The CARICOM delegation proposed an addition to the preamble of the draft agreement: 'on the basis of mutual respect for sovereign equality and territorial integrity of states'. That phrase can also be found in some of the US Shiprider Agreements.³³

In international law the concept of equality is inferred from the doctrine of sovereignty. It implies, *inter alia*, not equality of power but legal equality - equality under the law and before the law - applicable to all states, great or small. Sovereignty and equality of states represent the basic constitutional doctrine of the law of nations.³⁴ The proposed addition was not adopted. It was changed into: 'in a manner consistent with the principles of sovereignty, equality and territorial integrity of states including non-intervention in the domestic affairs of other states'.

Article 11 of the 2003 Agreement speaks about general principles, it reads:

Article 11 General principles

1. Law enforcement operations to suppress illicit traffic in and over the waters of a Party are subject to the authority of that Party.
2. No Party shall conduct law enforcement operations to suppress illicit traffic in the waters or air space of any other Party without the authorization of that other Party, granted pursuant to this Agreement or according to its domestic legal system. A request for such operations shall be decided upon expeditiously. The authorization may be subject to directions and conditions that shall be respected by the Party conducting the operations.
3. Law enforcement operations to suppress illicit traffic in and over the waters of a Party shall be carried out by, or under the direction of, the law enforcement authorities of that Party.
4. Nothing in this Agreement shall be construed as authorizing a law enforcement vessel, or law enforcement aircraft of one Party, independently to patrol within the waters or air space of any other Party.

Paragraph 1 of Article 11 is a restatement of customary international law. The draft text of this article was offered by a CARICOM working group. The final text can also be found in the US bilateral Shiprider Agreements.³⁵ Only the coastal state shall conduct operations to sup-

³³ See the Jamaica-US Shiprider Agreement's preamble discussed in Section 6.3.4. of this study.

³⁴ Brownlie (1988), p. 289.

³⁵ See Section 6.3.4. of this study.

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press illicit traffic in waters under its sovereignty. Those operations shall be carried out by or under the direction of, the law enforcement officials of the coastal state, and under its domestic law and regulations. Paragraph 4 of that article explicitly prohibits the independent patrolling by a foreign law enforcement vessel within the waters of a coastal state. Article 11 is an expression of the sovereignty of the coastal state as protection against the intrusion of a foreign state under the excuse of suppressing illicit drug trafficking.

Legal foundation for boardings

Article 17 states quite clearly that boarding under international law is not limited by the present agreement. The article reads:

Article 17 Other boardings under international law

Except as expressly provided herein, this Agreement does not apply to or limit boarding of vessels, conducted by any Party in accordance with international law, seaward of any State's territorial sea, whether based, *inter alia*³⁶, on the right of visit, the rendering of assistance to persons, vessels, and property in distress or peril, or an authorization from the flag State to take law enforcement action.

The boarding of vessels pursuant to the Convention on the High Seas, the LOSC and other customary international law can still take place.

It must be noted that, the first draft of the 2003 Agreement, included the so-called 'consensual boarding', that is boarding with the consent of the vessel's master.³⁷ Some delegations proposed deleting those words, because the vessel's master, who is not an official representative of the state his vessel is registered in, does not possess the authority to consent to enforcement action. Many Caribbean states supported this proposal, but the term '*inter alia*' remains in the final text of article 17.

Objective

The objective of the 2003 Agreement is maritime counter-drug cooperation in order to suppress illicit drug trafficking in and over the waters of the Caribbean area. The objectives are laid down in Article 2, which reads:

Article 2 Objectives

The Parties shall co-operate to the fullest extent possible in combating illicit maritime and air traffic in and over the waters of the Caribbean area, consistent with available law enforcement resources of the Parties and related priorities, in conformity with the international law of the sea and applicable agreements, with a view to ensuring that suspect vessels and suspect aircraft are detected, identified, continuously monitored, and where evidence of involvement in illicit traffic is found, suspect vessels are detained for appropriate law enforcement action by the responsible law enforcement authorities.

Although Article 3 of the 2003 Agreement states that the parties shall take the necessary steps to meet the objectives of the 2003 Agreement, that mandatory rule becomes less than mandatory due to the fact that that step must be taken within the limitations of available resources. Each party decides for itself whether resources are available.

Geographical scope

The geographical scope of the 2003 Agreement is limited by the definition discussed above. This is a pure Caribbean scope. A difference can be made for the geographical scope of maritime drug interdiction in waters under sovereignty of a coastal state and in waters seaward of the territorial sea.

³⁶ Emphasis added.

³⁷ See for consensual boarding Section 8.6.3. of this study.

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Maritime drug interdiction in waters under the sovereignty of a coastal state

The provisions under the title 'Law Enforcement Operations in and over Territorial Waters' are supposed to apply to the waters under the sovereignty of a coastal state. Those waters are the territorial sea, and the archipelagic waters if applicable, thus excluding the maritime internal waters, unless the application of those provisions has been extended to the maritime internal waters in accordance with Article 15 of the 2003 Agreement.

The participants recognized the importance of preventing certain areas inside the baseline and immediately adjacent to the territorial sea from becoming safe havens for illicit drug traffickers. It was therefore decided to include an optional clause that enables parties to indicate that the agreement also applies to internal waters as specified under their declarations. It must be borne in mind that foreign law enforcement vessels may be authorized to enforce jurisdiction in the waters of another party. Those waters may therefore, *inter alia*, include the maritime internal waters.

Parties may indicate to the Depositary that they have extended the application of the present agreement to the internal waters directly adjacent to the territorial sea, or the archipelagic waters, as specified by the parties.³⁸ That provision can be important for the large maritime rivers on the shoulder of the South America continent.

Maritime drug interdiction seaward of the territorial sea

Articles 16 and 17 of the present agreement are located under the heading 'Operations Seaward of the Territorial Sea'. Those articles only apply to the maritime zones beyond the territorial sea, in the maritime zones where the freedom of navigation of the high seas is applicable. This is the term used in the Convention on the High Seas.³⁹

5.4.3. Jurisdictional provisions of the 2003 Agreement

Jurisdiction

Prescriptive jurisdiction

Jurisdiction over offences is laid down in Article 23 of the 2003 Agreement which reads:

Article 23 Jurisdiction over offences

Each Party shall take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with Article 3, paragraph 1, of the 1988 Convention, when:

- a. the offence is committed in waters under its sovereignty or where applicable in its contiguous zone;
- b. the offence is committed on board a vessel flying its flag or an aircraft which is registered under its laws at the time the offence is committed;
- c. the offence is committed on board a vessel without nationality or assimilated to a ship without nationality under international law, which is located seaward of the territorial sea of any State;
- d. the offence is committed on board a vessel flying the flag or displaying the marks of registry or bearing any other indication of nationality of another Party, which is located seaward of the territorial sea of any State.

This article states that each party shall take measures as may be necessary to establish its jurisdiction over the offences described in Article 3(1) of the 1988 Convention committed in waters under its sovereignty, or on board on one of its flag ships. That is the verbatim wording of Article 4(1)(a) of the 1988 Convention. Article 23 also constitutes jurisdiction over

³⁸ For example, the Bahamas.

³⁹ See Section 3.1.1. of this study.

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offences committed on board a vessel of another party, which is located seaward of the territorial sea of any state. The draft article even stated that jurisdiction should be established over offences committed on board vessels of other states, and not restricted to any maritime zone. Article 4(1)(b)(ii) of the 1988 Convention stipulates that states may assert prescriptive jurisdiction over drug-related offences committed on board a vessel concerning which that party has been authorized to take appropriate action.

By virtue of paragraph 23(d), the final text of the present agreement also commits that each party to taking such measures as may be necessary to establish jurisdiction over offences committed on board a vessel located seaward of the territorial sea of any state and flying the flag or displaying the marks of registry of another party.

The provisions laid down in Article 23 concern prescriptive jurisdiction and they do not create an obligation for any state to intervene.

In conclusion, it can be stated that Article 23 of the 2003 Agreement constitutes the obligation for states to assert prescriptive jurisdiction over drug-related offences committed on board vessels flying their flags, stateless vessels and vessels of other state parties to the present agreement, located seaward of the territorial sea of any state.

Enforcement jurisdiction

Article 24(1) of the 2003 Agreement states, *inter alia*, that parties, in waters under its sovereignty or concerning a flag vessel, can enforce their jurisdiction over detained vessels, cargo and persons aboard including seizure, forfeiture, arrest and prosecution. That reflects customary international law. Article 24 reads:

Article 24 Jurisdiction over detained vessels and persons

1. In all cases arising in the waters of a Party, or concerning a Party's flag vessels seaward of any State's territorial sea, that Party has jurisdiction over a detained vessel, cargo and persons on board including seizure, forfeiture, arrest, and prosecution. Subject to its Constitution and its laws, the Party in question may consent to the exercise of jurisdiction by another State in accordance with international law and in conformity with any condition set by it.
2. Each Party shall ensure compliance with its notification obligations under the Vienna Convention on Consular Relations.

Waiving preferential jurisdiction

The draft text of Article 24 of the 2003 Agreement stated that in all cases arising in the waters of a party, or concerning a party's flag vessel seaward of any state's territorial sea, that party shall have the primary right of exercising jurisdiction over a detained vessel, but could waive its primary right to exercise that right and could authorize the enforcement of law by the boarding party against the vessel. No time indication within which the waiver should take place was given. During the consultations and negotiations, the timeframe of fourteen days came up. Another proposal that was submitted was the provision that a party could not waive its jurisdiction if no other party claimed the right to exercise its jurisdiction.

The final text states that the party with primary right to exercise its jurisdiction may consent to the exercise of jurisdiction by another state in accordance with international law. This did not therefore constitute a waiver of its primary execution jurisdiction, but 'consent to the exercise of jurisdiction by another state'. The latter term is a new one in the drug-related treaties, and was not proposed until the final negotiations.

It can be stated that Article 24 (see above) indicates that primary or preferential jurisdiction rests with the coastal state or flag state and that this state may consent to the exercise of juris-

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diction by another state and that conditions can be added. Paragraph 2 of the article makes a reference to the obligations that states have notified under the Vienna Convention on Consular Relations.⁴⁰

When the flag state has not consented to a foreign state exercising jurisdiction, the flag state must inform the intervening foreign state on the progress of the judicial process. Article 26(2) states that each party shall inform the other party. When the flag state has consented to the exercise of jurisdiction by a foreign state, that foreign state must keep the flag state up to date in respect of the status of all investigations. In that way, the flag state can monitor the process of judicial proceedings resulting from enforcement actions taken pursuant to the present agreement.

Stateless vessel

It was difficult to reach agreement on the establishment of jurisdiction over stateless vessels as now specified in Article 23(c), which reads:

Article 23 Jurisdiction over offences

Each Party shall take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with Article 3, paragraph 1, of the 1988 Convention, when:

- c. the offence is committed on board a vessel without nationality or assimilated to a ship without nationality under international law, which is located seaward of the territorial sea of any State.

One delegation indicated that it could not agree to the establishment as specified in paragraph c of this article, since its national law does not provide this kind of jurisdiction.

Other delegations claimed that Articles 3 and 17 of the 1988 Convention create that jurisdiction over stateless vessels. Ultimately, that paragraph was added at the express request of some states that claimed to need such a clause in order to develop national implementing legislation.

Article 16 (6)(7)(8) (see below under Authorization beyond the territorial sea) states that if the nationality of a suspect vessel cannot be determined by any means, the intervening state party may consider it to be a vessel without nationality in accordance with international law. Those paragraphs are the result of proposals submitted by several delegations that indicated those provisions should be included in the article to deal with the growing problem of the use of undocumented go-fast boats for illicit drug trafficking. Delegations agreed that law enforcement actions against that type of vessel required specific procedures. It was not until the final round of negotiations that the text of the article assumed its final form.

Authorization

Authorization in waters under the sovereignty of a coastal state

Article 8 of the 2003 Agreement constitutes authorization for law enforcement officials of a coastal state to permit the entry of foreign law enforcement vessels into its waters. The article reads:

Article 8 Authority of law enforcement officials

1. When law enforcement officials are within the waters or territory, or on board a law enforcement vessel or law enforcement aircraft, of another Party, they shall respect the laws and naval and air customs and traditions of the other Party.

⁴⁰ The Vienna Convention on Consular Relations and Optional Protocols, done at Vienna, on 24 April 1963, UNTS 8638-8640, Vol. 596, pp. 262-512.

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2. In order to carry out the objectives of this Agreement, each Party authorizes its designated law enforcement and aviation officials, or its competent national authority if notified to the Depositary, to permit⁴¹ the entry of law enforcement vessels, law enforcement aircraft and aircraft in support of law enforcement operations, under this Agreement into its waters and air space.

The article explicitly states that the foreign law enforcement officials shall respect the laws and naval customs of the coastal state. This explicit and strict text was added during the final negotiations.

The entry of foreign law enforcement vessels into waters of a coastal state must be consistent with the legal system of that coastal state party. That implies that maritime drug interdiction must be carried out under the national law of the coastal state party.

The draft article was silent in respect of the objectives of that foreign law enforcement vessel when it entered the waters of a coastal state. The final text of paragraph 2 states that the foreign law enforcement vessels should support the exercise of enforcement jurisdiction under the present agreement.

Another kind of authorization can be found in Article 12 of the 2003 Agreement, which deals with the right of cold pursuit⁴² into the sovereign waters of a coastal state by foreign law enforcement vessels. The article is a detailed description of Article 11(1) of the same agreement. Article 12 reads:

Article 12 Assistance by vessels for suppression of illicit traffic

1. Subject to paragraph 2 of this Article, a law enforcement vessel of a Party may follow a suspect vessel into the waters of another Party and take actions to prevent the escape of the vessel, board the vessel and secure the vessel and persons on board awaiting an expeditious response from the other Party if either:
 - a. the Party has received authorization⁴³ from the authority or authorities of the other Party defined in Article 1 and notified pursuant to Article 7; or
 - b. on notice to the other Party, when no embarked law enforcement official or law enforcement vessel of the other Party is immediately available to investigate. Such notice shall be provided prior to entry into the waters of the other Party, if operationally feasible, or failing this as soon as possible.
2. Parties shall elect either the procedure set forth in paragraph 1a or 1b, and shall so notify the Depositary of their election. Prior to receipt of notification by the Depositary, Parties shall be deemed to have elected the procedure set forth in paragraph 1a.
3. If evidence of illicit traffic is found, the authorizing Party shall be promptly informed of the results of the search. The suspect vessel, cargo and persons on board shall be detained and taken to a designated port within the waters of the authorizing Party unless otherwise directed by that Party.
4. Subject to paragraph 5, a law enforcement vessel of a Party may follow a suspect aircraft into another Party's waters in order to maintain contact with the suspect aircraft if either:
 - a. the Party has received authorization from the authority or authorities of the other Party defined in Article 1 and notified pursuant to Article 7; or
 - b. on notice to the other Party, when no embarked law enforcement official or law enforcement vessel or law enforcement aircraft of the other Party is immediately available to maintain contact. Such notice shall be provided prior to entry into the waters of the other Party, if operationally feasible, or failing this as soon as possible.
5. Parties shall elect either the procedure set forth in paragraph 4a or 4b, and shall so notify the Depositary of their election. Prior to receipt of notification by the Depositary, Parties shall be deemed to have elected the procedure set forth in paragraph 4a.

⁴¹ Emphasis added.

⁴² Cold pursuit must be commenced when the suspect vessel or one of its boats is beyond the sovereign waters of a coastal state and may be continued into the sovereign waters if the pursuit has not been interrupted. This is contrary to the right of hot pursuit pursuant to Article 111 LOSC.

⁴³ Emphasis added.

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Operations to suppress illicit traffic in the waters of a party, i.e. actions to freeze the situation, after a cold pursuit into those waters, are subject to the authorization of that party. Firstly that coastal state party authorizes⁴⁴ foreign law enforcement vessels to stop and board suspect vessels by the officials or authority pursuant to Article 7 of the present agreement.

Secondly, when no law enforcement officials of the coastal state are available to assist the foreign law enforcement vessel in pursuing a suspect vessel, the foreign law enforcement vessel is entitled to pursue a suspect vessel into another party's waters and take actions to prevent the escape of the vessel. They may board the vessel and secure the vessel and persons on board, awaiting an expeditious response from the coastal state party. The aim of this operation is to prevent the vessel from fleeing. If a state elects to adopt the latter procedure, described in Article 4(b), the Depositary must be notified. If not, it shall be deemed that a coastal state party must grant authorization to a foreign law enforcement vessel to pursue a suspect vessel in the territorial sea of that coastal state party. The guiding principle here is that of sovereignty.

Permission for cold pursuit is encouraged by the agreement. If a state fails to notify the Depositary, it shall be deemed to have elected the procedure set forth in paragraph 1(a) of Article 12: authorization to take preventive actions by another state party in the waters under sovereignty of the coastal state.

When a foreign law enforcement vessel has stopped and boarded a suspect vessel, after being so authorized by the coastal state, and evidence of illicit drug trafficking has been found, the coastal state shall be informed promptly. The suspect vessel, cargo and persons shall be detained and taken to a designated port within the waters of the coastal state. These disposition instructions are directed by the coastal state. The foreign law enforcement vessel acts as an instrument of the coastal state.

The agreement is silent on the question of whether granting prior authorization pursuant to Article 12(1)(a) is reciprocal. Other possibilities for authorizing each other in order to suppress illicit drug trafficking remain possible. Other arrangements, such as bilateral reciprocal treaties concluded between states, are encouraged.

It can be concluded that the coastal state has control over the foreign law enforcement vessels in the waters under its sovereignty.⁴⁵

Authorization beyond the territorial sea

Article 16 of the 2003 Agreement speaks about authorization beyond the territorial sea. The provisions in this article can be considered as a cornerstone of the Agreement, the article reads:

Article 16 Boarding

1. When law enforcement officials of one Party encounter a suspect vessel claiming the nationality of another Party, located seaward of any State's territorial sea, this Agreement constitutes the authorization by the claimed flag State Party to board and search the suspect vessel, its cargo and question the persons found on board by such officials in order to determine if the vessel is engaged in illicit traffic, except

⁴⁴ Emphasis added; 'authorize' of Article 12 as opposed to 'permit' in Article 8 and 'request' in Article 21.

⁴⁵ Command and control is an operational term, which describes the relationship between the commanding authority and the units at its disposal. Control is the exercise of authority and direction by the coastal state over the assigned foreign law enforcement vessels in the accomplishment of maritime counter-drugs cooperation.

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where a Party has notified the Depository that it will apply the provisions of paragraph 2 or 3 of this Article.

2. Upon signing, ratification, acceptance or approval of this Agreement, a Party may notify the Depository that vessels claiming the nationality of that Party located seaward of any State's territorial sea may only be boarded upon express consent of that Party. This notification will not set aside the obligation of that Party to respond expeditiously to requests from other Parties pursuant to this Agreement, according to its capability. The notification can be withdrawn at any time.
3. Upon signing, ratification, acceptance or approval of this Agreement, or at any time thereafter, a Party may notify the Depository that Parties shall be deemed to be granted authorization to board a suspect vessel located seaward of the territorial sea of any State that flies its flag or claims its nationality and to search the suspect vessel, its cargo and question the persons found on board in order to determine if the vessel is engaged in illicit traffic, if there is no response or the requested Party can neither confirm nor deny nationality within four (4) hours following receipt of an oral request pursuant to Article 6. The notification can be withdrawn at any time.
4. A flag State Party that has notified the Depository that it shall adhere to paragraph 2 or 3 of this Article, having received a request to verify the nationality of a suspect vessel, may authorize the requesting Party to take all necessary actions to prevent the escape of the suspect vessel.
5. When evidence of illicit traffic is found as the result of any boarding conducted pursuant to this Article, the law enforcement officials of the boarding Party may detain the vessel, 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 the boarding and search conducted pursuant to this Article, in accordance with paragraph 1 of Article 26 of this Agreement.
6. Notwithstanding the foregoing paragraphs of this Article, law enforcement officials of one Party may board a suspect vessel located seaward of the territorial sea of any State, claiming the nationality of another Party for the purpose of locating and examining the documents of that vessel when:
 - a. it is not flying the flag of that other Party;
 - b. it is not displaying any marks of its registration;
 - c. it is claiming to have no documentation regarding its nationality
 - d. on board; and
 - e. there is no other information evidencing nationality.
7. In the case of a boarding conducted pursuant to paragraph 6 of this Article, should any documentation or evidence of nationality be found, paragraph 1, 2 or 3 of this Article shall apply as appropriate. Where no evidence of nationality is found, the boarding Party may assimilate the vessel to a ship without nationality in accordance with international law.
8. The boarding and search of a suspect vessel in accordance with this Article is governed by the laws of the boarding Party.

During the negotiations, delegations disagreed on the form and content of Article 16. That article had been a compromise from the beginning and tried to accommodate three opinions. Many proposals to change this article into one with the provision for granting advance ship boarding authorization by the flag state were submitted. Other states tried to gain support for the provision for ship-boarding only with the express consent of the flag state on an *ad hoc* base.

The final text in paragraph 1 of Article 16, states that when law enforcement officers of one party encounter a suspect vessel claiming the nationality of another party, located seaward of any state's territorial sea, the present agreement constitutes the authorization by the claimed flag state to board and search the suspect vessel in order to determine whether the vessel is engaged in illicit drug trafficking or not. Advance ship boarding authorization is therefore granted, but only to determine whether illicit drug trafficking is taking place. Paragraph 1 indicates the basic rule for boarding: advance authorization.

Paragraph 2 of the same article states that a party may notify the Depository, that vessels located seaward of any state's territorial sea and claiming the nationality of that party may only be boarded with express consent of that party. That is exactly the opposite of advance authori-

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zation. In practice, that procedure allows precisely for what is currently possible under Article 17 of the 1988 Convention.

An intermediate provision is laid down in paragraph 3 of Article 16. That states that, if there is no response or the party can neither confirm nor deny nationality within four (4) hours following receipt of the request to board and search the vessel, a party shall be deemed to have granted authorization to board a suspect vessel located seaward of any state's territorial sea that flies its flag or claims its nationality in order to determine whether the vessel is engaged in illicit drug trafficking. That amounts to authorization when no answer has been received upon a request to board: tacit authorization. Of course, when an answer has been received, the intervening state should act in accordance with the answer.

Some delegations expressed concerns about the fact that law enforcement officials must be authorized to permit the entry of foreign law enforcement vessels. It should be noted, however, that the law enforcement authorities that will be responsible for carrying out the maritime and related law enforcement functions pursuant to this agreement, will be the authorities as identified by the respective state party to the Depositary of this agreement.

In conclusion, it can be stated that Article 16 constitutes three possibilities from which states can choose to achieve authorization for boarding and searching a foreign suspect vessel: advance, tacit or *ad hoc* authorization.

Applicable law

In principle, the applicable law during maritime drug-interdiction operations in waters under its sovereignty is the law of the coastal state. Pursuant to Article 9(4)(a) the law of both parties can be applicable when the embarked law enforcement official has expressly requested the assistance of the foreign law enforcement officials. The use of force by the assisting foreign law enforcement officials should be in accordance with Article 22 of the present agreement and their national law and regulations.⁴⁶

Pursuant to paragraph 3 of Article 20, when conducting actions during operations seaward of the territorial sea, each party shall ensure that its law enforcement officials act in accordance with their applicable national laws and procedures and with international law and accepted international practices. This paragraph is a safeguard for all the actions and protects the safety of several interests.

Article 25 states that each party shall ensure that the other parties are fully informed of its respective laws and procedures, particularly those related to the use of force.

Offences

Article 23 of the 2003 Agreement states that offences for this agreement are the same as those defined in Article 3(1) of the 1988 Convention. Some nations proposed the extension of the scope of the agreement to include other illegal activities prohibited by international law and agreements. The expanded scope would cover activities such as: hijacking, sea robbery, disposal of chemical, nuclear and other hazardous substances and human trafficking. The reasons for the proposed extension were the Maritime Study and the 1996 Treaty of the Regional Security System referring to these criminal activities.⁴⁷ Many states, both developed and devel-

⁴⁶ Some delegations stated that the multi-application of several national laws did not clearly indicate which party's law applies.

⁴⁷ See Section 5.3.1. of this study.

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oping, were opposed to broadening the scope of the agreement, as this would cause great delays in negotiating the agreement. The core of that draft paragraph was that the boarding party should notify the flag state and that appropriate measures should be undertaken. The proposed text was not adopted.

Suspicion

The draft agreement stated that only vessels used for commercial or private purposes and which a party has reasonable grounds to suspect could be stopped. The wording in the present provision of this agreement, laid down in the Article 1(l) speaks about ‘suspect vessels’. The term ‘reasonable grounds’ was considered too vague and may require different interpretations. The CARICOM delegation stated that a suspect vessel includes ‘reasonable grounds’. The wording ‘for commercial use or private purposes’ has been deleted. The definition now reads:

“a suspect vessel means any vessel in respect of which there are reasonable grounds to suspect that is engaged in illicit traffic”.

All suspect vessels can be subject to operations to suppress illicit traffic pursuant to this agreement. That is in accordance with Article 17 of the 1988 Convention. The core of this provision is therefore that any suspect vessels can be stopped, boarded and searched. Authorization and immunity can be restrictions when foreign suspect vessels are regarded.

Evidence

Paragraph 5 of Article 16 (see above under Authorization beyond the territorial sea) states that when evidence has been found as the result of any boarding conducted pursuant to this agreement, the law enforcement officials of the intervening boarding party may detain the vessel pending the expeditious receipt of disposition instructions from the flag state.

Surrender assets

Article 27 of the 2003 Agreement deals with asset seizure and forfeiture, it reads:

Article 27 Asset seizure and forfeiture

1. Assets seized, confiscated or forfeited in consequence of any law enforcement operation undertaken in the waters of a Party pursuant to this Agreement shall be disposed of in accordance with the laws of that Party.
2. Should the flag State Party have consented to the exercise of jurisdiction by another State pursuant to Article 24, assets seized, confiscated or forfeited in consequence of any law enforcement operation of any Party pursuant to this Agreement shall be disposed of in accordance with the laws of the boarding Party.
3. To the extent permitted by its laws and upon such terms as it deems appropriate, a Party may, in any case, transfer forfeited property or proceeds of their sale to another Party or intergovernmental bodies specializing in the fight against illicit traffic in and abuse of narcotic drugs and psychotropic substances.

Paragraph 1 of Article 27 deals with the assets seized in the waters of a party. The disposing of seized assets will be done under the law of the coastal state party. Even when an operation⁴⁸ has been carried out by another state party after receiving authorization from the coastal state, the assets seized shall be disposed of in accordance with the laws of the coastal state.

Paragraph 2 of Article 27 states that when the flag state has consented to the exercise of jurisdiction by another state, pursuant to Article 24 of the present agreement, the seized assets shall be disposed of in accordance with the law of the intervening state.

⁴⁸ The article speaks about any operation; see the emphasis.

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One delegation urged that the law of the seizing party should not control the distribution of seized assets. Rather, the law of the flag state should apply. See also Article 24 of the present agreement, which the delegation said is inconsistent with this provision. The latter paragraph (see above under Enforcement jurisdiction) deals with jurisdiction, and transferring it, over detained vessels. It can be stated that, when the flag state has transferred its jurisdiction, the intervening state may dispose of assets seized; there is therefore no inconsistency between both provisions.

Paragraph 3 of article 27 states that seized assets can be transferred to those law enforcements agencies that are involved in the suppressing of illicit drug trafficking by sea. This can be done inter-state as well as intra-state.

5.4.4. Operational provisions of the 2003 Agreement

Assistance

Article 3 of the 2003 Agreement deals with assistance in the region and in the sub region, it reads:

Article 3 Regional and sub-regional co-operation

1. The Parties shall take the steps necessary within available resources to meet the objectives of this Agreement, including, on a cost effective basis, the enhancement of regional and sub-regional institutional capabilities and the co-ordination and implementation of cooperation.
2. In order to meet the objectives of this Agreement, each Party is encouraged to co-operate closely with the other Parties, consistent with the relevant provisions of the 1988 Convention.
3. The Parties shall co-operate, directly or through competent international, regional or sub-regional organizations, to assist and support States party to this Agreement in need of such assistance and support, to the extent possible, through programmes of technical co-operation on suppression of illicit traffic. The Parties may undertake, directly or through competent international, regional or sub-regional organizations, to provide assistance to such States for the purpose of augmenting and strengthening the infrastructure needed for effective control and prevention of illicit traffic.
4. In order to enable Parties to better fulfill their obligations under this Agreement, they are encouraged to request and provide operational and technical assistance from and to each other.

Paragraphs 3 and 4 of Article 3 encourage parties to coordinate and provide technical assistance through regional and sub-regional organizations.⁴⁹ The latter paragraph deals with the reciprocity of technical assistance. Paragraphs 3 and 4 recognize the constraints on the ability of small states to implement the agreement. These paragraphs were endorsed by almost all developing parties located in the Caribbean region.

A text suggestion for an additional paragraph that recognized the need for assistance to be given to small states, thereby maintaining sovereignty did not make it, neither did a suggestion to draft a specific article to cover mutual assistance.

Article 21 is an example of assistance by foreign law enforcement vessels. The article states that a coastal state that is party to this agreement, may request one or more law enforcement vessels from another party to assist the coastal state in waters under its sovereignty. The article reads:

Article 21 Assistance by vessels

1. Each Party may request another Party to make available one or more of its law enforcement vessels to assist the requesting Party effectively to patrol and conduct surveillance with a view to the detection and prevention of illicit traffic by sea and air in the Caribbean area.

⁴⁹ UNDCP, CCLEC, ACCP, OECS, CARICOM, etc.

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2. When responding favorably to a request pursuant to paragraph 1 of this Article, each requested Party shall provide to the requesting Party via secure communication channels:
 - a. the name and description of its law enforcement vessels;
 - b. the dates at which, and the periods for which, they will be available;
 - c. the names of the Commanding Officers of the vessels; and
 - d. any other relevant information.

That foreign law enforcement vessel will assist the coastal state in effectively controlling its territorial waters. When a state responds favorably to such a request, it shall provide the name of the vessel and commanding officer, and other details. The foreign law enforcement vessels have no blanket authorization to patrol the territorial waters. The coastal state has the operational control of the foreign flag vessel.

Facilitation of assistance

Facilitation of, *inter alia*, the above mentioned assistance is dealt with in Article 4, that reads:

Article 4 Facilitation of co-operation

1. Each Party is encouraged to accelerate the authorizations for law enforcement vessels and law enforcement aircraft, aircraft in support of law enforcement operations, and law enforcement officials of the other Parties to enter its waters, air space, ports and airports in order to carry out the objectives of this Agreement, in accordance with its provisions.
2. The Parties shall facilitate effective co-ordination between their law enforcement authorities and promote the exchange of law enforcement officials and other experts, including, where appropriate, the posting of liaison officers.
3. The Parties shall facilitate effective co-ordination among their civil aviation and law enforcement authorities to enable rapid verification of aircraft registrations and flight plans.
4. The Parties shall assist one another to plan and implement training of law enforcement officials in the conduct of maritime law enforcement operations covered in this Agreement, including combined operations and boarding, searching and detention of vessels.

Paragraph 1 of Article 4 states that each party is encouraged, so only hortatory, to accelerate the authorizations for assistance to intervene in each other's jurisdictions. The draft text: '[s]hall take steps....' has been considerably weakened. In the draft articles, the jurisdiction was described as 'waters, airspace and territory'. The final agreement text has been limited. The term 'territory' has been limited to airports, which is more within the scope of the agreement.

The term 'waters' does not automatically include all waters where a coastal state is entitled to exercise its enforcement jurisdiction related to the illicit trafficking of drugs. Waters of the party means the territorial sea, and, where relevant, the archipelagic waters, of that party.⁵⁰ This article is silent about facilitating authorization for assistance to board and search suspect vessels in the contiguous zone, the EEZ or on the high seas.

Originally, the term 'territory' was included here to address the need for limited presence in the territory of a party, such as refueling or picking up embarked law enforcement officials while conducting maritime operations. The provision is not meant to be an operational one, it merely calls upon the parties to facilitate the provision of clearances by providing a legal basis and framework for granting them.

Coordination of assistance

Paragraph 2 of Article 4 covers the provision of regional assistance. The exchange of law enforcement officials and even the posting of liaison officers are encouraged. The exchange of

⁵⁰ See the definition in Article 1 of the 2003 Agreement.

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law enforcement officers already takes place in several positions. For example in the RSS region, and with the JIATF-E⁵¹ in Miami.

The restriction in this paragraph is the addition of ‘where appropriate’. Some delegations from developing countries, as well as the CARICOM delegation, suggested that, without that addition, it could be very difficult for small economies to implement this article, recognizing that many Caribbean countries don’t have diplomatic offices in the Caribbean region. Another initiative in the realm of this article is the USCG cutter that sails around in the Caribbean region with law enforcement officials of various countries embarked.⁵²

The text of the draft paragraph 4 of the present article was deleted. That draft paragraph accorded diplomatic status to law enforcement officials. The necessity of the diplomatic status of law enforcement officials was questioned.⁵³ Indications of reservations to this draft paragraph were also noted. The present paragraph 4 of Article 4 deals with the training for law enforcement officials, more specifically, the training in combined and jointed operations at sea, including stopping, boarding, searching and detention of a vessel. The agreement mentions training in the conduct of maritime law enforcement operations.⁵⁴

A proposal to delete the word ‘maritime’ was not adopted. The reason for the proposal was that a delegation noted that the threat posed by illicit trafficking extends beyond the sea, especially on very small islands. The delegation urged the inclusion of training of law enforcement officers for land-based operations as well.

Competent Authorities

Article 18 of the 2003 Agreement encourages parties to identify a single point of contact with the capability of receiving, processing and responding to requests and reports at any time. The article reads:

Article 18 Identification of point of contact

In designating the authorities and officials as defined in Article 1 that exercise responsibilities under this Agreement, each Party is encouraged to identify a single point of contact with the capability to receive, process and respond to requests and reports at any time.

Such a single point of contact should be manned 24 hours a day and 7 days a week. When a request for registry or authorization to stop and search a vessel, can be received, processed and responded to by one processing office, the loss of time will be reduced substantially.

This single point of contact can be the same as the designated authority pursuant to Article 17(7) of the 1988 Convention. To encourage, *inter alia*, identifying such single points of con-

⁵¹ Joint Interagency Task Force-East, a United States’ governmental organization for suppressing illicit drug trafficking.

⁵² The Caribbean Support Tender (CST) is a United States Coast Guard ex-buoy tender with 120,000 pounds of cargo-carrying capacity, berthing for 58 personnel and with onboard training and shop/repair capabilities. The concept for the CST was developed in response to the Bridgetown Plan of 1997 and subsequently commissioned in September 1999. The CST provides a multi-national platform to support regional coast guards and navies. Through consolidation of Department of State, Department of Defense, and USCG programs, the CST delivers a total support package. See www.uscg.mil/lantarea/cutter/gentian/about%20tender.htm (visited Fall 2006).

⁵³ The Shiprider Agreements in the same area do have this clause.

⁵⁴ Training is provided by, *inter alia*, Mobile Training Units of the United States, and the British Military Assistance Training Team (BMATT), based at Antigua and Barbuda.

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tact throughout the whole Caribbean region, the Project Management Office (PMO)⁵⁵ was established.

In addition to the single point of contact, the 2003 Agreement also provides for the appointment of two other competent national authorities able to respond officially to a request. That can include law enforcement officials of a state party pursuant to Article 16 and 20.

In order to communicate in a correct and speedy manner each party has to notify the Depository⁵⁶ of the officials or the authority to whom requests should be directed under Article 18.

Registry

Article 6 of the 2003 Agreement deals with the verification of the nationality of vessels, it reads:

Article 6 Verification of nationality

1. For the purpose of this Agreement, a vessel or aircraft has the nationality of the State whose flag it is entitled to fly or in which the vessel or aircraft is registered, in accordance with domestic laws and regulations.
2. Requests for verification of nationality of vessels claiming registration in, or entitlement to fly the flag of one of the Parties, shall be processed through the competent national authority of the flag State Party.
3. Each request should be conveyed orally and later confirmed by written communication, and shall contain, if possible, the name of the vessel, registration number, nationality, homeport, grounds for suspicion, and any other identifying information.
4. Requests for verification of nationality shall be answered expeditiously and all efforts shall be made to provide such answer as soon as possible, but in any event within four (4) hours.
5. If the claimed flag State Party refutes the claim of nationality made by the suspect vessel, then the Party that requested verification may assimilate the suspect vessel to a ship without nationality in accordance with international law.

In Article 17(3) of the 1988 Convention, that important provision was compressed into only a few words: 'request confirmation of registry'. Every state shall, therefore, maintain a register of ships containing the names and particulars of ships flying its flag, except those that are excluded from generally accepted international regulations on account of their small sizes.⁵⁷

Paragraph 2 of the article refers to the competent authority pursuant to Article 17 of the 1988 Convention. The CARICOM working group had proposed to use the law enforcement authority of the flag state as the competent authority pursuant to Article 17 of the 1988 Convention. In fact, the request for a verification of nationality would be received and processed by operational officials rather than civil servants of the flag state. The proposal was neither endorsed nor adopted. Originally, that provision of the draft agreement maintained a connection between the verification of nationality and the authorization for boarding. During the negotiations, that provision was confined to the procedures for verification of nationality. That verification procedure can precede a boarding, but can also be applied in other circumstances, such as, for example, when a party wishes to waive jurisdiction over offences to a flag state party, and therefore has to confirm the identity of the suspect vessel.

Paragraph 5 of Article 6 of the 2003 Agreement states that if the claimed flag state party refutes the claim of nationality made by the suspect vessel, then the intervening state may con-

⁵⁵ The establishing of these so-called National Joint Headquarters was the main task of the PMO. Another task of that Office was to monitor and support the progress of the present agreement.

⁵⁶ See Article 42 of the 2003 Agreement.

⁵⁷ Several states have opened their ship registries on the Internet. See for example the Vessel Registration System of Canada on: <http://www.tc.gc.ca/ShipRegistry/menu.asp?lang=e>, (visited Fall 2006).

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sider the suspect vessel to be a ship without nationality. This is in accordance with, and is an addition to Article 17 of the 1988 Convention.

Request

A request for the verification of nationality or for the authorization to stop and board a suspect vessel should be conveyed orally and later confirmed by written communication. The request should contain the name of the vessel, registration number, nationality, homeport and grounds for suspicion, and any other identifying information.

The agreement is silent about the non-response to a request for verification of nationality by the claimed flag state.

Communication

Paragraph 3 of Article 6 is a technical execution of the communication of the request for verification of nationality. A delegation urged the use of the fax, in order to use standard procedures and standard forms.⁵⁸ The CARICOM working group and other delegations did not agree that requests should be faxed to the requested state, stating that such a procedure would be impractical. Other lines of communications are available for written communication as well, such as emails via the Internet.

Timeslot

Paragraph 4 of Article 6 of the 2003 Agreement defines the timeslot within which the answer to the request for verification of nationality should be answered. That timeslot has been the subject of many discussions. Slots of two (2), three (3) and four (4) hours have been contemplated. Paragraph 4 of Article 6 of the 2003 Agreement states that such an answer should be made as soon as possible, but in any event within four (4) hours. That is the maximum. The answering time is, *inter alia*, dependent on the availability of access to the national ship's registries on a 24-hour basis and a correctly maintained ship registry system.

Actions

Article 10 of the 2003 Agreement describes boarding and searching, it reads:

Article 10 Boarding and search

1. Boarding and searches pursuant to this Agreement shall be carried out only by teams of authorized law enforcement officials from law enforcement vessels.
2. Such boarding and search teams may operate from law enforcement vessels and law enforcement aircraft of any of the Parties, and from law enforcement vessels and law enforcement aircraft of other States as agreed among the Parties.
3. Such boarding and search teams may carry arms.
4. A law enforcement vessel of a Party shall clearly indicate when it is operating under the authority of another Party.

No other actions than boarding and searches are mentioned in the article. The position of Article 10 has been subject of many discussions. It started under the heading 'Maritime Law Enforcement Operations', and then it moved to the heading 'Implementation'. In the final text, it has been returned to the heading 'Maritime and Air Law Enforcement Operations'.

Only law enforcement officials, in a team, are allowed to board and search a suspect vessel. Those law enforcement officials are authorized by their own state by national law. They are allowed to operate from foreign law enforcement vessels when agreed in advance.

⁵⁸ For standard forms see Annex E of the Maritime Study and the Report of the Meeting of the Working Group on Maritime Cooperation, held in Vienna (1994), E/CN.7/1995/13.

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When boarding a suspect vessel, the flag the law enforcement vessel is operating under must be clear. One delegation noted that the ensign of the boarding law enforcement authority must be hoisted on the boarding vessel.

Article 2 of the 2003 Agreement (see above Section 5.4.2. of this study under Objective) speaks about detecting, identifying and monitoring. Those actions may be carried out by non-law enforcement officers as well, i.e. naval ships. Paragraph 3 of Article 10 allows the law enforcement officials to carry arms. That includes firearms. It must be noted that Article 10 of the 2003 Agreement applies to all maritime zones. That is why some delegations suggested that boarding and searching vessels should be reexamined in respect of the distinction between state's territorial sea and the high seas. They stated that boarding in its territorial waters, if not conducted by its own officials, is contrary to its sovereignty. One delegation asserted that its own law enforcement officials must carry out all boardings.

Execution of actions

The 2003 Agreement states that law enforcement officials shall carry out the actions. The 1988 Convention mentions warships or other ships clearly marked as a government ship. The latter Convention got a broader scope regarding executing of actions.

Embarked law enforcement officials

The term 'embarked law enforcement official' (proposed acronym is ELO) was offered as a replacement for the use of the term 'shiprider'. Numerous delegations objected to that American term. Article 9 describes a system of a multinational law enforcement authority, such as the concept of the multinational coast guard of the RSS or the Caribbean Support Tender (see above). Article 9 reads:

Article 9 Designation and authority of embarked law enforcement officials

1. Each Party (the designating Party) shall designate qualified law enforcement officials to act as embarked law enforcement officials on vessels of another Party.
2. Each Party may authorize the designated law enforcement officials of another Party to embark on its law enforcement vessel. That authorization may be subject to conditions.
3. Subject to the domestic laws and regulations of the designating Party, when duly authorized, these law enforcement officials may:
 - a. embark on law enforcement vessels of any of the Parties;
 - b. enforce the laws of the designating Party to suppress illicit traffic in the waters of the designating Party, or seaward of its territorial sea in the exercise of the right of hot pursuit or otherwise in accordance with international law;
 - c. authorize the entry of the law enforcement vessels on which they are embarked into and navigation within the waters of the designating Party;
 - d. authorize the law enforcement vessels on which they are embarked to conduct counter-drug patrols in the waters of the designating Party;
 - e. authorize law enforcement officials of the vessel on which the law enforcement officials of the designating Party are embarked to assist in the enforcement of the laws of the designating Party to suppress illicit traffic; and
 - f. advise and assist law enforcement officials of other Parties in the conduct of boardings of vessels to enforce the laws of those Parties to suppress illicit traffic.
4. When law enforcement officials are embarked on another Party's law enforcement vessel, and the enforcement action being carried out is pursuant to the authority of the law enforcement officials, any search or seizure of property, any detention of a person, and any use of force pursuant to this Agreement, whether or not involving weapons, shall, without prejudice to the general principles of Article 11, be carried out by these law enforcement officials. However:
 - a. crew members of the other Party's vessel may assist in any such action if expressly requested to do so by the law enforcement officials and only to the extent and in the manner requested. Such a request may only be made, agreed to, and acted upon if the action is consistent with the applicable laws and procedures of both Parties; and

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- b. such crew members may use force in accordance with Article 22 and their domestic laws and regulations.
5. Each Party shall notify the Depository of the authority responsible for the designation of embarked law enforcement officials.
6. Parties may conclude agreements or arrangements between them to facilitate law enforcement operations carried out in accordance with this Article.

Pursuant to paragraph 1 of Article 9, each party shall designate qualified law enforcement officials to act as embarked law enforcement officials on vessels of another party.

The duly designated law enforcement official of a coastal state is acting more or less as the competent authority. Paragraph 2 of Article 9 was added during the last consultations, it states that the authorization to embark a foreign law enforcement official may be subject to conditions. That addition can be a restriction on the authorization of the foreign law enforcement official enumerated in paragraph 3 of this article.

The embarked law enforcement official has the right to conduct counter-drug controls in the waters of his coastal state. He may authorize the foreign law enforcement officials to assist him in the enforcement of the laws of his state. That enforcement may include stopping, boarding and searching a suspect vessel that flies the flag of the coastal state. The embarked law enforcement official is actually in charge of this operation, the foreign law enforcement officials are there to assist him, or, when necessary, to protect him in the case of force is used. Paragraph 1 of Article 20 states that when foreign law enforcement officials are conducting actions in the waters of a party, that party has to take measures to ensure that these foreign law enforcement officials are deemed to have the same powers as the law enforcement officials of that party. When embarked on a foreign law enforcement vessel located seaward of the territorial sea, those law enforcement officials are empowered to grant authorization to the foreign law enforcement vessel to stop and board a suspect vessel flying the flag of the embarked law enforcement official's state.

To facilitate law enforcement operations carried out in accordance with Article 9 of the 2003 Agreement, parties are encouraged by paragraph 6 of this article to conclude treaties or arrangements. Some delegations expressed the view that Article 9 bestows the law enforcement officials with full power so that they can allow foreign law enforcement vessels entry to the national territory, which, in the view of these delegations, is incompatible with the sovereign rights of the states to decide upon the entry of third-country vessels to their territory.

It has to be borne in mind, as has been stated before, that the law enforcement authorities have been designated by the state party and reported as such to the Depository and are therefore duly authorized.

Safeguards

By prescribing the conduct of the law enforcement officials the agreement built in some safeguards for several interests. As well as actions in the coastal state's sovereign waters as waters beyond the territorial sea are covered by the provisions of Article 20. The article reads:

Article 20 Authority and conduct of law enforcement and other officials

1. Subject to its constitutional principles and the basic concepts of its legal system, each Party shall take such measures as may be necessary under its domestic law to ensure that foreign law enforcement officials, when conducting actions in its water under this Agreement, are deemed to have like powers to those of its domestic law enforcement officials.

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2. Consistent with its legal system, each Party shall take appropriate measures to ensure that its law enforcement officials, and law enforcement officials of other Parties acting on its behalf, are empowered to exercise the authority of law enforcement officials as prescribed in this Agreement.
3. In accordance with the provisions in Article 8 and without prejudice to the provisions in Article 11, each Party shall ensure that its law enforcement officials, when conducting boardings and searches of vessels, and air activities pursuant to this Agreement, act in accordance with their applicable national laws and procedures and with international law and accepted international practices.
4. In taking such action under this Agreement, each Party shall take due account of the need not to endanger the safety of life at sea, the security of the vessel and cargo, and not to prejudice any commercial or legal interest. In particular, they shall take into account:
 - a. the dangers involved in boarding a vessel at sea, and give consideration as to whether this could be more safely done in port; and
 - b. the need to avoid unduly detaining or delaying a vessel.

Each party shall, pursuant to paragraph 4 of Article 20, ensure that its law enforcement officials, when conducting actions, act in accordance with their applicable national laws and procedures and with international law and accepted international practices. This paragraph is a safeguard for all the actions covered in the agreement and protects the safety of several interests, including commercial and legal interests.

Use of force

Pursuant to Article 22, the use of force is authorized if no other feasible means of resolving the situation can be applied. This use of force includes the right of self-defense of the law enforcement officials. Article 22 reads:

Article 22 Use of force

1. Force may only be used if no other feasible means of resolving the situation can be applied.
2. Any force used shall be proportional to the objective for which it is employed.
3. All use of force pursuant to this Agreement shall in all cases be the minimum reasonably necessary under the circumstances.
4. A warning shall be issued prior to any use of force except when force is being used in self-defense.
5. In the event that the use of force is authorized and necessary in the waters of a Party, law enforcement officials shall respect the laws of that Party.
6. In the event that the use of force is authorized and necessary during a boarding and search seaward of the territorial sea of any Party, the law enforcement officials shall comply with their domestic laws and procedures and the directions of the flag State.
7. The discharge of firearms against or on a suspect vessel shall be reported as soon as practicable to the flag State Party.
8. Parties shall not use force against civil aircraft in flight.
9. The use of force in reprisal or as punishment is prohibited.
10. Nothing in this Agreement shall impair the exercise of the inherent right of self-defense by law enforcement or other officials of any Party.

When law enforcement officials use force in foreign territorial waters, the laws of the coastal state must be respected. When force is used outside the territorial waters, the law enforcement officials shall comply with the laws and regulations of their own state and the directions of the flag state. In both cases, the national law and regulations of the law enforcement officials are leading. The article is silent about which law applies in the case of self-defense. It is reasonable to assume that in accordance with international law, the national laws and regulations of the law enforcement officials are applicable. We can therefore state that the use of force is controlled by national legislation of the party using force.

In the draft article, the term ‘deadly force’ was used. Many delegations proposed deleting that term. They did not like flagging the use of (deadly) force or emphasizing the possibility of deadly force. After many consultations, several states supported the principle of the escalation

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of force by proportionality. When the use of force exceeds that permitted under national law, criminal liability can result.

Paragraph 5 of the Article 22 forbids the use of any force against civilian aircraft. That paragraph was proposed as an addition by several delegations to ensure that civilian aircraft are expressly protected. References were made to Article 3*bis* of the Chicago Convention.⁵⁹

5.5. Conclusions

5.5.1. The 2003 Agreement

It can be stated that the 2003 Agreement can be a valuable tool in the Caribbean region in helping to strengthen maritime counter-drug cooperation. The agreement provides for various forms of law enforcement cooperation in different maritime zones. The process from drafting to concluding the agreement took six years, which in this specific and sensitive part of the world cannot be considered as having been too long, taking into consideration the number of states that took part in the consultations and negotiations and that are potential signatories.

The 2003 Agreement is an implementation of the 1988 Convention. It can be concluded that a great deal of progress has been made, because many vague provisions of the 1988 Convention have been detailed in order to successfully suppress illicit drug trafficking by sea. The present agreement provides many opportunities for mutual assistance at sea. It is a significant improvement that the mandatory assertion of jurisdiction over offences committed on board vessels of other parties has been achieved. Another strong point of this agreement is the wide range of possibilities of cooperation between joint and combined, inter- and intra-state, law enforcement operations at sea. The possibility and encouragement of prior authorization to board and search a suspect foreign flag vessel can significantly accelerate the suppression of illicit drug trafficking at sea.

The agreement constitutes two occasions when the principle of sovereignty may be overridden. Firstly, foreign assistance in the waters under sovereignty of a coastal party and, secondly, when boarding a flagship on the high seas.

The agreement focuses primarily on operational actions at sea. The provisions for prosecuting suspect persons have less attention. So have the enforcement measures related to apprehending suspect vessels, including apprehending persons aboard. The 2003 Agreement is a good and adequate tool for developing and developed states to be able to assist one another in suppressing illicit drug trafficking at sea. The agreement offers a legal framework within which maritime counter-drug cooperation should take place.

It can be concluded, as well, that the 2003 Agreement constitutes some new restrictions on the freedom of the high seas. The prior authorization to stop and board a suspect foreign flag vessel on the high seas is an especially serious restriction on the principle of freedom of navigation, but legally convened.

5.5.2. General conclusions about multilateral maritime drug-interdiction treaties

Four multilateral maritime drug-interdiction treaties in two regions of the world that are the most threatened by illicit drug trafficking at sea have been examined and discussed in the last two chapters. In Europe, the European Union and the Council of Europe are the main interna-

⁵⁹ Convention of International Civil Aviation, Chicago, 7 December 1944, UNTS Vol. 15, p. 295.

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tional organizations that are involved in suppressing illicit drug trafficking and have concluded treaties in this field. In the Caribbean region the initiative of the Ministry of Defense of the Kingdom of the Netherlands led to the concluding of a multilateral treaty, which has been endorsed by all states in the region, and by states that have interests in that region.

The multilateral maritime drug-interdiction treaties have developed rather well when compared with the LOSC and the 1988 Convention. Prior authorization to board and search a foreign suspect vessel on the high seas can almost be considered as the new standard.

The provisions in all treaties, especially when implemented in the national law and regulations by all state parties and potential state parties to the treaties might be adequate enough to suppress illicit drug trafficking at sea.

The decision of whether to apply for prior authorization is a critical one, as are the contents of notifications that includes some restrictions to the provisions. When all of the multilateral maritime drug-interdiction treaties that have been examined and discussed enter into force and have been ratified by all potential states, a global legal framework to suppress the illicit drug traffic at sea will be available.

In Chapter 7 of this study, the multilateral maritime drug-interdiction treaties will be compared, while in Chapter 8 the consequences of those agreements for the authority of coastal states and intervening states are examined.

Annex

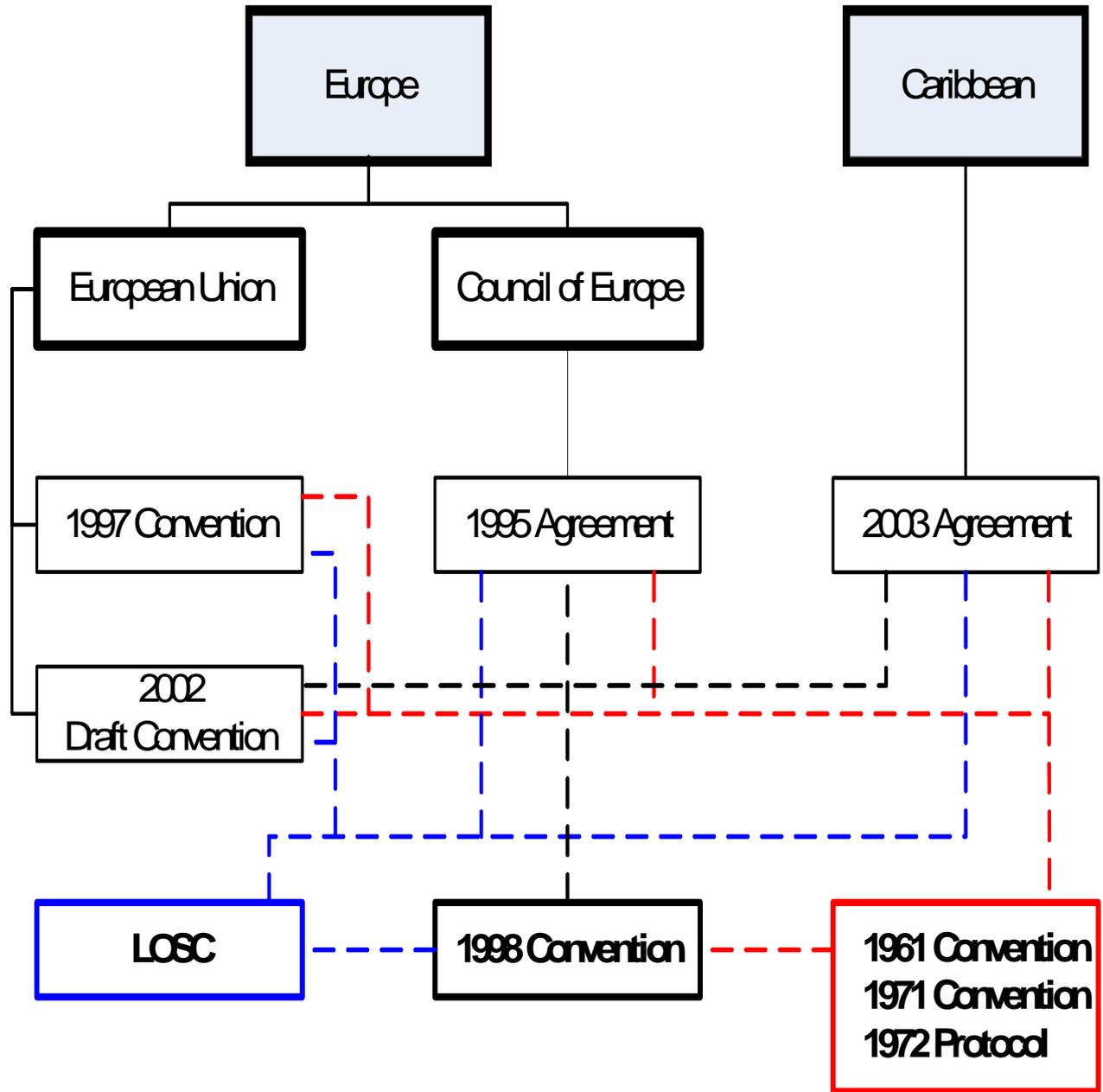


Figure 5-1 Overview of the multilateral maritime drug-interdiction treaties examined in Chapters 4 and 5

CHAPTER 6

BILATERAL MARITIME DRUG-INTERDICTION TREATIES

6.1. Introduction

Notwithstanding how significant the multilateral initiatives have been and still are, bilateral cooperation continues to play a central role in many countries' policies. It is in this sphere that the most dramatic strides in international cooperation have been secured and upon which the principal burden is likely to fall in the future.¹ In addition to the specific bilateral drug-interdiction treaties, which deal with illicit drug trafficking at sea and are examined in the present chapter, many other bilateral treaties concerning general illicit drug traffic between states all over the world have been concluded.² Those bilateral treaties are beyond the scope of this study, which concentrates on illicit drug trafficking at sea, a specific part of drug trafficking.

6.1.1. Bilateral agreements

A multilateral treaty has several parties, and establishes rights and obligations that each party has towards every other party. Multilateral treaties are often, but not always, open to any state; others are regional, such as the 2003 Agreement. Bilateral treaties by contrast are negotiated between a limited number of states, most commonly only two states, establishing legal rights and obligations between those states only. The majority of treaties registered pursuant to article 102 of the Charter of the United Nations are bilateral treaties. A bilateral treaty is, in general, an international agreement concluded between two parties, each possessing treaty-making capacity. There is no standard form for a bilateral treaty.

Bilateral treaties in the aggregate may create rules and patterns of conduct in particular subjects. Though, in general, more similar to contracts than to statutory law in form, such treaties are often standardized and therefore establish similar rights and obligations for a broad range of states. It has to be borne in mind that not all bilateral agreements are contractual in nature.

The many similar bilateral treaties on maritime drug interdiction may create networks of legal obligations that are an important part of international law. Whether such treaties may be viewed as creating customary international law in some cases is a separate matter.³ Bilateral treaties may provide evidence of customary rules,⁴ and indeed there is no clear and dogmatic distinction between law-making treaties and other ones.

It is to some of the more important developments relevant to bilateral counter-drug cooperation that the study now turns. The bilateral maritime drug-interdiction treaties in the most threatened regions of the world will be examined. Firstly, a bilateral maritime drug-

¹ Gilmore (1990), p. 368.

² For example, the Agreement Concerning the Investigation of Drug Trafficking Offenses and the Seizure and Forfeiture of the Proceeds and Instrumentalities of Drug Trafficking, between the USA and the UK, Canada, Australia, Bahamas, Spain, Nigeria, Malaysia, Sweden, and Brazil, respectively.

³ Baxter (1965-1966), pp. 275-300; see Section 8.8.4. of this study.

⁴ *Nottebohm Case*, ICJ Reports (1955), pp. 22-23.

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interdiction agreement in the European region will be examined. Secondly, some bilateral maritime drug-interdiction agreements in the Caribbean region will be analyzed. In that region, the most significant bilateral maritime drug-interdiction agreement, the so-called Shripriker Agreement, will be examined as well.

6.2. Bilateral maritime drug-interdiction treaty in Europe

6.2.1. General

In Europe, not many bilateral maritime drug-interdiction treaties are known to exist. There are bilateral agreements that deal with mutual assistance and serious offenses in general, but only a few that deal with the issue of illicit drug trafficking at sea. An example of one of the more general treaties is the bilateral agreement between Italy and Albania, concluded in 1997, including the subsequent 1997 and 1998 Naval Protocols. Pursuant to that agreement, Albania authorized -in advance- Italian law enforcement vessels to stop and board Albanian suspect vessels in all maritime zones, including the waters under sovereignty of Albania. After evidence has been found of illicit activities, those vessels must be diverted to an Albanian port. Within that legal framework, several counter-drugs operations have been carried out.⁵

Another example of a general drug-interdiction treaty is the Agreement between the European Community and the United States of America on precursors and chemical substances frequently used in the illicit manufacture of narcotic drugs or psychotropic substances, which was designed between the United States and the European Union.⁶ In the first formal US-EU anti-drug initiative, the two sides agreed to exchange information on transactions in regulated chemicals to allow for easier identification of suspicious shipments. That agreement is based on Article 12 of the 1988 Convention and deals with precursors. The US and the EU also agreed to increase cooperation in combating drugs in the Caribbean region, where a number of EU countries have territories or retain influence. Areas of cooperation include joint studies on maritime cooperation, exchange of information and equipment and training of police and judicial authorities.⁷

6.2.2. The 1990 Treaty between Spain and Italy

General

One of the few bilateral agreements in the specific area of maritime drug interdiction in Europe is the agreement between Spain and Italy that was concluded in 1990.⁸ In the light of the usefulness of this type of bilateral agreement, Spain also concluded a similar agreement

⁵ This so-called 'Italian Experiment' was mentioned in a presentation by the Head of Operations of the Italian Navy during a Counter Drugs Operations Conference at The Hague, May 2002. The presentation and speech, which mentioned the Naval Protocols, are on file with the author of this study. Those documents are classified.

⁶ Agreement between the European Community and the United States of America on precursors and chemical substances frequently used in the illicit manufacture of narcotic drugs or psychotropic substances, which was designed between the United States and the European Union, was signed at the Hague on 28 May 1997 and entered into force on 01 July 1997, Official Journal L 164, 21 July 1997.

⁷ The results of this bilateral agreement have been mentioned in Section 5.3.1. of this study, e.g. the Maritime Study (1997).

⁸ The Treaty between the Kingdom of Spain and the Republic of Italy to Combat Illicit Drug Trafficking at Sea, was signed at Madrid on 23 March 1990 and entered into force on 7 May 1994, UNTS Vol. 1776, p. 230, the Spanish text has also been published in Boletín Oficial del Estado (BOE), 6 May 1994. The English text has been published in the Law of the Sea Bulletin 29, 1995, p. 77. The English text of the treaty can be found in the Annex to this study.

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with Portugal in March 1998.⁹ The agreement between Spain and Italy will be examined in detail.

The 1990 Treaty between Spain and Italy is based on Article 17 of the 1988 Convention. Cooperation established under its provisions is based on the exercise of exclusive jurisdiction in each party's territorial seas, the recognition of each party's competence and the possibility for flag states to renounce their preferential jurisdiction outside territorial seas.

The 1990 Treaty is primarily concerned with questions of jurisdiction and the right of intervention. As regards the exercise of jurisdiction, the 1990 Treaty was designed to fill the gaps in Article 17 of the 1988 Convention.¹⁰ As regards the right of intervention, the 1990 Treaty introduced the possibility of waiving the system of authorization on a case-by-case basis. That resulted in adopting a system whereby one state recognized another state's right to intervene, while at the same time establishing conditions to protect freedom of navigation.

It must be borne in mind that the 1990 Treaty had been drawn up in the hope that the flag state would renounce its preferential jurisdiction.¹¹ In those days, Italy and Spain were considering concluding bilateral maritime drug-interdiction agreements with other countries of the Mediterranean basin, though they would not necessarily be similar to the 1990 Treaty.¹² As this was one of the first treaties dealing with illicit drug trafficking at sea, the 1990 Treaty between Spain and Italy was used as reference material to draw up the 1995 Agreement¹³ and the 2002 Draft Convention described in Chapter 4 of the present study.

General provisions of the 1990 Treaty between Spain and Italy

General

The preamble refers to rising crime rates in both countries as a result of traffic in narcotic drugs and psychotropic substances. Both countries were aware of the fact that the sea is one of the channels of distribution of drugs. In the preamble, reference is made to the 1988 Convention and to the 1958 Convention on the High Seas.¹⁴

Definitions

The definitions of the 1990 Treaty between Spain and Italy are contained in Article 1 of the agreement. Three definitions can be found in that article, all regarding to a different kind of ships. Article 1 reads:

Article 1 Definitions

Solely for the purpose of this Treaty:

- a. "Ship" means any seagoing craft or surface vessel that contains or transport goods and/or persons;

⁹ The Treaty between the Kingdom of Spain and the Portuguese Republic to Combat Illicit Drug Trafficking at Sea, was signed at Lisbon on 2 March 1998 and entered into force on 21 January 2001, UNTS Vol. 2149, p.4; see also ENFOCUSTOM 38, 11956/01, Brussels, 15 October 2001.

¹⁰ Draft Report of the Pompidou Group Working Group, held in Paris, 19-20 September 1991, PC-NU (92) 6, Strasbourg, 17 November 1992, p. 3.

¹¹ Draft Report of the Pompidou Group Working Group, held in Paris, 19-20 September 1991, PC-NU (92) 6, Strasbourg, 17 November 1992, p. 9.

¹² Draft Report of a Working Group on Drug Trafficking in International Waters of the Pompidou Group, held in Paris, 26-27 June 1990, PC-NU (92) 4, Strasbourg, 17 November 1992.

¹³ Draft Report of the Pompidou Group Working Group, held in Paris, 19-20 September 1991, PC-NU (92) 5, Strasbourg, 17 November 1992.

¹⁴ The LOSC only came into force in 1994.

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- b. “Warship” means any duly authorized ship conforming to the definition in article 8, paragraph 2, of the Geneva Convention on the High Seas of 29 April 1958, the actions of which must be coordinated by the competent national authorities;
- c. Solely for the purposes covered by articles 4, 5 and 6, the expressions “flag displayed by the ship” and “under whose flag the ship was sailing” signify not only a ship sailing under the flag of its own State, but also a ship flying no flag but belonging to a natural person or legal entity in one of the Parties.

Ship

The definition of ship in Article 1(a) includes any seagoing craft or surface vessel. That is a broad definition. Any craft floating on or sailing under the water surface is included. Parties are encouraged to give the broadest possible definition of the term.¹⁵ It also covers fishing boats and yachts. This definition is not in conformity with those discussed in previous chapters of this study; ‘vessel’ in those chapters includes a ship.

Warship

Warship is any duly authorized ship as defined by Article 8(2) of the Convention on the High Seas.¹⁶ That definition is the same as the definition in Article 29 LOSC. The definition is silent about other government ships operated for non-commercial purposes, such as customs or police vessels. Article 3 of the present treaty does mention those vessels, however.

Other ships

Article 1(c) states that for the sole purpose of Articles 4, 5 and 6 of this treaty, the expressions ‘flag displayed by the ship’ and ‘under whose flag the ship was sailing’ refer to a ship sailing under the flag of its own state. It also includes a ship flying no flag but owned by a natural person or legal entity in one of the parties.

Objective

In the preamble to the agreement, the objective of the 1990 Treaty between Spain and Italy is said to be the eradication of illicit drug trafficking by sea, by complementing the 1988 Convention.

Geographical scope

The geographical scope of this treaty comprises the waters outside the parties’ territorial limits.

Jurisdictional provisions of the 1990 Treaty between Spain and Italy

Jurisdiction

The wording of Article 17 of the 1988 Convention is not very clear in terms of jurisdiction and geographical scope. Article 4 of the 1990 Treaty is intended to remedy that deficiency.¹⁷ The present treaty therefore prescribes jurisdiction inside and outside the waters under the sovereignty of one of the state parties over acts committed in these zones. Article 4 reads:

Article 4 Jurisdiction

¹⁵ Draft Report of a Working Group of the Pompidou Group, held in Paris, 26-27 June 1990, PC-NU (92) 4, Strasbourg, 17 November 1992.

¹⁶ That article reads: “For the purposes of these articles, the term ‘warship’ means a ship belonging to the naval forces of a state and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government and whose name appears in the Navy List, and manned by a crew who are under regular naval discipline.”

¹⁷ Draft Report of a Working Group on Drug Trafficking in International Waters of the Pompidou Group, held in Paris, 26-27 June 1990, PC-NU (92) 4, Strasbourg, 17 November 1992, p.3.

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1. Each Party shall exercise sole jurisdiction over acts in its territorial waters, free zones or free ports, even if the said acts were initiated or terminated in the other State.
Should there be a discrepancy with regard to the extent of territorial waters of each Contracting Party, solely for the purposes of this Treaty the limit of the territorial waters of each Party shall correspond to the maximum limit stipulated by the law of one of the Parties.
2. In the case of acts covered by article 2 committed outside the territorial waters of one of the States, preferential jurisdiction shall be exercised by the State under whose flag the ship was sailing, on board which or by means of which offence was committed.

Within the waters under its sovereignty, sole jurisdiction shall be exercised by the coastal state, even if the act commenced or terminated in the other state. The interesting part of Article 4(1) is the latter part. That states that when the extent of territorial seas of each contracting party is doubtful, then the maximum limit of the territorial sea, as stipulated by the law of one of the parties will be taken as the limit. That provision may refer to unrecognized excessive claims of the parties regarding baselines and historic bays. These claims can be found in national regulations.¹⁸

Outside the waters under the sovereignty of a coastal state, the flag state shall exercise its preferential jurisdiction over its national ships. When, after an intervention, the non-flag state party requests, pursuant to Article 6 of this treaty, the renunciation of jurisdiction of the flag state, it can be assumed that that party has established jurisdiction over offences committed on board the vessel of the flag state party that it stopped and boarded.

Renunciation of jurisdiction

Article 6 deals with the subject of renunciation of jurisdiction after an intervention has taken place. The article reads:

Article 6 Renunciation of jurisdiction

1. If a Party has carried out any of the measures provided for in article 5, it may request the State under whose flag the ship was sailing to renounce its preferential jurisdiction.
2. The State under whose flag the ship was sailing shall examine the request in good faith and, in arriving at its decision, shall take into consideration, among other criteria, the place of seizure, the conditions under which evidence was obtained, any correlation between proceedings, the nationality of those involved and their place of residence.
3. If the State under whose flag the ship was sailing renounces its preferential jurisdiction, it shall provide the other State with the information and documents in its possession. If it decides to exercise its jurisdiction, the other State shall transfer to it any document obtained, items to be used in evidence, the persons arrested, and any other element relevant to the case.
4. The decision to exercise jurisdiction must be notified to the requesting Party within 60 days of the date of receipt of the request.
The necessary urgent legal measures which custom requires be carried out and the request and the request to renounce the exercise of preferential jurisdiction shall be governed by the legal system of the intervening State.
If the deadline provided for in the present article expires without any decision having been notified, jurisdiction will be deemed to have been renounced.
In addition to the usual channels of communication, the Parties shall specify which of their central authorities are empowered to forward requests for exercise of jurisdiction.

The party intervening as an agent of the other party may request the other party, *in casu* the flag state, to renounce its jurisdiction in favor of the jurisdiction of the intervening state. The flag state shall examine that request of renunciation and answer within 60 days. When no response has been provided by the flag state within that timeframe, jurisdiction will be deemed

¹⁸ See for excessive claims the Maritime Claims of Coastal States, US Department of Defense, Washington, June 2005, <http://www.dtic.mil/whs/directives/corres/html/20051m.htm> (visited Fall 2006). See also Roach and Smith (1994 and 1996).

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to have been waived by the flag state. This amounts to tacit renunciation. In the meantime, necessary legal measures shall be carried out by the legal system of the intervening state. Thus, when urgent measures must be taken at the time of boarding and searching the vessel, the rules of the intervening state should apply and this should cause no problem.

Given the diversity of national legislation, it must be noted that it is easier to reach consensus on the renunciation of preferential jurisdiction under a bilateral agreement than under a multi-lateral agreement. Article 6 of the present treaty contains provisions governing procedures for consideration of a request for renunciation of preferential jurisdiction. In the case of the Spanish state, the decision to renounce jurisdiction is a matter for the National Court (*Audiencia Nacional*). In the case of the Italian state, the decision is a matter for the Ministry of Justice, after consultation of the Public Prosecutor. To streamline the process, both parties shall specify which of their central authorities are empowered to forward requests for jurisdiction.

Concurrent jurisdiction

The question of concurrent jurisdiction arises in connection with the actual prosecution, that is to say, once the preliminary stages have been completed in cases where the flag state does not renounce its jurisdiction. At that moment, the exclusive jurisdiction of the flag state has priority.

Authorization

Article 5(1) describes the right of intervention as an agent of the other party. The intervening ship is as an instrument, as an agent of the other party.¹⁹ The paragraph reads:

Article 5 Right of intervention

1. Should there be reasonable grounds to suspect that offences covered by article 2 are being committed, each Party recognizes the other's right to intervene as its agent in waters outside its own territorial limits, in respect of ships displaying the flag of the other State. On ships sailing under national flags, police powers granted by the respective legal systems remain valid.

This article constitutes advance authorization from the other party to stop and search a suspect vessel of that party on the high seas.

Applicable law

Article 5(3) (see below) states that intervention should be in accordance with the general rules of international law. That means, in the opinion of the author, that the intervention shall take place under the law of the intervening state, with respect to the rules of international law, because the law enforcement officials have to act according to their domestic laws; this has been laid down in other drug-interdiction treaties as well.²⁰

Offences

Article 2 of the 1990 Treaty reads:

Article 2 Offences

1. Each Contracting Party shall treat as an offence, and punish accordingly, all acts committed on board ships or through the use of any boat or surface vessel which are not excluded from the scope of this Treaty under the terms of article 3, connected with the possession of narcotic drugs and psychotropic

¹⁹ Brownlie (1998), pp. 647, 675: States may act on behalf of other states for various purposes, provided that authority to do so exists and is not exceeded. This agency may arise from treatise or otherwise. See also the term 'Right of Representation' in Section 4.4.3. of this study.

²⁰ See the Articles 11, 12 and 13 of the 1995 Agreement, and the Articles 9, 11, 16, 20, 22 and 25 of the 2003 Agreement.

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substances, as defined by the international treaties by which the Parties are bound, for the purposes of distribution, transport, storage, sale manufacture or processing.

2. Attempting to commit an offence, failing to commit an offence for reasons beyond the control of the perpetrator, participation and complicity are likewise punishable.

The article states that both parties shall treat as an offence, and prosecute and punish all drug-related acts on board ships connected with the possession for the purposes of distribution, storage, transport, trans-shipment, sale, manufacture or processing. The seriousness of the offences is not mentioned. When the 1990 Treaty between Spain and Italy was being drafted, the parties discussed the seriousness of offences, but, given that it was such a complex, delicate issue and bearing in mind the discussion on the subject during the negotiations of the 1988 Convention, both parties preferred not to allude to it in the 1990 Treaty. The Italian delegation considered that taking that issue into account could make it difficult to reach an agreement.²¹

Article 8 of the 1990 Treaty states that drug-related offences committed in one state shall be taken into consideration by the other party, when it comes to a verdict for offences covered by this treaty.

Suspicion

Reasonable grounds to suspect that offences are being committed is the wording for suspect vessels in this treaty, according to Article 5(1) (see above under Authorization).

Evidence and surrender of assets

When the preferential jurisdiction is not renounced, evidence, arrested persons and all other relevant elements must be transferred to the flag state, says Article 6(3). The paragraph reads:

Article 6 Renunciation of jurisdiction

3. If the State under whose flag the ship was sailing renounces its preferential jurisdiction, it shall provide the other State with the information and documents in its possession. If it decides to exercise its jurisdiction, the other State shall transfer to it any document obtained, items to be used in evidence, the persons arrested, and any other element relevant to the case.

Extradition

With reference to Article 6(3) of the present treaty one might ask whether the transfer of arrested persons, in the event that the flag state decides to exercise its jurisdiction, would not give raise to a problem of extradition. The Italian delegation has admitted that this was indeed a delicate question, but stated that transfers had not been envisaged by the parties from the point of view of extradition.²²

Operational provisions of the 1990 Treaty between Spain and Italy

Actions

The actions enumerated in Article 5(2) are pursuing, arresting and boarding a suspect ship, checking documents and questioning persons aboard. The paragraph reads:

Article 5 Right of intervention

2. In exercising this authority, warships or military aircrafts, or any other duly authorized ship or aircraft visibly displaying exterior markings and identifiable as ships or aircraft in the service of the State of one

²¹ Draft Report of a Working Group on Drug Trafficking in International Waters of the Pompidou Group, held in Paris, 26-27 June 1990, PC-NU (92) 4, Strasbourg, 17 November 1992, p. 5.

²² Draft Report of the Pompidou Group Working Group, held in Paris, 19-20 September 1991, PC-NU (92) 6, Strasbourg, 17 November 1992, p. 9.

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of the Parties, may pursue, arrest and board the ship, check the documents, question persons on board, and if reasonable suspicion remains, search the ship, seize the drugs and arrest the persons involved and, where appropriate, escort the ship to the nearest suitable port, informing –if possible before, otherwise immediately on arrival- the State under whose flag the ship is sailing.

The 1990 Treaty has identified a series of enforcement stages. First, locating, tracing and stopping, then when suspicion remains, searching and seizing drugs and arresting persons onboard. The process ends with the disposition of the ship. The spectrum of those actions is what is called maritime counter-drug cooperation in the present study. It is not clear whether this series of actions is limited to the enumerated actions, or that other and more specific actions are allowed as well. Nor is the use of force during the actions described.

Executions of actions

Pursuant to Article 5(2), actions must be carried out by warships or other duly authorized ships, visibly displaying exterior markings and identifiable as ships in the service of the state. That includes all kinds of law enforcement agencies, such as police, customs etc. Only warships are defined in the 1990 Treaty (see above).

Safeguards

Provisions dealing with safeguards can be found in the latter paragraphs of Article 5, those read:

Article 5 Right of intervention

3. This authority shall be exercised in accordance with the general rules of international law.
4. When action is taken pursuant to this article, the Parties concerned shall take due account of the need not to endanger the safety of life at sea or the security of the ship and the cargo, or to damage the commercial and legal interests of the flag State in question, or of any other interested State. In any event, if a Party intervenes without adequate grounds for suspicion, it may be held liable for any loss or damage incurred, unless the intervention was at the request of the State under whose flag the ship was sailing.
5. In the event of the legal action over liability for any loss or damage arising from intervention as described under points 1 and 2 of paragraph 4, or over the extent of compensation, each Party recognizes the jurisdiction of the International Chamber of Commerce in London.

Paragraphs 3 and 4 of Article 5 are the safeguards for the suspect vessel, including cargo and personnel on board the suspect vessel.

Paragraph 4 of Article 5 refers to the proportionality rule of Article 17(5) of the 1988 Convention. That is the proportionality between action taken with respect to a vessel suspected of engaging in illicit drug trafficking and the need to avoid interfering with commercial interests (trade in general). The second section of paragraph 4 contains a provision on the liability of a party that took action with the respect to a ship sailing under the flag of another party without adequate grounds for suspecting that one of the offences listed in the 1990 Treaty had been committed on board. That section provides for the liability of the intervening state for any loss or damage incurred in the event that intervention took place without adequate grounds for suspicion. It should be noted that the text states ‘any loss or damage’, which includes very small losses as well.

According to paragraph 5 of Article 5, the intervening party is held liable for any loss or damage when the intervention took place without adequate grounds for suspicion. In case of disputes both parties recognize the jurisdiction of the Arbitration Section of the International Chamber of Commerce in London.

6.3. Bilateral maritime drug-interdiction treaties in the Caribbean region

6.3.1. General

General

The bilateral treaties examined in this section were primarily concluded to serve as a legal framework to suppress illicit drug trafficking into the United States. The United States had drawn up comprehensive strategies in which the goal of reducing the flow of narcotic drugs plays a central role. International cooperation is critical to the successful suppression of drug smuggling at sea. The United States therefore started, *inter alia*, negotiations and consultations in order to conclude bilateral treaties.

Threat to the US posed by illicit drug traffic

Judge Kravitch stated in the *US v. Gonzales* case:²³

“One need only one glance at a map of the Caribbean Region and compare the vast lengths of the United States coast to the narrow straits between Yucatan and Cuba, and the other narrow passages through the West Indies to understand the reasonableness of enforcing our drug laws outside the territorial sea”,

The distances between the drug-producing countries and the United States are relatively short. The narcotic drugs that are smuggled are mainly cocaine and marijuana. Maritime conveyance continues to be the predominant means for smuggling cocaine and marijuana into the United States.²⁴ The problem for the United States is the extensive sea borders, especially in Florida and along the coast of the Gulf of Mexico. The United States must also protect the Commonwealth of Puerto Rico and its Caribbean territories such as the US Virgin Islands. The long and unprotected sea borders are very vulnerable for the access of cocaine and marijuana from the continent of South America.

The security of the maritime borders of the United States is a critical component of a balanced national strategy to reduce drug use and its destructive consequences. The comprehensive strategies to stop the flow of drugs include the protection of the coastal borders of the United States. To prevent illicit drugs from crossing the vulnerable coastal borders, they should be intercepted at sea. For the United States law enforcement on the high seas falls to the US Coast Guard and the US Customs Service.

Bilateral approach

The enforcement jurisdiction over foreign flag vessels that exercise freedom of navigation is dependent on the cooperation of the flag state. Initially, the approach of the United States developed on a case-by-case procedure with concerned flag states in order to enhance maritime counter-drug cooperation on the high seas.²⁵ One of the concerned states was the United Kingdom.²⁶ In addition to vessels of the United Kingdom, flying the flag of the United Kingdom, vessels belonging to United Kingdom Overseas Territories (UKOT) may also be registered in the United Kingdom.²⁷ A further complicating factor arose when suspect vessels claimed to be United Kingdom-registered vessels but turned out to be registered in another

²³ *US v. Gonzales*, 776 F 2d 931, 1985 p. 939. See the analysis laid down in Section 8.6.3. of the study.

²⁴ Drug Control, Update on US Interdiction Efforts in the Caribbean and Eastern Pacific, GAO/NSIAD-98-30 October 1997, p. 4.

²⁵ Department of State Submission, *American Journal of International Law*, Vol. 72 (1982), pp. 377-379.

²⁶ *US v. Green* 671 F 2d 46, 1982, p. 49.

²⁷ See www.dft.gov.uk/stellent/groups/dft.shipping/documents/ (visited Fall 2006).

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state or to be stateless.²⁸ That situation was unsatisfactory. The prerequisites for concluding an agreement to suppress illicit trafficking at sea were met.

One of the first agreements in history to suppress illicit drug trafficking at sea, - which had been a problem worldwide for years - was a treaty between the US and the UK, signed in 1981 and effected by an Exchange of Notes (see below). In 1998, after some additional Memoranda of Understanding (MOU), the 1998 Agreement was concluded between those states. In the meantime, Shiprider Agreements were concluded between the United States and almost all other states in the Caribbean region.

Another MOU was concluded between France and the Governments of Dominica and Saint Lucia.²⁹ These three states are neighboring island states in the eastern part of the Caribbean region, with bordering territorial seas. This MOU is quite the same as the US Shiprider Agreements. For that reason, it is not examined separately in this study.

6.3.2. The 1981 Agreement between the US and the UK

General

The first innovative and drug-related bilateral maritime agreement worthy of note was concluded between the United States and the United Kingdom in November 1981 and addressed the issue of narcotic interdiction at sea. The need for such an agreement arose out of the frequent use of private foreign flag vessels to import marijuana and, to a lesser extent, cocaine into the United States.³⁰ Both the United States and the United Kingdom had drawn up comprehensive strategies to suppress the flow of illicit drugs. Both states recognized that international cooperation in general and international cooperation at sea in particular was essential in curbing illicit trafficking of drugs. That international cooperation was even called a key element.³¹

The United States and the United Kingdom had an *ad hoc* consent policy for maritime counter-drug cooperation. Due to the time lost during the process of granting authorization, negotiations were started during which the US and the UK agreed to dispense with the need for case-by-case United Kingdom consent in a formal agreement. That was a reason to conclude the 1981 Agreement.³² The provisions of the 1981 Agreement are laid down in nine paragraphs.

History

The Arrangements for the Direct Exchange of Certain Information Regarding the Traffic in Narcotic Drugs³³ and the Convention between the United States and Great Britain for the Prevention of Smuggling of Intoxicating Liquors into the United States of 1924 (The Alcohol

²⁸ US v. Dominiguez 604 F2d304 (1979); US v. Rubies 612 F 2d 397 (1979); American Journal of International Law, Vol. 74 (1980), pp. 437-438, 945.

²⁹ Memorandum of Understanding (MOU) on Counter-Drug Maritime Cooperation between the Authorities of France, Dominica and Saint Lucia, responsible for the Coast Guard Services, (2000), on file with the author.

³⁰ The Border War on Drugs, Office of Technology Assessment, Congress of the United States (1987) p. 24-27.

³¹ Tackling Drug Misuse: A Summary of the Government's Strategy Home Office of the UK, 3rd edition, London (1988), p. 9.

³² Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States Concerning Cooperation in the Suppression of the Unlawful Importation of Narcotic Drugs into the United States, signed at London, on 13 November 1981 and entered into force immediately, UNTS Vol.1285, I-21181, pp. 198-200. See the Annex to this study.

³³ Exchange of Notes, London, 23 December 1927, 4 and 11 January 1928, entered into force on 11 January 1928, 12 Bevans 467.

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Convention),³⁴ foreshadowed the 1981 Agreement. The drafters of the 1981 Agreement appropriated some legal key phrases used in that Alcohol Convention.³⁵ In 1981, the 1961 and 1971 Conventions were in force. The 1988 Convention with the important maritime counter-drug interdiction Article 17 had not been drafted yet.

The 1981 Agreement between the United States and the United Kingdom was used as reference material to draw up the 1995 Convention.³⁶

Both the Alcohol Convention and the 1981 Agreement are essentially non-reciprocal in nature. Its provisions are solely designed to facilitate the effective enforcement of the United States law, subject to a number of safeguards for the United Kingdom.³⁷

General provisions of the 1981 Agreement between the US and the UK

Definitions

The 1981 Agreement does not contain definitions itself. Some relevant terms from this treaty are described according to the opinion of the author, in order to be able to compare those terms with terms of other maritime drug- interdiction treaties in the next chapter of this study.

Cargo of drugs

The term ‘cargo of drugs’ as can be found in paragraph 1 includes a private vessel engaged with illicit drug trafficking but excludes the single person on a passenger liner who may be suspected of having drugs in his luggage.³⁸ Therefore, it can be stated that possession of drugs for personal use only is not a reason to stop and search a vessel. On the other hand, the luggage, including drugs more than for personal use, of a passenger on board a ship can in itself be a cargo of drugs.

Reasonably believe

The term ‘reasonably believe’ as stated in paragraph 1 of the 1981 Agreement is identical to the United States’ term ‘reasonable suspicion’. That term has been the subject of judicial scrutiny.³⁹

Private vessel

Private vessels are vessels that are not involved in governmental use.

No objection

The ‘will not object’ formula is interpreted in the legal literature as avoiding any implication that US authorities are acting on behalf of the UK Government.⁴⁰ This term is generally contrasted with terms such as ‘authorize’ or ‘permit’ which imply that the state conferring authority assumes responsibility for the acts of the party so authorized unless those acts are flagrantly in excess of the authority conferred.

³⁴ Convention between the United States and Great Britain for the Prevention of Smuggling of Intoxicating Liquors into the United States, 23 January 1924, LNTS Vol. 27 685, p.182.

³⁵ E.g. the ‘no objection’ provision of Article 2 of the Alcohol Convention and of paragraph 1 of the 1981 Agreement.

³⁶ Report of the Meeting of the Working Group on Drug Trafficking in International Waters of the Pompidou Group, held in Paris, 19-20 September 1991, PC-NU (92) 5, Strasbourg, 17 November 1992.

³⁷ Gilmore (1989), p. 222.

³⁸ Siddle (1982) pp. 726, 740.

³⁹ US v. Reeh 780 F.2d 154, 11th Circuit (1986); US v. Quemener 789 F.2d 145, 155, 2nd Circuit (1986).

⁴⁰ Gilmore (1989), p. 225; Siddle (1982), p. 739, 740.

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Principles

Under the agreement, the British authorities will not object to the United States authorities boarding and searching vessels under the British flag. Where the United States authorities consider that an offense has been committed against American legislation in respect of importing narcotic drugs, the British authorities will not object to the vessel being seized and taken to an American port. This is a practical restriction on the freedom of navigation, but one that has been agreed upon appropriately and is therefore in accordance with in the international law of the sea.

It must be pointed out that the very fact that the United Kingdom was willing to enter into such an agreement as this reflects well on its spirit of cooperation in narcotic matters and its trust in a close friend and ally.⁴¹ Nevertheless, the Government of the United Kingdom emphasized that the agreement should not be regarded as precedent for the conclusion of any further agreement affecting British vessels on the high seas.⁴²

Objective

The objective of the 1981 Agreement is to take more effective measures to suppress the unlawful importation of cannabis and other narcotic drugs into the United States. This is stated in the agreement's introduction.

Geographical scope

The area in which the right to stop and board a vessel registered in the United Kingdom by law officials of the United States can be exercised is defined in paragraph 9 of the agreement, which reads:

9. The areas referred to in paragraph 1 above comprise the Gulf of Mexico, the Caribbean Sea, that portion of the Atlantic Ocean West of longitude 55° West and South of 30° North and all other areas within 150 miles of the Atlantic coast of the United States.

All the vulnerable areas and routes in the Caribbean region are covered by the geographical scope. The area is larger than the area of the 2003 Agreement, which was specially drawn up for the Caribbean region. All the waters around the United Kingdom's Overseas Territories in the Caribbean (UKCOT) are covered as well, including the Commonwealth of the Bahamas. That important transit area is especially vulnerable. Some of the islands of the Bahamas are strategically well situated off the coast of the United States and many private leisure vessels can be found in the waters surrounding those islands. Only the waters surrounding the United Kingdom's Overseas Territory (UKOT) Bermuda is not included. The geographical scope of the agreement extends to an area north of the Caribbean region up to the border between Canada and the United States and 150 miles off the Atlantic coast.

Extrapolation of the geographical scope

The 1981 Agreement restricts its geographical scope, but the terms of this agreement has been applied elsewhere. This is illustrated by the boarding of the UK sailing vessel 'The Myth of Ecurie' on the high seas off the coast of California (US). This is well beyond the geographical scope of the 1981 Agreement. The flag state United Kingdom authorized the United States to board, search and seize, if evidence warrants, under United States law. The conditions and terms of the 1981 Agreement had to be used in this case.⁴³ It has to be borne in mind

⁴¹ Gilmore (1989), p. 226.

⁴² See the side letter of 13 November 1981, reproduced in the British Yearbook of International Law (1981), p. 473. The precedent, however, had already been set by the 1924 Alcohol Convention.

⁴³ US v. Biermann, 678 F Supp 1437 (1988).

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that this was an incident, no other examples of this extrapolation of the geographical scope are known.

Maritime zones

Worthy of note is the fact that reference to maritime zones other than the territorial sea was not made. The requirement of compliance with international law is implicit. It seems to follow that boardings can take place on the high seas and within the various EEZ's of third states within the region and their contiguous, customs and similar zones.⁴⁴

Jurisdictional provisions of the 1981 Agreement between the US and the UK

Jurisdiction

Although prescriptive jurisdiction is not mentioned in the agreement, it is assumed that the enforcement jurisdiction of the US law officials exercising the provisions of this agreement on board a UK suspect vessel is endorsed by prescriptive jurisdiction.

Applicable law

Paragraph 6 states that any action by the law enforcement officers shall be taken in accordance with this agreement and United States' law. That paragraph reads:

6. Any action by the authorities of the United States shall be taken in accordance with this Agreement and the United States law.

This provision is in accordance with customary international law and the other maritime drug-interdiction treaties discussed.

Offences

According to the Preamble of the 1981 Agreement, only illicit trafficking in narcotic drugs is considered to be an offence. The Preamble reads:

Bearing in mind the special nature of this problem and having regard to the need of international co-operation in suppressing the illicit traffic in narcotic drugs, which is recognized in the Single Convention on Narcotic Drugs of 1961

This agreement is silent about psychotropic substances, but the 1971 Convention, which deals specifically with psychotropic substances, is in force to cover those eventualities.⁴⁵ Conversely, a reference to the 1961 Convention is made, which deals specifically with narcotic drugs. Therefore, it is the author's opinion that illicit traffic in psychotropic substances can not be considered as an offence under this agreement.

Suspicion

Paragraph 1 mentions suspicion, it reads:

1. The Government of the United Kingdom of Great Britain and Northern Ireland agree that they will not object to the boarding by the authorities of the United States, outside the limits of the territorial sea and contiguous zone of the United States and within the areas described in paragraph 9 below of private vessel under the British flag in any case in which those authorities reasonably believe that the vessel has on board a cargo of drugs for importation into the United States in violation of the laws of the United States.

⁴⁴ Gilmore (1989), p. 224.

⁴⁵ See Section 2.4.6 of this study.

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The wording of paragraph 1 is designed to avoid arbitrary United States interference with vessels from the United Kingdom and seeks to achieve this result by requiring the United States authorities to ‘reasonably believe’ that the vessel has a cargo of drugs on board.⁴⁶

Extradition

Extradition of nationals of the United Kingdom can be found in paragraph 5, which reads:

5. The Government of the United Kingdom may, within 30 days of the vessel’s entry into port, object to the prosecution of any United Kingdom national found aboard the vessel, and the Government of the United States shall thereupon release such person. The Government of the United Kingdom agree that they will not otherwise object to the prosecution of any person found on board the vessel

Paragraph 5 states that, within 30 days of the vessel’s entry into a port of the United States, the Government of the United Kingdom may object to the prosecution of any United Kingdom national found on board the vessel. The law enforcement officers shall thereupon release such a person. This is the only way the United Kingdom can object to the prosecution of any person found on board the vessel. The agreement is silent about the extradition of non-British citizens.

Surrender assets

Under paragraph 4, the Government of the United Kingdom has fourteen days from the date of entry of a vessel into an American port to which it had been escorted to object to the continued exercise of United States’ jurisdiction. The United States shall thereupon release the vessel without charge. The provision reads:

4. The Government of the United Kingdom may, within 14 days of the vessel’s entry into port, object to the continued exercise of United States jurisdiction over the vessel for purposes of the laws referred to in paragraph 2 above, and the Government of the United States shall thereupon release the vessel without charge. The Government of the United States shall not institute forfeiture proceedings before the end of the period allowed for objection.

Operational provisions of the 1981 Agreement between the US and the UK

Registry

The boarding may take place on private vessels under the British flag. These private vessels must be registered in the United Kingdom or in any territory whose international relations the Government of the United Kingdom is responsible for.⁴⁷ These may be the United Kingdom’s Overseas Territories.⁴⁸ It is interesting to note that the confirmation of nationality is only done after the stopping and boarding of the suspect vessel (see below under paragraph 2). A request for a verification of nationality before the stopping and boarding is not described in the agreement.

Communications

Paragraph 7 speaks indirectly about communication, it reads:

7. In any case where a vessel under the British flag is boarded the authorities of the United States shall promptly inform the authorities of the United Kingdom of the action taken and shall keep them fully informed of any subsequent development.

⁴⁶ Gilmore (1989), p. 223.

⁴⁷ British Yearbook of International Law (1981), p. 472.

⁴⁸ Merchant Shipping (Registration, etc.) Act 1993 (c. 22).

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The United States' authorities are required to inform the British authorities of the actions taken and of any subsequent developments. In practice, the authorities are notified through diplomatic channels on a case-by-case basis.⁴⁹

Actions

Paragraph 2 states that following the stopping and boarding of a United Kingdom's registered vessel pursuant to paragraph 1, the United States officials may address inquiries to those on board, examine the ship's papers and take such measures as are necessary to establish the place of registration of the vessel. Paragraph 2 reads:

2. On boarding the vessel the authorities of the United States may address enquiries to those on board, examine the ship's papers and take such other measures as are necessary to establish the place of registration of the vessel. When these measures suggest that an offence against the law of the United States relative to the importation of narcotic drugs is being committed, the Government of the United Kingdom agree that they will not object to the authorities of the United States instituting a search of the vessel.

While the initial boarding of the suspect vessel may take place only where US authorities reasonably believe that there is a cargo of drugs on board destined for the US, a search may be instituted irrespective of whether preliminary inquiries raise doubts as to the continued reasonableness of that belief, pursuant to paragraph 3, which reads:

3. If the authorities of the United State then believe that an offence against the laws referred to in paragraph 2 above is being committed, the Government of the United Kingdom agree that they will not object to the vessel being seized and taken into the United States port.

When there is a suggestion that drugs will be found or other evidence of illicit drug trafficking, or any suggestions of offenses against the United States laws relative to the illicit trafficking of drugs, the Government of the United Kingdom agrees that it will not object to the law enforcement officers of the United States searching the vessel. After that search, if drugs or evidence that another appropriate offense is being committed have been found, the Government of the United Kingdom will not object to the vessel being seized and taken into a United States port.

Therefore, even when the vessel has been seized close to United Kingdom or one of its Overseas Territories, it will be taken into United States' territory, in order to bring the suspects to court in the United States.

Execution of actions

Actions must be carried out by US authorities. That is considered to be quite a broad term. The term 'US law enforcement officials' is the term used nowadays.

The use of force, when actions are carried out, is not mentioned in the agreement.

Safeguards

The provisions under paragraph 8 can be considered as a safeguard for ships not legally stopped and searched, it reads:

8. If any loss or injury is suffered as a result of any action taken by the United States in contravention of these arrangements or any improper or unreasonable action taken by the United States pursuant thereto,

⁴⁹ Draft Report of a Working Group on Drug Trafficking in International Waters of the Pompidou Group, held in Paris, 26-27 June 1990, PC-NU (92) 4, Strasbourg, 17 November 1992, p. 4.

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representatives of the two Governments shall meet at the request of either to decide any question relating to compensation. Representatives of the two Governments shall in any case meet from time to time to review the working of these arrangements.

The 1981 Agreement omits the binding mechanism for settling disputes, such as that can be found in its forerunner, the Alcohol Convention, discussed above. The provision in paragraph 8 is a weak provision for the settlement of disputes.⁵⁰ The provision for compensation is better taken care of. It has been suggested that to some extent, the provision for compensation may have been included to balance the relatively free hand that the US Coast Guard has been given under other provisions.⁵¹

6.3.3. The 1998 Agreement between the US and the UK/UKCOT

General

For this study, the 1998 Agreement between the US and the UK/UKCOT⁵² is considered to be a bilateral one, even though it was concluded between more than just two parties. The agreement was concluded between the US and the UK, on its own behalf and on behalf of the UK-COTS and Bermuda. The 1998 Agreement enhances existing cooperation between the United States and the United Kingdom against trafficking of illicit drugs in the waters around the United Kingdom's Overseas Territories in the Caribbean region (UKCOT).

The agreement came into force between the United States, the United Kingdom and on behalf of the United Kingdom's Overseas Territories in the Caribbean region and Bermuda. The United Kingdom's Overseas Territories in the Caribbean region are Anguilla, the British Virgin Islands, the Cayman Islands, Montserrat and the Turks and Caicos Islands. Bermuda, situated in the North Atlantic, is an Overseas Territory of the United Kingdom.⁵³

The purpose of the 1998 Agreement is to establish a legal framework for maritime counter-drug cooperation between the United States, the United Kingdom, the United Kingdom's Caribbean Overseas Territories and Bermuda. The agreement makes provision for shiprider programs whereby one party's law enforcement officials may embark on another party's government vessels to conduct counter-drug operations. The 1998 Agreement also provides the procedures to be followed for counter-drug cooperation to be continued in another party's sovereign waters, and for boarding in waters beyond the territorial sea.

Partial arrangements, in the area of maritime drug trafficking, between the United States and the United Kingdom, which have been successful, are already in place⁵⁴ and the present

⁵⁰ Sohn (1988), p. 62.

⁵¹ Siddle (1982), p.745.

⁵² Agreement between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland concerning Maritime and Aerial Operations to Suppress Illicit Trafficking by Sea in Waters of the Caribbean and Bermuda, was signed at Washington on 13 July 1998, and entered into force on 30 October 2000, TIAS. The text of this treaty can be found in the Annex to this study.

⁵³ See Article 2 of the 1998 Agreement.

⁵⁴ The Exchange of Notes between the Kingdom of Great Britain and Northern Ireland and the Government of the United States concerning Cooperation in the Suppression of the Unlawful Importation of Narcotic Drugs into the United States, was signed on 13 November 1981 and entered into force immediately. The MOU between the Government of the United Kingdom of Great Britain and Northern Ireland, including the Government of the Turks and Caicos Islands, the Government of the United States of America and the Government of the Commonwealth of the Bahamas, was signed at Washington on 12 July 1990 (1990 TRIPART MOU). The MOU between the Government of the United States and the Government of the United Kingdom of Great Britain and Northern Ireland, on behalf of the Government of the British Virgin Islands, concerning maritime narcotics interdiction operations, signed at Tortola on 6 February 1990, as extended to the United States Customs Service

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agreement will supplement them, speed up the procedures for counter-drug operations, and cover all the Caribbean Overseas Territories and Bermuda. The main existing arrangement, the 1981 Agreement has been described above.

The 1998 Agreement also provides the legal framework for the existing, successful shiprider program whereby US Coast Guard's law enforcement teams (LEDET) on board British Royal Navy and Royal Navy Auxiliary ships in the Caribbean region conduct boardings of suspect vessels.

Some specific provisions of the 1998 Agreement between the US and the UK/UKCOT

General

The 1998 Agreement can be considered as one of the Shiprider Agreements⁵⁵ which were concluded in the 1990s between the Government of the United States and almost all states washed by the Caribbean Sea, including states in South and Central America. The 1998 Agreement is a reciprocal one and before stopping and searching a suspect vessel of another party, authorization must be granted by that party. There is therefore no prior-authorization to stop and search a suspect vessel on the high seas.

It must be noted that the 1981 Agreement is still in force and applies to almost the same Caribbean area as the present agreement. In the present section of this study, only some specific provisions of the 1998 Agreement are described; other provisions are described below under the heading of Shiprider Agreements.

Definitions

Article 2 of the 1998 Agreement contains many definitions. Some of them very detailed.

Territory

As the present agreement has been concluded between more than two parties with quite a complicated geographic structure, all relevant waters are described in a detailed manner. All relevant individual United Kingdom Overseas Territories are enumerated in Article 2(6), as well as the islands over which the United States exercises sovereignty. The law enforcement authorities and officials, empowered to authorize foreign law enforcement officials to intervene, are listed in Article 2(5)(6). The laws of the United Kingdom Overseas Territories are also defined.

Shiprider

According to Article 2(8) a shiprider means a law enforcement official of one party authorized to embark on a law enforcement vessel of the other party.

Suspect vessel

A suspect vessel means a vessel used for commercial or private purposes in respect of which there are reasonable grounds to suspect that it is engaged in illicit drug traffic. It can be compared with the term of the 1981 Agreement: a cargo of drugs.

by Exchange of Notes dated December 2 and 10, 1992 (1990 MOU). This MOU gave vessels of the United States access to the British Virgin Islands territorial waters with law enforcement officers of the British Virgin Islands on board the vessels of the United States; and vice-versa.

⁵⁵ The Shiprider Agreements are examined further on in this chapter.

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Illicit traffic

According to Article 2(1) illicit traffic in the present agreement has the same meaning as in Article 1(m) of the 1988 Convention. It has to be emphasized that this includes the use of illicit drug for personal use, this in contrary to the multilateral drug-interdiction treaties examined in Chapters 4 and 5.

Geographical scope

The geographical scope of the present treaty comprises the waters of the Caribbean and Bermuda. See also the definition of territory above.

Registry

In Article 9, an explicit reference is made to the 1981 Agreement, it reads:

Article 9 Operations Seaward of the Territorial Sea

1. With regard to suspect vessels claiming registry in or the right to fly the flag of a UKOT or of the United States, as the case may be, in those circumstances to which the 1981 Agreement does not apply, whenever the law enforcement officials of one Party (the "first Party") encounter such a vessel located seaward of any State's territorial sea, the first Party may request, in accordance with Articles 11 and 12 of this Agreement, the other Party to:
 - (i) confirm the claim of registry in or the right to fly the flag of the other Party; and
 - (ii) if such claim is confirmed:
 - (a) to authorize the boarding and search of the suspect vessel, cargo and the persons found on board by the law enforcement officials of the first Party; and
 - (b) if evidence of illicit traffic is found, for permission for the law enforcement officials to detain the vessel, cargo and persons on board pending instructions from the law enforcement authorities of the other Party as to the exercise of jurisdiction in accordance with Article 10 of this Agreement.

The article states that with regard to suspect vessels claiming nationality and the circumstances to which the 1981 Agreement does not apply, a party may request a confirmation of registry and authorization to stop and board the suspect vessel.

As the 1998 Agreement can be considered as a Shiprider Agreement, the description of the other relevant provisions can be found below.

6.3.4. Shiprider Agreements

General

While illicit drug traffickers move with impunity through national jurisdictions, foreign law enforcement officials' vessels may not do so without the approval of the coastal state. For that reason, among others, the United States has developed a comprehensive agreement, the Shiprider Agreement,⁵⁶ to enable US maritime interdiction agencies to work more effectively and efficiently with other states. Since these agreements deal with issues of national sovereignty on a cooperative basis, the United States are not always able to reach agreement with all parties on all parts of maritime counter-drug cooperation and therefore, some agreements are more limited in scope. Shiprider Agreements are not the only form of bilateral maritime counter-drug cooperation,⁵⁷ but are the most relevant type for the purpose of this study.

⁵⁶ See Drug Control: Update on US Interdiction Efforts in the Caribbean and Eastern Pacific, Report to Congressional Requesters, GAO/NSIAD-98-30, 15 October 1997, pp. 15, 16.

⁵⁷ See, for example, the MOU on cooperation to combat illegal narcotics trafficking, signed at Paris on 8 January 1998, TIAS 11436, that includes provisions for maritime drug interdiction, and the MOU between the Government of the United States of America and the Republic of China regarding Joint Operations in Drug Control Efforts, 15 October 1997.

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A Shiprider Agreement itself is a model agreement with six operational elements authorizing law enforcement vessels and personnel to undertake law enforcement actions against vessels suspected of illicit traffic in drugs.⁵⁸

A Shiprider Agreement streamlines and materially enhances maritime counter-drug cooperation and fosters interdiction vessels' ability to respond immediately, or as the tactical situation dictates, without the need to wait for authorization through lengthy diplomatic channels on a case-by-case basis. The model Shiprider Agreement therefore constitutes a standing authority for maritime counter-drug cooperation in all applicable maritime zones. Not all concluded Shiprider Agreements provides this standing authorization to stop and search a suspect vessel, however.

All relevant states around the Caribbean basin have concluded some form of Shiprider Agreement with the United States.⁵⁹ It must be noted that when Shiprider Agreements have been concluded they are still subject to changes by protocols.⁶⁰

As the Shiprider Agreements are bilateral agreements between the US and a coastal state in the Caribbean region, these coastal states will be addressed as 'the other party' or 'state XXX' as well, in this section. The model Shiprider Agreement will, in general, be examined below.

General provisions of the model Shiprider Agreement

Definitions

Article 2 of the model Shiprider Agreement contains some interesting definitions, which are applicable to the Shiprider Agreement unless the context otherwise requires. Some definitions have the same meaning as those discussed in the 1988 Convention, such as the term 'illicit traffic', which includes illicit drug for personal use.

Waters

'Coastal state waters' means the territorial sea (insert archipelagic waters, if applicable) and internal waters of the coastal state.

It is interesting to note that the maritime internal waters of the coastal states are open to foreign law enforcement officers. This provision cannot be found in other maritime drug-interdiction treaties.

Law enforcement vessels

Article 2(e) states:

'law enforcement vessels' means warships and other ships, of the Parties or of third States, aboard which law enforcement officials are embarked, clearly marked and identifiable as being on government service and authorized to that effect, including any embarked boat or aircraft.

⁵⁸ A Model Shiprider Agreement can be found in the Annex to this study.

⁵⁹ Statement of the Commander of the Coast Guard Atlantic Area on the Drug Smuggling Problem in the Caribbean before the Subcommittee on Criminal Justice Oversight Committee on the Judiciary, United States Senate, 09 May 2000. See Drug Control, Update on US Interdiction Efforts in the Caribbean and Eastern Pacific, Report to Congressional Requesters, GAO/NSIAD-98-30, October 1997, p. 15, 16.

⁶⁰ For example, the Protocol between the Government of the United States of America and the Government of Belize to the Agreement concerning Maritime Counter-Drug Operations of 1992, signed at Belmopan, Belize on 25 April 2000, which entered into force on the same date, TIAS 11600; UNTS 2190, 355.

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This is quite a complete definition, which includes warships, but emphasizes the fact that law enforcement officials should be embarked to execute the actions, not the military. This definition applies for both parties. Interesting to note that an embarked aircraft is covered by the definition of vessels.

Law enforcement officials

The definition in Article 2(g) reads:

‘law enforcement officials’ means: for the Government of the United States of America, uniformed members of the United States Coast Guard; and for the Government of XXX, uniformed members of XXX.

For the United States law enforcement officials mean uniformed members of the US Coast Guard. This excludes military personnel. For the other party, this definition does not exclude military personnel. In some states, military personnel can be authorized to act as law enforcement official, however.

Principles

The Preamble states that Article 17 of the 1988 Convention serves as the basis of the Shiprider Agreements. The Shiprider Agreement generally states that, except as expressly provided herein, the agreement does not apply to or limit boarding of vessels, conducted by either party, seaward of any nation’s territorial sea, whether based on the right of visit, the rendering of assistance to persons, vessels, and property in distress or peril, the consent of the vessel master⁶¹, or an authorization from the flag state to take law enforcement action.

Article 3 clearly states that maritime counter-drug operations in the waters under sovereignty of a party are the responsibility of, and subject to the authority of that state.

Some of the Shiprider Agreements are subject to various non-prejudice clauses. For example:

“Nothing in this Agreement shall prejudice the position of either party with regard to the international law of the sea, including the Law of the Sea Convention or affect the claims to territory or maritime boundaries of either party or third states.”⁶²

or:

“Nothing in the Shiprider Agreement shall be interpreted so as to prejudice the legal status of the EEZ, or the right of archipelagic sea lanes passage, as provided in the LOSC or otherwise in accordance with international law.”⁶³

Objective

According to Article 1 of the agreement, the objective of the Shiprider Agreement is to cooperate in combating illicit maritime drug traffic to the fullest extent possible, consistent with available law enforcement resources and related priorities.

⁶¹ For consensual boarding see Section 8.6.3. of this study.

⁶² Agreement between the Government of the United States of America and the Government of Honduras concerning cooperation for the suppression of illicit maritime traffic in narcotic drugs and psychotropic substances, with implementing agreement, was signed at Tegucigalpa, Honduras, on 30 March 2000 and entered into force at 30 January 2001, TIAS.

⁶³ Agreement between the US and Jamaica concerning cooperation for the suppression of illicit maritime traffic in narcotic drugs and psychotropic substances, was signed at Kingston, Jamaica at 6 May 1997 and entered into force on 22 August 2001. Protocol to the Agreement of 6 May 1997, concerning cooperation in suppressing illicit maritime drug trafficking, was signed at Kingston on 6 February 2004 and entered into force on the same date, TIAS.

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Geographic scope

The geographical scope of the Shiprider Agreements comprises the waters under the sovereignty of the parties and seaward of the territorial sea, according to the main headings of the Shiprider Agreement.

Jurisdictional provisions of the model Shiprider Agreement

Jurisdiction

Article 14 speaks about jurisdiction in waters under the sovereignty of the other state or, concerning a vessel of that state seaward of the territorial sea, it reads:

Article 14

In all cases arising in XXX waters or concerning XXX flag vessels seaward of any nation's territorial sea the Government of XXX shall have the primary right to exercise jurisdiction over a detained vessel and/or persons on board (including seizure, forfeiture, arrest, and prosecution), provided, however, that the Government of XXX may, subject to its constitution and laws, waive its primary right to exercise jurisdiction and authorize the enforcement of United States law against the vessel and/or persons on board.

The article says that in all cases arising in waters under sovereignty of the other party or concerning its flag vessels seaward of any nation's territorial sea, that party has the primary right to exercise jurisdiction over detained vessel and/or persons on board (including seizure, forfeiture, arrest, and prosecution), provide that the party may, subject to its constitution and laws, waive its primary right to exercise jurisdiction and authorize the enforcement of United States law against the vessel and/or personnel.

Therefore, in the event that drugs are found on a vessel that has been boarded and searched under the model Shiprider Agreement, the US law enforcement officials take no action except to detain the vessel, cargo, and crew, preserving the other party's option to exercise or waive prosecutorial jurisdiction.

Stateless vessel

Article 15 states that counter-drug operations pursuant to the model Shiprider Agreement shall be carried out against vessels without nationality and suspected of being involved in illicit drug traffic. In one of the Shiprider Agreements⁶⁴ the term 'undocumented' suspect vessel is mentioned. Article 15 reads:

Article 15

Counter-drug operations pursuant to this agreement shall be carried out only against vessels and aircraft used for commercial or private purposes and which either of the Parties has reasonable grounds suspect are involved in illicit traffic, including vessels and aircraft without nationality.

Law enforcement officials are authorized to board and search suspect vessels claiming to be registered in the other party that is not flying the flag of the other party, nor displaying any marks of its registration, and claiming to have no documentation on board the vessel. If after boarding, no documentation is found the vessel may be considered to be a ship without nationality in accordance with international law.

⁶⁴ Supplementary Arrangement Between the Government of the United States of America and the Government of the Republic of Panama to the Arrangement Between the Government of the United States of America and the Government of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice, was signed at Panama City, Panama on 5 February 2002 and entered into force on the same date, TIAS 11833.

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Authorization

The model Shiprider Agreement refers to advanced non-reciprocal authorization to intervene. Not all Shiprider Agreements are the same as the model one, however. Provisions with other modes of authorization have been concluded. Those provisions can be reciprocal authorization, tacit authorization or authorization on an *ad hoc* basis.

In addition to the above-mentioned authorization applicable on the high seas, authorization to act after entry of a law enforcement vessel into the waters under sovereignty of a foreign coastal state, as laid down in the model Shiprider Agreement, is discussed.

Advance non-reciprocal authorization

The standard provision in the model Shiprider Agreement is advance non-reciprocal authorization for the US to stop and search a vessel of the other party on the high seas. Article 12 of the model Shiprider Agreement constitutes that advance non-reciprocal authorization for US law enforcement officials to board and search a suspect vessel flying the flag of the other party or claiming to be registered by the other party, located seaward of the territorial sea. Article 12 reads:

Article 12

Whenever US law enforcement officials encounter a vessel flying the XXX flag or claiming to be registered in XXX, located seaward of any nation's territorial sea and have reasonable grounds to suspect that the vessel is engaged in illicit traffic, this Agreement constitutes the authorization of the Government of XXX for the boarding and search of the suspect vessel and the persons found on board by such officials. If evidence of illicit traffic is found, United States law enforcement officials may detain the vessel, persons on board, evidence and cargo pending expeditious disposition instructions from the Government of XXX.

The most used text in the concluded Shiprider Agreements for this provision is:⁶⁵

“Whenever US Coast Guard officials encounter an XXX flag vessel, located seaward of any nation’s territorial sea and suspected of illicit traffic, the Shiprider Agreement constitutes the authorization of the Government of XXX for the boarding and search of the suspect vessel and the persons found on board by such officials. If evidence of illicit traffic is found, US Coast Guard officials may detain the vessel and persons on board pending expeditious instructions from the Government of XXX

⁶⁵ Antigua and Barbuda: Agreement concerning maritime counter-drug operations was signed at St. John’s on 19 April 1995 and entered into force on 19 April 1995, TIAS, Amendments: 3 June 1996 and 30 September 2003. Belize: Agreement concerning maritime counter-drug operations was signed at Belmopan on 23 December 1992 and entered into force on 23 December 1992, TIAS 11914. Dominica: Agreement concerning maritime counter-drug operations was signed at Roseau on 19 April 1995 and entered into force on 19 April 1995, TIAS 12630. Dominican Republic: Agreement concerning maritime counter-drug operations was signed at Santo Domingo on 23 March 1995 and entered into force on 23 March 1995, TIAS 12620, Protocol to the agreement of March 23, 1995 concerning maritime counter-drug operations was signed at Washington May 20, 2003 and entered into force on 20 May 2003. Grenada: Agreement concerning maritime counter-drug operations was signed at St. George’s 16 May 1995 and entered into force on 16 May 1995, TIAS 12648. St. Kitts and Nevis: Agreement concerning maritime counter-drug operations was signed at Basseterre on 13 April 1995 and entered into force on 13 April 1995, TIAS, Amendment, 27 June 1996. St. Lucia: Agreement concerning maritime counter-drug operations was signed at Castries on 20 April 1995 and entered into force on 20 April 1995, TIAS, Amendment, 5 June 1996. Vincent and the Grenadines: Agreement concerning maritime counter-drug operations was signed at Kingstown and Bridgetown on 29 June and 4 July 1995 and entered into force on 4 July 1995, TIAS 12676. Trinidad and Tobago: Agreement concerning maritime counter-drug operations was signed at Port of Spain on 4 March 1996 and entered into force on 4 March 1996.

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Other texts differ slightly. The provision above only constitutes authorization for another party's vessel flying its flag. Other texts constitute authorization for vessels flying the other party's flag and vessels claiming to be registered in that state.⁶⁶

Other differences in the text of this provision are US Coast Guard officials or US law enforcement officials,⁶⁷ suspect vessels or reasonable grounds to suspect; boarding and search or inspect⁶⁸ the documents and search, and the no-objection formula.⁶⁹

Reciprocal authorization

The United States of America has concluded Shiprider Agreements with some states where the authorization to board and search a suspect vessel is based on reciprocity.⁷⁰ This text says:

“Whenever law enforcement officials of one party find a suspect vessel seaward of any nation's territorial sea, and claiming registration in the other party, competent authority of the former party may request the competent authority of the other party to verify the vessel's registry, and in case it is confirmed, its authorization to board and search the vessel.”

It is the opinion of the author that this authorization is equal to the one laid down in Article 17 of the 1988 Convention. Those reciprocal provisions cannot be considered as a step forward in combating illicit maritime drug trafficking.

Tacit Authorization

Some variations in the provisions relating to carrying out the boarding and other activities, and procedural provisions are possible. For example, if the requested party has not responded to the request for authorization to board and search within a certain time of receiving the request, it shall be understood that the authorization has been granted: that amounts to tacit authorization.⁷¹

One state even spelled out the non-reciprocity in the Shiprider Agreement, in combination with tacit authorization.⁷² In one paragraph the advance authorization to board and search for US law enforcement officials is provided. Another paragraph reads:

⁶⁶ Costa Rica: Agreement concerning cooperation to suppress illicit traffic. Signed at San Jose December 1, 1998; entered into force November 19, 1999.

⁶⁷ Haiti: Agreement concerning cooperation to suppress illicit maritime drug traffic was signed at Port au Prince on 17 October 1997 and entered into force on 5 September 2002. Surinam: Agreement concerning cooperation in maritime law enforcement was signed at Paramaribo on 31 December 1998 and entered into force on 26 August 1999, TIAS.

⁶⁸ Haiti Shiprider Agreement

⁶⁹ United Kingdom of Great Britain and Northern Ireland; see the 1981 Agreement.

⁷⁰ Colombia: Agreement to suppress illicit traffic by sea was signed at Bogota on 20 February 1997 and entered into force on 20 February 1997. Honduras Shiprider Agreement; Jamaica Shiprider Agreement; Nicaragua: Agreement concerning cooperation to suppress illicit traffic by sea and air was signed at Managua on 1 June 2001 and entered into force on 15 November 2001. Panama Shiprider Agreement, United Kingdom and Overseas Territories pursuant to the 1998 Agreement, in those circumstances to which the 1981 Agreement does not apply.

⁷¹ Colombia Shiprider Agreement: 3 hours; Nicaragua Shiprider Agreement: 2 hours.

⁷² Nicaragua Shiprider Agreement.

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“Whenever Nicaraguan law enforcement officials encounter a suspect vessel flying the United States flag or claiming to be registered in the United States, located seaward of the United States territorial sea, the Government of the Republic of Nicaragua may request, in accordance with Article 17(3) of the 1988 Convention, authorization to board and search the suspect vessel and search the persons found on board by such officials. If authorization is granted and evidence of illicit traffic is found, Nicaraguan law enforcement officials may detain the vessel and persons on board pending expeditious disposition instructions from the Government of the United States of America. Authorization will be understood to have been granted if no reply to the request for authorization has been made within two hours.”

Ad hoc authorization

Ad hoc authorization to stop and board suspect vessels on the high seas means, in the opinion of the author, that one of the parties may request permission to stop and search a suspect vessel of the other party on an *ad hoc* base. That authorization is not the same as the one mentioned in Article 17 of the 1988 Convention that speaks about requesting authorization on a permanent base. In the specific Shiprider Agreement it is agreed that parties may request authorization on an *ad hoc* base, not on a permanent base. That authorization on an *ad hoc* base can even be considered as a restriction when compared with the authorization of Article 17 of the 1988 Convention. The Shiprider Agreement between the United States and Barbados speaks about *ad hoc* authorization.⁷³

Authorization after entry in pursuit

The principle of all Shiprider Agreements is that the Government of the United States of America shall not carry out counter-drug operations in the waters of the coastal state without the permission of the government of the coastal state, whether granted by a Shiprider Agreement or otherwise. The provision about this subject contained in article 5 of the model Shiprider Agreement reads:

Article 5

The Government of XXX may designate qualified law enforcement officials to act as law enforcement shipriders. Subject to XXX law, these shipriders may in appropriate circumstances:

- a. embark on US law enforcement vessels;
- b. authorize the pursuit, by the US law enforcement vessels on which they are embarked, of suspect vessels and aircraft fleeing into XXX waters;
- c. authorize the US law enforcement vessels on which they are embarked to conduct counter-drug patrols in XXX waters;
- d. enforce the laws of XXX in XXX waters or seaward there from in the exercise of the right of hot pursuit or otherwise in accordance with international law; and
- e. authorize the US law enforcement officials to assist in the enforcement of the laws of XXX.

The provision grants standing authority to US law enforcement assets to pursue fleeing vessels suspected of illicit drug trafficking into the sovereign waters of the other party, including the internal waters. The provision also includes authority to stop, board, and search pursued vessels.

Some Shiprider Agreements⁷⁴ constitute permission by the government of the other party for the United States to conduct counter-drug operations in any of the following circumstances:

- An embarked shiprider of that party so authorizes.

⁷³ Barbados: Agreement concerning cooperation in suppressing illicit maritime drug trafficking, was signed at Bridgetown, Barbados on 25 June 1997 and entered into force on 11 October 1998, TIAS.

⁷⁴ Antigua and Barbuda Shiprider Agreement; Belize Shiprider Agreement; Dominica Shiprider Agreement; Dominican Republic Shiprider Agreement; Grenada Shiprider Agreement; St. Kitts and Nevis Shiprider Agreement; St. Lucia Shiprider Agreement; St. Vincent and the Grenadines Shiprider Agreement; Trinidad and Tobago Shiprider Agreement.

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- A suspect vessel flees into the territorial waters of the coastal state and is pursued therein by a US law enforcement vessel without a shiprider of the coastal state embarked.

In both cases the US law enforcement vessels may board and search the suspect vessel, and if evidence warrants, detain any such vessel pending disposition instructions from the coastal state's authorities.

Other states⁷⁵ concluded more restricted provisions in the case of pursuit into the sovereign waters of those states. On occasions when a foreign suspect vessel flees into the territorial sea of the other party, the US law enforcement vessels may pursue that suspect vessel into the territorial sea and monitor or board the suspect vessel and secure the scene, while awaiting expeditious instructions from the coastal state and the arrival of law enforcement officials of the coastal state. The provisions sometimes depend on the availability of law enforcement officials of the coastal state.

More options are therefore available when a US law enforcement vessel pursues a suspect vessel into foreign sovereign waters, but all options are designed to suppress of illicit drug trafficking at sea.

It must be noted that authorization to pursue a suspect vessel into foreign sovereign waters is not always based on reciprocity. Usually only US law enforcement vessels are authorized to pursue suspect vessels into the sovereign waters of the other party. The provisions for pursuit of suspect vessels into foreign sovereign waters by virtue the 1998 Agreement, between the United States of America and the United Kingdom and its Overseas Territories in the Caribbean and Bermuda, are reciprocal, however.

Authorization after entry without pursuit

Another, even more liberal provision, is authorization for US law enforcement vessels to enter into the waters under sovereignty of the other party, without the prerequisite of pursuit. Article 8 of the model Shiprider Agreement deals with this provision, it reads:

Article 8

The Government of the United States of America shall not conduct maritime counter-drug operations in XXX waters without the permission of the Government of XXX granted by this agreement or otherwise. This agreement constitutes permission by the Government of XXX for United States maritime counter-drug operations in any of the following circumstances:

- a. an embarked XXX shiprider so authorizes;
- b. a suspect vessel or aircraft, detected seaward of the territorial sea of XXX enters XXX waters or airspace and no XXX shiprider is embarked on a US law enforcement vessel in the vicinity, and no XXX law enforcement vessel is immediately available to investigate, the US law enforcement vessel may follow the suspect vessel or aircraft into XXX waters in order to investigate, and board and search the vessel, and, if the evidence warrants, detain the vessel and the persons on board pending expeditious disposition instructions from XXX authorities; and
- c. no XXX shiprider is embarked on a US law enforcement vessel in the vicinity, and no XXX law enforcement vessel is immediately available to investigate, in which case the US law enforcement vessel may enter XXX waters in order to investigate a suspect vessel or aircraft located therein, and board and search the suspect vessel. If the evidence warrants, US law enforcement officials may detain the suspect vessel and persons on board pending disposition instructions from XXX authorities.

⁷⁵ Costa Rica Shiprider Agreement, Honduras Shiprider Agreement, the United Kingdom and its Overseas Territories in the Caribbean and Bermuda (1998), Haiti Shiprider Agreement, Nicaragua Shiprider Agreement, Panama Shiprider Agreement and Surinam Shiprider Agreement.

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The article states that entry to investigate means standing authority for the US law enforcement assets to enter foreign waters to investigate suspect vessels located therein. This may also include authority to stop, board and search such vessel. It must be noted that entry to investigate is exercised without pursuing a suspect vessel. This provision only materializes when no law enforcement vessel of the other party is immediately available to investigate and the US law enforcement is in the vicinity. Therefore, some restrictions to the breach on the sovereignty of the other party are present. The unavailability of a law enforcement officer of the coastal state should be decided by the coastal state.

The principle again is that the United States shall not enter into the waters under sovereignty of a coastal state in order to conduct counter-drug operations in the waters of that coastal state, unless a shiprider of the coastal state is unavailable to embark on a US law enforcement vessel, in which case that vessel may enter the waters of the coastal state to investigate any suspect vessel or board and search any suspect vessel, other than a flag vessel of the coastal state, and if evidence warrants, detain such vessel pending disposition instructions of the coastal state authorities.

Variations on this theme are the same as described in the pursuit provision above. Sometimes, boarding and searching vessels of the coastal state, the other party, must be executed by law enforcement officials of that coastal state. Such suspect vessels of the coastal state and the persons on board may be detained, by boarding if necessary, by US law enforcement officials pending instructions from the authorities of the coastal state.⁷⁶

Applicable law

Waters under sovereignty of the other party

In principle, the applicable law during maritime drug-interdiction operations in waters under its sovereignty is the law of the coastal state. Pursuant to Article 7 of the model Shiprider Agreement, the law of both parties can be applicable when the embarked law enforcement official has expressly requested the assistance of the foreign law enforcement officials. The use of force by the assisting foreign law enforcement officials should be in accordance with of the present agreement and their national law and regulations. Article 7 reads:

Article 7

When a shiprider is embarked on the other Party's vessel, and the enforcement action being carried out is pursuant to the shiprider's authority, any search or seizure of property, and detention of a person, and any use of force pursuant to this agreement whether or not involving weapons, shall be carried out by the shiprider except as follows:

- a. crew members of the other Party's vessel may assist in any such action if expressly requested to do so by the shiprider and only to the extent and in the manner requested. Such request may only be made, agreed to and acted upon in accordance with the applicable laws and policies of both parties; and
- b. such crew members may use force in self-defense in accordance with the applicable laws and policies of their government.

Therefore in the waters under the sovereignty of the other party, the shiprider of this party embarked on the US law enforcement vessel shall carry out the law enforcement action under his national law except when crewmembers of the US law enforcement vessel are expressly requested to assist or such crewmembers use force in self-defense. Both exemptions shall be in accordance with both parties' applicable laws and policies. Article 20 of the model Shi-

⁷⁶ Haiti Shiprider Agreement and Surinam Shiprider Agreement.

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prider Agreement states that each party shall ensure that the other party is fully informed of its respective laws and procedures, particularly those related to the use of force.

High seas

Pursuant to Article 17, when conducting actions during operations seaward of the territorial sea, each party shall ensure that its law enforcement officials act in accordance with their applicable national laws and procedures and with international law and accepted international practices.

Offences

Although not mentioned explicitly, the offence pursuant to the model Shiprider Agreement is illicit traffic. Article 2(a) says that this term has the same meaning as that term in the 1988 Convention. The Preamble and other articles of the model Shiprider Agreement speak about illicit maritime drug trafficking. Pursuant to Article 1(m) of the 1988 Convention, illicit traffic means the offence set forth in Article 3(1)(2) of the 1988 Convention, which include the possession of illicit drug for personal use.

Suspicion

Counter-drug operations shall be carried out against vessels used for commercial or private purposes and which either of the parties has reasonable grounds to suspect are involved in illicit traffic, says Article 15, which reads:

Article 15

Counter-drug operations pursuant to this agreement shall be carried out only against vessels and aircraft used for commercial or private purposes and which either of the Parties has reasonable grounds to suspect are involved in illicit traffic, including vessels and aircraft without nationality.

It is interesting to note that both the term ‘suspect’ and the term ‘reasonable grounds’ are used. It is the opinion of the author that the term ‘suspect’ implies ‘reasonable grounds’. According to the provision, only one of the parties has to have reasonable grounds to stop and search the suspect vessel. It is not necessary to describe this explicitly, because it is not relevant for the intervening state to have information about suspiciousness of both parties.

Evidence

Article 16 of the model Shiprider Agreement states that a party shall timely report to the other party, consistent with its laws, when evidence of illicit traffic was found, as the result of an action. After the report of evidence, the other party, coastal or flag state, shall make a decision about waiving its primary right to exercise jurisdiction in conformity with Article 14 of the model Shiprider Agreement.

Surrender assets

The sharing of assets and the disposition of seized property is dealt with in the majority of the agreements. Article 22 of the model Shiprider Agreement deals with the issue of surrendering assets, the article reads:

Article 22

Assets seized in consequence of any operation undertaken in XXX waters pursuant to this agreement shall be disposed of in accordance with the laws of XXX. Assets seized in consequence of any operation undertaken seaward of the territorial sea of XXX pursuant to this agreement shall be disposed of in accordance with the laws of the seizing Party. To the extent permitted by its laws and upon such terms as it deems appropriate, a Party may, in any case, transfer forfeited assets or proceeds of their sale to the other Party.

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As described in the article, the United States can transfer seized, or forfeited assets or proceeds of that sale to developing states, where those assets can be used in the suppression of illicit drug trafficking by sea. In addition to the foregoing asset-sharing provisions of bilateral maritime counter-drug cooperation agreements, the United States has assets-sharing agreements with several governments.⁷⁷

In the United States, national laws authorize sharing assets seized during maritime counter-drug operations.⁷⁸ In some cases, the proposed recipient has to have taken adequate steps on its own to achieve full compliance with the goals and objectives by the 1988 Convention.

Operational provisions of the model Shiprider Agreement

Assistance

Article 4 of the model Shiprider Agreement states that parties shall establish a joint law enforcement shiprider program between their respective law enforcement authorities. A coordinator has to be designated. The article is silent about the contents of that program. The article reads:

Article 4

The parties shall establish a joint law enforcement shiprider program between their respective law enforcement authorities. Each Party may designate a coordinator to organize its program activities and to identify the vessels and officials involved in the program to the other Party.

In addition to the provision described above, other Shiprider Agreements say that a law enforcement authority of one party may request technical assistance from the other party, such as specialized assistance in carrying out searches of suspect vessels located in the territorial waters of the first party.⁷⁹ In order to carry out the law enforcement operation properly, the coastal states shall permit the mooring and stay of law enforcement vessels of the United States of America.⁸⁰

The Shiprider Agreements may also provide the opportunity for professional education and training for partner maritime forces. As most of the Caribbean island states are developing countries, which do not have the maritime assets available, this is a fruitful provision.

Competent Authorities

Embarked coastal state shipriders

Pursuant to article 5 (see above), the other party may designate qualified law enforcement officials to act as a shiprider. These are law enforcement officials of a coastal state party embarked on board United States' law enforcement vessels. Those officials may authorize as a competent authority specific law enforcement actions in their sovereign waters. Subject to the law of the coastal state, those shipriders may, in appropriate circumstances:

- Authorize the pursuit, by the US law enforcement vessels on which they are embarked, of suspect vessels into the territorial waters of the coastal state.

⁷⁷ Colombia Shiprider Agreement, signed at Bogotá on 24 July 1990, entered into force on the same date, TIAS 12417; Jamaica Shiprider Agreement, signed at Kingston on 22 August 2002, entered into force on the same date; the Netherlands, signed at Washington on 22 November 1992, entered into force on 4 August 1994.

⁷⁸ 18 USC Section 981, 21 USC Section 881, and 19 USC Section 1616.

⁷⁹ Costa Rica Shiprider Agreement; Honduras Shiprider Agreement; Nicaragua Shiprider Agreement; Panama Shiprider Agreement.

⁸⁰ Costa Rica Shiprider Agreement; Panama Shiprider Agreement.

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- Authorize the US law enforcement vessels on which they are embarked to conduct counter-drug patrols in the territorial waters of the coastal state.
- Enforce the law of the coastal states in the territorial waters of the coastal state, or seaward there from in the exercise of the right of hot pursuit or otherwise in accordance with international law.
- Authorize the US law enforcement vessels on which they are embarked to assist in the enforcement of the laws of the coastal state.

Embarked US shipriders

On the other hand, according to Article 6 the Government of the United States of America may designate qualified law enforcement officials to act as law enforcement shipriders. Article 6 reads:

Article 6

The Government of the United States of America may designate qualified law enforcement officials to act as law enforcement shipriders. Subject to United States law, these shipriders may, in appropriate circumstances:

- a. embark on XXX law enforcement vessels;
- b. advise and assist XXX law enforcement officials in the conduct of boardings of vessels to enforce the laws of XXX.
- c. enforce, seaward of the territorial sea of XXX, the laws of the United States where authorized to do so; and
- d. authorize the XXX law enforcement vessels on which they are embarked to assist in the enforcement of the laws of the United States seaward of the territorial sea of XXX.

Subject to United States law, those shipriders may in appropriate circumstances act as competent authorities.

Request

The model Shiprider Agreement is silent about requests for authorization to intervene, because it constitutes advance authorization. But, when concluded to ad-hoc authorization to board and search a suspect vessel, a request for authorization may be supported by the basis on which it is claimed that the reasonable grounds for suspicion exist.⁸¹

Other parties concluded very detailed paragraphs in the Shiprider Agreement. The form and content of the request has been described and many safeguards have been put in.⁸²

Actions

Article 18 of the model Shiprider Agreement describes boarding and searching. No other actions are mentioned in the model agreement.

All provisions examined above are subject to providing prior notice to the other party of action to be taken, unless it is not operationally feasible to do so. In any case, notice of action taken shall be provided to the law enforcement authorities the other party, without delay.

⁸¹ Jamaica Shiprider Agreement.

⁸² Panama Shiprider Agreement and Venezuela Shiprider Agreement: Agreement to suppress illicit traffic in narcotic drugs and psychotropic substances by sea was signed at Caracas on 9 November 1991 and entered into force on 9 November 1991, TIAS 11827, 2211 UNTS 387; Protocol to the agreement of 9 November 1991 to suppress illicit traffic in narcotic drugs and psychotropic substances by sea was signed at Caracas on 23 July 1997 and entered into force on 21 July 1997.

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Execution of actions

The model Shiprider Agreement states that law enforcement officials shall carry out actions. Those officials can be embarked onboard a warship or another vessel of the state. The law enforcement officials or shipriders can be authorized to execute actions in all maritime zones.

Safeguards

One of the safeguards for the law enforcement officials is the status of these persons. The Shiprider Agreement⁸³ may state that unless their status is specifically provided for in another agreement, all law enforcement officials and other officials of the Government of the United States of America present in the waters of the coastal state or territory or on vessels of the coastal state, in connection with the Shiprider Agreement shall be accorded the privileges and immunities equivalent to those of the administrative and technical staff of a diplomatic mission under the Vienna Convention on Diplomatic Relations, 1961.⁸⁴ Exemption even from immigration fees and all taxes on income can be concluded between the two parties in the Shiprider Agreement.⁸⁵ The immunity of foreign law enforcement officials is a key point that is, however, not undisputed.⁸⁶

Another criticism on the Shiprider Agreement concerns the legitimacy of law enforcement personnel of one state possibly enforcing the laws of that state against a vessel of another state in passage in the territorial waters of a third state. That scenario envisages, for example, the coastal state waiving its primary right to exercise jurisdiction and authorizing the enforcement of US law against third-state vessels and/or persons on board in cases arising in the coastal states' waters. Arguably, this constitutes a breach of international law.⁸⁷

Use of force

Article 7 (see above under Applicable law) states that the use of force is authorized regardless of whether weapons are involved. Article 7 of the model Shiprider Agreement also states that when a shiprider is embarked on the other Party's vessel, he may use force during actions if expressly requested to assist any such actions. He may use force in self-defense in accordance with the applicable laws and policies of his government. Article 19 speaks about proportionality, it reads:

Article 19

All use of force by a Party pursuant to this agreement shall be in strict accordance with applicable laws and policies of the respective Party and shall in all cases be the minimum reasonably necessary under the circumstances. Nothing in this agreement shall impair the exercise of the inherent right of self-defense by law enforcement or other officials of either Party.

⁸³ Antigua and Barbuda Shiprider Agreement, Belize Shiprider Agreement, Dominica Shiprider Agreement, Dominican Republic Shiprider Agreement; Grenada Shiprider Agreement; St. Kitts and Nevis Shiprider Agreement; St. Lucia Shiprider Agreement; St. Vincent and the Grenadines Shiprider Agreement; Surinam Shiprider Agreement.

⁸⁴ The Vienna Convention on Diplomatic Relations, done at Vienna on 18 April 1961, entered into force at 24 April 1964, UNTS Vol. 500, p. 95.

⁸⁵ The 1990 TRIPART MOU.

⁸⁶ Brown (1997), p. 66.

⁸⁷ Brown (1997), p. 68.

6.4. Conclusions

6.4.1. Europe

In Europe, only a few bilateral agreements are known that specifically deal with illicit drug trafficking at sea. The 1990 Treaty between Spain and Italy is one of those, the 1998 Treaty between Spain and Portugal is another, and similar.

The 1990 Treaty is an example of suppression of illicit drug trafficking in the Mediterranean. That treaty uses the concept of agency to achieve general advance authorization for boarding and related measures. It should be noted, however, that it does so within a context of preferential jurisdiction for the flag state.

In comparison with the 1988 Convention, the 1990 Treaty is a big step forward in improving the legal framework for suppressing illicit drug trafficking at sea. Instead of requesting authorization to stop and board a foreign suspect vessel, advance authorization to do so has been created.

6.4.2. Caribbean region

Many more bilateral maritime drug-interdiction treaties have been concluded for the Caribbean region. The 1981 Agreement uses the system of no-objection to achieve advance authorization for boarding and related measures. It should be noted again that it does so within the context of preferential jurisdiction for the flag state.

The 1981 Agreement has been a success in effectively promoting the interdiction of narcotics trafficking and furthering the central goal of the United States law enforcement in this important area.⁸⁸

Shiprider Agreements

Other bilateral treaties are the Shiprider Agreements. The model Shiprider Agreement has been examined and described. The concluded Shiprider Agreements are not uniform and some provide very limited rights to United States' law enforcement authorities.

For example, the United States-Belize Shiprider Agreement allows US Coast Guard personnel to board suspect Belizean-flagged vessels on the high seas without prior notification to the Government of Belize. But, the United States-Jamaica Shiprider Agreement requires specific authorization after request, in conformity with Article 17 of the 1988 Convention.

In conclusion, it can be said that a variety of these Shiprider Agreements has been concluded. Some grant many rights for US law enforcement officials in the territory of the other party, while others grant fewer rights. Such jurisdictional inconsistencies have created a patchwork quilt of authority, including some notably large gaps, for the law enforcement agencies to operate within.

The 1998 Agreement can be considered as a Shiprider Agreement for a specific, quite complicated, geographic area; the agreement is based on the 1988 Convention. It enhances, replaces or supersedes previous drug controlling MOU's and agreements.

⁸⁸ Gilmore (1989), p. 227.

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6.4.3. Development

It can be concluded that, in general, the bilateral maritime drug-interdiction treaties that have been examined and discussed, have made a significant development when compared with the 1988 Convention. Advance authorization is a particularly important step forward in international maritime drug interdiction.

Development and the interrelationship between the examined bilateral maritime drug interdiction treaties and the general framework of international law for maritime drug interdiction will be examined in Section 8.8. of this study.

Annex

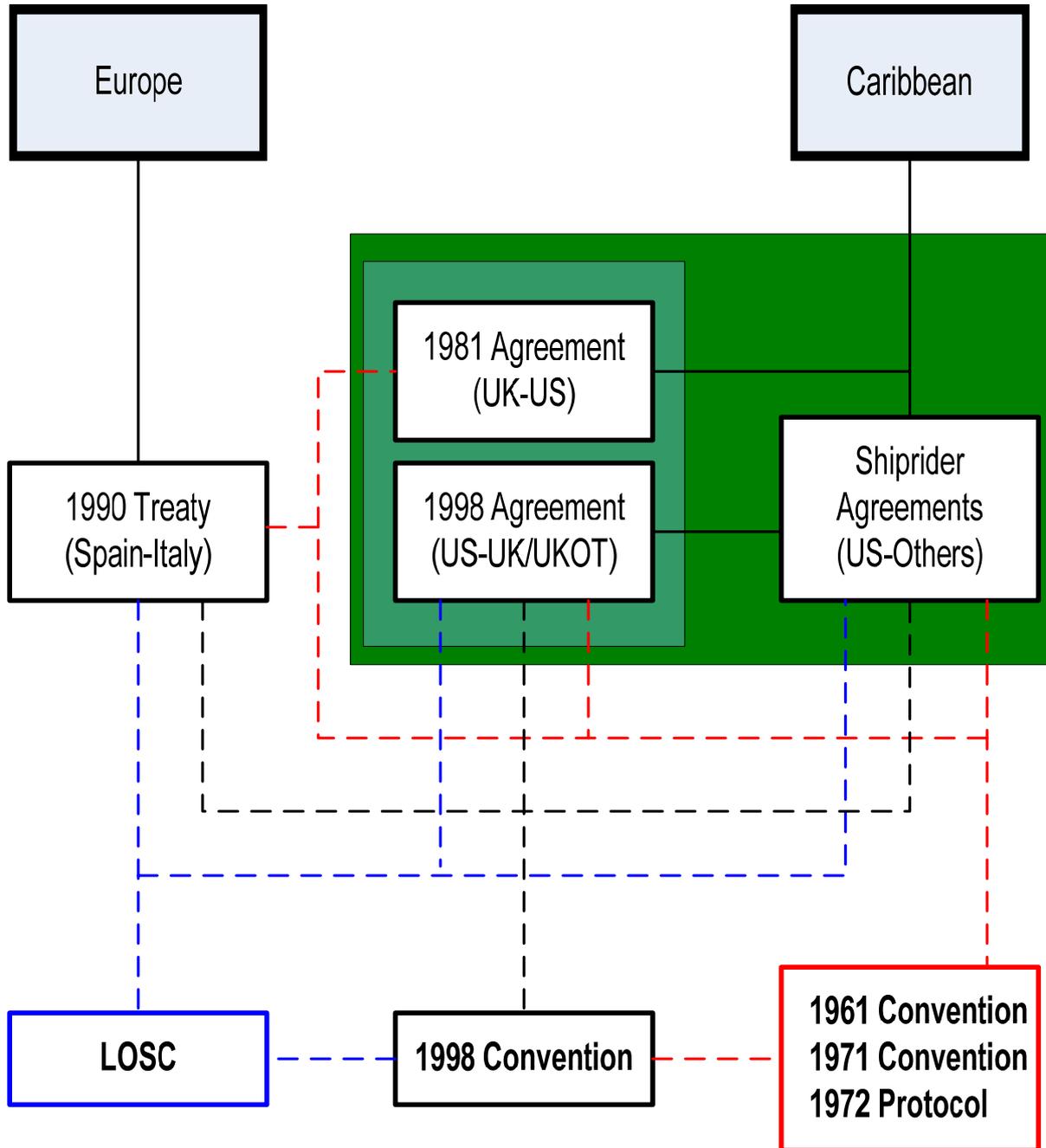


Figure 6-1 Overview of the bilateral maritime drug-interdiction treaties examined

CHAPTER 7

MARITIME DRUG-INTERDICTION TREATIES COMPARED

7.1. Introduction

7.1.1. General

The drug control system is governed by a series of treaties¹ that have been adopted under the aegis of the United Nations and that require that governments exercise control over production and distribution of narcotic and psychotropic substances, combat drug abuse and illicit trafficking, maintain the necessary administrative machinery, and report to international organs on their actions. Maritime drug-interdiction treaties are those treaties that implement one or more provisions of the UN drug control treaties, regarding to illicit drug trafficking at sea. In this chapter, the maritime drug-interdiction treaties examined and discussed previously are compared.

Comparison

After considering the maritime drug-interdiction treaties without reference to its systematic environment, in Chapter 4, 5 and 6 of the present study, we must now relate them to one another. Objectives of comparing these treaties are to discover differences and similarities, and to identify contradictions. When different definitions and/or provisions are applicable in the same maritime zones, it can become very confusing for the prescriptive or enforcement jurisdiction of a coastal or intervening state. Another objective of comparing the maritime drug-interdiction treaties is that the development of international drug treaties can be evaluated.

Firstly, the multilateral maritime drug-interdiction treaties and, secondly, the bilateral maritime drug-interdiction treaties are compared. In the last section of this chapter, a comparison between multilateral and bilateral maritime drug-interdiction treaties will be made. Comparisons will be made for the clusters of general provisions, jurisdictional provisions and operational provisions. After comparing the individual provisions, the achieved progress or addition, compared with the 1988 Convention will be examined.

This chapter ends with some conclusions about the result of comparing the maritime drug-interdiction treaties. Development and interrelationship of the maritime drug-interdiction treaties will be examined in detail in Section 8.8. of this study.

7.2. Comparison of the multilateral maritime drug-interdiction treaties examined

7.2.1. General

The multilateral maritime drug-interdiction treaties that are being compared are: the 1995 Agreement, the 2002 Draft Convention and the 2003 Agreement. The sequence of the provisions compared is analogous to the sequence of the provisions in the previous chapters. In the

¹ The so-called UN drug control treaties are the 1961, 1971 and 1988 Conventions.

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Maritime drug-interdiction treaties compared

Annex to this chapter two tables can be found, in which an overview of all compared provisions for multilateral and bilateral maritime drug interdiction treaties.

7.2.2. Comparison of the UN drug-control treaties

Before the multilateral maritime drug-interdiction treaties are compared, some relevant provisions, the main mandatory requirements on parties, of the UN drug-control treaties will be compared (see table 7-1).

Main mandatory requirements of the UN drug-control treaties			
Provisions	Conventions		
	1961	1971	1988
Licit drug and precursor control			
Licit drug regulatory administration	17	6	
Central offices for international cooperation			1,12,7
Classify controlled drug and chemical	2, 4	2	12
Limit licit drug use for medical and scientific purposes	2, 4	5, 7	
Prohibit cultivation (with many clauses)	22		
End traditional, quasi and medical use of drugs	49		
National licensing and permit systems for:			
• Cultivation	4, 22, 23, 25, 26, 27, 28		
• Manufacture/distribution	4,21,21bis,24,25,27, 29, 30	2, 3, 7, 8	12
• Import/export	4, 21, 23, 24, 25, 31, 32,	2,3,4,7,8,12,13,14	12
• Supply by health professionals	2, 4, 30, 32, 33	2,3,4,5,9,10,14,20	
Estimates and statistics for the INCB, to prevent stock	2, 4, 9, 12, 13, 14, 19, 20, 21, 21bis, 23-31, 34	2, 3, 16	
Inspections of regulated persons and enterprises	23, 29, 30, 31, 34	4, 7, 8, 15	12
Drug-related criminal justice			
Punish drug trafficking and related conduct as serious crimes, coordinate law enforcement actions, training, intelligence and operations	35, 36, 37	21, 22	1-19
Tracing, freezing, seizing and confiscation of proceeds			3,5
Possession for personnel consumption as a criminal offence	2, 3, 36	3, 5, 22	3
International legal cooperation			
Extradition	36	22	6
Mutual legal assistance			7
Controlled delivery			11
Law enforcement cooperation			9
Maritime cooperation on the high seas²			17
Use of mails			18

Table 7-1 Main mandatory requirements on parties to the UN-drug control treaties

As can be seen in table 7-1, the 1988 Convention creates international legal cooperation in general and international maritime counter-drug cooperation in particular. The 1961 and 1971 Conventions concentrate more on the control of licit drugs than on the prohibition of the illicit drugs.

7.2.3. General provisions compared

General

In this section, the general provisions of the multilateral maritime drug-interdiction treaties that are being examined are compared and discussed. All of those general provisions can be

² Emphasis added.

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Maritime drug-interdiction treaties compared

found in these treaties. A short interpretation, relevant for this study, will precede the comparison of the subjects.

Definitions

General

Definition is a word or phrase expressing the essential nature of a thing as understood by the parties to an agreement. Definitions apply throughout an agreement, except where otherwise expressly indicated or where the context requires otherwise.

In the treaties examined, different topics are defined. It can be assumed that definitions not mentioned in the drug-interdiction treaties will be the same ones as the definitions in the 1988 Convention, because the maritime drug-interdiction treaties are based upon the 1988 Convention. In those treaties, terms such as ‘narcotic drugs’ and ‘psychotropic substances’ cannot be interpreted differently from the definitions in the 1988 Convention. It is the opinion of the author that there is no doubt about the definition of ‘illicit traffic’: this is the definition in the 1988 Convention, based upon previous drug control treaties. (see Section 3.1.3. of the study)

Competent Authorities

In the 2003 Agreement, the ‘competent authority’ is defined as the one designated pursuant to Article 17(7) of the 1988 Convention.

In the 2002 Draft Convention, that term is defined as ‘Customs authorities and other authorities appointed for the purpose of implementing the provisions of this Convention’. A different and vague definition that should be brought in line with the other treaties.

The 1995 Agreement did not define competent authorities explicitly, but a description of this subject can be found in Article 17 (see below under Section 7.2.5.).

Law enforcement officials

The 2003 Agreement provides a very detailed definition of law enforcement authorities. The 1995 Agreement uses the term ‘officials of the state’, which is not necessarily the same as law enforcement officials.

It must be noted that appropriate law enforcement agencies must apprehend illicit drug traffickers, and must collect evidence in order to achieve a conviction by court.

Suspect vessel

All treaties refer to suspect vessels, which, it may be argued, suggest that there must be some complicity in the crime by those in control of the vessel, and not merely a suspicion of criminal activity of other individuals who happen to be on board.

In general, warships and other official vessels are excluded from the definition of suspect vessels.

In conclusion, it can be stated that, although the multilateral drug-interdiction treaties do not define the same topics, inasmuch as the main definitions have been derived from the 1988 Convention, their meaning cannot be in doubt.

Principles

Principles are the universal and fundamental rules or codes of conduct that apply in the context of the treaty. The treaties examined refer to Article 17(1) of the 1988 Convention that states that parties shall cooperate to the fullest extent possible to suppress illicit drug traffic by sea, in conformity with the international law of the sea as laid down in the LOSC. The princi-

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Maritime drug-interdiction treaties compared

ples of the international law of the sea can therefore be found in the multilateral drug-interdiction treaties. In their preambles, the 1995 and the 2003 Agreements recognize the implementation of the 1988 Convention in conformity with the international law of the sea and the right of freedom of navigation.

The preamble to the 2003 Agreement refers to many regional institutions and makes a firm reference to the principles of sovereign equality and territorial integrity.

International cooperation

In the 1995 Agreement the general principles for international cooperation are stated. These principles apply to all maritime zones and are a confirmation of some general principles of the international law of the sea. It must be noted that Article 2(5) of the 1995 Agreement emphasizes the collection and exchange of information as a general principle for international cooperation. That is the trigger for maritime counter-drug cooperation and the suppression of illicit drug trafficking at sea.

The 2003 Agreement provides general principles for operations in and over waters under sovereignty of a coastal state. Those principles emphasize the importance of the sovereignty of the state party to the agreement, i.e. no maritime counter-drug cooperation in those waters against the will of the coastal state.

Objective

The objective of a treaty may be quite simple, such as, for example, extending the duration of an expiring treaty. Usually, however, treaties deal with complex matters requiring a rather long text that has to reconcile conflicting interests and that invariably involves negotiations culminating in the drawing up of a text.

The objectives of the 2003 Agreement and the 2002 Draft Convention are almost the same: achieving maritime cooperation to the fullest extent possible in conformity with Article 17 of the 1988 Convention.

The 2003 Agreement goes a little further by stating that suspect vessels must be detected, identified, continuously monitored, and where evidence is found, detained by responsible law enforcement authorities. Thus, the objective of this agreement covers even more than the standard maritime counter-drug cooperation.

Geographical scope

Scope is the geographic or territorial area in which suspect vessels can be stopped and searched. Unless a different intention arises from the treaty or is otherwise established, a treaty is binding upon each party in respect of all of its territory.³ In some cases, however, the territorial scope of the rules laid down by a treaty - the territory or extraterritorial location in which the situation and facts governed by such rules may arise - must be identified. Each treaty shall define its territorial scope. Otherwise, it may be difficult to ascertain the parties' intention, especially for areas where status has not been clearly defined, such as, for example, in the case of the Netherlands Antilles and Aruba, or the Overseas Territories of the United Kingdom and the United States.

The territorial scope of the 1995 Agreement is beyond the territorial sea of any party. States may specify the territory or territories in respect of which its consent to be bound to the 1995 Agreement shall apply.

³ Article 29 Vienna Convention 1969.

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The territorial scope of the 2002 Draft Convention is the sea outside the territorial waters of a member state.⁴

The geographic or territorial scope of the 2003 Agreement covers all maritime zones in the Caribbean region, which have been defined in Article 1(i) of this agreement.

It can be concluded that the 2003 Agreement is a strictly regional agreement. The other multi-lateral maritime drug-interdiction agreements that have been discussed in this study are more global: they can apply to maritime zones all over the world.

7.2.4. Jurisdictional provisions compared

Jurisdiction

In broad terms, jurisdiction refers to the power and authority of a government to legislate, adjudicate and enforce its laws.

Prescriptive jurisdiction

Prescriptive jurisdiction for the drug-interdiction treaties being discussed is based on Article 4 of the 1988 Convention. Paragraph 4(1)(a)(ii) of that convention states that each party shall⁵ establish jurisdiction over drug-related offences when committed on board vessels flying its flag. Paragraph 4(1)(b)(ii) states that each party may establish jurisdiction over drug-related offences committed on board a vessel concerning which that party has been authorized to take appropriate actions pursuant to Article 17 of the 1988 Convention, thus adding an optional assertion of jurisdiction over foreign flag ships.

The 2002 Draft Convention states in Article 3 that each member state shall assert jurisdiction over drug-related offences on board vessels not excluded from the convention. This means assertion of jurisdiction over any vessel, excluding warships.

Parties to the 1995 or the 2003 Agreement shall establish jurisdiction over drug-related offences on board vessels flying the flag of any party to this agreement as well as over vessels without nationality.

In addition, the 2003 Agreement says that jurisdiction shall be established over drug-related offences when committed in waters under the sovereignty of the state party, or, where applicable, in the contiguous zones of these states.

All multilateral drug-interdiction treaties are therefore additional to Article 4 of the 1988 Convention.

Enforcement jurisdiction

Enforcement of jurisdiction is normally exercised by law enforcement officers, such as police or customs officials. The police and customs do not, in principle, operate at sea, especially not beyond the territorial sea. At sea, warships are, in general, the only vessels operating as representatives of a state. It must be noted that the crew of a warship in general is not part of a law enforcement agency, but part of the armed forces, which does not always possess police powers.

⁴ The full name of the 2002 Draft Convention is: ‘Suppression by Customs Administration of Illicit Drug Trafficking on the High Seas’ (emphasis added).

⁵ Emphasizes added.

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Maritime drug-interdiction treaties compared

Intervention shall take place by warships, official ships or law enforcement ships, respectively, pursuant to the 1995 Agreement, the 2002 Draft Convention and the 2003 Agreement.

Preferential jurisdiction

Preferential jurisdiction means having concurrent jurisdiction -the right to exercise jurisdiction on a priority basis, to the exclusion of the exercise of another state's jurisdiction over the offence- with another state. In principle, the flag state has preferential jurisdiction over its ships. That preferential jurisdiction can be transferred or surrendered in favor of an intervening state.

The 1995 Agreement states that a flag state wishing to exercise its preferential jurisdiction shall notify the intervening state within fourteen days of the intervention. If the flag state fails to do so, it shall be deemed to have waived the exercise of its preferential jurisdiction.

The 2002 Draft Convention has the same provision, but the timeslot stated in that agreement is one month.

The 2003 Agreement refers to the undefined term 'consent to the exercise of jurisdiction by another state'.

In conclusion, it can be stated that in the multilateral drug-interdiction treaties discussed, jurisdiction has been dealt with in approximately the same way and that progress has been made regarding to the assertion of jurisdiction constituted in the 1988 Convention.

Stateless vessel

A stateless vessel or a vessel without nationality is a vessel not legitimately registered in a register of ships of any one state pursuant to Article 94 LOSC, or a vessel flying no flag, and refusing to show a flag when called upon to do so in a proper manner. Pursuant to Article 110 LOSC, a stateless vessel can be boarded by a warship.

The 1995 Agreement adds to the provisions of Article 110 LOSC that a party that has reasons to believe a stateless vessel is engaged in illicit drug trafficking, shall inform other parties as appear most closely affected to the stateless vessel.

Boarding is justified when reasonable grounds are present that the ship is without nationality. This is stated by the 2003 Agreement as well. It is therefore not necessary to have a secondary reason - e.g. suspicion off illicit drug trafficking - to board such a vessel. It may be necessary to have a secondary reason, however, to justify searching the vessel.

Authorization

Authorization means investing a party with legal power. That can be done in advance by treaties or on an *ad hoc* basis. The word 'authorize' is used to stress the positive nature of the decision and of the action that the flag state, in the exercise of its sovereignty, must take with regard to its vessel. Authorization creates no obligations: the decision of a flag state to act against one of its vessels is entirely the prerogative of the flag state.⁶

The 1995 Agreement recognizes authorization on an *ad hoc* basis and on request. Pursuant to the 2002 Draft Convention, a state has prior authorization to exercise the right of representation when an official ship encounters a suspect vessel of another party on the high seas. The

⁶ UN Doc. E/CONF82/C2/SR29, p. 2.

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Maritime drug-interdiction treaties compared

2003 Agreement recognizes three modes of achieving authorization, including prior authorization.

It can be concluded that progress has been made since the 1988 Convention regarding the implementation of authorization: from a request for authorization to stop and board a foreign suspect vessel on the high seas pursuant to the 1988 Convention and the 1995 Agreement, to prior authorization to do so in the 2003 Agreement and the 2002 Draft Convention.

Applicable law

Applicable law is the law and regulations that have to be applied to drug-related offences in various maritime zones when law enforcement officials exercise jurisdiction.

The 1995 Agreement is quite clear about this issue. Article 11 states that the law of the intervening state shall govern actions taken by the intervening state. That law shall be applicable until the flag state clearly indicates that it will not waive its preferential jurisdiction. When the flag state has notified the intervening state that it exercises its preferential jurisdiction, the exercise of the jurisdiction of the intervening state shall be suspended, save for the purpose of surrendering persons, vessel, cargo and evidence. The 1995 Agreement therefore gives a broad and general provision for applicable law.

The 2002 Draft Convention is silent about the law that applies during and after intervention. It only refers to the fact that the law of the intervening state shall rule in the case of urgent mandatory judicial proceedings and to the general provisions of international law.

The 2003 Agreement contains very detailed provisions about applicable law. In that agreement, the point of view of the law enforcement officer is taken. The authority of the law enforcement officer in general is described, including the law that person operates under. In addition, the designation and authority of law enforcement officials on board a foreign law enforcement vessel is described, including the law under which they operate in various maritime zones. Even the law that applies if force is used by the law enforcement officer in various situations, is described. Moreover, the 2003 Agreement states that law enforcement officials must be informed about all applicable laws, including foreign laws.

The 2002 Draft Convention is therefore the only one with a weak provision about applicable law.

Offences

Offences in this study are the illegal acts or crimes related to narcotic drugs and psychotropic substances.

The 1995 Agreement uses the term ‘relevant offence’ and defines that term in Article 1 (c). It means any offence of the kind described in Article 3(1) of the 1988 Convention.

The 2002 Draft Convention does not refer to the 1988 Convention. It enumerates some elements of illicit drug traffic as defined in the 1988 Convention. It must be noted that the 2002 Draft Convention does not mention illicit traffic in precursors⁷ as an offence.

⁷ Precursors are substances used for the manufacture of illicit drugs. See Section 1.3.5. of this study.

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Maritime drug-interdiction treaties compared

The 2003 Agreement states that each party shall take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with Article 3(1) of the 1988 Convention.

None of the treaties refers to the possession and use of drugs for personal use. It can be stated that the 1995 and the 2003 Agreement are not additions to the 1988 Convention in respect of offences. The 2002 Draft Convention is even more limited than the 1988 Convention.

Suspicion

Suspicion means being suspected of or suspecting drug-related crimes. The terms ‘reasonable grounds to suspect’ in the 1988 Convention, 1995 Agreement and the 2003 Agreement⁸ and ‘good grounds to suspect’ in the 2002 Draft Convention, are used. The term ‘reasonable suspicion’ is equivalent to the term ‘reasonable ground for suspecting’ used in Article 22 of the Convention on the High Seas⁹ and, most likely, to the terms ‘reasonable grounds for believing’ in Article 108 LOSC and ‘reasonable grounds to suspect’ in Article 17(2) of the 1988 Convention.

It can be stated that there is hardly any difference amongst the definitions regarding the term ‘suspicion’. The definition found in the 1995 Agreement has been expanded when compared with the definition in the 1988 Convention (see Section 4.2.4. of the study).

Evidence

Evidence is specific information or materials used by a tribunal to arrive at the truth. The 1995 Agreement and the 2002 Draft Convention state that the intervening state shall transfer a summary of evidence to the flag state during the process of deciding whether to surrender jurisdiction. The summary will include all evidence. Evidence may be subject to confidentiality and restriction of use.

The 2003 Agreement only requires periodical information about evidence.

Extradition

Extradition is the surrender of an alleged criminal by one state to another one having jurisdiction to try the charge. One should bear in mind that in the regions described, many multilateral and bilateral extradition treaties and other mutual legal assistance treaties are in force.

The 1995 Agreement states that intervening states shall use their best endeavors to expedite the surrender of persons after an official request for surrender by the preferential state, but without formal extradition proceedings. That process is controlled by judicial authorities, however.

The 2002 Draft Convention simply states that when the flag state decides to exercise its preferential jurisdiction after an intervention, the intervening state shall transfer the persons detained to the preferential state. There is therefore no formal and complex extradition process.

The 2003 Agreement deals with the transfer of seized assets but is silent about the transfer of seized persons.

⁸ This agreement defines a suspect vessel as: “any vessel in respect of which there are reasonable grounds to suspect that it is engaged in illicit traffic”.

⁹ US v. Williams 617 F2d 1063, 5th Circuit (1980).

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Only the 1995 Agreement states that the surrender of any person may be refused to a state where drug-related offences are punishable by the death penalty, unless that state provides assurances that the death penalty will not be carried out. The 2002 Draft Convention and the 2003 Agreement are silent about capital punishment.

In general, when suspects must be surrendered to another state, national law and other treaties are applicable. As a result, instead of formal, complicated and time-consuming extradition processes, the multilateral drug-interdiction treaties provide for informal transfer of suspect persons.

Surrender assets

Surrender assets refers to the transfer of seized, confiscated or forfeited vessels, cargoes, or the proceeds of their sale.

The 1995 Agreement says that vessels and cargo can be surrendered at the request of the flag state.

The 2002 Draft Convention states that a seized suspect vessel must be returned to the flag state or given the right of free passage as soon as possible.

The 2003 Agreement concerns the proceeds of sales: the proceeds and the seized assets may be transferred to any party in accordance with the laws of the intervening state.

All treaties under discussion therefore provide for the transfer of commercial goods at the request of the flag state.

7.2.5. Operational provisions compared

Assistance

Pursuant to the 1995 and to the 2003 Agreement, a state can request assistance from another state or can render assistance to a state. Assistance shall be rendered within the means available. For the drug-interdiction treaties, requesting assistance to intervene is the opposite of requesting authorization to intervene.

The 2003 Agreement extends the meaning of assistance to include technical assistance as well.

Competent Authorities

Authorities in the multilateral drug-interdiction treaties are referred to as competent (national) authorities, designated authorities, competent bodies or law enforcement authorities.

The 1995 Agreement recognizes two authorities: an authority responsible for sending and answering authorization requests, and the central authority responsible for providing notification of the exercise of preferential jurisdiction and for all other communications or notifications under this agreement.

As all these authorities have to communicate with each other, they should be known. This is achieved by depositing the particulars of the authorities with the Depositary that shall distribute these particulars among the member states.

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Maritime drug-interdiction treaties compared

The 2002 Draft Convention has a divergent competent authority. Pursuant to that convention, a competent authority is the authority responsible for the implementation of the convention.

In the 2003 Agreement, the process of authorization is split in two. Nevertheless that agreement encourages every state to identify a single point of contact with the capacity to receive, process and respond to requests and reports at any time. In addition to the single point of contact, the 2003 Agreement constitutes two other competent authorities: the office that decides on requests for authorization and the law enforcement official.

Request

Request forms should be standard in order to gain time and to avoid confusion in the authorization process. Those requests should be communicated in writing, but may be conveyed orally first. Modern means of telecommunication, such as telefax or e-mails by Internet may be used. Requests should contain all necessary details of the vessel concerned, including its name, marks of registry, name of homeport, etc. Request should also contain the grounds for suspicion.¹⁰

The 1995 and the 2003 Agreement deal with requests in roughly the same way as described above.

Registry

Registry is the entry into the registers that states are required to maintain. Those registers of ships contain the names and particulars of ships flying the states' flag, except the names and particulars of the ships that are excluded from generally accepted international regulations on account of their small size.

Only the 2003 Agreement explicitly deals with this pre-authorization item in detail. The two other treaties are silent about verifying nationality before requesting authorization to stop and board a suspect vessel. It can be stated that a flag state shall only grant authorization for one of its registered vessels.

Communications

Communications mean ship-to-shore *vice versa* and shore-to-shore *vice versa*. Ship-to-shore *vice versa* is mainly a national issue. International shore-to-shore is more political. Many communications channels are available, such as INTERPOL, and others.¹¹

Article 18 of the 1995 Agreement states that designated competent authorities shall communicate directly with one another. The article goes so far as to specify communications channels.

The 2002 Draft Convention states that international shore-to-shore communication will pass through the Ministries of Justice.

Maritime counter-drug cooperation

Maritime counter-drug cooperation has been defined in Section 1.5.3. of the present study.

¹⁰ See for standard forms the Report of the Meetings of the Working Group on Maritime Cooperation, held in Vienna from 19-23 September 1994 and from 20-24 February 1995; see also Annex F of the Maritime Study (1997).

¹¹ See the Study of Secure Communications for the Exchange of Intelligence, Barbados, 15 May 1997.

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The 2003 Agreement takes maritime counter-drug cooperation to be the core of the treaty: regional and sub-regional, direct or through international organizations, on the high seas or in the territorial waters, by national or by foreign law enforcement officials, including training programs and combined operations. All aspects of maritime counter-drug cooperation are described in the agreement.

Timeslot

Timeslot is the maximum time between a request for authorization by an intervening state and the response to it by the flag state. The smaller that timeslot, the better the chance to stop and board a suspect ship. The timeslot is an accelerator of the process of suppressing the illicit drug trafficking at sea.

Where the 1988 Convention uses the term ‘expeditiously’, the 1995 and the 2003 Agreements define a timeslot of within four hours of the receipt of the request both for registration and for authorization.

Actions

Actions can be described as engagements between law enforcement officials and suspected illicit drug traffickers.

The 1995 Agreement includes an article that describes all authorized actions that can be taken after receiving the authorization from the flag state. Those actions start with stopping a suspect vessel. The early part of the process, including such things as detection and monitoring, is not mentioned. The last action described is the seizure, securing and protection of evidence or material discovered on the vessel. Enforcement measures and the execution of the enumerated actions are described as well.

The 2002 Draft Convention enumerates specific actions as well. That convention starts with the pursuit of a suspect vessel. The last and apparently mandatory action is to escort the vessel to the nearest or most suitable port where it shall be detained prior to being returned.

The term used for action in the 2003 Agreement is ‘to conduct operations’: a somewhat vague term. When read in conjunction with the objectives of this agreement, however, it becomes clear. The objectives state that suspect vessels must be detected, identified, continuously monitored, and, when evidence of illicit drug traffic is found, detained for appropriate law enforcement action by the responsible law enforcement authorities.

It can therefore be stated that the 2003 Agreement starts its operations or actions from the very beginning of the process of suppressing illicit drug trafficking. After intelligence determines that a vessel should be considered as a suspect vessel, the vessel must first be detected and later on to be monitored, before the actions of stopping, boarding, searching etc. can take place. In that way, the 2003 Agreement covers the whole process of maritime counter-drug cooperation without enumerating all specific actions.

The 2003 Agreement is therefore the only one to cover the whole process. Both of the other treaties can be considered as a limitation of the 1988 Convention, because that convention enumerates some actions, but uses the term ‘*inter alia*’. On the other hand, that is a matter of interpretation, nothing in the multilateral maritime drug-interdiction treaties prohibits the use of other actions that have not been mentioned.

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Execution of actions

Actions must be executed or carried out by official representatives of a state. The three multi-lateral drug-interdiction treaties discussed use different terms for these officials.

Pursuant to the 1995 Agreement, actions must be carried out by warships or other ships clearly marked and identifiable as being on government service and authorized to that effect. The 2002 Draft Convention uses two terms: 'official ships' and 'ships belonging to the customs administration'.

The 2003 Agreement uses the term 'law enforcement officials operating from any party's law enforcement vessel'

Regardless of how many words have been used to identify who has been authorized to carry out actions, those officials must be empowered and authorized in conformity with their national laws.

Safeguards

Safeguards are necessary to restrict the power of the law enforcement officers in order to protect specific interests. Those officials shall take due account of the need not to endanger the safety of life at sea or the security of the vessel and cargo and not to prejudice any commercial or legal interest. Other safeguards are references to the principles of international law in general and of the law of the sea in particular. All treaties make references to these principles.

The 1995 Agreement gives detailed indirect operational safeguards. It is up to the commanding officer of the pursuing vessel whether to stop and board a suspect vessel.¹²

The 1995 Agreement and the 2002 Draft Convention also contain judicial safeguards, such as prosecution of suspected foreign law enforcement officials, enforcement measures and periods of detention.

Conditions on the authorization to intervene, as a safeguard, are applicable to the 1995 and 2003 Agreement. It is the flag state, if it grants the request for authorization to intervene that such authorization may be made subject to conditions, directions or limitations.

The safeguard for third states is mentioned in the 1995 Agreement and the 2002 Draft Convention. The interest of that state, whether party to the treaties or not must be considered.

In conclusion, it can be stated that all multilateral maritime drug-interdiction treaties contain many safeguards for various interests, directly or indirectly.

Use of force

The use of force examined in the study is police powers, that is the power of a state to use physical force in order to coerce suspect persons to obeying that state's laws. It is the use of force in maritime law enforcement operations. Force implies the whole spectrum of using force against a suspect vessel and suspect persons, including the use of firearms. Ultimately, the force used can be deadly.

The 2003 Agreement and the 1995 Agreement have clear provisions where the use of force is defined and limited. The principles of proportionality and subsidiary are elaborated. Those

¹² The UNDCP and the 2003 Agreement encourage training in boarding operations on the high seas. Many naval forces see this training as mandatory for their warships.

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Maritime drug-interdiction treaties compared

treaties are quite clear about the law under which force must be used: namely under the national law of the law enforcement officer, in compliance with the directions of the flag state. Use of force must be reported to the flag state.

7.3. Comparison of the bilateral maritime drug-interdiction treaties examined

7.3.1. General

The majority of treaties registered pursuant to Article 102 of the Charter of the United Nations are bilateral treaties. Though more similar to contracts than to statutory law in form, such treaties are often standardized and therefore establish similar rights and obligations for a broad range of states. The many similar bilateral treaties on maritime drug interdiction can create networks of legal obligations that are an important part of custom international law. Whether such treaties may be viewed as creating customary law in some cases is a separate matter.¹³ Bilateral treaties may provide evidence of customary rules,¹⁴ and indeed there is no clear and dogmatic distinction between law-making treaties and others. If bilateral treaties, for example on drug-related matters, are habitually framed in the same way, a court may regard the usual form as the law even in the absence of a treaty obligation.¹⁵

Bilateral maritime drug-interdiction treaties

The bilateral maritime drug-interdiction treaties that are being compared in this chapter are the 1990 Treaty, the 1981, the 1998 and the Shiprider Agreements. Of those four, Europe is included in the geographical scope of only the 1990 Treaty. The others were concluded for the Caribbean region. One should remember that the 1998 Agreement was not intended to modify, replace or affect in some way the provisions of the 1981 Agreement. The 1981 Agreement has two parties, the USA and the UK, with its own territorial scope and the 1998 Agreement has three parties, the USA, the UK and UK Overseas Territories in the Caribbean (UKCOT), also with its own, but different, territorial scope. Some provisions of the 1998 Agreement are only applicable to UKCOT and the USA. The 1981 Agreement will only be compared with the other treaties when relevant.

It must also be noted that not all of the Shiprider Agreements are the same. Differences arose during the negotiations for the Shiprider Agreements. Where appropriate for the present study, the model Shiprider Agreement that has the largest number of provisions, will be used for comparison. In other instances, a specific Shiprider Agreement will be used for comparison.

7.3.2. General provisions compared

Definitions

The newer Shiprider Agreements, the 1990 Treaty and the 1998 Agreement contain definitions. Some definitions are integrated into the text in the older Shiprider Agreements.¹⁶

¹³ Baxter (1965-1966), pp. 275-300.

¹⁴ Nottebohm Case, ICJ Reports (1955), pp. 22-23.

¹⁵ Lillich (1971), p. 527.

¹⁶ Shiprider Agreement between the US and Venezuela, November 1991, TIAS no. 11827, and the Shiprider Agreement between the US and Belize, December 1992, TIAS no. 11914.

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Illicit traffic

Illicit drug traffic in the 1998 Agreement and the newer Shiprider Agreements have the same meaning as in Article 1(m) of the 1988 Convention, including the possession of illicit drugs for personal consumption.

Law enforcement

Law enforcement vessels, law enforcement authorities, and law enforcement officials are defined in great detail in the Shiprider Agreements and in the 1998 Agreement. Only the 1990 Treaty defines the term 'warship', which means any duly authorized ship matching the definition of Article 8 of the Geneva Convention on the High Seas.

Shiprider

The term 'shiprider' is defined both in the Shiprider Agreements and in the 1998 Agreement.

Ship flying no flag

The 1990 Treaty has an interesting definition of ships flying no flag, which cannot be found in any other drug-interdiction treaty. The terms 'flag displayed by the ship' and 'ship sailing under the flag' signify both a ship sailing under the flag of its own state, but also a ship flying no flag but belonging to a physical person or legal entity in one of the parties.

Suspect vessel

Suspect vessels may only be vessels used for commercial or private purposes. That excludes warships, pursuant to all treaties. The 1981 Agreement is explicitly restricted to British private vessels.

Principles

The preambles of all of the bilateral maritime drug-interdiction treaties being compared make references to the implementation of the 1988 Convention and the LOSC. The underlying principle of the 1981 Agreement, the 1990 Treaty and some Shiprider Agreements is the prior authorization to stop and board a foreign suspect vessel at sea. The 1998 Agreement constitutes prior authorization only under specific circumstances, but does not provide for blanket prior authorization.

Objective

The objectives of the bilateral maritime drug-interdiction treaties are suppression of or combating illicit drug traffic at sea.

Geographical scope

The geographical or territorial scope of the 1998 Agreement is applicable in and outside parties' sovereign waters in the Caribbean region. The 1990 Treaty is applicable in the maritime zones outside flag states' sovereign waters. The geographical scope of the Shiprider Agreements includes all maritime zones.

It can be stated that with the exception of the regional 1998 Agreement, all of the bilateral maritime drug-interdiction treaties being discussed have a global aspect.

7.3.3. Jurisdictional provisions compared

Jurisdiction

Prescriptive jurisdiction

All of the bilateral maritime drug-interdiction treaties being discussed are silent about prescriptive jurisdiction. It can be assumed, however, that exercising jurisdiction is not done without asserting prescriptive jurisdiction. Each party will therefore establish jurisdiction over drug-related offences when committed on board a vessel of the other party. In that way, the bilateral maritime drug-interdiction treaties are additions to the 1988 Convention.

Enforcement jurisdiction

The Shiprider Agreements and the 1998 Agreement are very clear about exercising jurisdiction. In its sovereign waters, the coastal state exercises its jurisdiction, though there may be some circumstances under which another party may exercise that jurisdiction. Seaward of the sovereign waters, parties can exercise jurisdiction on board a vessel of the other party.

The 1981 Agreement states that the United Kingdom will not object to the exercising of United States' jurisdiction on board British suspect vessels.

Preferential jurisdiction

Preferential jurisdiction is the term used in the 1990 Treaty. Pursuant to that treaty, preferential jurisdiction shall, outside the sovereign waters, be exercised by the state under whose flag the suspect ship, on board of which or by means of which the offence was committed, is sailing. The flag state, at the request of the intervening state, can renounce its preferential jurisdiction.

The Shiprider Agreements use the term 'primary right to exercise jurisdiction'. The flag state may waive its primary right to exercise jurisdiction and authorize the enforcement of the other party's law against its suspect vessel, including cargo and/or persons on board. In some Shiprider Agreements, that provision is not reciprocal.

In conclusion, it can be stated that the bilateral maritime drug-interdiction treaties are additions to the 1988 Convention and that progress has been made in respect of the assertion of jurisdiction as defined in the 1988 Convention.

Stateless vessel

Pursuant to the Shiprider Agreements and the 1998 Agreement, operations to suppress illicit drug trafficking shall be carried out against stateless vessels as well.

Authorization

Authorization must be requested and granted pursuant to some of the Shiprider Agreements¹⁷ and the 1998 Agreement. Other Shiprider Agreements¹⁸ and the 1990 Treaty constitute prior authorization to board and search a suspect vessel of the other party.

Applicable law

Applicable law is, in principle, the law of the coastal state when in sovereign waters, and the national law of the acting law enforcement agency when outside those waters. The use of

¹⁷ For example, the Shiprider Agreement with, respectively, Jamaica and Barbados.

¹⁸ For example, the Shiprider Agreement with Belize.

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force is ruled by the national law of the law enforcement officers. Those principles are laid down in all off the bilateral maritime drug-interdiction treaties under discussion, with the exception of the 1990 Treaty. That agreement only refers to general rules of international law.

It must be noted that some Shiprider Agreements have, in addition, a provision that foresees the exchange and knowledge of each others laws and policies.

Offences

Offences are defined in the 1990 Treaty. That treaty defines offences as acts that are or have been committed on board ships and that are connected with the possession of narcotic drugs and psychotropic substances for the purpose of distribution, storage, transport, trans-shipment, sale, manufacture or processing. That is partly the definition of illicit drug traffic of the 1988 Convention.

The 1981 Agreement speaks about having a cargo of drugs on board for importation into the United States in violation of the laws of the United States.

The 1998 Agreement and the Shiprider Agreements speak about the offence 'illicit traffic as defined in the 1988 Convention', which includes the possession of illicit drugs for personal use.

Illicit trafficking of precursors is only mentioned in the 1998 Agreement and in some Shiprider Agreements.

In conclusion, it can be stated that, in respect of offences, none of the bilateral maritime drug-interdiction treaties is an addition to the 1988 Convention. The 1990 Treaty is even more restrictive.

Suspicion

Suspicion is defined by the terms 'reasonable grounds to suspect' or 'reasonably believes'. There are no significant differences in the bilateral maritime drug-interdiction treaties.

Evidence

Evidence is only mentioned in the 1990 Treaty. That treaty states that evidence must be transferred to the flag state if the latter does not renounce its preferential jurisdiction.

Extradition

Extradition can be found in the 1981 Agreement. The United Kingdom may object to the prosecution of any United Kingdom national found on board of a suspect vessel. When an objection is submitted, the United States shall release such a person.

The 1990 Treaty states that arrested persons must be transferred, if the flag state has not renounced its preferential execution.

Surrender assets

Surrender assets are covered in all examined bilateral maritime drug-interdiction treaties. Documents, forfeited assets and other relevant materials must be transferred when the flag state executes its preferential jurisdiction.

The Shiprider Agreements add the provision that seized assets may be transferred to other parties, for use in the suppression of illicit drug trafficking.

7.3.4. Operational provisions compared

Assistance

Assistance is the core of the Shiprider and 1998 Agreement. The two parties assist each other in all maritime zones. Both treaties speak about operational and technical assistance, such as assistance with mooring and berthing of law enforcement vessels in the harbors of the other party.

Competent Authorities

Competent authorities in the Shiprider Agreements are the law enforcement authorities, regardless of whether they are embarked as shipriders. In some cases, shipriders have been empowered with the authority to allow enforcement actions to be carried out by foreign law enforcement officials on board a suspect vessel registered in the shipriders' state or in their territorial waters.

In addition to the law enforcement authority, the 1998 Agreement uses the system of points of contact. Each party shall provide the other party with, and keep up to date, the points of contact for notification and for processing requests for verification and the authorization to stop and board a suspect vessel. Those points of contact are enumerated in great detail, including telephone numbers, in the annex to the 1998 Agreement.

The other examined treaties do not mention competent authorities, these treaties use the terms 'the state' or 'the government'.

Request

Request content and the responses to requests are dealt with in detail in the 1998 Agreement. Some Shiprider Agreements have a provision that any such request shall be supported by evidence as to the basis on which the requesting party claims that there are reasonable grounds for suspicion.¹⁹ The other treaties are silent about this matter.

Request forms are not mentioned in the bilateral maritime drug-interdiction treaties, other than stating that when requests have been conveyed orally, they shall later be confirmed in writing.

Registry

Registry is a separate issue in the Shiprider Agreements. These agreements explicitly state that confirmation of a claim of registry in or the right to fly the flag of the other party is part of the requested authorization to board and search a suspect vessel.

Communication

Communications are dealt with in the 1990 Treaty. The usual channels must be used by the central authority.

Maritime counter-drug cooperation

In the 1998 Agreement shiprider programs are constituted, but only between the USA and the UKCOT (and therefore not with the UK). Pursuant to those programs, shipriders from the UKCOT and the USA may authorize the entry of law enforcement vessels of the other party into their respective territorial waters and grant them permission to patrol in those waters.

¹⁹ See Article 12 of the Shiprider Agreement with Jamaica.

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They can also authorize actions against their respective flagships when on the high seas. In the Shiprider Agreements, these shiprider programs can be reciprocal or non-reciprocal.

It can be stated that this is a significant development since the 1988 Convention.

Timeslot

Timeslot is the time between a request for authorization to stop and board a suspect vessel, and the positive response. In the Shiprider Agreements, the shortest timeslot is a minimum of two (2) hours and the longest is a maximum of four (4) hours.

Actions

Actions covered by the Shiprider Agreement and the 1998 Agreement are boarding and searching a suspect vessel, including its cargo and the persons found on board. If evidence of illicit drug trafficking is found, additional actions can be carried out, such as detaining the vessel, cargo and persons on board pending instructions from the other party.

The 1990 Treaty states that actions during the intervention are pursuing, arresting and boarding the ship, checking documents and questioning persons on board. If evidence of illicit drug trafficking is found, the actions are seizing the drugs and arresting the persons involved, and when appropriate, escorting the ship to the nearest suitable port.

In conclusion, it can be stated that there are not too many notable differences between the bilateral maritime drug-interdiction treaties and the 1988 Convention.

Execution of actions

Actions must be executed, or carried out, by warships or any other duly authorized and identifiable ships in the service of the state, according to the 1990 Treaty.

The 1998 Agreement speaks about law enforcement officials from law enforcement vessels, while the Shiprider Agreements vary from warships to official vessels.

The 1981 Agreement has the broadest approach. In that agreement, US authorities must carry out actions.

Safeguards

Safeguards are not all explicitly mentioned in the bilateral maritime drug-interdiction treaties under discussion. They, however, have generic implicit provisions such as the phrase “each party shall ensure that its law enforcement officials, when conducting boardings and searches act in accordance with its applicable national laws and policies and with international law and accepted international practices”.

Placing conditions on authorization to board and search a suspect vessel of another party is not applicable to the standard model of the Shiprider Agreement. This standard model provides for standing authorization. Some Shiprider Agreements however, have conditions on the authorization to stop and board a suspect vessel.

The safeguard for third states is only mentioned in the 1990 Treaty: “a safeguard of commercial and legal interests of any other state” is the formulation.

Privileges and immunities are part of the Shiprider Agreements. The law enforcement officials and other officials of the government of the US government who are present in the terri-

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tory of the other state shall be accorded the privileges and immunities equivalent to those of the administrative and technical staff of a diplomatic mission under the Vienna Convention on Diplomatic Relations of 1961. This provision is not reciprocal and continues to be a source of dispute.

Use of force

The 1998 Agreement and some Shiprider Agreements deal with all uses of force. Not only for self-defense but also when necessary to stop a suspect vessel, such as the use of disabling fire. All instances of the use of force should be in strict accordance with applicable laws and policies, however, and shall in all cases be the minimum force that is reasonably necessary under the circumstances. Some Shiprider Agreements - the Shiprider Agreement with Belize, for example - have been amended to include use-of-force provisions. The Belize agreement now also uses the term 'all use of force'.²⁰

7.4. Comparison of multilateral and bilateral maritime drug-interdiction treaties

7.4.1. Comparing multilateral and bilateral maritime drug-interdiction treaties

At this moment, either multilateral or bilateral drug treaties are in force for the most threatened regions. It is interesting to note that several multilateral treaties have been concluded in the European region to suppress illicit drug trafficking at sea. These treaties even have a global aspect. In that region, only a few bilateral maritime drug-interdiction treaties have been concluded. In the Caribbean region, however, only one multilateral maritime drug-interdiction treaty has been concluded, but many more bilateral maritime drug-interdiction treaties have been concluded, mostly between the United States and another state in that region. The question of whether there are overlaps or gaps in jurisdiction and therefore in the ability to suppress illicit drug trafficking at sea by law enforcement agencies, will be discussed in Chapter 8 of the present study.

The various provisions of all of the multilateral and bilateral maritime drug-interdiction treaties under discussion are difficult to compare in detail. The comparison would become too broad and vague to add any value to the present study. Therefore the multilateral and bilateral drug-interdiction treaties are not compared relatively.

7.5. Conclusions

7.5.1. Relations with the LOSC

The most maritime drug-interdiction treaties are concluded in accordance with the international law of the sea. The 1988 Convention, the main framework for maritime drug-interdiction treaties, uses in Article 17, the most relevant provision for maritime drug interdiction, the phrase '...[su]ppres illicit traffic by sea, in conformity with the international law of the sea'. The 2003 Agreement, the 2002 Draft Convention, the 1997 Convention, the 1998 Agreement and most of the Shiprider Agreements do have a direct reference to the LOSC. The 1990 Treaty refers to the 1958 Geneva Convention. The 1981 Agreement does not contain a direct reference to the international law of the sea.

²⁰ Protocol between the Government of the United States of America and the Government of Belize to the Agreement Concerning Maritime Counter-Drug Operations, April 2000.

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Maritime drug-interdiction treaties compared

We may conclude that the LOSC has had its indispensable influence on the maritime drug-interdiction treaties.

7.5.2. Relations with the 1988 Convention

All of the maritime drug-interdiction treaties that have been examined and compared, with the exception of the 1981 Agreement and the 1997 Convention, are based on Article 17 of the 1988 Convention. In general, the majority of the maritime drug-interdiction treaties are extensions to the provisions of the 1988 Convention. See for an overview of the comparison the Annex to the present chapter.

7.5.3. Conclusions about the general provisions

The definitions in the maritime drug-interdiction treaties do not define the same topics, but the most important definitions are derived from the 1988 Convention and therefore do not cause too much confusion.

The principles of the drug-interdiction treaties compared are not the same. The difference is the moment of authorizing another party to interfere with a nationally flagged ship.

The objective of all drug-interdiction treaties is the suppression of illicit drug trafficking at sea.

The geographical scope of the maritime drug-interdiction treaties is not always the same. Some of the treaties have a global scope; others are limited to a certain region.

7.5.4. Conclusions about the jurisdictional provisions

The prescriptive and enforcement jurisdictions laid down in the majority of the treaties examined are based on the 1988 Convention and, in general, an extension to the provisions of that convention.

The stateless vessel is dealt with in most of the treaties examined: the exceptions are the 2002 Draft Agreement and the 1990 Treaty.

Authorization is the core of maritime drug-cooperation. The spectrum found in the treaties examined goes from prior authorization to all parties in the 2002 Draft Convention to a request for authorization on an *ad hoc* base in the 1995 Agreement. The tendency in the last decade is prior authorization.

Only the 2002 Draft Convention is silent about the applicable law during an intervention. In general the law of the intervening law enforcement official is applicable during an intervention. The 1988 Convention was silent about the applicable law; therefore, the other treaties are an improvement.

Regarding the offences, some of the treaties are not extensions to the provisions of 1988 Convention, and one of them is even more limited.

The provisions about suspicion are more or less the same in all maritime drug-interdiction treaties and in accordance with the 1988 Convention.

Under all treaties examined, the evidence should be transferred to the prosecuting state.

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Extradition has been dealt with in a simple way: there is no complicated extradition processes, nor is there a complicated process for the surrender of assets

7.5.5. Conclusions about the operational provisions

All of the drug-interdiction treaties that have been examined define their own operational provisions, such as requests, action and the use of force, which do not differ too much. All treaties contain many safeguards for various interests, directly or indirectly.

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Annex

MULTILATERAL MARITIME DRUG-INTERDICTION TREATIES						
Subject	Art	1995 Agreement	Art	2003 Agreement	Art	2002 Draft Convention
General provisions						
Definitions	1	intervening state, preferential jurisdiction, relevant offence, vessel	1	illicit traffic, authority, law enforcement official, -vessel and -agency; waters, area, suspect vessel	1	customs vessel, intervening state, preferential jurisdiction, law enforcement officials as competent authority, ¹ relevant offence
Principles	2	supplementing art. 17 of the 1988 Convention in conformity with international law of the sea and the right of freedom of navigation, no prior authorization, non-bis-in-idem	3, 11, 16	implement or enhance Article 17 of the 1988 Convention in accordance with the law of the sea and the freedom of navigation; references to the RSS, CCLEC and LOSC; principles of sovereign equality and territorial integrity; sovereignty in national waters	6	based on Treaty on EU, strengthening 1967 and 1997 Convention; references to LOSC and the 1988 Convention; prior authorization through the right of representation.
Objective			2	maritime counter-drug cooperation	2	cooperation of customs at sea.
Geographical scope	6	beyond the territorial sea of any party	2, 15	waters in the Caribbean area, may be extended to internal maritime waters	5	outside territorial waters of a member state
Jurisdictional provisions						
Jurisdiction Prescriptive	3	flag, other party's and stateless vessels, excluding warships	23	parties' territorial waters and CZ; flag, other parties' and stateless vessels, excluding warships	3, 5, 8	parties' territorial waters; any parties' vessels excluding warships
Enforcement	3	idem, after surrender of preferential jurisdiction	23	Idem	8	after surrender of preferential jurisdiction
Preferential	4	flag state has to notify intervening state within fourteen days, otherwise	24	consent to the exercise of jurisdiction by another state party	5, 8	preferential jurisdiction by flag state, flag state may surrender to intervening state

¹ Deviation from definitions in the other treaties.

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MULTILATERAL MARITIME DRUG-INTERDICTION TREATIES						
Subject	Art	1995 Agreement	Art	2003 Agreement	Art	2002 Draft Convention
		waived				within one month, tacit
Stateless vessel	5	most closely affected party shall take action	5, 16	board to ascertain nationality, when stateless in accordance with international law		
Authorization	4, 6, 8	authorization on request, conditional	7,12, 16	three modes of authorization: prior, tacit and express consent, including in national waters	6	prior authorization by right of representation
Applicable law	11, 12, 13	actions, use of force, gathering and protecting evidence under the law of the intervening state	9,11, 16, 20, 22, 25	in waters of a party law of that party, otherwise domestic laws of the boarding party; use of force domestic laws; law enforcement officials must be informed about all applicable laws		judicial proceedings by law of intervening state
Offences	1	pursuant to art. 3(1) of the 1988 Convention; possession for personal use not included; including precursors	23	Pursuant to art. 3(1) of the 1988 Convention; possession for personal use not included; including precursors	3	possession for distribution, transport, transshipment, storage, sale manufacture or processing of narcotic drugs and psychotropic substances on board a vessel; excluding precursors and personal use
Suspicion	6	reasonable grounds to suspect	1	reasonable grounds to suspect	6	good grounds to suspect
Evidence	13, 15, 23, 24	intervening state transfers summary of evidence to flag state to decide surrendering jurisdiction; surrender when preferential jurisdiction is exercised; notify flag state of other evidence; subject to restriction of use and confidentiality	26	periodical information, subject to restrictions	8	intervening state transfers summary of evidence to flag state, which decides whether to surrender jurisdiction; surrender when preferential jurisdiction is exercised all relevant evidence
Extradition	8, 15, 16	surrender persons without formal extradition proceedings, but controlled by judicial authority; no surrender of suspect persons required if capital punishment applicable; possibility of serving imposed sentence in home state			8	surrender persons without formal extradition proceedings
Surrender assets	15	vessels, cargoes on request	27	assets can be disposed of or sold cf.	6	return vessels to flag state or give right to

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MULTILATERAL MARITIME DRUG-INTERDICTION TREATIES						
Subject	Art	1995 Agreement	Art	2003 Agreement	Art	2002 Draft Convention
				laws of intervening state, may be transferred to another party		free passage ASAP
Operational provisions						
Assistance	4	party requests assistance of other parties, which shall render assistance within means available, conditional	3, 4, 12, 21	in territorial waters by foreign law enforcement vessel on request; operational technical;		
Competent Authorities	17	a. one for sending and answering requests (24x7); b. central authority notification of preferential jurisdiction and all other communications or notifications	1, 6, 8, 9, 10, 18 20	a. single point of contact to receive, process and respond to requests and reports (24x7); b. competent national authority processes request for verification or authorization; c. law enforcement officials	1	customs or other law enforcement authorities
Request	19, 20, 21	in writing, also modern means, language pending on notifications; no authentication and legislation formalities, requesting and executing authorities, details of suspect vessel and offences, grounds for suspicion, proposed actions	6, 16	orally confirmed by written communication, details of vessel, grounds for suspicion, identifying information		
Registry			6, 15	request for verification of registry shall be answered expeditiously; refuting registry means stateless vessel		
Communications	17, 22	authorities communicate directly or use channels of international law enforcement organizations; inform owners/masters about Agreement			8	any communications through the Ministries of Justice
Maritime counter-drug cooperation			3, 4, 19	regional and sub-regional, directly or through international organizations, actions on the high seas; clearances for foreign law enforce-		

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MULTILATERAL MARITIME DRUG-INTERDICTION TREATIES						
Subject	Art	1995 Agreement	Art	2003 Agreement	Art	2002 Draft Convention
				ment vessels to enter into territorial waters, coordination among agencies, maritime training programs, combined operations; S.O.P.		
Timeslot	7	four hours for authorization	6	four hours for registry or authorization		
Actions	6, 9	stop and board, establish control, relocate the vessel, search, seize, secure and protect any evidence	2, 7, 10	detect, identify, monitor, board and search, detain, provide disposition instructions, entry into national waters in order to support law enforcement operations	6	pursue, stop, board search, examine documents, identify and question persons on board, inspect the vessel, detain, escort the vessel to most suitable harbor, inform flag state and return vessel.
Execution of actions	11	warships or other ships clearly marked and identifiable as being on government service	1, 10	authorized law enforcement officials operating from any party's law enforcement vessels	6	official ships; ships belonging to customs administration
Safeguards	4, 8, 10, 11, 12	safety of life at sea, the security of the vessel and cargo, any commercial or legal interests; report use of firearms; full cooperation after death or injury of any person; detention period for persons and vessel; prosecution officials; communication with vessel master/owner; any condition imposed by the flag state; enforcement measures to seize secure and protect persons and evidence; involving owners; relocation of suspect vessel into territory of third state.	20, 22	safety of life at sea, security of the vessel and cargo, any commercial or legal interest; consider risks of boarding; avoid unduly detaining; report use of force.	7	safety of life at sea, security of the vessel and cargo, any commercial or legal interest or the commercial interests of a third party; if no adequate grounds the intervening state is responsible, return a detained vessel ASAP, persons detained have the same right as nationals, period of detention is subject of court of intervening state; safeguard for commercial interests of third party.
Use of force	12	minimum necessary, governed by the law of the law enforcement officials, including firearms	22	proportionally, minimum reasonably necessary, prior warning, under domestic laws of the law enforcement official and the directions of the flag state, report discharge of firearms, no reprisal or punishment		

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Annex

BILATRAL DRUG-INTERDICTION TREATIES						
Subject	Art	1990 Treaty	Art	1998 Agreement²	Art	Shiprider Agreement³
General provisions						
Definitions		ship, warship, ship without flag	2, Annex	illicit traffic, territory, law enforcement vessels, authorities and officials, shiprider, suspect vessel, UKOT laws		illicit traffic, territory, waters, law enforcement vessels, authorities and officials, shiprider, suspect vessel
Principles	4	integrating the 1988 Convention with the 1958 Geneva Convention on the law of the sea	3, 6, 9	urgent need of international cooperation in suppressing illicit traffic by sea, references to all drug treaties, LOSC and previous bilateral treaties		general references to the implementation of Art. 17 of the 1988 Convention, LOSC and the drug conventions; sovereignty in national waters
Objective	pre- amble	combating illicit drug trafficking by sea	1	cooperation in combating illicit traffic by sea		suppression of illicit drug traffic by sea
Geographical scope	5	outside flag state's territorial waters	pre- amble	waters of the Caribbean and Bermuda [specified area in the Caribbean region, outside territorial sea and CZ of the USA.]		may vary between territorial waters, including internal maritime waters, and the high seas or combinations
Jurisdictional provisions						
Jurisdiction prescriptive & enforcement	4, 6	by flag state in its territorial waters, free zones or free ports and aboard ships flying its flags	3, 6, 10	in territorial waters by flag state or, under circumstances by other party; seawards of any state's territorial sea; detained vessels, cargo, persons [by USA aboard UK vessels]		may vary
Preferential	6	flag state, may renounce it on request within 60 days	10	by flag state, may be waived [object to continued (preferential?) exercise of USA. jurisdiction over UK vessels within fourteen days]		primary right by flag state, may be waived
Stateless vessel			14	operations shall be carried out		operations shall be carried out

² Including the 1981 Agreement; when relevant, text of this agreement between square brackets [...]

³ In general, because all the bilateral Shiprider Agreements have been subject to negotiations by different states

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BILATRAL DRUG-INTERDICTION TREATIES						
Subject	Art	1990 Treaty	Art	1998 Agreement²	Art	Shiprider Agreement³
Authorization	5	prior authorization by right of intervention as an agent	4, 6, 9, 13	on request, tacit to inspect the vessel; under circumstances only prior notice unless urgent, including national waters; [no objection to boarding by USA]		advance, tacit, reciprocal, non-reciprocal, <i>ad hoc</i> on request
Applicable law	5,6	intervention in accordance with the general rules of international law; necessary urgent legal measures by the legal system of the intervening state; judicial assistance in accordance with relevant international treaties	5, 17, 18, 19	actions by law of intervening state; use of force, including self-defense in accordance with national law; law enforcement officials must be informed about any applicable law; request to assist a shiprider in accordance with applicable laws of both parties. [US laws]		actions by law of intervening state; use of force, including self-defense in accordance with national law; law enforcement officials must be informed about any applicable law; request to assist a shiprider in accordance with applicable laws of both parties
Offences	2, 8	all acts committed on board ships, connected with the possession of drugs for the purposes of distribution, storage, transport, trans-shipment, sale manufacture or processing; including attempts and repeated offences	2	illicit traffic has been defined as in Art. 1(m) of the 1988 Convention; including precursors and minor offences, [importation of narcotic drugs into USA.]		illicit traffic has been defined as in Art. 1(m) of the 1988 Convention; including precursors and minor offences
Suspicion	5	reasonable grounds	2	reasonable grounds, [reasonably believe]		reasonable grounds
Evidence	6	obtaining evidence; if no renunciation of preferential jurisdiction, evidence will be transferred				
Extradition	6	transfer of arrested persons		[after objection, within thirty days, release UK citizens]		
Surrender assets	6	any document obtained and any other relevant element	19	transfer forfeited assets or their sales; [after objection, within fourteen days, release vessel]		assets seized can be transferred to other parties, in order to be used against illicit drug traffic
Operational provisions						
Assistance			4, 20	cf. shiprider program; technical assistance		cf. shiprider program; technical assistance; mooring or stay of law enforcement

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BILATRAL DRUG-INTERDICTION TREATIES						
Subject	Art	1990 Treaty	Art	1998 Agreement²	Art	Shiprider Agreement³
						vessels and officials
Competent authorities	6	central authority to forward requests for jurisdiction	5, 11	a. points of contact for processing requests, b. law enforcement authority c. shiprider		may vary
Request			12, 13	if orally, written confirmation; details vessel, basis for suspicion, identifying information; responses how to act		may vary
Registry			9	before authorization a confirmation of registry by the flag state		may vary
Communications	6, 8	usual channels, by central authority;				may vary
Timeslot			12	two hours		two to four hours
Maritime counter-drug cooperation			4	shiprider programs; UKOT and US shipriders, entry and patrolling in foreign territorial waters, actions on the high seas, reciprocal		reciprocal or non-reciprocal shiprider programs in territorial waters and actions on the high seas
Actions	5	pursue, arrest and board, check documents, question persons, search, seize, escort ship to the nearest suitable port, inform flag state	9	patrol, pursue, board, search, detain, inform flag state, dispose; [enquire, examine, search, seize, take vessel into US port, keep UK informed]		patrols, pursuit, boardings, searches, seizures and arrest, inform flag state, disposition of seized property
Execution of actions	5	warships or any other duly authorized and identifiable ship in the service of the state	16	law enforcement officials from law enforcement vessels; may be vessels of other states, [US authorities]		may vary from warships to official vessels; law enforcement officials from law enforcement vessels
Safeguards	5, 7	safety of life at sea; security ship and its cargo; damage to commercial and legal interests, judicial assistance in accordance with international treaties; no adequate grounds; sentence deduction; interests of any other state.	9	actions in accordance with international law		in general US officials are protected by the 1961 Vienna Convention on Diplomatic Relations
Use of force			17	in strict accordance with applicable laws and policies, minimum reasonably necessary; no impair on the right of self-defense		in strict accordance with applicable laws and policies, minimum reasonably necessary; no impair on the right of self-defense

CHAPTER 8

CONCLUDING REMARKS

8.1. Introduction

In Chapter 3 of this study, we have examined maritime drug interdiction based on the current general framework of international law for maritime drug interdiction, including the law of the sea,¹ the 1988 Convention and customary international law. Maritime drug interdiction was examined from the point of view of a coastal state and from the point of view of an intervening state, in relevant maritime zones.

As was discussed in Chapter 3 of this study, intervening states are states, other than flag states or competent coastal states, that act to exercise their authority over maritime drug trafficking in the relevant maritime zones or over ships under the regimes surveyed in that chapter. Warships are excluded from that authority, because those ships enjoy immunity under the law of the sea. Authority here refers to the competence of a state to enforce its jurisdiction under international law. Coastal-state authority and intervening-state authority over maritime drug trafficking mean authority over vessels suspected of illicit drug trafficking. That authority may be exercised without the authorization of any other state.

In Chapter 3, some conclusions were drawn as well. *Inter alia*, that coastal state-authority in the waters under its sovereignty is, in principle, complete where illicit drug trafficking is concerned. Foreign flag ships merely transiting under the regime of transit passage or archipelagic sea lane passage could be regarded as exceptions. Those exceptions are laid down in the LOSC and have been examined in detail in Section 3.2.5 of this study.

In waters beyond the territorial sea, the scope and extent of coastal-state authority over maritime drug trafficking can be exercised over ships of their own nationality and stateless ones: foreign flag ships are excluded. Exceptions are foreign flag ships in the contiguous zone and the right of hot pursuit. Those exceptions are laid down in the LOSC and have been examined in detail in the Sections 3.2.6. and 3.2.9 of this study, respectively.

Another conclusion was that the scope and extent of intervening-state authority in waters under sovereignty of a coastal state is limited to exceptional situations. In waters beyond the territorial sea, intervening-state authority over maritime drug trafficking can be exercised over ships flying its flag and stateless ones. In those waters, foreign flag vessels are exempted from exercising of intervening-state authority over maritime drug trafficking. Authorization of the flag state is required to enforce jurisdiction.²

In the Chapters 4, 5 and 6 of this study, multilateral and bilateral maritime drug-interdiction treaties have been examined and discussed; those treaties can be regarded as the specific framework of international law for maritime drug interdiction. In the first part of the present chapter the consequences, - that is to say, the implications for the exercise of jurisdiction - , of those maritime drug-interdiction treaties will be examined; more specifically the conse-

¹ The 1958 Geneva Conventions and the LOSC.

² See Section 3.4. of this study.

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quences or implications per maritime zone. The consequences of the maritime drug-interdiction treaties, compared with the current general framework of international law for maritime drug interdiction will be examined from two points of view: that of a coastal state and that of an intervening state.

The authority of coastal states or intervening states is executed by law enforcement officials of the respective states. The authority of various law enforcement officials per maritime zone – law enforcement officials of which state are empowered to exercise authority over suspect vessels – will be surveyed as well.

None of the maritime drug-interdiction treaties examined specifically mentions the ‘transit passage-regimes’, in relation to riparian coastal states. That means that, based on the general framework of international law, suspect vessels merely transiting under those regimes, are excluded from riparian coastal states’ enforcement jurisdiction.³ The fact that practice of some law enforcement officers is contrary, can not be considered as a contra-argument at this moment. There is a possibility that this practice may turn into customary international law, but not in the foreseeable future (see Section 8.8.4. of the study).

In the last chapter of this study, some particular aspects of maritime drug interdiction will be dealt with as well. A subject not yet examined in detail is the utility of making a distinction between large and small suspect vessels for the purpose of the exercise of enforcement jurisdiction. In addition, we will reflect on the influence of maritime drug interdiction on the freedom of the high seas, in particular on the freedom of navigation, and on the exclusive jurisdiction of flag states over ships on the high seas.

The next section of this chapter deals with a possible future development of maritime drug interdiction, more specifically with the suppression of illicit drug trafficking at sea under the concept of universal jurisdiction.

The last part of the present study will examine whether the aims of this study as laid down in Section 1.3.2. have been achieved.

8.2. Summary survey of the scope and extent of coastal-state authority over maritime drug trafficking, under the maritime drug-interdiction treaties

8.2.1. General

In this section the consequences for the scope and extent of coastal-state authority under the maritime drug-interdiction treaties discussed, compared to the general framework of international law for maritime drug interdiction is examined. This will be done per maritime zone. The authority of various law enforcement officials per maritime zone will be discussed as well.

WATERS UNDER THE SOVEREIGNTY OF A COASTAL STATE AND INTERNATIONAL STRAITS

8.2.2. Maritime internal waters, archipelagic waters and territorial sea

The current general framework of international law for maritime drug trafficking provides, in principle, complete coastal state’s authority where illicit drug trafficking is concerned, in waters under the sovereignty of that coastal state.

³ See Section 3.2.5. of this study.

Chapter 8 Concluding remarks

Law enforcement officials of the coastal state, applying national laws and regulations, may enforce the jurisdiction in waters under sovereignty of their state.

8.2.3. International Straits

As have been said above in Section 8.1., none of the maritime drug-interdiction treaties examined specifically mentions the ‘transit passage-regimes’, in relation to coastal states. That implies that the maritime drug-interdiction treaties do not have any implication for the scope and extent of coastal-state authority. That means that suspect vessels merely transiting under those regimes, are excluded from coastal states’ enforcement jurisdiction.⁴

Foreign flag ships merely transiting under the regime of transit passage or under the regime of archipelagic sea lane passage are an exemption from the authority over maritime drug trafficking of riparian coastal states; that exemption is not effected by the maritime-drug interdiction treaties.

WATERS UNDER THE FUNCTIONAL JURISDICTION OF A COASTAL STATE

8.2.4. Contiguous zone and EEZ

According to the current general framework of international law for maritime drug trafficking, maritime zones outside the territorial sea are beyond the scope and extent of coastal-state authority over maritime drug trafficking. An exception is the contiguous zone. If established, maritime law enforcement actions may be taken against foreign flag vessels when suspected of illicit drug trafficking, but only when the drugs are destined for or coming from the coastal state; the so-called nexus requirement.⁵ The maritime drug-interdiction treaties are silent about the contiguous zone or the nexus requirement.

Only law enforcement officials of the coastal state, applying national laws and regulations, may exercise that state’s authority in the contiguous zone.

The current general framework of international law of the sea states that, for maritime drug interdiction, the EEZ can be considered as part of the high seas (see below Section 8.2.5.). There has been some discussion about expanding coastal-state authority in the EEZ regarding maritime drug interdiction,⁶ but the maritime-drug interdiction treaties discussed are silent about this subject.

WATERS BEYOND THE JURISDICTION OF COASTAL STATES

8.2.5. High seas

As has been concluded in Section 3.4. of this study, coastal-state authority over maritime drug trafficking on the high seas may not, in general,⁷ be exercised over foreign flag ships: only over ships flying its flag and stateless ones. Coastal-state authority over foreign suspect vessels, without permission of the flag state, has not been provided for in the maritime drug-interdiction treaties.

⁴ See Section 3.2.5. of this study.

⁵ See Section 3.2.6. of this study.

⁶ See Section 3.2.7. of this study.

⁷ An exception is hot pursuit.

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8.3. Summary survey of the scope and extent of intervening-state authority over maritime drug trafficking, under the maritime drug-interdiction treaties

8.3.1. General

According to the current general framework of international law for maritime drug trafficking, the scope and extent of intervening state authority over maritime drugs trafficking in waters under the sovereignty of a coastal state is limited to exceptional situations.

In waters beyond the territorial sea, intervening-state authority over maritime drug trafficking can be exercised over ships flying its flag and stateless ships. Foreign flag vessels are not subjected to that authority; authorization of the flag state is required.

In this section, the consequences of the maritime drug-interdiction treaties discussed, are examined in comparison to the general framework of international law for maritime drug interdiction is examined. This will be done per maritime zone, separately for Europe and the Caribbean. The authority of various law enforcement officials per maritime zone will be discussed as well.

WATERS UNDER THE SOVEREIGNTY OF A COASTAL STATE AND INTERNATIONAL STRAITS

8.3.2. Maritime internal waters

Europe

Only the 1997 Convention deals with the maritime internal waters in Europe. The subject of that convention is mutual assistance among customs administration and not the suppression of illicit drug trafficking at sea. Article 20 of that convention, however, authorizes law enforcement officials of an intervening member state to continue the hot pursuit of a suspect into the territory, including the maritime internal waters and the territorial sea, of another member state without prior approval where urgency demands it. As that convention was concluded between EU member states, virtually all European maritime internal waters are covered by it.

Law enforcement officials

Law enforcement officials of a coastal state may enforce the state's laws and regulations in its maritime internal waters. In accordance with the 1997 Convention, foreign law officials may enforce laws and regulations, under specific circumstances, in the maritime internal waters as well. It is necessary, however, for the state of those acting foreign law enforcement officials to be party to the 1997 Convention.

Caribbean

For the Caribbean region, the 2003 Agreement states in Article 15 that the scope of the agreement can be extended to internal waters. Upon signing, ratification, acceptance or approval of that agreement, a party may notify the Depositary that it has extended the application of the agreement to some or all of its internal waters. Those internal waters must be specified by the party. Some Shiprider Agreements have the same provision.

Law enforcement officials

In addition to the law enforcement officials of the coastal state, law enforcement officials of foreign intervening states may, pursuant to the 2003 Agreement and some Shiprider Agreements, enforce the law of the coastal state in the maritime internal waters of that coastal state. In that case, a foreign law enforcement vessel may have rights of entrance into the maritime internal waters of that coastal state.

8.3.3. Archipelagic waters

Europe

Although an archipelagic state may be found in Europe⁸, all relevant treaties are silent about archipelagic waters.

Caribbean

The 2003 Agreement and some Shiprider Agreements define the waters of a party as ‘the territorial sea and the archipelagic waters’ of that party. Other treaties are silent on this subject. In the Caribbean region, therefore, from the aspect of maritime drug interdiction, the territorial sea and the archipelagic waters can be considered as maritime zones with the same interdiction regime.

8.3.4. Territorial sea

Europe

Only the 1997 Convention deals with the territorial sea (see above). The 1995 Agreement and the 2002 Draft Convention are not applicable in the territorial sea, nor is the 1990 Treaty.

Law enforcement officials

In accordance with the 1997 Convention foreign law officials may enforce laws and regulations, under circumstances, in the territorial sea as well. The state of those acting foreign law enforcement officials must be party to the 1997 Convention, however.

Caribbean

Contrary to the multilateral treaties that include Europe in their scope, the 2003 Agreement is applicable in the territorial waters (territorial sea, and where relevant, archipelagic waters) in the Caribbean region. Specific provisions have been included for operations in territorial waters. Some of the Shiprider Agreements are also applicable in the territorial sea of the parties.

Law enforcement officials

The 2003 Agreement provides for assistance by foreign law enforcement vessels in the territorial sea of a coastal state, albeit under the control of that coastal state. Such assistance can be authorized by a shiprider of the coastal state aboard the foreign law enforcement vessel or by another competent authority. The 1998 Agreement empowers law enforcement officers of the USA and UKOT to authorize each others’ law enforcement vessels to enter each others’ territorial seas in order to suppress illicit drug traffic. As discussed in previous chapters, it is the law of the coastal state that is enforced in such situations.

8.3.5. International Straits

As was stated earlier, none of the maritime drug-interdiction treaties examined specifically mentions the ‘transit passage-regimes’, in relation to intervening states. That implies that the maritime drug-interdiction treaties do not have any consequences for the scope and extent of intervening-state authority. That means that suspect vessels merely transiting under those regimes, are excluded from intervening states’ enforcement jurisdiction.⁹

⁸ Malta may be considered as an undeclared but qualified archipelagic state.

⁹ See Section 3.2.5. of this study.

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WATERS UNDER FUNCTIONAL JURISDICTION OF A COASTAL STATE

8.3.6. Contiguous zone and EEZ

Europe

The 1995 Agreement uses the term ‘beyond the territorial sea of any Party’. That includes the contiguous zone and EEZ, which implies that maritime counter-drug interdiction can take place in those maritime zones, without the consent of the coastal state, and without notifying that state. The same wording is used in the 2002 Draft Convention and the 1990 Treaty.

Law enforcement officials

Law enforcement officials of all state parties, duly authorized by one of the maritime drug-interdiction treaties, are, in general, empowered to stop and board all suspect vessels in waters under the functional jurisdiction of a coastal state.

Caribbean

The 2003 Agreement, all Shiprider Agreements and the 1981 Agreement allow enforcement of maritime counter-drug regulations in all maritime zones. None of the treaties makes any restriction for the contiguous zone or EEZ.

Law enforcement officials

In these maritime zones, authorized law enforcement authorities of many nationalities may therefore be entitled, in accordance with the maritime drug-interdiction treaties and international law, to stop and board a suspect vessel: vessels flying its flag, foreign flag vessels and stateless ones.

WATERS BEYOND THE JURISDICTION OF COASTAL STATES

8.3.7. High seas

Europe

The 1995 Convention and the 2002 Draft Convention are applicable to the high seas. The geographical scopes of these treaties are defined as ‘beyond the territorial sea of any Party’ and ‘outside the territorial waters of a Member State’, respectively. The 1995 Convention provides authorization on request. When the intervening state has reasonable grounds to suspect that a vessel of a foreign state is engaged in illicit drug trafficking, this intervening state may request the authorization to stop and board this suspect vessel. The authorization by the flag state is crucial.

The 2002 Draft Convention, however, provides prior authorization by the right of representation. Consequently the flag state’s jurisdiction is no longer exclusive; the intervening state may stop and board a suspect vessel of another party on the high seas.

Law enforcement officials

The 1995 Convention requires that warships or other clearly marked and authorized ships carry out maritime counter-drugs operations on the high seas. The 2002 Draft Convention refers to official ships or ships belonging to customs administrations. Both treaties are silent about the type of personnel that must be on board those vessels.

Caribbean

The situation in the Caribbean region is more complicated. Many different Shiprider Agreements have been concluded with different modes of authorization for stopping and boarding a

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Concluding remarks

suspect vessel. In addition, the multilateral 2003 Agreement has three modes of authorization that every state can choose from when becoming party to that agreement. The authorization pursuant to the various Shiprider Agreements and the 2003 Agreement ranges from general pre-authorization without any condition to express consent of the flag state after being requested by the intervening state, where the request for authorization is accompanied by a summary of evidence available. In the Caribbean region, therefore, many methods are available for the intervening state to obtain authorization to stop and board a suspect vessel.

Law enforcement officials

The range of nationalities of law enforcement officials that are empowered to execute maritime counter-drug interdiction is very wide, as well. Authorized law enforcement officials may operate from a range of law enforcement vessels as well.

8.4. Conclusions about the consequences of the maritime drug-interdiction treaties

8.4.1. Consequences for the scope and extent of coastal-state authority

Compared with the general framework of international law for maritime drug interdiction the maritime drug-interdiction treaties or specific framework of international law for maritime drug interdiction examined have no consequences for the scope and extent of coastal-state authority over maritime drug trafficking in waters under its sovereignty, in waters under its functional jurisdiction or in waters beyond the jurisdiction of coastal states.

8.4.2. Consequences for the scope and extent of intervening-state authority

The scope and extent of intervening-state authority over maritime drug trafficking in waters under the sovereignty of a coastal state has been enlarged when compared with the current general framework of international law for maritime drug trafficking. Under conditions laid down in the maritime drug-interdiction treaties discussed, law enforcement officers of an intervening state may enforce the jurisdiction of a coastal state in that state's maritime internal waters, archipelagic waters or in its territorial sea.

The scope and extent of intervening-state authority over maritime drug trafficking under the maritime drug-interdiction treaties, in waters under the functional jurisdiction of a coastal state do not differ from the scope and extent of this intervening-state authority in waters beyond the jurisdiction of coastal states.

The scope and extent of intervening state authority over maritime drug trafficking in waters beyond the jurisdiction of coastal states has been significantly enlarged by the consequences of the maritime drug-interdiction treaties discussed, when compared with the general framework of international law. Those treaties have provided for different modes of authorization for the intervening state to stop and board a foreign flag ship suspected of illicit drug trafficking. The time-consuming process of requiring flag-confirmation and subsequent authorization to stop and board a suspect vessel can be shortened or even eliminated by pre-authorization as laid down in the maritime drug-interdiction treaties.

8.4.3. Law enforcement officials

Law enforcement officials of many nationalities and embarked on many different state vessels can stop and board a suspect vessel in accordance with the authorization of the flag state. We may therefore conclude that many law enforcement officials of different nationalities can be empowered to suppress illicit drug trafficking in whatever maritime zone (see Table 8.3.). Table 8.3. is based on the assumption that all potential states are party to the relevant mari-

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Concluding remarks

time drug-interdiction treaties. The figures in that table are based upon the maritime drug-interdiction treaties.

It can be very complicated for a master of a (suspect) vessel to understand whether there is a legal basis when he is ordered to stop his vessel to be boarded. In addition, it is very difficult for him to anticipate what kind of law enforcement officials from which state are boarding his vessel, let alone the state from which compensation can be claimed when no drugs are found and he experiences damages or losses. A complicating factor for the Caribbean region is that the RSS Treaty¹⁰ provides that law enforcement vessels and officials of the member states must fly the RSS flag and wear badges of rank or other designation appropriate to their appointments. It is doubtful whether the RSS flag and RSS badges are well-known by all masters.

8.5. Exercising enforcement jurisdiction in relation to the size of the ship

8.5.1. General

The most frequently encountered method of illicit drug trafficking in the Caribbean region is by a small vessel named ‘go-fast’, even more than 80 percent of the shipments is carried by those vessels. A ‘go-fast’ is typically a 30-to-50-foot, multi-engine boat that carries 500 to 1,500 kilograms of drugs in each trip, and often outruns law enforcement vessels.¹¹ In Europe, drugs are smuggled by small vessels, including fishing boats and leisure crafts as well.

All but one of the maritime drug-interdiction treaties discussed in this study use the term ‘suspect vessel’.¹² The size of the vessels is not mentioned. All treaties refer also to safeguards regarding stopping, boarding and searching a suspect vessel on the high seas. Those safeguards refer to safety at sea and to the commercial interest of the vessels, as well. It is submitted that the size of the suspect vessel can be relevant for maritime drug interdiction.

It has to be borne in mind that stopping and searching a suspect vessel is only allowed under international law when there are reasonable grounds to believe that serious drug-related offences have been committed aboard that vessel. The multilateral drug-interdiction treaties exclude minor offences such as the possession, purchase or cultivation of illicit drugs for personal use. The bilateral drug-interdiction treaties include minor offences.¹³

8.5.2. Large suspect vessels

For some international organizations such as the European Union and the International Maritime Organization (IMO) large vessels are defined as vessels of 500 tons or more.¹⁴ That can be considered as a common figure and will be used in this chapter.

Due to the size and intricate structure of large vessels, the possibilities for concealing drug shipments on them are seemingly endless. The illicit drugs can be concealed in the cargo of

¹⁰ See Section 5.3.1. of this study.

¹¹ See Section 5.2.1. of this study.

¹² The 1981 Agreement defines the term ‘cargo of drugs’.

¹³ Article 3(2) of the 1988 Convention, examined in Section 3.1.2. of this study.

¹⁴ The Regulation (EC) no. 725/2004 of the European Parliament and of the Council of 31 March 2004 on enhancing ship and port-facility security, Official Journal L129, 29 April 2004, pp. 0006–0091; The International Ship and Port Facility Security Code (ISPS Code), adopted by a Conference of Contracting Governments to the International Convention for the Safety of Life at Sea (SOLAS), convened in London from 9-13 September 2002, SOLAS/CONF5/34, Annex 1, 17 December 2002.

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commercial carriers and retrieved by shore-based individuals, making the participation of the crew unnecessary. Containerized drug trafficking is undoubtedly a huge problem because the capacity of a 20- or 40-foot container makes it possible to conceal a multi-ton consignment of drugs. Stopping a suspect containership and, in addition, searching hundreds of containers that are virtually inaccessible due to stowing is almost impossible. The delay would be unacceptable for commercial reasons.

Illicit drugs are transported as well by large passenger-liners with hundreds of persons aboard, crew and passengers, especially when they sail under a passenger-service schedule. Searching such a ship on the high seas is virtually impossible. In addition, both kinds of vessels have a scheduled next port of call, where the law enforcement officials of that coastal state can do the searching.

During the negotiations for the 1995 Agreement, a proposal was submitted to have large suspect vessels searched at their next port of call, which would mean no stopping and boarding of large suspect vessels at all. The reason to take such a step is the commercial interest of larger vessels.¹⁵ In addition to the fact that it is practically impossible to stop, board and search such a large vessel with suspect cargo, the master and the crew of a large container vessel can hardly be suspected of illicit drug trafficking on the basis of the contents of the containers, nor, in general, can the master and his crew on board a large passenger-liner be suspected, when only one person, passenger or crew, is engaged in illicit drug trafficking.

It can be stated that large container vessels and passenger liners suspected of being engaged in illicit drug trafficking, should, in general, not be stopped and boarded at sea by law enforcement officials, although the latter are empowered by international law to stop and search a suspect vessel. Such actions are disproportional and contrary to the safeguard of commercial interests as laid down in the maritime drug-interdiction treaties.¹⁶

8.5.3. Small suspect vessels

Small suspect vessels under treaty law

LOSC

At a session of the Sea-Bed Committee in 1971, Malta addressed the subject of transporting illicit drugs at sea.¹⁷ At the 1972 session of the Sea-Bed Committee, the importance of addressing the issue of traffic in narcotic drugs warranted its inclusion in the list of subjects and

¹⁵ Committee of Experts on the Implementation of Article 17 of the United Nations Convention against Illicit Drug Trafficking, Summary Report of the 2nd meeting, Strasbourg, 1-3 February 1993, PC-NU (93)3, Strasbourg, 11 February 1993, p. 20; Explanatory Report of the Agreement on Illicit Traffic by Sea Implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

¹⁶ Committee of Experts on the Implementation of Article 17 of the United Nations Convention against Illicit Drug Trafficking, Summary Report of the 3rd meeting, Strasbourg, 5-17 March 1993, PC-NU (93)5, Strasbourg, 22 March 1993, p. 3; Explanatory Report of the Agreement on Illicit Traffic by Sea Implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

¹⁷ The Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction, Resolution of the GA 2467 of 21 December 1968. One of the tasks of that Committee was to prepare draft treaty articles on some subjects and issues; see also A/AC.138/53, Article 16, reproduced in SBC Report 1971, pp. 105, 123.

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issues to be dealt with by the third United Nations Conference Law of the Sea.¹⁸ In 1974, a proposal by nine West European States¹⁹ set out the following interesting provision:

“Any State, which has reasonable grounds for believing that a vessel is engaged in illicit traffic in narcotic drugs, may, whatever the nationality of the vessel but provided that its tonnage is less than 500 tons,²⁰ seize the illicit cargo. The State, which carried out this seizure, shall inform the State of nationality of the vessel in order that the latter State may institute proceedings against those responsible for the illicit traffic.”

That paragraph would have authorized seizures of illicit cargos from ships of less than 500 tons on the high seas. On introducing that proposal, the representative of France explained that the provision was included to prevent ships of small tonnage from discharging illicit cargo before entering ports.²¹ The proposal created universal jurisdiction for illicit drug trafficking on the high seas, only limited by the size of the vessel.

At the third session in 1975, a separate provision on the suppression of traffic in narcotic drugs was not included in the consolidated text. Article 2 of the proposed text was not included in the subsequent Article 94 of the ISNT/Part II.²² Several delegations expressed concern about the effect that such language about universal enforcement jurisdiction over maritime drug interdiction might have on the freedom of navigation, fearing that states might use it as a pretext for abuse or harassment.²³

The 1995 Agreement

The distinction between small and large vessels has been the subject of discussion during the negotiations for the 1995 Agreement, where it was proposed that larger vessels should be searched at the vessel's next port of call and small vessels could be searched at sea due to the fact that they were less likely to suffer damages to commercial interest. Small suspect vessels were, however, safeguarded for operational circumstances, such as bad weather, etc.²⁴

The 2003 Agreement

The structure of article 16 of the 2003 Agreement is a result of proposals submitted by several delegations that indicated that provisions should be included in this article dealing with the growing problem of small vessels used for illicit drug trafficking. Delegations agreed that law enforcement actions against that type of vessel required specific procedures. It was not until the final round of negotiations that the text of the article, with provisions for advance authorization to stop and board was finalized.²⁵

It can be stated that, in general, only small vessels, defined as less than 500 tons, suspected of being engaged in illicit drug trafficking, may be stopped and boarded at sea by law enforcement officials to search for illicit drugs. Reasons for stopping only small suspect vessels is the fact that the majority of illicit drugs is transported by small vessels and that the *bona fide* commercial interests of small vessels, especially the most used smuggling vessel ‘go-fast’, are

¹⁸ SBC Report 1972, page 5; Vol. I, page 32.

¹⁹ A/CONF62/C2/L54 (1974), Article 21*bis*, III Off. Rec. pp. 229, 230. The Western European States were: Belgium, Denmark, France, Federal Republic Germany, the Netherlands and the United Kingdom.

²⁰ Emphasis added.

²¹ Second Committee, 42nd meeting para 2, II Off. Rec. (1974), p. 292.

²² A/CONF62/WP8/Part II, ISNT (1974) Article 94, IV Off. Rec. pp. 137, 166.

²³ Oxman (1984), pp. 761, 829.

²⁴ Committee of Experts on the Implementation of Article 17 of the United Nations Convention against Illicit Drug Trafficking, Summary Report of the 3rd meeting, Strasbourg, 5-17 March 1993, PC-NU (93)5, Strasbourg, 22 March 1993, p. 3.

²⁵ Article 16 of the 2003 Agreement has been examined in Section 5.4.3. of this study.

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significantly less than those of larger vessels; therefore it is not disproportional such as with large suspect vessels.²⁶ Reasons for not stopping and boarding small suspect vessels at sea include bad weather or other operational circumstances.

8.5.4. Conclusions about enforcing jurisdiction in relation to the size of the ship

In some regions, the majority of illicit drugs is transported by small vessels; therefore a distinction should be made between small and large suspect vessels. Although authorized under international law, a large vessel, containership, freighter or passenger liner should not be stopped and boarded at sea, as it is almost impossible to search such a large vessel within a reasonable timeframe and the next port of call is generally known. The commercial interests of small ships are, in general, significantly less than the commercial interests of larger vessels and the chance to flee or to disappear is significantly greater. Small vessels, rather than large ones, should be stopped and searched at sea when suspected of illicit drug trafficking. The condition here is, in addition to limited commercial interests, operational circumstances such as bad weather.

It can be concluded as well, that more specific treaty provisions for small vessels are required to emphasize the suppression of maritime drug trafficking by small vessels.

8.6. Erosion of the principle of freedom of navigation by maritime drug interdiction?

8.6.1. General

The fundamental principle of freedom of the high seas

This study focuses its attention, *inter alia*, on the interrelationship between two fundamental principles of international law.

In relation to maritime drug interdiction, the freedom of navigation is the most important freedom of the high seas. Freedom of navigation is the first of the freedoms listed in the respective articles of the Convention on the High Seas and the LOSC. That may well reflect its status as probably the most important of all freedoms.

The second principle is that of exclusive flag state jurisdiction in respect of vessels sailing on the high seas. A natural corollary of the principle of freedom of the high seas, this principle require states to refrain from interfering on the high seas with ships flying the flag of other states

Although both principles are stated in absolute terms these principles are not, and never have been, absolute. Restrictions have been put on the principles, *inter alia*, by many treaties concerning illicit drug trafficking at sea.

General restrictions on the principle of freedom of navigation

In peacetime, four categories of situations can be identified in customary international law as giving rise to the possibility of lawful restrictions of the freedom of navigation or constituting exceptions to the exclusive flag state jurisdiction on the high seas. The four categories give rise to a right of at-sea enforcement on the high seas by non-flag states.

²⁶ See Committee of Experts on the Implementation of Article 17 of the United Nations Convention against Illicit Drug Trafficking, Summary Report of the 3rd meeting, Strasbourg, 5-17 March 1993, PC-NU (93)5, Strasbourg, 22 March 1993, p. 3; Explanatory Report of the Agreement on Illicit Traffic by Sea Implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

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First, there are the situations as provided for in Article 110 LOSC. Second, a number of situations allowing for varying degrees of interference on the high seas arise from specific treaties such as those relating to illicit drug trafficking as discussed in the present study. Third, the restrictions permitted in situations of self-defense, including self-defense against aggressive acts and defense of territory in the case of maritime casualties, such as marine pollution. Most commentators seem to accept that that right now exists in customary international law.²⁷ Fourth, control on maritime shipping imposed as a result of United Nations Security Council resolutions may also give rise to rights of visit, search and possibly seizure by non-flag states without authorization of the flag state.²⁸

8.6.2. Erosion of the principle of freedom of navigation by maritime drug-interdiction provisions?

History

The restriction on the freedom of the high seas, including freedom of navigation, that we now turn to is the interdiction of illicit traffic in narcotic drugs or psychotropic substances at sea as laid down in international agreements. The first attempt to prohibit the traffic in illicit drugs in general can be found in the 1936 Convention, which was ultimately not successful.

The first provision for illicit drug trafficking at sea was made in the Convention on the Territorial Sea and the Contiguous Zone. The Convention on the High Seas on the other hand, neither makes any direct provision for the suppression of illicit drug trafficking nor refers to it as a ground for the exercise of the right to visit by a foreign warship.

The Convention

Reflecting, in part, bilateral cooperation in the interdiction of ships engaged in the illicit traffic in drugs by sea, the LOSC introduced limited improvements. Article 27(1), in confirming again the coastal state's criminal jurisdiction over foreign drug-trafficking vessels passing through the territorial sea, added psychotropic substances to the list of narcotic drugs.

More importantly, Article 108 LOSC made provision for international cooperation for suppressing such illicit traffic on the high seas. As has been described in Chapter 3 of the present study, two points may be noted about this article. Firstly, it does not empower a state to interfere with a foreign flag vessel on the high seas without the consent of the flag state. Secondly, it envisages that a request for cooperation should come from the flag state rather than from another state that may be suffering the effects of the illicit traffic engaged in the vessel concerned.

It may be noted that Article 110 LOSC, in making provision for the right of visit similar to that in Article 22 of the Convention on the High Seas, despite some proposals to do so, once again makes no references to this illicit trade as a ground for visiting unless such acts of interference derive from powers conferred by treaty.²⁹

It can be stated that the LOSC provided the first general provisions for maritime drug interdiction, which, however, can not be considered as a restriction of the freedom of navigation.

²⁷ Churchill and Lowe (1999), p. 355; Treves (1991), p. 876; Molenaar (1999).

²⁸ Soons (2000).

²⁹ See Section 3.3.5. of this study.

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Maritime drug-interdiction treaties

The first step on the road to restrictions on the freedom of the high seas by maritime drug-interdiction treaties was made by the 1981 Agreement between the USA and the UK. That agreement provided for advance authorization for boarding and related measures of British vessels by officials of the United States. More bilateral drug treaties came into force. Useful though these bilateral treaties are and will continue to be, the need was felt for a multilateral instrument. That led to the 1988 Convention. The main provision for illicit drug trafficking at sea can be found in Article 17.

The 1988 Convention was followed by the 1995 Agreement of the Council of Europe. Under both agreements, flag state authorization to board and search a suspect vessel is still required. In their requirement for authorization before ships of other states parties are boarded, the 1988 and 1995 treaties are less adventurous than the many bilateral Shiprider Agreements. The more progressive approach is being pursued at the bilateral level.

A big step forward in multilateral maritime drug interdiction is the 2003 Agreement. It also introduces a substantial practical restriction on the freedom of navigation, however. By becoming party to that agreement, states may give up, under conditions, exclusive jurisdiction over their ships and other state parties are authorized to stop and board such ships when they are suspected of illicit drug trafficking. The same can be said about the 2002 Draft Convention, but without conditions.

It can therefore be stated that some maritime drug-interdiction treaties constitute serious lawful restrictions on the principle of freedom of navigation, from a practical point of view, but it can be considered from a legal point of view as a confirmation of the exclusive flag state jurisdiction. It must be noted that, in general, the lawful restrictions on the freedom of navigation by maritime drug-interdiction treaties are only applicable to states that are party to those treaties.

8.6.3. Erosion of the principle of freedom of navigation by US state practice?

General

We shall now turn to US state practice that results in a restriction of the freedom of navigation by maritime drug interdiction. As the United States of America is a major key player in drug interdiction in general and at sea in particular, the not-objected US state practice can become general state practice. The US state practice is known as consensual boarding. A reason for discussing this potential restriction on the freedom of navigation is that no official objections by other states are known.³⁰ On the contrary, some states actively cooperate with this US state practice.

Consensual boarding

Right of visit

An example of a restriction on the freedom of the high seas is the right of visit. The right of visit has been described in Article 110 LOSC. Boarding is justified when there are reasonable grounds for suspecting that the foreign flag ship is engaged in piracy, slave trade, unauthor-

³⁰ The persistent objector doctrine: that if one or more states object persistently to the formation of a nascent rule of customary law, then the rule, if and when formed, cannot be applied against them. The state or states concerned must have objected to the emerge of a new norm, *in casu* consensual boarding, during its formation and continue to object persistently afterwards. Stein (1985), p. 457; Charney (1985); Bradley (2002), p. 485.

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ized broadcasting, or that it is without nationality. No right of visit exists when there are reasonable grounds for suspecting that a vessel is engaged in illicit drug trafficking.

Nevertheless, the US Coast Guard approaches vessels on the high seas suspected of illicit drug trafficking and asks to speak with the master. Initial questions regarding the vessel's nationality, last port of call, next port of call, and general nature of the cargo or employment of the vessel will be asked.

Master's consent

If the vessel is determined to be initially not subject to US jurisdiction, permission to board will be requested of the master, unless the master asserts that the vessel is a warship or another vessels owned or operated by a state. If the master consents, the US Coast Guard will board the vessel and conduct an examination to ensure that the vessel is in compliance with all applicable US laws and regulations.

It is important to note that this US national-law doctrine of consensual boarding is not the same thing as a Fourth Amendment consent.³¹

The master's consent does not confer jurisdiction on the boarding party, and the master controls the scope and duration of the visit. During consensual boarding, the boarding party has the same legal status as guests upon the vessel, and may not exert control over the persons onboard. The boarding officer may suggest that the master steer a certain course or gather the crew together.

The scope of the master's consent will initially determine the scope of the search. If the master permits the US Coast Guard to do a document inspection and no more, the US Coast Guard will limit itself to a document inspection. When the US Coast Guard completes its document inspection and believes drugs are onboard, and the master gives consent to a search of his vessel, the US Coast Guard will conduct a complete search. Otherwise the US Coast Guard will contact the flag state to obtain permission to search for drugs.

If the document inspection and interview with the master reveals that the vessel lacks nationality, the US Coast Guard will normally consider the vessel to have a stateless status, whereupon a full search can lawfully be conducted.

The voluntary consent of the master permits the boarding, but it does not allow assertion of law enforcement authority (such as arrest or seizure). Consensual boarding is not, therefore, an exercise of maritime law enforcement jurisdiction per se. According to US law enforcement agencies, such boardings have utility in allowing rapid verification of the legitimacy of a vessel's voyage by obtaining or confirming vessel documents, cargo, and navigation records without undue delay to the boarded vessel.

The legal status of the law enforcement officials is that of (armed) guests on board. They do retain the inherent right of self-defense, however. Consensual boarding can be used as an in-

³¹ US Constitution: Fourth Amendment (Search and Seizure). Amendment Text: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. Entered into force, as part of the Bill of Rights, on 15 December 1791.

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strument to enhance the use of scarce law enforcement resources and reduces the administrative burden on flag states and requesting states.

Legal basis for consensual boarding

Despite the fact that the freedom of the high seas is a fundamental principle of the law of the sea that operates as a restraint on the police powers of a state, United States' courts have repeatedly ruled that US Coast Guard vessels may stop foreign flag vessels on the high seas if such vessels are engaged in drug-smuggling activities, irrespective of whether this constitutes a breach of international law such as the 1958 Convention on the High Seas.³²

United States practice³³ apparently sometimes follows the adage: *male captus, bene iudicatus*. Although court decisions following that adage are not based on lawful arrest under international law, it will not be discussed in this study, although it is worthwhile mentioning it, due to reasons discussed above.

Consensual boarding for maritime drug interdiction is not endorsed by international law. None of the examined treaties provides for it or mentions it. Consensual boarding carried out by the US Coast Guard, and related to maritime drug interdiction is based on US national law. The Marijuana on the High Seas Act³⁴ as amended by the 46 USC section 1903 (c) (1) permits a foreign nation to consent to the enforcement of the United States law through informal means. According to the US, those informal means may include the consent of the master of the suspect vessel.

Objections to this absence of procedural structure with regard to the method of consensual boarding could easily have been raised by foreign nations. Such objections have not been made, however, not even in the most egregious cases. The courts in the United States do not object to the method of consensual boarding either. In the *US v. Barrio Hernandez*³⁵ the court determined that the only restriction the court required was that the flag state grants consent

³² *US v. Postal*, 589 F.2d 62, 5th Circuit, cert. denied, 100 S. Ct. 61 (1979); *US v. Cadena*, 585 F.2d 1252, 5th Circuit (1978), clarified per curiam, 588 F.2d 100, 5th Circuit (1979); *US v. Williams*, 617 F.2d 1063, 5th Circuit (1980); *US v. Pearson*, 791 F.2d 867, 870, 11th Circuit (1986); *US v. Reeh*, 780 F.2d 1541-45, 11th Circuit (1986).

³³ The United States Courts expanded the traditional objective territorial principle to allow seizures of foreign vessels on the high seas without requiring an actual effect on the nation. In the *US v. Ricardo* case, the seizure of the ship took place 150 miles from the coast of Texas on the high seas. The overt act requirement was viewed as unnecessary because the statute used by the US Coast Guard to justify the seizure, did not require proof of an overt act. Increasingly, the protective principle has been utilized as the sole justification for the extension of extraterritorial jurisdiction in drug-smuggling cases. The 1986 Maritime Drug Law Enforcement Act satisfied the protective principle, the court concluded, because Congress has determined that all drug trafficking aboard vessels threatens the nation's security, regardless of whether the cargo was intended for the United States. International law, as evidenced in Article 110 LOSC, requires an existing treaty between two states before informal communications, may be used to authorize the boarding of a particular vessel. The 1986 Maritime Drug Law Enforcement Act provides that consent may be obtained by informal communications, however and that act has no requirement for an authorizing treaty. In the *US v. Maynard* case the Commandant of the US Coast Guard gave authorization to stop and search a suspect vessel under the flag of the United Kingdom on the high seas. The flag state was not approached. See *US v. Smith*, 680 F.2d 255, 1st Circuit (1982); *Strasheim v. Dailey*, 221 US 280 (1911); *US v. Postal* 589 F.2d 862, 5th Circuit (1979); *US v. Baker*, 609 F.2d 134, 5th Circuit (1980); *US v. Marino-Garcia*, 697 F.2d 1373, 1381 n.14 (1982) 888F.2d 918, 1st Circuit (1989); *US v. Gonzales*, 776 F.2d 931, 941, 11th Circuit (1985). See also President's Commission on Organized Crime, Report to the President and Attorney General: America's Habit: Drug Abuse, Drug Trafficking and Organized Crime (March 1986), p. 313; Chelberg (1986) p. 46-51; Churchill and Lowe (1999), pp. 139, 218.

³⁴ Public Law no. 99-570, 100 Stat. 3302, section 3201-3202.

³⁵ 665 F. Supp. 1069, District Puerto Rico (1987); See *US v. Nestor Suerte*, No. 01-20626, 5th Circuit (2002) and *US v. Perez-Oviedo*, No. 01-2512, 3rd Circuit (2002).

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before the resulting trial. A request to conduct consensual boarding is almost never refused.³⁶ In fact, refusal is so infrequent, that it is considered in and of itself suspicious.³⁷

It must be stated that consensual boarding can be conducted even without reasonable suspicion. If the boarding team develops a reasonable suspicion of illicit activity during a consensual boarding of limited scope, it can request authorization from the flag state to continue the search for evidence of that illicit activity.

State practice

While consensual boarding to stop and search a vessel on the high seas suspected of being engaged in illicit drug trafficking is not general state practice, it is not only carried out by the United States. The 1997 US Narcotics Report indicates that consensual boardings by US Coast Guard officials have been carried out from British Royal Navy vessels but fails to provide details on the terms of this US-UK cooperation.³⁸

For information concerning consensual boarding for matters other than drug interdiction, see the 'Implementation of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing'. One of the measures mentioned in that plan suggests consensual boarding as an international measure.³⁹ Some intervening states practice consensual boarding in respect of the 'war' on terrorism; the legal base therefore, however, is, under circumstances, self defense.⁴⁰

It can be concluded, notwithstanding the fact that a review on this subject showed the absence of any international protest,⁴¹ that, during a consensual boarding, the communication between the master of the vessel and the United States authorities is not in accordance with Article 110 LOSC⁴² or Article 17 of the 1988 Convention, because the master of a vessel is not a designated authority of the flag state, unless the flag state has designated the master of the vessel as its official representative. Consensual boarding is not to be found in the discussed maritime drug-interdiction treaties either, although the draft text of the 2003 Agreement did provide for consensual boarding.⁴³

8.6.4. Conclusions about erosion of the principle of freedom of navigation by maritime drug interdiction.

When taking into account the number of vessels engaged in illicit drug traffic, the amount of illicit drugs that must be transported by sea from the producing countries to the consuming

³⁶ Anderson (1986), p. 32; Refusals by the master of a suspect vessel to a request to conduct a consensual boarding have not been found. See for a (non)-voluntary master's consent *US v. Pilco*, No. 96-1326, II (1997). See also *US v. Nestor Suerte*, No. 01-20626, 5th Circuit (2002) and *US v. Perez-Oviedo*, No. 01-2512, 3rd Circuit (2002).

³⁷ Anderson (1986), p. 32.

³⁸ International Narcotics Control Strategy Report, US Department of State, Bureau for International Narcotics and Law Enforcement Affairs, March 1997, p. 46.

³⁹ Implementation of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, FAO Technical Guidelines for Responsible Fisheries, No. 9, Food and Agriculture Organization of the United Nations, Fisheries Department, Rome, (2002), Measure nr. 2.5.2, p. 70. See also the Draft Procedures for Boarding and Inspection Pursuant to the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, WCPFC Preparatory Conference, Fourth session 24, Nadi, Fiji Islands, WCPFC/PrepCon/WP.14, April 2003.

⁴⁰ See the Letter from the Ministers of Foreign Affairs, Defence, and Development Cooperation, no. 27 925 no. 46, The Hague, 27 February 2002 and Parliamentary Document 2010207820, The Hague, 11 March 2004.

⁴¹ Anderson (1982).

⁴² A warship has the right to visit a foreign flagship on the high seas when conferred by treaty.

⁴³ See Section 5.4. of this study.

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countries, and the amount of official vessels engaged in maritime drug interdiction, worldwide, it can be concluded that the maritime drug-interdiction treaties can be considered, from a practical point of view, as serious restrictions on the principle of freedom of the high seas, including freedom of navigation. Nevertheless, those restrictions have been properly laid down in international agreements and apply only to parties to these agreements. From a legal point of view those restrictions are exceptions agreed by states and, therefore, a confirmation of the exclusive flag state jurisdiction.

It can be concluded that the unilateral state practice of the United States regarding consensual boarding constitutes a practical but not (yet) an internationally accepted legal restriction on the freedom of navigation which is endorsed by international law. However, that US state practice lasts already for more than three decades and no official objection of any state has been noticed, and some states even actively cooperate with this practice of the United States. Therefore, it is not inconceivable that this US state practice may transfer into general state practice within the next decades.

In conclusion, it can be stated that the maritime drug-interdiction treaties discussed do not cause erosion of the principle of freedom of navigation, which, at this moment, cannot be said of the unilateral state practice of the United States regarding consensual boarding.

8.7. Future developments: universal jurisdiction, restricted to a specific area and to small vessels?

8.7.1. General

Illicit drug trafficking is a problem of serious concern to all nations. Many drug-control and drug-interdiction treaties have been concluded over the last hundred years. The latest trend in the maritime drug-interdiction treaties is that many tools have been presented to the international community for stopping and searching a suspect vessel at sea, regardless of the maritime zone in which the action takes place. The flow of illicit drugs by sea, however, is still continuing.⁴⁴ Despite massive efforts to combat the drug trade, states have been unable to effectively stop the flow of illicit drugs over the ocean. Drug traffickers often operate with impunity in areas where governments are unwilling or unable to prosecute.⁴⁵ The problems associated with apprehending and prosecuting those involved in illicit drug trafficking at sea are of such complexity and gravity that they defy easy solution.

A tool to achieve an answer to those problems would be that by virtue of the principle of universality all states would have jurisdiction to try and punish illicit maritime drug traffickers.⁴⁶ For the purpose of this study, that concept can be defined as: universal jurisdiction for the offence of illicit drug trafficking committed aboard vessels exercising freedom of navigation. That jurisdiction may be restricted to small suspect vessels and/or restricted to specific regions; i.e. restricted to small vessels in the Caribbean region, because the majority of illicit maritime drug trafficking is done by small vessels in that region.

Universal jurisdiction over small vessels in a restricted region may be considered as a *contra-dictio in terminis*, but in this study it means that all states may assert jurisdiction over of-

⁴⁴ 2004 and 2006 World Drug Report.

⁴⁵ See Section 5.2. of this study; see also Abrams (1996), p. 1.

⁴⁶ See for jurisdiction in general Section 1.6. of this study.

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fences committed on board a vessel on the high seas in that specific region, irrespective the flag.

This section of the study examines the arguments in favor and against expanding universal jurisdiction over illicit maritime drug trafficking and the requirements for establishing universal jurisdiction in general. Further the question of whether illicit drug traffic at sea fits the requirements for that universal jurisdiction will also be discussed. Arguments against expanding universal jurisdiction over illicit drug trafficking at sea, and the development of that universal jurisdiction will be examined as well. The last part of this section discusses some possible future developments of universal jurisdiction over illicit drug trafficking at sea, including universal jurisdiction over small vessels and in specific regions.

It has to be noted, that the right to exercise jurisdiction under the universality principle can stem either from a treaty of universal or quasi-universal scope, or from acceptance under customary international law.⁴⁷ The latter provides the basis for the most commonly accepted examples of offences allowing of universal jurisdiction: piracy and slave trade on the high seas.⁴⁸

8.7.2. Universal jurisdiction

General

In general, universal jurisdiction is the right of a state to define and prescribe punishment for certain offenses recognized by the community of nations as being of global concern, regardless of whether the prosecuting state can establish a connection with the perpetrator, victim or location of the offence.⁴⁹ Universal jurisdiction *stricto sensu* allows any state to assert jurisdiction over an offence.⁵⁰ It can be stated that this is not the case regarding to maritime drug trafficking, because the 1988 Convention does not constitute universal jurisdiction over that offence and not all states are party to the maritime drug-interdiction treaties.

The applicability of the universality principle to certain crimes can be determined by customary international law or can be stipulated by international agreements. The universality principle is limited to crimes, which the nations of the world have qualified as attacks upon the international legal order and have mutually agreed to suppress, e.g. war crimes.⁵¹

In international law there is no set test to determine when an offence becomes subject to universal jurisdiction. There is an ongoing scholarly debate over what crimes should be afforded universal jurisdiction status.⁵² Despite lack of clarity, an examination of acts that are generally accepted as crimes of universal jurisdiction suggest some coherent guidelines. As a general matter, the crime must be one of such international concern that it invokes one of the two traditional theoretical rationales for universal jurisdiction.

⁴⁷ See Article 4(1)(b)(ii) of the 1988 Convention, especially the part referring to Article 17(4,9) of that convention, see Section 8.8.4. of the study.

⁴⁸ Higgins (1994), p. 58.

⁴⁹ See Section 1.6.2. of this study.

⁵⁰ Higgins (1994), p. 64. For a more broad interpretation of universal jurisdiction see the Third Restatement of the Law: the Foreign Relations Law of the United States (1987) p. 257.

⁵¹ See the Rome Statute of the International Criminal Court, A/CONF.183/9, 17 July 1998. See also Section 8.7 of this study.

⁵² See the discussion about whether genocide is a universal jurisdiction crime. At one hand we have, for example, the Princeton Principles on Universal Jurisdiction (Princeton Principles), published by the Program in Law and Public Affairs, Princeton University, Princeton (NY) (2001), listing genocide as a universal crime. On the other hand we have the Convention on the Prevention and Punishment of the Crime Genocide, 9 December 1948, UNTS 277, which lists genocide not as a crime under universal jurisdiction.

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The first rationale: pragmatic matter

The first rationale is pragmatic because it provides a basis for jurisdiction when jurisdiction is hard to find.⁵³ This involves the *locus delicti*. Under that theory, universal jurisdiction responds to the danger that no state will be able to establish jurisdiction by traditional means, such as through a territorial link between the offender and the prosecuting state. That pragmatic rationale therefore ensures that criminals do not go free merely because no state is available or willing to assert subject-matter jurisdiction.

Piracy is an example of such a crime. This crime is a paradigm for the pragmatic rationale for universal jurisdiction. It is not a crime under universal jurisdiction because it is particularly heinous when compared with other crimes. A connection with the location is difficult due to the fact that piracy takes place on the high seas. Piracy is, *inter alia*, a crime under universal jurisdiction because it is otherwise difficult or impossible to apprehend a pirate ship. For a dissenting opinion see Kontorovich.⁵⁴

The second rationale: humanitarian matter

The second rationale for universal jurisdiction is humanitarian: the gravity of the crime is the operative factor. If a crime is considered heinous or detrimental in scope and degree to the world community, then any member of the world community has a right to prosecute that crime to ensure that perpetrators do not go unpunished.⁵⁵ This second rationale for universal jurisdiction is based not on a territorial link with the prosecuting state, but it is the nature of the crime itself that provides a basis for the exercise of universal jurisdiction.⁵⁶ Examples of these crimes include serious war crimes and torture.

Development from crime into a crime under universal jurisdiction

With the two theoretical bases described above in mind, it is also important to examine the means by which a crime may become a crime under universal jurisdiction.

Customary international law

First, a crime may become subject to universal jurisdiction through the development of customary international law, as evidenced by domestic legislation, international agreements, the commentary of international law scholars and actual prosecutions. That has to be demonstrated in state practice, and states must believe that the practice is required by international law: *opinio juris*. Once a crime has satisfied those two criteria, it is referred to as customary international law and is binding upon all states, regardless of whether the law is formally recognized by treaty or other international agreements.

Today, crimes that have become subject to universal jurisdiction as a matter of customary international law include war crimes, crimes against peace, crimes against humanity, genocide, and torture. As it is true with all of customary international law, that list is not static. As the law develops, it is possible for other offences, such as illicit drug trafficking at sea, to become widely accepted as subject to universal jurisdiction as a matter of customary international law.

⁵³ Jordan (2000).

⁵⁴ Universal jurisdiction over piracy is not necessary, because the locus of piracy does not render standard jurisdictional rules inapplicable, according to Kontorovich (2004), p. 190.

⁵⁵ See Bassiouni (2001).

⁵⁶ Princeton Principles, no. 1.

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Treaty-law

Second, states may establish universal jurisdiction over an offence by treaty. Such treaties contain the requirement of *aut dedere aut judicare*. States are then required to enact legislation giving themselves jurisdiction in any case where the state chooses not to extradite; jurisdiction regardless of whether the state has any link with the suspect or with the crime. That is a form of universal jurisdiction. It is not as complete as universal jurisdiction established by customary international law because it does not extend to non-state parties, nor does it allow any state to prosecute, it only extends universal jurisdiction to the state where the accused is present. If a treaty is widely accepted and implemented in state practice – also regarding to and by non-state parties –, however, the universal requirement can become binding upon all states as a matter of customary international law, regardless of whether they are party to the treaty.⁵⁷

8.7.3. Universal jurisdiction over maritime drug trafficking

General

Some opinions suggest that trade in narcotic drugs belongs to the limited number of international crimes that may justify recourse to the universality principle,⁵⁸ but the existence of such state practice has not been established.⁵⁹ The establishment of universal jurisdiction over maritime drug trafficking will not be a panacea for the problem of international drug trafficking at sea, but it might be a tool in the combat against illicit maritime drug trafficking.

It has to be noted, that the right to exercise jurisdiction under the universality principle can stem either from a treaty of universal or quasi-universal scope, or from acceptance under customary international law. Therefore, if maritime drug trafficking evolves into a crime under the principle of universality, then all state may assert jurisdiction over that offence, but on the high seas only the flag state has jurisdiction over a suspect vessel. It may be the case that in due time all states are allowed to stop and search a suspect vessel on the high seas, but this should be conferred by treaties or it should have been developed under customary international law (see section 8.8.4. of the study).

Universal jurisdiction on the high seas

In the case of piracy, both the LOSC and customary international law give states legislative jurisdiction and enforcement jurisdiction over ships on the high seas.⁶⁰ Under the LOSC, when a vessel is reasonably suspected of being engaged in slave trade, it may only be visited and boarded, seizing the ship and arresting those on board by the foreign intervening vessel is not allowed.⁶¹ The reference of Article 110(1)(b) LOSC to a right of visit and search on suspicion of engaging in the slave trade links Article 110 LOSC to Article 99 LOSC. The latter provision prohibits the transport of slaves and requires states to take effective measures to prevent and to punish such activity.⁶²

Under international law, slave trading is therefore not analogous to piracy: only the flag state may actually proceed to the seizure of the ship or the arrest of those aboard, if the suspicion that the ship is engaged in slavery is well founded. Other states may only report their findings

⁵⁷ Jordan (2000), p. 24; See Brownlie (1998), pp. 4-17.

⁵⁸ Mann (1972) p. 81; Oehler (1986), pp. 52-53; Verdross (1984).

⁵⁹ Kunig (1978), pp. 594 -596; The Princeton Principles on Universal Jurisdiction, Princeton University, Program in Law and Public Affairs, Princeton (NJ), 2001, p. 48.

⁶⁰ Churchill and Lowe (1999), p. 212.

⁶¹ Article 110 LOSC, Article 22 Convention on the High Seas. Brown (1994) p. 309-310.

⁶² Nordquist (2002), p. 245.

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to the flag state, which is however, obliged to adopt effective measures for the repression of slave trading by its ships.⁶³ It can therefore be stated that universal jurisdiction for the offence of slave trade at sea is a limited form of universal jurisdiction, which might be an option for illicit maritime drug trafficking.

Pragmatic matter for maritime drug trafficking

A pragmatic matter involves the *locus delicti*. Like piracy, jurisdiction for maritime drug trafficking is hard to find. More pragmatic matters are that states crippled by drug problems are often unable or unwilling to assert jurisdiction over maritime drug trafficking especially if organized drug trafficking groups are able to bribe or terrorize the judiciary.

In respect of stopping and boarding suspect vessels, there are a great many problems in the Caribbean region as well. Contributing factors include a lack of assets for apprehending illicit drug traffickers at sea, lack of political will, the inability to match commitment with action, the vulnerability of both individuals and organizations to corruption.⁶⁴

Finally, providing states with universal jurisdiction over maritime drug trafficking would send an important message to illicit drug traffickers that there are no safe havens for their behavior.⁶⁵

Humanitarian matter for (maritime) drug trafficking

This section addresses the question of whether illicit drug trafficking at sea is of sufficient humanitarian concern to justify assertion of jurisdiction based upon the universality principle. As has been discussed in previous chapters of the present study, illicit drug trafficking destabilizes governments, corrupts officials, results in the murders and deaths by other means of hundreds of thousands of people worldwide every year, wreaks havoc on the environment and provides funding for terrorists.

The international community has long recognized the grave consequences of drug trafficking on the world's population, beginning with the enactment of the Shanghai Resolutions in 1909 and still ongoing. Each of the international agreements discussed in this study contains language that recognizes the seriousness of the global drug problem and the need for international cooperation. That language is evidence that drug trafficking, including maritime drug trafficking, is regarded by the international community as a matter of serious concern.

8.7.4. Development of universal jurisdiction over (maritime) drug trafficking

History

In 1927, the Conference for the Unification of Penal Law⁶⁶ called for enactment of national criminal laws to provide for universal jurisdiction over crimes under international law, as well as over ordinary crimes under national law of international concern. Article 6 of the draft legislation provided:

⁶³ Article 99 LOSC, Article 13 Convention on the High Seas.

⁶⁴ Morris (1994), p. 4; Morris (1987), p. 5; Saunders (1989), p. 5; Report of the Regional Meeting on Drug Control Cooperation in the Caribbean, UNDCP, Barbados, May 1996; Report of the International Narcotics Control Board for 1996, E/INCB/1996/1, United Nations, New York, 1997; Maritime Counter-Drug Cooperation in the Caribbean, Barbados, 15 May 1997, p. 2-5; The Caribbean and the Drug Problem, Report EU Experts Group, April, 1996, 6879/3/96, DG H II, JV/dp.

⁶⁵ Fry (2002).

⁶⁶ Resolution on International Penal Law, adopted by the Conference for the Unification of Penal Law, Warsaw, 5 November 1927.

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“Anyone who commits one of the following offences in a foreign country will also be punished according to the law of..... (x), irrespective of the law of the place where the offence was committed and of the nationality of the perpetrator:

f) “[d]rugs trafficking;”.....

In 1932, the International Congress of Comparative Law⁶⁷ at The Hague adopted a similarly broad recommendation:

“Any State is entitled to punish acts committed outside its territory by a foreign national, including any against a foreign national, when, under its criminal law, such acts constitute a punishable offence if the accused is present in its territory and cannot be extradited. The exercise of this right must be limited to the prosecution of serious offences against the general interests of humanity, which include:

d) “[d]rugs trafficking;”.....

An example of a regional universal jurisdiction over drug trafficking at sea can be found in the 1940 Treaty of International Penal Law⁶⁸, which was concluded for the South-America continent. Article 14 of that agreement reads:

“International piracy, drug trafficking, white slavery and the destruction or damaging of submarine cables, shall be subject to the jurisdiction and the law of the State where the suspects are apprehended, independently of where the crimes have been committed. This shall not preclude the jurisdictional preference, inherent to the State where the criminal acts have been committed, of demanding by means of extradition the handing over of the suspect.”

History of universal jurisdiction in drug-control treaties

At least four treaties⁶⁹ concerning illicit drug trafficking include a kind of universal jurisdiction and impose an *aut dedere aut judicare* obligation on state parties with respect to persons suspected of such offences found in their territory.

The 1936 Convention introduced the optional principle of universality for adoption by municipal penal legislation to insure that illicit drug traffickers would not escape prosecution because of a lack of criminal jurisdiction. The 1936 Convention limited itself to the formulation of rather vague provisions, accompanied by escape clauses. The 1961 Convention including the 1972 Protocol requires parties to it to take action against illicit drug traffic, but these are no more than ‘best efforts’ clauses.

Universal jurisdiction over maritime drug trafficking by customary international law

We can conclude, based on the research laid down in previous chapters of this study, that while there is some evidence that the law has begun to develop, state practice and belief is not yet consistent enough to consider universal jurisdiction *stricto sensu* over the offence of illicit drug trafficking at sea as a matter of customary international law (see Section 8.8.4. and Table 8-1 of this study)

Universal jurisdiction over maritime drug trafficking by treaty-law

As customary law cannot be formed at will, we have to suggest that reforms should be attempted via treaty. As discussed above, a treaty may provide for universal jurisdiction over illicit drug trafficking on the high seas.

⁶⁷ Resolution on International Penal Law, adopted by the International Congress of Comparative Law, The Hague, 2-6 August 1932.

⁶⁸ Tratado Sobre de Dercho Penal Internacional de 1940, signed at Montevideo, Uruguay, on 19 March 1940, this treaty was signed by Brazil, Colombia, Bolivia, Argentina, Peru, Paraguay and Uruguay, but only Uruguay appears to have ratified it.

⁶⁹ See Chapters 2 and 3 of the present study.

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Prescriptive jurisdiction regarding maritime drug trafficking

In Section 3.1.3., we concluded that the 1988 Convention allows for the exercise of universal prescriptive jurisdiction. The 1988 Convention delegates the possibility of asserting universal prescriptive jurisdiction over maritime drug trafficking to the state parties. All of the multilateral maritime drug-interdiction treaties discussed, oblige parties to assert universal prescriptive jurisdiction over drug-related offences when committed on board a vessel. All of the bilateral maritime drug-interdiction treaties being discussed, are silent about prescriptive jurisdiction, but it can be assumed, however, that exercising jurisdiction is not done without asserting prescriptive jurisdiction.⁷⁰ Many states recognize universal prescriptive jurisdiction over drug trafficking, including maritime drug trafficking, as a matter of state practice.⁷¹

We can state that prescriptive jurisdiction over drug-related offences committed on board vessels is rapidly developing to or even has achieved the status of universality, assuming that all relevant states have become party to the maritime drug-interdiction treaties (see Section 8.8.4. and the Annex to Chapter 8 of this study).

Enforcement jurisdiction regarding maritime drug trafficking

The enforcement of universal jurisdiction is a separate question. It has to be noted, that the right to exercise jurisdiction under the universality principle can stem either from a treaty of universal or quasi-universal scope, or from acceptance under customary international law.⁷²

On the high seas, freedom of navigation and exclusive jurisdiction of the flag state are the leading principles, while a coastal state has exclusive jurisdiction in the waters under its sovereignty.

However, in previous chapters, we concluded that there are many provisions in the maritime drug-interdiction treaties available to enable the apprehension of illicit drug traffickers at sea. When all relevant states will become party to the 1997 Convention, the 2003 Agreement and the 2002 Draft Convention⁷³, and/or will conclude a bilateral drug-interdiction treaty discussed, then it will be possible to state that the exercise of universal jurisdiction over illicit drug trafficking on the high seas, is developing in a serious way (see Table 8-1). Especially when all 'specially affected states' have become party to those treaties.⁷⁴

The not-objected unilateral state practice of the US, the consensual boarding, may be regarded as a development under customary international law.

Looking at all of the agreements concluded in the last hundred of years and analyzed in this study a development in the direction of universal jurisdiction over illicit maritime drug trafficking, is not out of the question for the future. Also the exercise of universal jurisdiction may develop in a way that all states may apprehend a suspect vessel on the high seas irrespective of the flag the suspect vessel is flying.

⁷⁰ See Section 7.2.4 and 7.3.3. of this study.

⁷¹ France's Code Procedure Penal Articles 689-2 to 689-7; Germany's Strafgesetzbuch par. 6, 1 & 9 and par. 7, 2; Australia's Crimes Traffic in Drugs and Psycho Substances Act 1990, No. 97; Portugal's Diaro da Republica Article 49 (1999); Thailand's Act on Measures for the Suppression of Offenders Relating to Narcotics, Chapter 1, par. 5 (1991); Bahrain's Controlling the Use and Circulation of Narcotic Substances and Preparations, No.4 (1973); see for more examples: Universal Jurisdiction in the European Union, Country Studies, available on: www.redress.org/conferences/country%20studies.pdf (visited Fall 2006)

⁷² See, for example, Article 4(1)(b)(ii) of the 1988 Convention; especially the reference to Article 17 (4, 9) of the same convention.

⁷³ It should be borne in mind, that a state cannot become party to a draft convention; that draft convention should become a treaty first.

⁷⁴ Henckaerts (2005), p. 180-182.

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8.7.5. Arguments against the establishment of universal jurisdiction over maritime drug trafficking and the exercise of it

General

Universal jurisdiction over maritime drug trafficking has a significant advantage. Every state may assert jurisdiction over illicit drug smugglers on the high sea, no matter the flag of the suspect vessel.

Nevertheless, the discussion of universal jurisdiction over illicit drug trafficking at sea is not complete without some recognition of the substantial body of opinion that universal jurisdiction over maritime drug trafficking is unwise and that universal jurisdiction should not be expanded. The arguments against the establishment of universal jurisdiction over illicit drug trafficking at sea will be examined to determine whether they are strong enough to counterbalance the potential harm caused by illicit maritime drug trafficking.

Logical limit to universal jurisdiction crimes

There is no logical limit to the crimes that are and are not subject to universal jurisdiction. That question goes to the very heart of the debate over jurisdiction. Universal jurisdiction is supposed to be a very narrow exception to traditional jurisdictional rules, used only as an exceptional measure, because it does transcend traditional notions of state sovereignty. If universal jurisdiction were expanded to a broad range of crimes, there would be no *raison d'être* for the other bases of jurisdiction. In theory, that is a legitimate concern. As discussed above, however, the international community has almost embraced universal jurisdiction over illicit maritime drug trafficking.

The question is whether universal jurisdiction over illicit drug trafficking at sea is the beginning of a slippery slope or not. An answer to this question may be found in the fact that if the international community was indeed concerned about a slippery slope, it could work to a halt of universal jurisdiction over illicit maritime drug trafficking. Instead, states have gone out of their way to expand the availability of universal jurisdiction over illicit drug traffickers at sea.

Integrity of sovereignty

Perhaps the most significant reason that states resist to (the exercise of) universal jurisdiction over illicit maritime drug trafficking is the concern that it will interfere with national sovereignty. Universal jurisdiction is, in general, an exception to that rule, and is reserved for extreme cases that are well established under customary international law.⁷⁵ For illicit drug trafficking at sea, that means an infringement of the exclusive jurisdiction of the flag state and a severe restriction on the freedom of the high seas. But, when that exception has developed in customary international law and it is reflected in global multilateral maritime-drug-interdiction treaties, it shows conformity with the exclusive flag state jurisdiction and can not be considered as an infringement on the integrity of sovereignty.

8.7.6. A possible future development of universal jurisdiction over maritime drug trafficking, restricted to a specific area and to small vessels

A possible future development is the establishment of universal jurisdiction over small suspect ships, for a specific maritime area, i.e. the Caribbean region and a region round Europe. Universal jurisdiction over small vessels in a restricted region may be considered as a *contra-dictio in terminis*, but in this study it means that all states may assert jurisdiction over offences committed on board a vessel on the high seas in that specific region, no matter the flag the suspect vessel is flying. Exercise of universal jurisdiction over small vessels in a restricted

⁷⁵ See the separate opinion of Lord Slynn of Hadley in *Regina v. Bartle (EX Parte Pinochet)* (1998).

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region means, in this study, that law enforcement officers of all states may stop and search a small suspect vessel on the high seas in that specific region.

As we have seen in previous chapters of this study, a substantial part of the illicit drugs is transported at sea by small ships, both privately and commercially. In addition to the fact that the commercial interest of small ships is, in general, significantly less than the commercial interest of larger vessels, it is quite possible for small ships to flee and disappear. Larger ships can be tracked or traced to their next port of call. Most of the suspect small vessels can be found in coastal areas in the Caribbean region or in the waters round Europe.⁷⁶

The exercise of universal jurisdiction over illicit drug trafficking at sea, restricted to those specific maritime areas, may become a valuable tool in the hands of law enforcement vessels who for tactical and effective reasons operate in those maritime areas.

Those factors and others mentioned earlier give grounds for a possible future change to achieve improved maritime drug interdiction over small ships. If universal jurisdiction were to be applicable to small ships enjoying freedom of navigation, suspected of being engaged in illicit drug trafficking and located in the European or Caribbean region, then the amount of drugs illegally transported by sea may decrease substantially, because more suspect vessels would probably be apprehended. However, this is also dependable on the exercise of the universal jurisdiction.

8.7.7. Avenues of possible future development of universal jurisdiction over maritime drug trafficking

It could be argued that the international community could embrace universal jurisdiction over the offence of illicit drug trafficking at sea in different ways.

Firstly, all states must become party to the 1988 Convention and adopt an additional protocol to the 1988 Convention. The proposed additional protocol would establish universal jurisdiction over illicit drug trafficking on the high seas, including the right to exercise this jurisdiction under the universality principle. Adopting an additional protocol to the 1988 Convention establishing universal jurisdiction would close some of the gaps by ensuring that there would always be a state that is willing and able to try illicit drug traffickers. That protocol would need to explicitly establish universal jurisdiction, including the right to exercise it, on the high seas, regardless of connections between the perpetrator, the crime, and the intervening state.

Secondly, the time will come to review Articles 108 and 110 LOSC with a view to establishing the right of visit in cases of illicit drug trafficking as is provided for in cases of slavery or non-authorized broadcasting. Today, those kinds of activities are no more relevant than illicit drug trafficking or more dangerous than illicit drug trafficking.⁷⁷

In addition, states should amend their national legislation on drug trafficking to reflect an acceptance of universal jurisdiction over illicit drug trafficking on the high seas.

Those actions, if undertaken by a sufficient number of states, may constitute universal jurisdiction over illicit drug trafficking at sea. Once established, it would truly become possible for any state to establish universal jurisdiction over participants in the illicit maritime drug trade,

⁷⁶ See Section 1.3.5. of this study.

⁷⁷ INCB Annual Report 1996, 4 March 1997.

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regardless of whether or not that state is a party to the LOSC, the 1988 Convention, the additional protocol or to the maritime drug-interdiction treaties examined.

8.7.8. Conclusions about universal jurisdiction

Universal jurisdiction for the offence of illicit drug trafficking on the high seas, may be an adequate instrument for all states. Universal jurisdiction over maritime drug trafficking can be based on the location of the crime, as is the case with piracy, and on the theory that the drug trade is so egregious as to be a matter of concern to all states: the pragmatic and humanitarian rationale.

Prescriptive universal jurisdiction over relevant offences committed on board vessels enjoying freedom of navigation can be considered as almost universal, that jurisdiction is widely accepted and implemented in state practice; especially when all states become party to the relevant maritime-drug interdiction treaties examined.

A manner of exercising universal jurisdiction over illicit drug trafficking at sea could be reached by extending the provisions of the LOSC. Other avenues are that states become party to all relevant maritime drug-interdiction treaties and/or to conclude an additional protocol to the 1988 Convention conferring universal jurisdiction and making it possible for any state to stop and search a suspect vessel on the high seas.

If the maritime drug-interdiction treaties or the additional protocol are accepted widely enough and reflected in state practice, customary international law may develop making drug trafficking at sea a crime under universal jurisdiction, as is the exercise of universal jurisdiction (see Section 8.8.4. of the study)

Another possible future development is the constitution of universal jurisdiction over small suspect vessels and restricted to a certain region. The right to exercise this limited form of jurisdiction under the universality principle can stem either from a treaty of universal scope or from customary international law.

8.8. Concluding remarks about the results of this study

8.8.1. General

The present study focuses on the interdiction of trafficking in illicit drugs at sea as one part of the general problem of illicit drug trafficking. More specifically, the study focuses on the legal framework for the interdiction of illicit maritime drug trafficking under international law. In order to do so, several aims were formulated in Section 1.3.2. of this study. In the present section of this study, the achievement of those aims will be examined.

The first aim of this study was to analyze the general framework of international law for maritime drug interdiction. The second aim of this study was to analyze the specific framework of international law for maritime drug interdiction, formed by multilateral and bilateral maritime drug-interdiction treaties. The third aim of this study was to examine whether there is a relationship or parallel between the multilateral and bilateral maritime drug-interdiction treaties, respectively for various regions of the world. Another aim of this study was to examine whether those drug-interdiction treaties have contributed to the formation of customary international law in the area of maritime drug interdiction. The last aim of this study was to examine the development of maritime drug-interdiction provisions based on international law.

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8.8.2. Analyses of the framework of international law for maritime drug interdiction

Based on the analyses as laid down in previous chapters of the present study, reflected, *inter alia*, in the Annex to Chapter 7, and the Tables 8-2 and 8-3 in the Annex to Chapter 8, we may conclude that due to jurisdictional inconsistencies in the relevant geographical maritime areas and jurisdictional maritime zones, a patchwork quilt of authority for apprehending suspect vessels has been created, but no notably large gaps can be identified where coast guard, maritime constabulary or warships are not authorized to exercise their or other states' laws.

One of the gaps that can be identified is the authority of either a coastal state or intervening state over suspect vessels enjoying the right of transit passage or the right of archipelagic sea lanes passage. It has to be noted that this is not such a large gap that it should be repaired immediately because a suspect vessel, enjoying the right of transit passage in an international strait, will arrive within a notable timeslot in a maritime zone, where the coastal state or an intervening state may apprehend that suspect vessel. On the other hand, the coastal state may request the authorization of the flag state of the suspect vessel enjoying the right of transit passage, to stop and search that vessel. This may apply *mutatis mutandis* for suspect vessels under the right of archipelagic sea lanes passage.

The authority of a competent coastal state to stop and visit a foreign suspect vessel enjoying the right of transit passage can be compared with the authority of an intervening state to stop and search a suspect vessel on the high seas. Treaty provisions for prior authorization to stop and search a foreign suspect vessel on the high seas are silent, however, about the application of those provisions to foreign ships enjoying the right of transit passage.

The analyses of the general and specific framework of international law for maritime drug interdiction have contributed to a more unambiguous interpretation and implementation of various terms, definitions and provisions. Some recommendations, based upon the analyses have been given to harmonize those terms, definitions and provisions. An unambiguous interpretation and implementation of provisions laid down in the maritime drug-interdiction treaties may help to combat illicit drug trafficking at sea.

The conclusion, based upon the analyses, can therefore be drawn that the scope and extent of coastal state and intervening-state authority over maritime drug trafficking in the relevant maritime zones may contribute to the enforcement of international law. A legal framework of maritime drug-interdiction treaties, based on international law exists and there are treaty provisions available for all states that understand the urgent need for international cooperation in combating illicit drug trafficking at sea.

As a final conclusion, it can be stated that all of the multilateral and bilateral maritime drug-interdiction treaties examined do have provisions to interdict illicit drug traffic at sea; a weak point being suspect vessels enjoying the right of transit passage. From a legal perspective, the objective of cooperating to the fullest extent possible to suppress illicit drug traffic at sea⁷⁸, unconstrained authority, officially laid down in treaties, to stop and board a foreign flag vessel on the high seas and to assist a coastal state in its sovereign waters, has partly been achieved.

8.8.3. Relationship between the treaties examined

In this section of the study, the relations between the general legal framework and the specific legal framework for maritime drug interdiction will be examined. Moreover, the relationship between specific maritime drug-interdiction treaties will be examined.

⁷⁸ This is the common term found in the majority of all maritime drug-interdiction treaties.

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General framework and specific framework for maritime drug interdiction

In Chapter 3 of the present study the general framework of international law for maritime drug interdiction has been examined. In the Chapters 4, 5 and 6 the specific maritime drug-interdiction treaties have been examined, which were compared in Chapter 7.

Article 17 of the 1988 Convention, one of the most important parts of the general legal framework for maritime drug-interdiction, uses the most relevant provision for maritime drug interdiction, the phrase "...[su]ppres illicit traffic by sea, in conformity with the international law of the sea". The 2003 Agreement, the 2002 Draft Convention, the 1997 Convention, the 1998 Agreement and most of the Shiprider Agreements do have a direct reference to the LOSC. The 1990 Treaty refers to the 1958 Geneva Conventions. The 1981 Agreement does not contain a direct reference to the international law of the sea.

We can conclude that the LOSC has had its indispensable influence on the maritime drug-interdiction treaties, because the principles of the international law of the sea can be found in the maritime drug-interdiction treaties. All of the maritime drug-interdiction treaties examined, excluding the 1981 Agreement, have been concluded in conformity with the international law of the sea and direct references were made.

All of the maritime drug-interdiction treaties that have been examined, with the exception of the 1981 Agreement and the 1997 Convention, are based on Article 17 of the 1988 Convention. In general, the majority of the maritime drug-interdiction treaties are extensions to the provisions of the 1988 Convention (see Table 8-4).

The 1990 Treaty and the 2002 Draft Convention

After comparing the multilateral and bilateral maritime drug-interdiction treaties, it can be stated that the 1990 Treaty between Spain and Italy is the forerunner to the 2002 Draft Convention. Both agreements cover the same geographical area. Many parallels can be drawn: the definitions are similar, as are the principles. Both implementation treaties are based on the right of representation. Each party recognizes the other party's right to intervene as its agent, in waters outside its own territorial limits when a vessel of the other party is suspected of illicit drug trafficking. Both treaties therefore use the same concept of prior authorization in the form of agency, but in the context of preferential jurisdiction for the flag state. In some articles of both treaties, the same text is used verbatim.

It must be noted that the 1990 Treaty was concluded between Spain and Italy, and the text of the 2002 Draft Convention was proposed by the Spanish delegation of the Working Group on Custom Cooperation of the European Union.

The Shiprider Agreement and the 2003 Agreement

Another remarkable resemblance can be found between the Shiprider Agreement and the 2003 Agreement. The resemblance is even more significant when the model Shiprider Agreement is compared with the first draft of the 2003 Agreement.⁷⁹ Both treaties have the shiprider as a starting point. Some definitions are identical, and in some articles the same text can be found verbatim. The setup of operations in the territorial waters and seaward thereof respectively, and the authority and conduct of law enforcement officials are virtually identical. During the consultations and negotiations, the text of the 2003 Agreement underwent many changes, not only in the provisions, but some definitions as well. Even the term 'shiprider' was removed.

⁷⁹ That draft can be found in the Maritime Study of 1997, under Annex G.

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In conclusion it can be stated that the 1990 Treaty is the forerunner of the 2002 Draft Convention. As we have seen in Section 6.2.2. of this study, the 1990 Treaty has been used as reference material for the 1995 Agreement. Other parallels can be found between the Shiprider Agreements and the 2003 Agreement. They both apply to the Caribbean region and the underlying principles are those of maritime counter-drug cooperation by law enforcement programs and the use of shipriders.

8.8.4. Maritime drug interdiction and customary international law

General

The purpose of this section is to determine whether the maritime drug-interdiction treaties examined have contributed to the formation of customary international law in the area of maritime drug interdiction, more specific, a contribution to a (new) rule of customary international law that should allow a state to stop and search a foreign suspect vessel on the high seas; at this moment the authorization of the flag state of that ship is required.

Customary international law can be distinguished from treaty law, as has been examined in the present study. Treaty law consists of explicit agreements between states to assume obligations; many treaties are attempts to codify pre-existing customary international law, however. Nevertheless, there is a serious impediment to the application of treaties, including the maritime drug-interdiction treaties examined, which explain why an examination of customary international law might be necessary and useful in this section. Treaties apply only to the states that have ratified them. This means that different treaties in the area of maritime drug interdiction apply in different maritime jurisdictional zones depending on which treaties the states involved have ratified.

All governments accept the existence of customary international law, although there are many differing opinions as to what rules are contained in it. The Statute of the International Court of Justice describes customary international law as: “a general practice accepted as law”⁸⁰

Customary international law consists of rules of law derived from the consistent conduct of states acting out of the belief that the law required them to act that way. It follows that customary international law can be discerned by a widespread repetition by states of similar international acts over time: state practice (*usus*). Acts must occur out of a sense of obligation (*opinio juris sive necessitatis*). Acts must be taken by a significant number of states and not be rejected by a significant number of states. Another definition is: customary international law results from a general and consistent practice of states followed out of a sense of legal obligation, so much so that it becomes custom. As such, it is not necessary for a state to sign a treaty for customary international law to apply. In other words, customary international law must be derived from a clear consensus among states, as exhibited both by widespread conduct and a discernible sense of obligation. Customary international law can therefore not be declared by a majority of states for their own purposes; it can be discerned only through actual widespread practice. For example, laws of armed conflict were long a matter of customary international law before they were codified in, *inter alia*, the Geneva Conventions.⁸¹

⁸⁰ Article 38(1)(b) of the Statute of the International Court of Justice.

⁸¹ First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, first adopted in 1864, last revision in 1949; Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, first adopted in 1949, successor of the 1907 Hague Convention X; Third Geneva Convention relative to the Treatment of Prisoners of War, first adopted in 1929, last revision in 1949; Fourth Geneva Convention relative to the Protection of Civilian

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The question that must be answered now is whether stopping and searching a suspect vessel on the high seas without prior authorization of the flag state is, or may become, a rule under customary international law or not. The general and consistent state practice and the *opinio juris* of maritime drug interdiction have to be indicated. The exact meaning and content of those two elements have been the subject of much academic writing. The approach taken in this section of the study to determine whether a rule of customary international law exists or is developing is a classic one, set out by the International Court of Justice, in particular in the North Sea Continental Shelf cases.⁸²

State practice

State practice may be looked at from two angles. Firstly, what practice contributes to the creation of customary international law (selection of state practice). Secondly, whether this practice establishes a rule of customary international law (assessment of state practice).

Selection of state practice may be both physical and verbal acts of states constituting practice that contributes to the creation of customary international law. Physical acts include, for example, law enforcement behavior at sea, such as the apprehension of suspect vessels in various maritime jurisdiction zones. US state practice as examined in Section 8.6.3. of this study, *inter alia*, consensual boarding is such a physical act that may contribute to the creation of customary law in that area. Other acts of state practice are the international operations in the area of maritime drug interdiction. Many law enforcement agencies, joint and combined, of different states cooperate in the interdiction of maritime drug trafficking.⁸³

Verbal acts include law enforcement manuals, national legislation, national case-law, instructions to law enforcement forces, diplomatic protests, opinions of official legal advisers, comments by governments on draft treaties, executive decisions and regulations, statements in international fora, and government positions on resolutions adopted by international organizations. This list shows that the practice of the executive, legislative and judicial organs of a state can contribute to the formation of customary international law. The fact that many states recognize universal prescriptive jurisdiction over drug trafficking, including maritime drug trafficking, may contribute to the creation of customary international law in that area (see Section 3.1.3. of this study).

The negotiation and adoption of resolutions by international organizations or conferences, together with the explanations of vote, are acts of the states involved. It is recognized that, with a few exceptions, resolutions are normally not binding in themselves and therefore the value accorded to any particular resolution in the assessment of the formation of a rule of customary international law depends on its content, its degree of acceptance and the consistency of related state practice.⁸⁴ The greater the support for the resolution, the more importance it is to be accorded. From 1946, when the United Nations took over the control of illicit drugs, until the moment of writing of this study, Fall 2006, many hundreds of drug-related resolutions and decisions were adopted by the General Assembly of the United Nations, its Economic and Social Council (ECOSOC) and the Commission on Narcotic Drugs (CND).⁸⁵ That state practice may also

Persons in Time of War, first adopted in 1949, based on parts of the 1907 Hague Convention IV. The text of the Geneva Convention is available on www.icrc.org (visited Fall 2006); see Schachter, (1989), pp. 730-731.

⁸² North Sea Continental Shelf cases, ICJ Reports 1969, 20 February 1969; see Henckaerts and Doswald-Beck (2005).

⁸³ See for example: www.ciponline.org/facts/uscg.htm and www.uscg.mil/ (visited Fall 2006).

⁸⁴ The importance of those conditions was emphasized by the International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, 8 July 1996, pp. 254-255

⁸⁵ See for an overview of those resolutions: www.unodc.org/unodc/en/resolutions.html (visited Fall 2006).

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contribute to the creation of customary international law in the area of maritime drug interdiction.

Assessment of state practice means that state practice has to be weighed to assess whether it is sufficiently 'dense' to create a rule of customary international law.⁸⁶ To establish a rule of customary international law, state practice has to be virtually uniform, extensive and representative.⁸⁷ Therefore, for state practice to create a rule of customary international law, it must be virtually uniform. Different states must not have engaged in substantially different conduct. The jurisprudence of the International Court of Justice shows that contrary practice which, at first sight, appears to undermine the uniformity of the practice concerned, does not prevent the formation of a rule of customary international law as long as this contrary practice is condemned by other states or denied by the government itself. Through such condemnation or denial, the rule in question is actually confirmed.⁸⁸

Moreover, for a rule of general customary international law to come into existence, the state practice concerned must be both extensive and representative. It does not, however, need to be universal: a 'general' practice suffices.⁸⁹ No precise number or percentage of states is required. One reason it is impossible to put an exact figure on the extent of participation required is that the criterion is in a sense qualitative rather than quantitative. That is to say, it is not simply a question of how many states participate in the practice, but also which states.⁹⁰ In the words of the International Court of Justice in the North Sea Continental Shelf cases, the practice must "include that of states whose interests are specially affected."⁹¹

This consideration has two implications. First, if all 'specially affected states' are represented, it is not essential for a majority of states to have actively participated, but they must have at least acquiesced in the practice of 'specially affected states'. Second, if 'specially affected states' do not accept the practice, it cannot mature into a rule of customary international law, even though unanimity is not required as explained.⁹² It can be stated that the majority of states are affected by illicit drugs (see Section 1.2. of this study). When looking at the tables annexed to the present chapter, it is obvious that those 'specially affected states' are concerned with illicit drug trafficking. Therefore, it can be stated that the 'specially affected states' are very well represented and participate seriously in the combat against illicit drug trafficking at sea.

While some time will normally elapse before a rule of customary international law emerges, there is no specified timeframe. Rather, it is the accumulation of a practice of sufficient density, in terms of uniformity, extent and representativeness, which is the determining factor.⁹³

Here, an important distinction must be made between consensus that maritime drug trafficking is illegal and consensus that stopping and searching a suspect vessel on the high seas without prior authorization of the flag state is, or may become, a rule under customary international law. Mere consensus among states that maritime drug trafficking is illegal and that it

⁸⁶ Waldock (1962), p. 44.

⁸⁷ North Sea Continental Shelf cases, ICJ Reports 1969, 20 February 1969, p. 43.

⁸⁸ See the Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits Judgment, ICJ Reports 1986, p. 98.

⁸⁹ ILA Report (2000), Principle 14, p. 23.

⁹⁰ ILA Report (2000), Commentary (d) and (e) to Principle 14, pp. 25-26.

⁹¹ North Sea Continental Shelf cases, ICJ Reports 1969, 20 February 1969, p. 43.

⁹² ILA Report (2000), Commentary (e) to Principle 14, p. 26.

⁹³ ILA Report (2000), Commentary (b) to Principle 15, p. 27.

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has cross-boundary repercussions does not, on its own, indicate consensus that stopping and searching without prior authorization of the flag state is, or may become, a rule under customary international law. It may be stated that maritime drug trafficking is a crime that has only sufficient international impact that states find it necessary to cooperate in maritime drug interdiction.⁹⁴

In conclusion it can be stated that state practice can be discovered in the assertion of prescriptive jurisdiction over drug-related offences on board vessels located in the relevant maritime jurisdictional zones, because most of the states have made the traffic of illicit drugs at sea illegal as a matter of state policy and legislation, either by means of implementing their international obligations or on a strictly unilateral basis (see also Section 3.1.2., the Annex to Chapter 7 and Section 8.7.8. of this study). When looking at the tables annexed to the present chapter, the conclusion may be drawn that the criteria for density, uniformity, extent and representativeness have not (yet) been met referring to stopping and searching a suspect vessel on the high seas without prior authorization of the flag state.

Opinio juris

The requirement of *opinio juris* in establishing the existence of a rule of customary international law refers to the legal conviction that a particular practice is carried out ‘as of right’. The form in which the practice and the legal conviction are expressed may well differ depending on whether the rule concerned contains a prohibition, an obligation or merely a right to behave in a certain manner.

It should be noted, that it proved to be very difficult and largely theoretical to strictly separate elements of practice and legal conviction. Often, the same act reflects both practice and legal conviction. As the International Law Association pointed out, the International Court of Justice “has not in fact said in so many words that just because there are (allegedly) distinct elements in customary law the same conduct cannot manifest both. It is in fact often difficult or even impossible to disentangle the two elements.”⁹⁵ This is particularly so because verbal acts, such as law enforcement manuals, count as state practice and often reflect the legal conviction of the state involved at the same time.

When there is sufficiently dense practice, an *opinio juris* is generally contained within that practice and, as a result, it is not usually necessary to demonstrate separately the existence of an *opinio juris*. In situations where practice is ambiguous, however, *opinio juris* plays an important role in determining whether or not that practice counts towards the formation of custom.

It may be concluded from the present study, based on the analyses laid down in previous chapters and on the development during the last decades, that there is *opinio juris* that illicit drug trafficking at sea is a crime, even a transnational crime, and that a *communis opinio* exists that this crime has far-reaching international ramifications. However, there is no *opinio juris* that all states may apprehend a suspect vessel on the high seas without the prior authorization of the flag state. For many states, the principles of sovereignty and freedom of navigation still outweighs the desire to assert such a rule of customary international law.

State practice and *opinio juris* show that there is a rule of customary international law, allowing all states to criminalize (prescriptive jurisdiction) illicit maritime drug trafficking.

⁹⁴ Higgins (1994), p. 64.

⁹⁵ ILA Report (2000), Commentary (b) to Principle 15, p. 27.

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Impact of treaty law

Treaties are also relevant in determining the existence of customary international law because they help shed light on how states view certain rules of international law. In the North Sea Continental Shelf cases, the International Court of Justice clearly considered the degree of ratification of a treaty to be relevant to the assessment of customary international law. In that case, the Court stated that “the number of ratifications and accessions so far secured is, though respectable, hardly sufficient”, especially in a context where practice outside the treaty was contradictory.⁹⁶ Conversely, in the Nicaragua case, the Court placed a great deal of weight, when assessing the customary status of the non-intervention rule, on the fact that the Charter of the United Nations was almost universally ratified.⁹⁷ It can even be the case that a treaty provision reflects customary law, even though the treaty is not yet in force, provided that there is sufficiently similar practice, including by specially affected states, so that there remains little likelihood of significant opposition to the rule in question.⁹⁸

In practice, the drafting of treaty norms helps to focus world legal opinion and has an undeniable influence on the subsequent behavior and legal conviction of states. The International Court of Justice recognized this in its judgment in the Continental Shelf case in which it stated that “multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them.”⁹⁹ The Court thus confirmed that treaties may codify pre-existing customary international law but may also lay the foundation for the development of new customs based on the norms contained in those treaties. The Court has even gone so far as to state that “it might be that ... a very widespread and representative participation in [a] convention might suffice of itself, provided it included that of States whose interests were specially affected.”¹⁰⁰

The present study takes the cautious approach that widespread ratification is only an indication and has to be assessed in relation to other elements of practice, in particular the practice of states not party to the treaty in question. Consistent practice of states not party is considered as important positive evidence. Contrary practice of states not party, however, is considered as important negative evidence. The practice of states party to a treaty vis-à-vis states not party is also particularly relevant.

Thus, the present study does not limit itself to the practice of states not party to the relevant treaties of maritime drug interdiction. To limit the study to a consideration of the practice of only a few states that have not ratified the 1988 Convention, for example, would not comply with the requirement that customary international law be based on widespread and representative practice. Therefore, the assessment of the existence of customary law takes into account that, at the time of writing this study, the 1988 Convention has been ratified by 183 states out of 192 that are member of the UN.

Conclusions about maritime drug interdiction and customary international law

The universal character of the offence of international illicit drug trafficking stems from the 1988 Convention, which considerably broadened the scope of drug-related offences through

⁹⁶ North Sea Continental Shelf cases, ICJ Reports 1985, p. 42.

⁹⁷ Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), ICJ Reports 1986, p. 9-100. Another important factor in the decision of the ICJ was that relevant UN General Assembly Resolutions had been widely approved, in particular Resolution 2625 (XXV) on friendly relations between states, which was adopted without a vote.

⁹⁸ North Sea Continental Shelf cases, ICJ Reports 1985, p. 33.

⁹⁹ North Sea Continental Shelf cases, ICJ Reports 1985, pp. 29-30.

¹⁰⁰ North Sea Continental Shelf cases, ICJ Reports 1985, p. 42; see ILA Report (2000), see also Princeton Principles on Universal Jurisdiction no's 20, 21, 24, 26 and 27, pp. 43-54.

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its definition of illicit traffic. The status of a transnational crime given to illicit drug trafficking is clearly evident in Article 2(1) of the 1988 Convention, referring to the international aspects of these offences. The 1988 Convention constitutes original and primary jurisdiction for states, outside their land territory or territorial waters as well, in the event of capturing persons suspected of crimes mentioned in article 3 of the 1988 Convention. This convention in fact requires states to establish as criminal offences those mentioned in Article 3 the scope of which is rather broad. This assertion of prescriptive jurisdiction is supported by the majority of the maritime drug interdiction treaties examined in this study.

While state practice can change customary international law over time, that process does not occur instantly. Customary international law changes as states begin to feel compelled to avoid certain actions. Even though, as a rule of customary law, the assertion of prescriptive jurisdiction over illicit maritime drug trafficking has been achieved, a customary international law norm against stopping and searching a suspect vessel without prior authorization of the flag state has not been formed. But, given the development during the last decades, it must not be excluded, that in due time, if developments continue at the current pace (see section 8.8.5.), that stopping and boarding of a suspect vessel may become a rule under customary international law. Then it may be possible to stop and board any¹⁰¹ suspect vessel on the high seas without prior authorization of the flag state, and when illicit drugs are found, those can be taken off the market and the suspects can be brought to justice. At that time, the principles of freedom of navigation and exclusive flag state jurisdiction will be overruled by the interdiction of maritime drug trafficking which has evolved into a rule under customary international law.

Although in the past it took a rather long time for customary international law to develop, the acceleration of international interaction, as a result of modern electronic means, may result in a rather more rapid creation of customary law. It is not excluded that as a result of a very seriously growing of the world drug problem that instant customary law may be created regarding to illicit drug trafficking, including maritime drug trafficking.

Regional customary law in the Caribbean

It is worthwhile examining whether a derivate form of customary international law exists, for international law does recognize what has been called local custom or regional customary law.¹⁰² The Asylum Case, involved the application of a local standard of custom. In that case, the issue was whether or not Colombia properly invoked a practice of unilaterally characterizing an offense for the purpose of determining eligibility for asylum. In the Asylum Case the ICJ recognized local (Latin American) custom where the state invoking it could prove it was binding on the states that were parties to the dispute. This, of course, is necessary with all questions of customary international law.

A great majority of states washed by the Caribbean Sea have concluded a Shiprider Agreement with the United States (see also the 1980 Agreement and the 1998 Agreement which were concluded for that area). In general, the bilateral Shiprider Agreements in the aggregate may create rules and patterns of conduct in maritime drug interdiction, such as prior authorization to stop and board a foreign suspect vessel on the high seas. Those treaties are standardized and therefore establish similar rights and obligations for a broad range of states. The many similar bilateral drug-interdiction treaties may create networks of legal obligations.

¹⁰¹ Excluding warships.

¹⁰² The Asylum Case, *Columbia v. Peru*, ICJ Reports (1950), p. 266 *et seq.*

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It should be borne in mind, that those treaties were concluded with the United States, the leading state in the area of maritime drug interdiction, especially in the Caribbean region. In addition, the multilateral 2003 Agreement has been particularly concluded for the Caribbean region, which provide for prior authorization to stop and board foreign suspect vessels. These geographic limits on the scope of customary international law are not unique.¹⁰³

Whether such treaties may be viewed as creating customary international law in some cases is a separate matter.¹⁰⁴ Those specific maritime drug-interdiction treaties may provide evidence of customary rules,¹⁰⁵ and indeed there is no clear and dogmatic distinction between ‘law-making’ treaties and others. If specific treaties, for example on maritime drug interdiction, are habitually framed in the same way, a court may regard the usual form as the law even in the absence of a treaty obligation.¹⁰⁶

Therefore, it may be argued, that, maritime drug interdiction, that is to stop and search a suspect vessel on the high seas without the prior authorization of the flag state, in the Caribbean region is close to becoming a rule under regional customary law. That is based upon the specific development in the area of maritime drug interdiction in that region. Besides the development in the global maritime drug-interdiction treaties, one multilateral maritime drug-interdiction treaty and about 30 bilateral maritime drug-interdiction treaties have been concluded for that specific area (see Tables 8-1 and 8-5). In addition to the network of those specific maritime drug-interdiction treaties, the practice of the United States, consensual boarding as has been examined in the present chapter of this study including the absence of persistent objectors may be mentioned. See also the possible development to universal jurisdiction as mentioned in the present chapter, specifically for the Caribbean region. See also the conclusions about enforcing jurisdiction in relation to the size of the ship in section 8.5.4. of the study.

In general, it is not inconceivable that illicit maritime drug interdiction has taken a path to become a rule under customary international law in the future. Indications therefore are, *inter alia*, the will to stop illicit drug trafficking at sea as expressed by the United Nations and many states, practice as demonstrated by the United States and examined in the present chapter, the development, especially in the Caribbean region, of the maritime drug-interdiction treaties examined, and the possible future developments as surveyed in the present chapter of this study.

We may conclude that the drug-interdiction treaties examined may have contributed to the formation of customary law in the future, in the area of maritime drug interdiction, specifically in the Caribbean region.

8.8.5. Development of the legal framework for maritime drug interdiction

Development is seen from the point of view that illicit maritime drug trafficking must be combated to the fullest extent possible. Development means, in this section, from no maritime drug-interdiction provisions in international agreements to provisions for international maritime-drug interdiction, especially regarding the authority to stop and board a foreign flag ship on the high seas (see also Table 8-5 in the Annex to the present chapter).

¹⁰³ See for example Universal Jurisdiction: The duty of states to enact and enforce legislation, Chapter One, E2, available on: web.amnesty.org/library/index/engior530032001?OpenDocument (visited Fall 2006).

¹⁰⁴ Baxter, (1965-1966), pp. 275-300. See Section 8.7.4. of this study, including note 68.

¹⁰⁵ Nottebohm Case, ICJ Reports (1955), pp. 22-23.

¹⁰⁶ See Lillich (1971), p. 527.

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The 1909 Shanghai Resolutions were a first weak step on the path towards international drug control. In the 1936 Convention a first attempt to interdict illicit drug traffic in general can be found, which after all had not been successful, due to provisions that were too weak and too restricted. The 1958 Geneva Convention on the Territorial Sea and Contiguous Zone constitutes criminal jurisdiction for a coastal state over suspect vessels enjoying the right of innocent passage.

The 1981 Agreement between US and UK was a step forward by using the 'no-objection' formula. This bilateral treaty was the first one to use prior authorization to stop and board a suspect vessel on the high seas.

The 1982 LOSC confirms the provision of the 1958 Geneva Convention for suspect vessels enjoying the right of innocent passage, and creates by Article 108 a weak provision for maritime drug interdiction on the high seas.

The 1988 Convention was the first treaty seriously concerned with maritime drug trafficking on the high seas. Especially, Article 17 of the 1988 Convention contains innovative law enforcement provisions designed to promote international cooperation in the interdiction of suspect vessels on the high seas. Under the 1988 Convention authority had to be obtained on a case-by-case request for authorization from the flag state to stop and board a foreign suspect vessel. A positive answer to that request had to be awaited, before the intervention legally could take place: *ad-hoc* authorization on request. Paragraph 9 of Article 17 contains the follow up for the 1988 Convention, by requiring parties to consider entering into bilateral and multilateral maritime drug- interdiction agreements.

The 1990 Treaty between Spain and Italy created prior authorization by the right of intervention for the intervening state. That prior authorization between two states can be considered as a step forward in development.

The 1995 Agreement is based entirely on Article 17 of the 1988 Convention, with some influences from the 1990 Treaty and the 1981 Agreement. In some aspects it is an extension to the provisions of the 1988 Convention, but does not reflect the development mentioned in the two bilateral agreements in the area of authorization.

In the European region, the 1997 Convention constitutes prior authorization for an intervening state in waters under sovereignty of a foreign coastal state. This may be considered as a large step forward in the fight against illicit drug trafficking. It has to be noted, that this prior authorization is only for coastal states, because it is a continuing of a hot pursuit from the territorial sea of a coastal state into the neighboring territorial sea. That means that land-locked states are, in general, excluded from that prior authorization.

For the Caribbean region, the 1998 Agreement between the US and UK/UKOT, the Shiprider Agreements and the 2003 Agreement can be considered as quite a development in the area of maritime drug interdiction. Prior authorization to stop and board foreign suspect vessels on the high seas and, under certain circumstances, in waters under the sovereignty of a foreign coastal state has been achieved. This is an innovation in terms of authorization.

The 2002 Draft Convention, which has not been subject to negotiations and therefore could not be signed by any party, indeed contains a substantial part of development compared with all of the maritime drug-interdiction treaties. All (potential) parties to this feasible agreement

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have prior authorization to stop and board a suspect vessel of another party on the high seas. This comes near to maritime drug interdiction to the fullest extent possible.

It can be stated that significant development may be noticed since the 1988 Convention as regards to the authority to stop and board a foreign suspect vessel on the high seas. The framework of international law for maritime drug interdiction has been developed in the last decades from very weak provisions into many opportunities under treaty law for prior authorization to stop and search a foreign suspect vessel, especially on the high seas.

The pace of the development of the legal framework for maritime drug interdiction has increased progressively from the first weak attempt in 1936 until the provisions for prior authorization to stop and search a suspect vessel, especially on the high seas (see Table 8-5). A future development of the current framework of international law for maritime drug interdiction may be universal jurisdiction over maritime drug trafficking and the exercising of universal jurisdiction, especially over small vessels suspected of being engaged in illicit drug trafficking and located in a specific region (see Section 8.7.6. of the present study).

The crime of illicit maritime drug trafficking may become subject to universal jurisdiction through the development of customary international law as evidenced by state practice and *opinio juris*, or by treaty law as analyzed and examined in the present study.

The right to exercise this jurisdiction under the principle of universality can stem either from maritime-drug interdiction treaties of universal scope or from customary international law.

At the end we can state that the current framework of international law for maritime drug interdiction analyzed and examined in this study may contribute to solving the problem of illicit drug trafficking at sea as a part of the global drug problem as discussed in the first section of this study, because at this moment in time, there are sufficient and adequate treaty provisions available for all states that understand the urgent need to combat illicit drug trafficking to the fullest extent possible. In the future even more provisions may be available, especially for streamlining or by-passing the process of *ad hoc* authorization by the flag state.

Annex

See Section 3.1.1. of the study

Parties to the relevant treaties							
+ party	- potential party	General		Europe		Caribbean	
United Nations Member States	LOSC	1988 Convention	1995 Agreement	1997 Convention	2002 Draft Convention	2003 Agreement	Shiprider Agreement
Afghanistan	+	+					
Albania	+	+	-				
Algeria	+	+					
Andorra	-	+	-				
Angola	+	+					
Antigua and Barbuda	+	+				-	+
Argentina	+	+					
Armenia	+	+	-				
Australia	+	+					
Austria	+	+	+	+	-		
Azerbaijan	-	+	-				
Bahamas	+	+				-	+
Bahrain	+	+					
Bangladesh	+	+					
Barbados	+	+				-	+
Belarus	+	+					
Belgium	+	+	-	+	-		
Belize	+	+				+	+
Benin	+	+					
Bhutan	+	+					
Bolivia	+	+					
Bosnia and Herzegovina	+	+	-				
Botswana	+	+					
Brazil	+	+					
Brunei Darussalam	+	+					
Bulgaria	+	+	+				
Burkina Faso	+	+					
Burundi	+	+					
Cambodia	+	+					
Cameroon	+	+					
Canada	+	+				-	
Cape Verde	+	+					
Central African Republic	+	+					
Chad	+	+					
Chile	+	+					
China	+	+					
Colombia	+	+				-	+
Comoros	+	+					

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Parties to the relevant treaties								
+ party	- potential party	General		Europe			Caribbean	
United Nations Member States		LOSC	1988 Convention	1995 Agreement	1997 Convention	2002 Draft Convention	2003 Agreement	Shiprider Agreement
Congo, Republic of the	+	+	+					
Costa Rica	+	+	+				+	+
Côte d'Ivoire	+	+	+					
Croatia	+	+	+	-				
Cuba	+	+	+				-	-
Cyprus	+	+	+	+	+	-		
Czech Republic	+	+	+	+	+	-		
Democratic People's Rep. Korea	+	+	+					
Democratic Republic of Congo	+	+	+					
Denmark	+	+	+	-	+	-		
Djibouti	+	+	+					
Dominica	+	+	+				-	+
Dominican Republic	+	+	+				+	+
Ecuador	-	+	+				-	-
Egypt	+	+	+					
El Salvador	+	+	+				-	-
Equatorial Guinea	+	-	-					
Eritrea	-	+	+					
Estonia	+	+	+	+	+	-		
Ethiopia	+	+	+					
European Union (non-member UN)	+	+	+					
Fiji	+	+	+					
Finland	+	+	+	-	+	-		
France	+	+	+	-	+	-	+	
Gabon	+	+	+					
Gambia	+	+	+					
Georgia	+	+	+	-				
Germany	+	+	+	+	+	-		
Ghana	+	+	+					
Greece	+	+	+	+	+	-		
Grenada	+	+	+				-	+
Guatemala	+	+	+				+	+
Guinea	+	+	+					
Guinea-Bissau	+	+	+					
Guyana	+	+	+				-	+
Haiti	+	+	+				+	+
Honduras	+	+	+				+	+
Hungary	+	+	+	+	+	-		
Iceland	+	+	+	-				
India	+	+	+					
Indonesia	+	+	+					

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Parties to the relevant treaties								
+ party	- potential party	General		Europe			Caribbean	
United Nations Member States		LOSC	1988 Convention	1995 Agreement	1997 Convention	2002 Draft Convention	2003 Agreement	Shiprider Agreement
Iran (Islamic Republic of)		+	+					
Iraq		+	+					
Ireland		+	+	-	+	-		
Israel		-	+					
Italy		+	+	+	+	-		
Jamaica		+	+				+	+
Japan		+	+					
Jordan		+	+					
Kazakhstan		-	+					
Kenya		+	+					
Kiribati		+	-					
Kuwait		+	+					
Kyrgyzstan		-	+					
Lao People's Democratic Republic		+	+					
Latvia		+	+	+	+	-		
Lebanon		+	+					
Lesotho		+	+					
Liberia		+	+					
Libyan Arab Jamahiriya		+	+					
Liechtenstein		+	+	-				
Lithuania		+	+	+	+	-		
Luxembourg		+	+	-	+	-		
Madagascar		+	+					
Malawi		+	+					
Malaysia		+	+					
Maldives		+	+					
Mali		+	+					
Malta		+	+	+	+	-		
Marshall Islands		+	-					
Mauritania		+	+					
Mauritius		+	+					
Mexico		+	+				-	-
Micronesia (Federated states of)		+	+					
Monaco		+	+	-				
Mongolia		+	+					
Montenegro		-	+					
Morocco		+	+					
Mozambique		+	+					
Myanmar		+	+					
Namibia		+	-					

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Parties to the relevant treaties								
+ party	- potential party	General		Europe			Caribbean	
United Nations Member States		LOSC	1988 Convention	1995 Agreement	1997 Convention	2002 Draft Convention	2003 Agreement	Shiprider Agreement
Nauru		+	-					
Nepal		+	+					
Netherlands		+	+	-	+	-	+	-
New Zealand		+	+					
Nicaragua		+	+				+	+
Niger		+	+					
Nigeria		+	+					
Niue (non-member UN)		+	-					
Norway		+	+	+				
Oman		+	+					
Pakistan		+	+					
Palau		+	-					
Panama		+	+				-	+
Papua New Guinea		+	-					
Paraguay		+	+					
Peru		-	+					
Philippines		+	+					
Poland		+	+	-	-	-		
Portugal		+	+	-	-	-		
Qatar		+	+					
Republic of Korea		+	+					
Republic of Moldova		-	+	-				
Romania		+	+	+				
Russian Federation		+	+	-				
Rwanda		+	+					
Saint Kitts and Nevis		+	+				-	+
Saint Lucia		+	+				-	+
Saint Vincent and the Grenadines		+	+				-	+
Samoa		+	+					
San Marino		-	+	-				
Sao Tome and Principe		+	+					
Saudi Arabia		+	+					
Senegal		+	+					
Serbia		+	+	-				
Seychelles		+	+					
Sierra Leone		+	+					
Singapore		+	+					
Slovakia		+	+	+	+	-		
Slovenia		+	+	+	+	-		
Solomon Islands		+	-					

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Parties to the relevant treaties								
+ party	- potential party	General		Europe			Caribbean	
United Nations Member States		LOSC	1988 Convention	1995 Agreement	1997 Convention	2002 Draft Convention	2003 Agreement	Shiprider Agreement
Somalia		+	-					
South Africa		+	+					
Spain		+	+	-	+	-		
Sri Lanka		+	+					
Sudan		+	+					
Suriname		+	+				-	+
Swaziland		+	+					
Sweden		+	+	+	+	-		
Switzerland		+	+	-				
Syrian Arab Republic		-	+					
Tajikistan		-	+					
Thailand		+	+					
The fm. Yugo. Rep. Macedonia		+	+	-				
Timor-Leste		-	-					
Togo		+	+					
Tonga		+	+					
Trinidad and Tobago		+	+				-	+
Tunisia		+	+					
Turkey		-	+	+				
Turkmenistan		-	+					
Tuvalu		+	-					
Uganda		+	+					
Ukraine		+	+	+				
United Arab Emirates		+	+					
UK of Great Britain N. Ireland		+	+	+	+	-	+	+
United Republic of Tanzania		+	+					
United States of America		-	+				+	
Uruguay		+	+					
Uzbekistan		-	+					
Vanuatu		+	+					
Venezuela		-	+				-	+
Viet Nam		+	+					
Yemen		+	+					
Zambia		+	+					
Zimbabwe		+	+					
Ratio		153/192	183/192	20/46	25/25	-/25	12/31	23/28

Table 8-1 Overview of (potential) parties to the relevant treaties

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Applicable provisions for intervening states		
Maritime Zones	Europe	Caribbean
Waters under the sovereignty of a coastal state		
Maritime Internal Waters	1997 Convention, Art. 20	2003 Agreement, Art. 15
Archipelagic Waters	Not mentioned	2003 Agreement, Art. 2, 15
Territorial Sea	1997 Convention, Art. 20	1998 Agreement, Preamble 2003 Agreement, 3 rd Title Shiprider Agreements
Transit Passage	Not mentioned	Not mentioned
Waters under functional jurisdiction of a coastal state		
Contiguous Zone	Not mentioned	Not mentioned
EEZ	Not mentioned	Not mentioned
Waters beyond the jurisdiction of coastal states		
High Seas	1990 Treaty, Art. 5 1995 Agreement, Art. 6 2002 Draft Convention, Art. 5	1998 Agreement, preamble 2003 Agreement, 4 th Title Shiprider Agreements

Table 8-2 Overview of applicable provisions for maritime drug-interdiction for intervening states in various maritime zones

Empowered law enforcement officials per maritime zone pursuant to the maritime drug-interdiction treaties (coastal states and intervening states)		
Maritime Zones	Europe	Caribbean
Waters under the sovereignty of a coastal state		
Maritime Internal Waters	National and Parties to the 1997 Convention; max. 25 nationalities	National and Parties to the 2003 Agreement and the Shipriders Agreements; max. 31 nationalities
Archipelagic Waters	National and Parties to the 1997 Convention; max. 25 nationalities	National and Parties to the 2003 Agreement and the Shiprider Agreements; max. 31 nationalities
Territorial Sea	National and Parties to the 1997 Convention; max. 25 nationalities	National and Parties to the 2003 Agreement and the Shiprider Agreements; max. 31 nationalities
Transit Passage	Not mentioned	Not mentioned
Waters under functional jurisdiction of a coastal state		
Contiguous Zone	National and Parties to the 1995 Convention and the 2002 Draft Convention; max. 46 nationalities	National and Parties to the 2003 Agreement and the Shiprider Agreements; max. 31 nationalities
EEZ	National and Parties to the 1995 Convention and the 2002 Draft Convention; max. 46 nationalities	National and Parties to the 2003 Agreement and the Shiprider Agreements; max. 31 nationalities
Waters beyond the jurisdiction of coastal states		
High Seas	National and Parties to the 1995 Convention and the 2002 Draft Convention; max. 46 nationalities	National and Parties to the 2003 Agreement and the Shiprider Agreements; max. 31 nationalities

Table 8-3 Overview of the quantity of nationalities of law enforcement officials that can be empowered with authority applicable in various relevant maritime zones.

Authority over suspect vessels pursuant to the general framework (GF) compared with the specific framework (SF)													
Maritime zones		Coastal State						Intervening State					
		Own ship		Foreign ship		Stateless ship		Own ship		Foreign ship		Stateless ship	
Under sovereignty of a coastal state and international straits	Mar. Int. Waters	●	●	●	●	●	●	●	●	●	●	●	●
	Territorial Sea	●	●	●	●	●	●	●	●	●	●	●	●
	Transit passage	●	●	●	●	●	●	●	●	●	●	●	●
Under functional jurisdiction of a coastal state	Contiguous Zone	●	●	●	●	●	●	●	●	●	●	●	●
	EEZ	●	●	●	●	●	●	●	●	●	●	●	●
Beyond jurisdiction of coastal states	High Seas	●	●	●	●	●	●	●	●	●	●	●	●
GF: General Framework (LOSC, 1988 Convention) SF: Specific Framework (maritime drug- interdiction treaties)		GF	SF	GF	SF	GF	SF	GF	SF	GF	SF	GF	SF
Legend		●	●	●	●	●	●	●	●	●	●	●	●
		●	●	●	●	●	●	●	●	●	●	●	●
		●	●	●	●	●	●	●	●	●	●	●	●
		●	●	●	●	●	●	●	●	●	●	●	●

Table 8-4 Overview of authority constituted by the general framework and by the specific framework for maritime drug interdiction

Chapter 8
Annex

Development of maritime drug interdiction		
Drug-related treaty	Waters under sovereignty coastal state	High Seas
1909 Shanghai Resolutions		
1912 Convention		
1925 Agreement		
1925 Protocol		
1925 Convention		
1931 Agreement		
1931 Convention		
1936 Convention (multilateral/world wide)	First (weak) attempt to interdict illicit drug trafficking in general	First (weak) attempt to interdict illicit drug trafficking in general
1946 Protocol		
1948 Protocol		
1953 Protocol		
1958 Geneva Conventions (multilateral/world wide)	Strong provision for maritime drug interdiction in the territorial sea by coastal state	
1961 Convention		
1971 Convention		
1972 Protocol		
1981 Agreement US-UK (bilateral/ Caribbean)		'No-objection' formula
1982 LOSC (multilateral/world wide)	Strong provision for maritime drug interdiction in the territorial sea by coastal state	Weak provision for maritime drug interdiction on the high seas by intervening state
1988 Convention (multilateral/world wide)		First treaty concerned with maritime drug trafficking on the high seas: authorization on <i>ad-hoc</i> base after an official request by the intervening state
1990 Treaty Spain-Italy (bilateral/ world wide)		Prior authorization by right of intervention by intervening state

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Annex

Development of maritime drug interdiction		
Name international agreement	Waters under sovereignty coastal state	High Seas
1995 Agreement (multilateral/world wide)		Authorization on request on an <i>ad-hoc</i> base by intervening state
1997 Convention (multilateral/ Europe)	Prior authorization under circumstances for intervening state	
1998 Agreement US-UK/UKOT (bilateral/Caribbean)	Prior authorization under circumstances for intervening state	Authorization on request, tacit for inspection by intervening state
2002 Draft Convention (Multilateral/world wide)		Prior authorization by right of intervention by intervening state
2003 Agreement (multilateral/Caribbean)	Three modes of authorization: prior, tacit and on request for intervening state	Default is prior authorization; tacit and request for intervening
Model Shiprider Agreement (bilateral/Caribbean)	Prior authorization for intervening state	Prior authorization for intervening state

Table 8-5 Overview of the development of maritime drug interdiction as laid down in treaties examined in this study

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Agreement on Illicit Traffic by Sea, implementing article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

The Member States of the Council of Europe, having expressed their consent to be bound by the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done at Vienna on 20 December 1988, hereinafter referred to as "The Vienna Convention",

Considering that the aim of the Council of Europe is to achieve a greater unity between its members;

Convinced of the need to pursue a common criminal policy aimed at the protection of society;

Considering that the fight against serious crime, which has become an increasingly international problem, calls for close co-operation on an international scale;

Desiring to increase their co-operation to the fullest possible extent in the suppression of illicit traffic in narcotic drugs and psychotropic substances by sea, in conformity with the international law of the sea and in full respect of the principle of right of freedom of navigation;

Considering, therefore, that Article 17 of the Vienna Convention should be supplemented by a regional agreement to carry out, and to enhance the effectiveness of the provisions of that article,

Have agreed as follows:

Chapter I Definitions

Article 1 Definitions

For the purposes of this Agreement:

- a. "Intervening State" means a State Party which has requested or proposes to request authorization from another Party to take action under this Agreement in relation to a vessel flying the flag or displaying the marks of registry of that other State Party;
- b. "Preferential jurisdiction" means, in relation to a flag State having concurrent jurisdiction over a relevant offence with another State, the right to exercise its jurisdiction on a priority basis, to the exclusion of the exercise of the other State's jurisdiction over the offence;
- c. "Relevant offence" means any offence of the kind described in Article 3, paragraph 1, of the Vienna Convention;
- d. "Vessel" means a ship or any other floating craft of any description, including hovercraft and submersible craft.

Chapter II International cooperation

Section 1 General provisions

Article 2 General principles

1. The Parties shall co-operate to the fullest extent possible to suppress illicit traffic in narcotic drugs and psychotropic substances by sea, in conformity with the international law of the sea.
2. In the implementation of this Agreement the Parties shall endeavor to ensure that their actions maximize the effectiveness of law enforcement measures against illicit traffic in narcotic drugs and psychotropic substances by sea.
3. Any action taken in pursuance of this Agreement shall take due account of the need not to interfere with or affect the rights and obligations of and the exercise of jurisdiction by coastal States, in accordance with the international law of the sea.
4. Nothing in this Agreement shall be so construed as to infringe the principle of non bis in idem, as applied in national law.
5. The Parties recognize the value of gathering and exchanging information concerning vessels, cargo and facts, whenever they consider that such exchange of information could assist a Party in the suppression of illicit traffic in narcotic drugs and psychotropic substances by sea.
6. Nothing in this Agreement affects the immunities of warships and other government vessels operated for non-commercial purposes.

Article 3 Jurisdiction

1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the relevant offences when the offence is committed on board a vessel flying its flag.
2. For the purposes of applying this Agreement, each Party shall take such measures as may be necessary to establish its jurisdiction over the relevant offences committed on board a vessel flying the flag or displaying

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the marks of registry or bearing any other indication of nationality of any other Party to this Agreement. Such jurisdiction shall be exercised only in conformity with this Agreement.

3. For the purposes of applying this Agreement, each Party shall take such measures as may be necessary to establish its jurisdiction over the relevant offences committed on board a vessel which is without nationality, or which is assimilated to a vessel without nationality under international law.
4. The flag State has preferential jurisdiction over any relevant offence committed on board its vessel.
5. Each State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, or at any later date, by a declaration addressed to the Secretary General of the Council of Europe, inform the other Parties to the agreement of the criteria it intends to apply in respect of the exercise of the jurisdiction established pursuant to paragraph 2 of this article.
6. Any State which does not have in service warships, military aircraft or other government ships or aircraft operated for non-commercial purposes, which would enable it to become an intervening State under this Agreement may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe declare that it will not apply paragraphs 2 and 3 of this Article. A State which has made such a declaration is under the obligation to withdraw it when the circumstances justifying the reservation no longer exist.

Article 4 Assistance to flag States

1. A Party which has reasonable grounds to suspect that a vessel flying its flag is engaged in or being used for the commission of a relevant offence, may request the assistance of other Parties in suppressing its use for that purpose. The Parties so requested shall render such assistance within the means available to them.
2. In making its request, the flag State may, inter alia, authorize the requested Party, subject to any conditions or limitations which may be imposed, to take some or all of the actions specified in this Agreement.
3. When the requested Party agrees to act upon the authorization of the flag State given to it in accordance with paragraph 2, the provisions of this Agreement in respect of the rights and obligations of the intervening State and the flag State shall, where appropriate and unless otherwise specified, apply to the requested and requesting Party, respectively.

Article 5 Vessels without nationality

1. A Party which has reasonable grounds to suspect that a vessel without nationality, or assimilated to a vessel without nationality under international law, is engaged in or being used for the commission of a relevant offence, shall inform such other Parties as appear most closely affected and may request the assistance of any such Party in suppressing its use for that purpose. The Party so requested shall render such assistance within the means available to it.
2. Where a Party, having received information in accordance with paragraph 1, takes action it shall be for that Party to determine what actions are appropriate and to exercise its jurisdiction over any relevant offences which may have been committed by any persons on board the vessel.
3. Any Party which has taken action under this article shall communicate as soon as possible to the Party which has provided information, or made a request for assistance, the results of any action taken in respect of the vessel and any persons on board.

Section 2 Authorization procedures

Article 6 Basic rules on authorization

Where the intervening State has reasonable grounds to suspect that a vessel, which is flying the flag or displaying the marks of registry of another Party or bears any other indications of nationality of the vessel, is engaged in or being used for the commission of a relevant offence, the intervening State may request the authorization of the flag State to stop and board the vessel in waters beyond the territorial sea of any Party, and to take some or all of the other actions specified in this Agreement. No such actions may be taken by virtue of this Agreement, without the authorization of the flag State.

Article 7 Decision on the request for authorization

The flag State shall immediately acknowledge receipt of a request for authorization under Article 6 and shall communicate a decision thereon as soon as possible and, wherever practicable, within four hours of receipt of the request.

Article 8 Conditions

1. If the flag State grants the request, such authorization may be made subject to conditions or limitations. Such conditions or limitations may, in particular, provide that the flag State's express authorization be given before any specified steps are taken by the intervening State.

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2. Each State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by declaration addressed to the Secretary General of the Council of Europe declare that, when acting as an intervening State, it may subject its intervention to the condition that persons having its nationality who are surrendered to the flag State under Article 15 and there convicted of a relevant offence, shall have the possibility to be transferred to the intervening State to serve the sentence imposed.

Section 3 **Rules governing action**

Article 9 **Authorized actions**

1. Having received the authorization of the flag State, and subject to the conditions or limitations, if any, made under Article 8, paragraph 1, the intervening State may take the following actions:
 - i. stop and board the vessel;
 - a. establish effective control of the vessel and over any person thereon;
 - b. take any action provided for in sub-paragraph ii of this article which is considered necessary to establish whether a relevant offence has been committed and to secure any evidence thereof;
 - c. require the vessel and any persons thereon to be taken into the territory of the intervening State and detain the vessel there for the purpose of carrying out further investigations;
 - ii. and, having established effective control of the vessel:
 - a. search the vessel, anyone on it and anything in it, including its cargo;
 - b. open or require the opening of any containers, and test or take samples of anything on the vessel;
 - c. require any person on the vessel to give information concerning himself or anything on the vessel;
 - d. require the production of documents, books or records relating to the vessel or any persons or objects on it, and make photographs or copies of anything the production of which the competent authorities have the power to require;
 - e. seize, secure and protect any evidence or material discovered on the vessel.
2. Any action taken under paragraph 1 of this article shall be without prejudice to any right existing under the law of the intervening State of suspected persons not to incriminate themselves.

Article 10 **Enforcement measures**

1. Where, as a result of action taken under Article 9, the intervening State has evidence that a relevant offence has been committed which would be sufficient under its laws to justify its either arresting the persons concerned or detaining the vessel, or both, it may so proceed.
2. The intervening State shall, without delay, notify the flag State of steps taken under paragraph 1 above.
3. The vessel shall not be detained for a period longer than that which is strictly necessary to complete the investigations into relevant offences. Where there are reasonable grounds to suspect that the owners of the vessel are directly involved in a relevant offence, the vessel and its cargo may be further detained on completion of the investigation. Persons not suspected of any relevant offence and objects not required as evidence shall be released.
4. Notwithstanding the provisions of the preceding paragraph, the intervening State and the flag State may agree with a third State, Party to this Agreement, that the vessel may be taken to the territory of that third State and, once the vessel is in that territory, the third State shall be treated for the purposes of this Agreement as an intervening State.

Article 11 **Execution of action**

1. Actions taken under Articles 9 and 10 shall be governed by the law of the intervening State.
2. Actions under Article 9, paragraph 1 a, b and d, 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.
3.
 - a. An official of the intervening State may not be prosecuted in the flag State for any act performed in the exercise of his functions. In such a case, the official shall be liable to prosecution in the intervening State as if the elements constituting the offence had been committed within the jurisdiction of that State.
 - b. In any proceedings instituted in the flag State, offences committed against an official of the intervening State with respect to actions carried out under Articles 9 and 10 shall be treated as if they had been committed against an official of the flag State.
4. The master of a vessel which has been boarded in accordance with this Agreement shall be entitled to communicate with the authorities of the vessel's flag State as well as with the owners or operators of the vessel

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for the purpose of notifying them that the vessel has been boarded. However, the authorities of the intervening State may prevent or delay any communication with the owners or operators of the vessel if they have reasonable grounds for believing that such communication would obstruct the investigations into a relevant offence.

Article 12 Operational safeguards

1. In the application of this Agreement, the Parties concerned shall take due account of the need not to endanger the safety of life at sea, the security of the vessel and cargo and not to prejudice any commercial or legal interest. In particular, they shall take into account:
 - a. the dangers involved in boarding a vessel at sea, and give consideration to whether this could be more safely done at the vessel's next port of call;
 - b. the need to minimize any interference with the legitimate commercial activities of a vessel;
 - c. the need to avoid unduly detaining or delaying a vessel;
 - d. the need to restrict the use of force to the minimum necessary to ensure compliance with the instructions of the intervening State.
2. The use of firearms against, or on, the vessel shall be reported as soon as possible to the flag State.
3. The death, or injury, of any person aboard the vessel shall be reported as soon as possible to the flag State. The authorities of the intervening State shall fully co-operate with the authorities of the flag State in any investigation the flag State may hold into any such death or injury.

Section 4 Rules governing the exercise of jurisdiction

Article 13 Evidence of offences

1. To enable the flag State to decide whether to exercise its preferential jurisdiction in accordance with the provisions of Article 14, the intervening State shall without delay transmit to the flag State a summary of the evidence of any offences discovered as a result of action taken pursuant to Article 9. The flag State shall acknowledge receipt of the summary forthwith.
2. If the intervening State discovers evidence which leads it to believe that offences outside the scope of this Agreement may have been committed, or that suspect persons not involved in relevant offences are on board the vessel, it shall notify the flag State. Where appropriate, the Parties involved shall consult.
3. The provisions of this Agreement shall be so construed as to permit the intervening State to take measures, including the detention of persons, other than those aimed at the investigation and prosecution of relevant offences, only when:
 - a. the flag State gives its express consent; or
 - b. such measures are aimed at the investigation and prosecution of an offence committed after the person has been taken into the territory of the intervening State.

Article 14 Exercise of preferential jurisdiction

1. A flag State wishing to exercise its preferential jurisdiction shall do so in accordance with the provisions of this article.
2. It shall notify the intervening State to this effect as soon as possible and at the latest within fourteen days from the receipt of the summary of evidence pursuant to Article 13. If the flag State fails to do this, it shall be deemed to have waived the exercise of its preferential jurisdiction.
3. Where the flag State has notified the intervening State that it exercises its preferential jurisdiction, the exercise of the jurisdiction of the intervening State shall be suspended, save for the purpose of surrendering persons, vessels, cargoes and evidence in accordance with this Agreement.
4. The flag State shall submit the case forthwith to its competent authorities for the purpose of prosecution.
5. Measures taken by the intervening State against the vessel and persons on board may be deemed to have been taken as part of the procedure of the flag State.

Article 15 Surrender of vessels, cargoes, persons and evidence

1. Where the flag State has notified the intervening State of its intention to exercise its preferential jurisdiction, and if the flag State so requests, the persons arrested, the vessel, the cargo and the evidence seized shall be surrendered to that State in accordance with the provisions of this Agreement.
2. The request for the surrender of arrested persons shall be supported by, in respect of each person, the original or a certified copy of the warrant of arrest or other order having the same effect, issued by a judicial authority in accordance with the procedure prescribed by the law of the flag State.
3. The Parties shall use their best endeavors to expedite the surrender of persons, vessels, cargoes and evidence.

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- Nothing in this Agreement shall be so construed as to deprive any detained person of his right under the law of the intervening State to have the lawfulness of his detention reviewed by a court of that State, in accordance with procedures established by its national law.
- Instead of requesting the surrender of the detained persons or of the vessel, the flag State may request their immediate release. Where this request has been made, the intervening State shall release them forthwith.

Article 16 Capital punishment

If any offence for which the flag State decides to exercise its preferential jurisdiction in accordance with Article 14 is punishable by death under the law of that State, and if in respect of such an offence the death penalty is not provided by the law of the intervening State or is not normally carried out, the surrender of any person may be refused unless the flag State gives such assurances as the intervening State considers sufficient that the death penalty will not be carried out.

Section 5 Procedural and other general rules

Article 17 Competent authorities

- Each Party shall designate an authority, which shall be responsible for sending and answering requests under Articles 6 and 7 of this Agreement. So far as is practicable, each Party shall make arrangements so that this authority may receive and respond to the requests at any hour of any day or night.
- The Parties shall furthermore designate a central authority which shall be responsible for the notification of the exercise of preferential jurisdiction under Article 14 and for all other communications or notifications under this Agreement.
- Each Party shall, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, communicate to the Secretary General of the Council of Europe the names and addresses of the authorities designated in pursuance of this article, together with any other information facilitating communication under this Agreement. Any subsequent change with respect to the name, address or other relevant information concerning such authorities shall likewise be communicated to the Secretary General.

Article 18 Communication between designated authorities

- The authorities designated under Article 17 shall communicate directly with one another.
- Where, for any reason, direct communication is not practicable, Parties may agree to use the communication channels of ICPO-Interpol or of the Customs Co-operation Council.

Article 19 Form of request and languages

- All communications under Articles 4 to 16 shall be made in writing. Modern means of telecommunications, such as telefax, may be used.
- Subject to the provisions of paragraph 3 of this article, translations of the requests, other communications and supporting documents shall not be required.
- At the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, any Party may communicate to the Secretary General of the Council of Europe a declaration that it reserves the right to require that requests, other communications and supporting documents sent to it, be made in or accompanied by a translation into its own language or into one of the official languages of the Council of Europe or into such one of these languages as it shall indicate. It may on that occasion declare its readiness to accept translations in any other language as it may specify. The other Parties may apply the reciprocity rule.

Article 20 Authentication and legalization

Documents transmitted in application of this Agreement shall be exempt from all authentication and legalization formalities.

Article 21 Content of request

A request under Article 6 shall specify:

- the authority making the request and the authority carrying out the investigations or proceedings;
- details of the vessel concerned, including, as far as possible, its name, a description of the vessel, any marks of registry or other signs indicating nationality, as well as its location, together with a request for confirmation that the vessel has the nationality of the requested Party;
- details of the suspected offences, together with the grounds for suspicion;
- the action it is proposed to take and an assurance that such action would be taken if the vessel concerned had been flying the flag of the intervening State.

Article 22 Information for owners and masters of vessels

Each Party shall take such measures as may be necessary to inform the owners and masters of vessels flying their flag that States Parties to this Agreement may be granted the authority to board vessels beyond the territorial sea of any Party for the purposes specified in this Agreement and to inform them in particular of the obligation to comply with instructions given by a boarding party from an intervening State exercising that authority.

Article 23 Restriction of use

The flag State may make the authorization referred to in Article 6 subject to the condition that the information or evidence obtained will not, without its prior consent, be used or transmitted by the authorities of the intervening State in respect of investigations or proceedings other than those relating to relevant offences.

Article 24 Confidentiality

The Parties concerned shall, if this is not contrary to the basic principles of their national law, keep confidential any evidence and information provided by another Party in pursuance of this Agreement, except to the extent that its disclosure is necessary for the application of the Agreement or for any investigations or proceedings.

Section 6 Costs and damages

Article 25 Costs

1. Unless otherwise agreed by the Parties concerned, the cost of carrying out any action under Articles 9 and 10 shall be borne by the intervening State, and the cost of carrying out action under Articles 4 and 5 shall normally be borne by the Party which renders assistance.
2. Where the flag State has exercised its preferential jurisdiction in accordance with Article 14, the cost of returning the vessel and of transporting suspected persons and evidence shall be borne by it.

Article 26 Damages

1. If, in the process of taking action pursuant to Articles 9 and 10 above, any person, whether natural or legal, suffers loss, damage or injury as a result of negligence or some other fault attributable to the intervening State, it shall be liable to pay compensation in respect thereof.
2. Where the action is taken in a manner which is not justified by the terms of this Agreement, the intervening State shall be liable to pay compensation for any resulting loss, damage or injury. The intervening State shall also be liable to pay compensation for any such loss, damage or injury, if the suspicions prove to be unfounded and provided that the vessel boarded, the operator or the crew have not committed any act justifying them.
3. Liability for any damage resulting from action under Article 4 shall rest with the requesting State, which may seek compensation from the requested State where the damage was a result of negligence or some other fault attributable to that State.

Chapter III Final provisions

Article 27 Signature and entry into force

1. This Agreement shall be open for signature by the member States of the Council of Europe which have already expressed their consent to be bound by the Vienna Convention. They may express their consent to be bound by this Agreement by:
 - a. signature without reservation as to ratification, acceptance or approval; or
 - b. signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval.
2. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.
3. This Agreement shall enter into force on the first day of the month following the expiry of a period of three months after the date on which three member States of the Council of Europe have expressed their consent to be bound by the Agreement in accordance with the provisions of paragraph 1.
4. In respect of any signatory State which subsequently expresses its consent to be bound by it, the Agreement shall enter into force on the first day of the month following the expiry of a period of three months after the date of its consent to be bound by the Agreement in accordance with the provisions of paragraph 1.

Article 28 Accession

1. After the entry into force of this Agreement, the Committee of Ministers of the Council of Europe, after consulting the Contracting states to the Agreement, may invite any State which is not a member of the Council but which has expressed its consent to be bound by the Vienna Convention to accede to this

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Agreement, by a decision taken by the majority provided for in Article 20.d of the Statute of the Council of Europe and by the unanimous vote of the representatives of the Contracting states entitled to sit on the Committee.

2. In respect of any acceding State, the Agreement shall enter into force on the first day of the month following the expiry of a period of three months after the date of deposit of the instrument of accession with the Secretary General of the Council of Europe.

Article 29 Territorial application

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories in respect of which its consent to be bound to this Agreement shall apply.
2. Any State may, at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend its consent to be bound by the present Agreement to any other territory specified in the declaration. In respect of such territory the Agreement shall enter into force on the first day of the month following the expiry of a period of three months after the date of receipt of such declaration by the Secretary General.
3. In respect of any territory subject to a declaration under paragraphs 1 and 2 above, authorities may be designated under Article 17, paragraphs 1 and 2.
4. Any declaration made under the preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the expiry of a period of three months after the date of receipt of such notification by the Secretary General.

Article 30 Relationship to other conventions and agreements

1. This Agreement shall not affect rights and undertakings deriving from the Vienna Convention or from any international multilateral conventions concerning special matters.
2. The Parties to the Agreement may conclude bilateral or multilateral agreements with one another on the matters dealt with in this Agreement, for the purpose of supplementing or strengthening its provisions or facilitating the application of the principles embodied in it and in Article 17 of the Vienna Convention.
3. If two or more Parties have already concluded an agreement or treaty in respect of a subject dealt with in this Agreement or have otherwise established their relations in respect of that subject, they may agree to apply that agreement or treaty or to regulate those relations accordingly, in lieu of the present Agreement, if it facilitates international co-operation.

Article 31 Reservations

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that it avails itself of one or more of the reservations provided for in Article 3, paragraph 6, Article 19, paragraph 3 and Article 34, paragraph 5. No other reservation may be made.
2. Any State which has made a reservation under the preceding paragraph may wholly or partly withdraw it by means of a notification addressed to the Secretary General of the Council of Europe. The withdrawal shall take effect on the date of receipt of such notification by the Secretary General.
3. A Party which has made a reservation in respect of a provision of this Agreement may not claim the application of that provision by any other Party. It may, however, if its reservation is partial or conditional, claim the application of that provision in so far as it has itself accepted it.

Article 32 Monitoring committee

1. After the entry into force of the present Agreement, a monitoring committee of experts representing the Parties shall be convened at the request of a Party to the Agreement by the Secretary General of the Council of Europe.
2. The monitoring committee shall review the working of the Agreement and make appropriate suggestions to secure its efficient operation.
3. The monitoring committee may decide its own procedural rules.
4. The monitoring committee may decide to invite States not Parties to the Agreement as well as international organizations or bodies, as appropriate, to its meetings.
5. Each Party shall send every second year a report on the operation of the Agreement to the Secretary General of the Council of Europe in such form and manner as may be decided by the monitoring committee or the European Committee on Crime Problems. The monitoring committee may decide to circulate the information supplied or a report thereon to the Parties and to such international organizations or bodies as it deems appropriate.

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Article 33 Amendments

1. Amendments to this Agreement may be proposed by any Party, and shall be communicated by the Secretary General of the Council of Europe to the member States of the Council of Europe and to every non-member State which has acceded to or has been invited to accede to the Agreement in accordance with the provisions of Article 28.
2. Any amendment proposed by a Party shall be communicated to the European Committee on Crime Problems, which shall submit to the Committee of Ministers its opinion on the proposed amendment.
3. The Committee of Ministers shall consider the proposed amendment and the opinion submitted by the European Committee on Crime Problems, and may adopt the amendment.
4. The text of any amendment adopted by the Committee of Ministers in accordance with paragraph 3 of this article shall be forwarded to the Parties for acceptance.
5. Any amendment adopted in accordance with paragraph 3 of this article shall come into force on the thirtieth day after all the Parties have informed the Secretary General of their acceptance thereof.

Article 34 Settlement of disputes

1. The European Committee on Crime Problems of the Council of Europe shall be kept informed of the interpretation and application of this Agreement.
2. In case of a dispute between Parties as to the interpretation or application of this Agreement, the Parties shall seek a settlement of the dispute through negotiation or any other peaceful means of their choice, including submission of the dispute to the European Committee on Crime Problems, to an arbitral tribunal whose decisions shall be binding upon the Parties, mediation, conciliation or judicial process, as agreed upon by the Parties concerned.
3. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, or on any later date, by a declaration addressed to the Secretary General of the Council of Europe, declare that, in respect of any dispute concerning the interpretation or application of this Agreement, it recognizes as compulsory, without prior agreement, and subject to reciprocity, the submission of the dispute to arbitration in accordance with the procedure set out in the Annex to this Agreement.
4. Any dispute which has not been settled in accordance with paragraphs 2 or 3 of this article shall be referred, at the request of any one of the parties to the dispute, to the International Court of Justice for decision.
5. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that it does not consider itself bound by paragraph 4 of this article.
6. Any Party having made a declaration in accordance with paragraphs 3 or 5 of this article may at any time withdraw the declaration by notification to the Secretary General of the Council of Europe.

Article 35 Denunciation

1. Any Party may, at any time, denounce this Agreement by means of a notification addressed to the Secretary General of the Council of Europe.
2. Such denunciation shall become effective on the first day of the month following the expiry of a period of three months after the date of receipt of the notification by the Secretary General.
3. The present Agreement shall, however, continue to remain effective in respect of any actions or proceedings based on applications or requests made during the period of its validity in respect of the denouncing Party.

Article 36 Notifications

The Secretary General of the Council of Europe shall notify the member States of the Council, any State which has acceded to this Agreement and the Secretary General of the United Nations of:

- a. any signature;
- b. the deposit of any instrument of ratification, acceptance, approval or accession;
- c. the name of any authority and any other information communicated pursuant to Article 17;
- d. any reservation made in accordance with Article 31, paragraph 1;
- e. the date of entry into force of this Agreement in accordance with Articles 27 and 28;
- f. any request made under Article 32, paragraph 1, and the date of any meeting convened under that paragraph;
- g. any declaration made under Article 3, paragraphs 5 and 6, Article 8, paragraph 2, Article 19, paragraph 3 and Article 34, paragraphs 3 and 5;
- h. any other act, notification or communication relating to this Agreement.

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In Witness Whereof the undersigned, being duly authorized thereto, have signed this Agreement.

Done at Strasbourg, this 31st day of January 1995, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe and to any State invited to accede to this Agreement.

Annex

1. The Party to the dispute requesting arbitration pursuant to Article 34, paragraph 3, shall inform the other Party in writing of the claim and of the grounds on which its claim is based.
2. The Parties concerned shall establish an arbitral tribunal.
3. The arbitral tribunal shall consist of three members. Each Party shall nominate an arbitrator. Both Parties shall, by common accord, appoint the presiding arbitrator.
4. Failing such nomination or such appointment by common accord within four months from the date on which the arbitration was requested, the necessary nomination or appointment shall be entrusted to the Secretary General of the Permanent Court of Arbitration.
5. Unless the Parties agree otherwise, the tribunal shall determine its own procedure.
6. Unless otherwise agreed between the Parties, the tribunal shall decide on the basis of the applicable rules of international law or, in the absence of such rules, *ex aequo et bono*.
7. The tribunal shall reach its decision by a majority of votes. Its decision shall be final and binding.

The 1997 Convention (Naples II)

Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on mutual assistance and cooperation between customs administrations

The High Contracting Parties to this Convention, Member States of the European Union,

Referring to the Act of the Council of the European Union of 18 December 1997,

Recalling the need to strengthen the commitments contained in the Convention on mutual assistance between customs administrations, signed in Rome on 7 September 1967,

Considering that customs administrations are responsible on the customs territory of the Community and, in particular at its points of entry and exit, for the prevention, investigation and suppression of offences not only against Community rules, but also against national laws, in particular the cases covered by Articles 36 and 223 of the Treaty establishing the European Community,

Considering that a serious threat to public health, morality and security is constituted by the developing trend towards illicit trafficking of all kinds,

Considering that particular forms of cooperation involving cross-border actions for the prevention, investigation and prosecution of certain infringements of both the national legislation of the Member States and Community customs regulations should be regulated, and that such cross-border actions must always be carried out in compliance with the principles of legality (conforming with the relevant law applicable in the requested Member State and with the Directives of the competent authorities of that Member State), subsidiarity (such actions to be launched only if it is clear that other less significant actions are not appropriate) and proportionality (the scale and duration of the action to be determined in the light of the seriousness of the presumed infringement),

Convinced that it is necessary to reinforce cooperation between customs administrations, by laying down procedures under which customs administrations may act jointly and exchange data concerned with illicit trafficking activities,

Bearing in mind that the customs administrations in their day-to-day work have to implement both Community and national provisions, and that there is consequently an obvious need to ensure that the provisions of mutual assistance and cooperation in both sectors evolve as far as possible in parallel,

Have agreed on the following provisions:

TITLE I GENERAL PROVISIONS

Article 1 Scope

1. Without prejudice to the competences of the Community, the Member States of the European Union shall provide each other with mutual assistance and shall cooperate with one another through their customs administrations, with a view to:
 - preventing and detecting infringements of national customs provisions, and
 - prosecuting and punishing infringements of Community and national customs provisions.
2. Without prejudice to Article 3, this Convention shall not affect the provisions applicable regarding mutual assistance in criminal matters between judicial authorities, more favorable provisions in bilateral or multi-lateral agreements between Member States governing cooperation as provided for in paragraph 1 between the customs authorities or other competent authorities of the Member States, or arrangements in the same field agreed on the basis of uniform legislation or of a special system providing for the reciprocal application of measures of mutual assistance.

Article 2 Powers

The customs administrations shall apply this Convention with the limits of the powers conferred upon them under national provisions. Nothing in this Convention may be construed as affecting the powers conferred under national provisions upon the customs administrations within the meaning of this Convention.

Article 3 Relationship to mutual assistance provided by the judicial authorities

1. This Convention covers mutual assistance and cooperation in the framework of criminal investigations concerning infringements of national and Community customs provisions, concerning which the applicant authority has jurisdiction on the basis of the national provisions of the relevant Member State.
2. Where a criminal investigation is carried out by or under the direction of a judicial authority, that authority shall determine whether requests for mutual assistance or cooperation in that connection shall be submitted on the basis of the provisions applicable concerning mutual assistance in criminal matters or on the basis of this Convention.

Article 4 **Definitions**

For the purposes of this Convention, the following definitions shall apply:

1. 'national customs provisions': all laws, regulations and administrative provisions of a Member State the application of which comes wholly or partly within the jurisdiction of the customs administration of the Member State concerning:
 - cross-border traffic in goods subject to bans, restrictions or controls, in particular pursuant to Articles 36 and 223 of the Treaty establishing the European Community,
 - non-harmonized excise duties;
2. 'Community customs provisions':
 - the body of Community provisions and associated implementing provisions governing the import, export, transit and presence of goods traded between Member States and third countries, and between Member States in the case of goods that do not have Community status within the meaning of Article 9(2) of the Treaty establishing the European Community or goods subject to additional controls or investigations for the purposes of establishing their Community status,
 - the body of provisions adopted at Community level under the common agricultural policy and the specific provisions adopted with regard to goods resulting from the processing of agricultural products,
 - the body of provisions adopted at Community level for harmonized excise duties and for value-added tax on importation together with the national provisions implementing them;
3. 'infringement': acts in conflict with national or Community customs provisions, including, inter alia:
 - participation in, or attempts to commit, such infringements,
 - participation in a criminal organization committing such infringements,
 - the laundering of money deriving from the infringements referred to in this paragraph;
4. 'mutual assistance': the granting of assistance between customs administrations as provided for in this Convention;
5. 'applicant authority': the competent authority of the Member State which makes a request for assistance;
6. 'requested authority': the competent authority of the Member State to which a request for assistance is made;
7. 'customs administrations': Member States' customs authorities as well as other authorities with jurisdiction for implementing the provisions of this Convention;
8. 'personal data': all information relating to an identified or identifiable natural person; a person is considered to be identifiable if he or she can be directly or indirectly identified, inter alia by means of an identification number or of one or more specific elements which are characteristic of his or her physical, physiological, psychological, economic, cultural or social identity;
9. 'cross-border cooperation': cooperation between customs administrations across the borders of each Member State.

Article 5 **Central coordinating units**

1. Member States shall appoint in their customs authorities a central unit (coordinating unit). It shall be responsible for receiving all applications for mutual assistance under this Convention and for coordinating mutual assistance, without prejudice to paragraph 2. The unit shall also be responsible for cooperation with other authorities involved in an assistance measure under this Convention. The coordinating units of the Member States shall maintain the necessary direct contact with each other, particularly in the cases covered by Title IV.
2. The activity of the central coordinating units shall not exclude, particularly in an emergency, direct cooperation between other services of the customs authorities of the Member States. For reasons of efficiency and consistency, the central coordinating units shall be informed of any action involving such direct cooperation.
3. If the customs authority is not, or not completely, competent to process a request, the central coordinating unit shall forward the request to the competent national authority and inform the applicant authority that it has done so.
4. If it is not possible to accede to the request for legal or substantive reasons, the coordinating unit shall return the request to the applicant authority with an explanation as to why the request could not be processed.

Article 6 **Liaison officers**

1. Member States may make agreements between themselves on the exchange of liaison officers for limited or unlimited periods, and on mutually-agreed conditions.
2. Liaison officers shall have no powers of intervention in the host country.
3. In order to promote cooperation between Member States' customs administrations, liaison officers may, with the agreement or at the request of the competent authorities of the Member States, have the following duties:

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- a. promoting and speeding up the exchange of information between the Member States;
 - b. providing assistance in investigations which relate to their own Member State or the Member State they represent;
 - c. providing support in dealing with requests for assistance;
 - d. advising and assisting the host country in preparing and carrying out cross-border operations;
 - e. any other duties which Member States may agree between themselves.
4. Member States may agree bilaterally or multilaterally on the terms of reference and the location of the liaison officers. Liaison officers may also represent the interests of one or more Member States.

Article 7 **Obligation to prove identity**

Unless otherwise specified in this Convention, officers of the applicant authority present in another Member State in order to exercise the rights laid down in this Convention shall at all times be able to produce written authority stating their identity and their official functions.

TITLE II **ASSISTANCE ON REQUEST**

Article 8 **Principles**

1. In order to provide the assistance required under this Title, the requested authority or the competent authority which it has addressed shall proceed as though it were acting on its own account or at the request of another authority in its own Member State. In so doing it shall avail itself of all the legal powers at its disposal within the framework of its national law in order to respond to the request.
2. The requested authority shall extend this assistance to all circumstances of the infringement which have any recognizable bearing on the subject of the request for assistance without this requiring any additional request. In case of doubt, the requested authority shall firstly contact the applicant authority.

Article 9 **Form and content of the request for assistance**

1. Requests for assistance shall always be made in writing. Documents necessary for the execution of such requests shall accompany the request.
2. Requests pursuant to paragraph 1 shall include the following information:
 - a. the applicant authority making the request;
 - b. the measure requested;
 - c. the object of, and the reason for, the request;
 - d. the laws, rules and other legal provisions involved;
 - e. indications as exact and comprehensive as possible on the natural or legal persons being the target of the investigations;
 - f. a summary of the relevant facts, except in cases provided for in Article 13.
3. Requests shall be submitted in an official language of the Member State of the requested authority or in a language acceptable to such authority.
4. When required because of the urgency of the situation, oral requests shall be accepted, but must be confirmed in writing as soon as possible.
5. If a request does not meet the formal requirements, the requested authority may ask for it to be corrected or completed; measures necessary to comply with the request may be commenced in the meantime.
6. The requested authority shall agree to apply a particular procedure in response to a request, provided that that procedure is not in conflict with the legal and administrative provisions of the requested Member State.

Article 10 **Requests for information**

1. At the request of the applicant authority, the requested authority shall communicate to it all information which may enable it to prevent, detect and prosecute infringements.
2. The information communicated is to be accompanied by reports and other documents, or certified copies or extracts of the same, on which that information is based and which are in the possession of the request authority or which were produced or obtained in order to execute the request for information.
3. By agreement between the applicant authority and the requested authority, officers authorized by the applicant authority may, subject to detailed instructions from the requested authority, obtain information pursuant to paragraph 1 from the offices of the requested Member State. This shall apply to all information derived from the documentation to which the staff of those offices have access. Those officers shall be authorized to take copies of the said documentation.

Article 11 **Requests for surveillance**

At the request of the applicant authority, the requested authority shall as far as possible keep a special watch or arrange for a special watch to be kept on persons where there are serious grounds for believing that they have

infringed Community or national customs provisions or that they are committing or have carried out preparatory acts with a view to the commission of such infringements. At the request of the applicant authority, the requested authority shall also keep a watch on places, means of transport and goods connected with activities which might be in breach of the abovementioned customs provisions.

Article 12 **Requests for enquiries**

1. The requested authority shall at the request of the applicant authority carry out, or arrange to have carried out, appropriate enquiries concerning operations which constitute, or appear to the applicant authority to constitute, infringements. The requested authority shall communicate the results of such enquiries to the applicant authority. Article 10(2) shall apply *mutatis mutandis*.
2. By agreement between the applicant authority and the requested authority, officers appointed by the applicant authority may be present at the enquiries referred to in paragraph 1. Enquiries shall at all times be carried out by officers of the requested authority. The applicant authority's officers may not, of their own initiative, assume the powers conferred on officers of the requested authority. They shall, however, have access to the same premises and the same documents as the latter, through their intermediary and for the sole purpose of the enquiry being carried out.

Article 13 **Notification**

1. At the request of the applicant authority, the requested authority shall, in accordance with the national rules of the Member State in which it is based, notify the addressee or have it notified of all instruments or decisions which emanate from the competent authorities of the Member State in which the applicant authority is based and concern the application of this Convention.
2. Requests for notification, mentioning the subject of the instrument or decision to be notified, shall be accompanied by a translation in the official language or an official language of the Member State in which the requested authority is based, without prejudice to the latter's right to waive such a translation.

Article 14 **Use as evidence**

Findings, certificates, information, documents, certified true copies and other papers obtained in accordance with their national law by officers of the requested authority and transmitted to the applicant authority in the cases of assistance provided for in Articles 10 to 12 may be used as evidence in accordance with national law by the competent bodies of the Member State where the applicant authority is based.

TITLE III **SPONTANEOUS ASSISTANCE**

Article 15 **Principle**

The competent authorities of each Member State shall, as laid down in Articles 16 and 17, subject to any limitations imposed by national law, provide assistance to the competent authorities of the other Member States without prior request.

Article 16 **Surveillance**

Where it serves the prevention, detection and prosecution of infringements in another Member State, each Member State's competent authorities shall:

- a. as far as is possible keep, or have kept, the special watch described in Article 11;
- b. communicate to the competent authorities of the other Member States concerned all information in their possession and, in particular, reports and other documents or certified true copies or extracts thereof, concerning operations which are connected with a planned or committed infringement.

Article 17 **Spontaneous information**

The competent authorities of each Member State shall immediately send to the competent authorities of the other Member States concerned all relevant information concerning planned or committed infringements and, in particular, information concerning the goods involved and new ways and means of committing such infringements.

Article 18 **Use as evidence**

Surveillance reports and information obtained by officers of one Member State and communicated to another Member State in the course of the spontaneous assistance provided for in Articles 15 to 17 may be used in accordance with national law as evidence by the competent bodies of the Member State receiving the information.

TITLE IV SPECIAL FORMS OF COOPERATION

Article 19 Principles

1. Customs administrations shall engage in cross-border cooperation in accordance with this Title. They shall provide each other with the necessary assistance in terms of staff and organizational support. Requests for cooperation shall, as a rule, take the form of requests for assistance in accordance with Article 9. In specific cases referred to in this Title, officers of the applicant authority may engage in activities in the territory of the requested State, with the approval of the requested authority.
Coordination and planning of cross-border operations shall be the responsibility of the central coordinating units in accordance with Article 5.
2. Cross-border cooperation within the meaning of paragraph 1 shall be permitted for the prevention, investigation and prosecution of infringements in cases of:
 - a. illicit traffic in drugs and psychotropic substances, weapons, munitions, explosive materials, cultural goods, dangerous and toxic waste, nuclear material or materials or equipment intended for the manufacture of atomic, biological and/or chemical weapons (prohibited goods);
 - b. trade in substances listed in Tables I and II of the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances and intended for the illegal manufacture of drugs (precursor substances);
 - c. illegal cross-border commercial trade in taxable goods to evade tax or to obtain unauthorized State payments in connection with the import or export of goods, where the extent of the trade and the related risk to taxes and subsidies is such that the potential financial cost to the budget of the European Communities or the Member States is considerable;
 - d. any other trade in goods prohibited by Community or national rules.
3. The requested authority shall not be obliged to engage in the specific forms of cooperation referred to in this Title if the type of investigation sought is not permitted or not provided for under the national law of the requested Member State. In this case, the applicant authority shall be entitled to refuse, for the same reason, the corresponding type of cross-border cooperation in the reverse case, where it is requested by an authority of the requested Member State.
4. If necessary under the national law of the Member States, the participating authorities shall apply to their judicial authorities for approval of the planned investigations. Where the competent judicial authorities make their approval subject to certain conditions and requirements, the participating authorities shall ensure that those conditions and requirements are observed in the course of the investigations.
5. Where officers of a Member State engage in activities in the territory of another Member State by virtue of this Title and cause damage by their activities, the Member State in whose territory the damage was caused shall make good the damage, in accordance with its national legislation in the same way as it would have done if the damage had been caused by its own officers. That Member State will be reimbursed in full by the Member State whose officers have caused the damage for the amounts it has paid to the victims or to other entitled persons or institutions.
6. Without prejudice to the exercise of its rights vis-à-vis third parties and notwithstanding the obligation to make good damages according to the second sentence of paragraph 5, each Member State shall refrain, in the case provided for in the first sentence of paragraph 5, from requesting reimbursement of the amount of damages it has sustained from another Member State.
7. Information obtained by officers during cross-border cooperation provided for in Articles 20 to 24 may be used, in accordance with national law and subject to particular conditions laid down by the competent authorities of the State in which the information was obtained, as evidence by the competent bodies of the Member State receiving the information.
8. In the course of the operations referred to in Articles 20 to 24, officers on mission in the territory of another Member State shall be treated in the same way as officers of that State as regards infringements committed against them or by them.

Article 20 Hot pursuit

1. Officers of the customs administration of one of the Member States pursuing in their country, an individual observed in the act of committing one of the infringements referred to in Article 19(2) which could give rise to extradition, or participating in such an infringement, shall be authorized to continue pursuit in the territory of another Member State without prior authorization where, given the particular urgency of the situation, it was not possible to notify the competent authorities of the other Member State prior to entry into that territory or where these authorities have been unable to reach the scene in time to take the pursuit. The pursuing officers shall, not later than when they cross the border, contact the competent authorities of the Member State in whose territory the pursuit is to take place. The pursuit shall cease as soon as the Member State in whose territory the pursuit is taking place so requests. At the request of the pursuing officers, the competent

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- authorities of the said Member State shall challenge the pursued person so as to establish his identity or to arrest him. Member States shall inform the depositary of the pursuing officers to whom this provision applies; the depositary shall inform the other Member States.
2. The pursuit shall be carried out in accordance with the following procedures, defined by the declaration provided for in paragraph 6:
 - a. the pursuing officers shall not have the right to apprehend;
 - b. however, if no request to cease the pursuit is made and if the competent authorities of the Member State in whose territory the pursuit is taking place are unable to intervene quickly enough, the pursuing officers may apprehend the person pursued until the officers of the said Member State, who must be informed without delay, are able to establish his identity or arrest him.
 3. Pursuit shall be carried out in accordance with paragraphs 1 and 2 in one of the following ways as defined by the declaration provided for in paragraph 6:
 - a. in an area or during a period, as from the crossing of the border, to be established in the declaration;
 - b. without limit in space or time.
 4. Pursuit shall be subject to the following general conditions:
 - a. the pursuing officers shall comply with the provisions of this Article and with the law of the Member State in whose territory they are operating; they shall obey the instructions of the competent authorities of the said Member State;
 - b. when the pursuit takes place on the sea, it shall, where it extends to the high sea or the exclusive economic zone, be carried out in conformity with the international law of the sea as reflected in the United Nations Convention on the Law of the Sea, and, when it takes place in the territory of another Member State, it shall be carried out in accordance with the provisions of this Article;
 - c. entry into private homes and places not accessible to the public shall be prohibited;
 - d. the pursuing officers shall be easily identifiable, either by their uniform or an armband or by means of accessories fitted to their means of transport; the use of civilian clothes combined with the use of unmarked means of transport without the aforementioned identification is prohibited; the pursuing officers shall at all times be able to prove that they are acting in an official capacity;
 - e. the pursuing officers may carry their service weapons, save (i) where the requested Member State has made a general declaration that weapons may never be carried into its territory or (ii) where specifically decided otherwise by the requested Member State. When officers of another Member State are permitted to carry their service weapons, their use shall be prohibited save in cases of legitimate self-defense;
 - f. once the pursued person has been apprehended as provided for in paragraph 2(b), for the purpose of bringing him before the competent authorities of the Member State in whose territory the pursuit took place he may be subjected only to a security search; handcuffs may be used during his transfer; objects carried by the pursued person may be seized;
 - g. after each operation mentioned in paragraphs 1, 2 and 3, the pursuing officers shall present themselves before the competent authorities of the Member State in whose territory they were operating and shall give an account of their mission; at the request of those authorities, they must remain at their disposal until the circumstances of their action have been adequately elucidated; this condition shall apply even where the pursuit has not resulted in the arrest of the pursued person;
 - h. the authorities of the Member State from which the pursuing officers have come shall, when requested by the authorities of the Member State in whose territory the pursuit took place, assist the enquiry subsequent to the operation in which they took part, including legal proceedings.
 5. A person who, following the action provided for in paragraph 2, has been arrested by the competent authorities of the Member State in whose territory the pursuit took place may, whatever his nationality, be held for questioning. The relevant rules of national law shall apply *mutatis mutandis*. If the person is not a national of the Member State in whose territory he was arrested, he shall be released no later than six hours after his arrest, not including the hours between midnight and 9 a.m., unless the competent authorities of the said Member State have previously received a request for his provisional arrest for the purposes of extradition in any form.
 6. On signing this convention, each Member State shall make a declaration in which it shall define, on the basis of paragraphs 2, 3 and 4, the procedures for implementing pursuit in its territory. A Member State may at any time replace its declaration by another declaration, provided the latter does not restrict the scope of the former. Each declaration shall be made after consultations with each of the Member States concerned and with a view to obtaining equivalent arrangements in those States.
 7. Member States may, on a bilateral basis, extend the scope of paragraph 1 and adopt additional provisions in implementation of this Article.

8. When depositing its instruments of adoption of this Convention, a Member State may declare that it is not bound by this Article or by part thereof. Such declaration may be withdrawn at any time.

Article 21 **Cross-border surveillance**

1. Officers of the customs administration of one of the Member States who are keeping under observation in their country persons in respect of whom there are serious grounds for believing that they are involved in one of the infringements referred to in Article 19(2) shall be authorized to continue their observation in the territory of another Member State where the latter has authorized cross-border observation in response to a request for assistance which has previously been submitted. Conditions may be attached to the authorization. Member States shall inform the depositary of the officers to whom this provision applies; the depositary shall inform the other Member States. On request, the observation shall be entrusted to officers of the Member State in whose territory it is carried out. The request referred to in the first subparagraph shall be sent to an authority designated by each of the Member States empowered to grant the requested authorization or pass on the request. Member States shall inform the depositary of the authority designated for this purpose; the depositary shall inform the other Member States.
2. Where, for particularly urgent reasons, prior authorization of the other Member State cannot be requested, the officers conducting the observation shall be authorized to continue beyond the border the observation of persons in respect of whom there are serious grounds for believing that they are involved in one of the infringements referred to in Article 19(2), provided that the following conditions are met:
 - a. the competent authorities of the Member State in whose territory the observation is to be continued shall be notified immediately of the crossing of the border, during the observation;
 - b. a request submitted in accordance with paragraph 1 and outlining the grounds for crossing the border without prior authorization shall be submitted without delay. Observation shall cease as soon as the Member State in whose territory it is taking place so requests, following the notification referred to in (a) or the request referred to in (b), or where authorization has not been obtained five hours after the border was crossed.
3. The observation referred to in paragraph 1 and 2 shall be carried out only under the following general conditions:
 - a. the officers conducting the observation shall comply with the provisions of this Article and with the law of the Member State in whose territory they are operating; they must obey the instructions of the competent authorities of the said Member State;
 - b. except in the situations provided for in paragraph 2, the officers shall, during the observation, carry a document certifying that authorization has been granted;
 - c. the officers conducting the observation shall be able at all times to provide proof that they are acting in an official capacity;
 - d. the officers conducting the observation may carry their service weapons during the observation save (i) where the requested Member State has made a general declaration that weapons may never be carried into its territory or (ii) where specifically decided otherwise by the requested Member State. When officers of another Member State are permitted to carry their service weapons, their use shall be prohibited save in cases of legitimate self-defense;
 - e. entry into private homes and places not accessible to the public shall be prohibited;
 - f. the officers conducting the observation may neither challenge nor arrest the person under observation;
 - g. all operations shall be the subject of a report to the authorities of the Member State in whose territory they took place; the officers conducting the observation may be required to appear in person;
 - h. the authorities of the Member State from which the observing officers have come shall, when requested by the authorities of the Member State in whose territory the observation took place, assist the enquiry subsequent to the operation in which they took part, including legal proceedings.
4. The Member States may, at bilateral level, extend the scope of this Article and adopt additional measures in implementation thereof.
5. When depositing its instruments of adoption of this Convention, a Member State may declare that it is not bound by this Article or by part thereof. Such declaration may be withdrawn at any time.

Article 22 **Controlled delivery**

1. Each Member State shall undertake to ensure that, at the request of another Member State, controlled deliveries may be permitted on its territory in the framework of criminal investigations into extraditable offences.
2. The decision to carry out controlled deliveries shall be taken in each individual case by the competent authorities of the requested Member State, with due regard for the national law of that State.
3. Controlled deliveries shall take place in accordance with the procedures of the requested Member State. Competence to act and to direct operations shall lie with the competent authorities of that Member State.

The requested authority shall take over control of the delivery when the goods cross the border or at an agreed hand-over point in order to avoid any interruption of surveillance. During the rest of the journey it shall ensure that the goods are kept permanently under surveillance in such a way that at any time it has the possibility of arresting the perpetrators and seizing the goods.

4. Consignments the controlled delivery of which is agreed to may, with the consent of the Member States concerned, be intercepted and allowed to continue with the initial contents intact or removed or replaced in whole or in part.

Article 23 Covert investigations

1. At the request of the applicant authority, the requested authority may authorize officers of the customs administration of the requesting Member State or officers acting on behalf of such administration operating under cover of a false identity (covert investigators) to operate on the territory of the requested Member State. The applicant authority shall make the request only where it would be extremely difficult to elucidate the facts without recourse to the proposed investigative measures. The officers in question shall be authorized in the course of their activities to collect information and make contact with subjects or other persons associated with them.
2. Covert investigations in the requested Member State shall have a limited duration. The preparation and supervision of the investigations shall take place in close cooperation between the relevant authorities of the requested and applicant Member States.
3. The conditions under which a covert investigation is allowed, as well as the conditions under which it is carried out, shall be determined by the requested authority in accordance with its national law. If, in the course of a covert investigation, information is acquired in relation to an infringement other than that covered by the original request, then the conditions concerning the use to which such information may be put shall also be determined by the requested authority in accordance with its national law.
4. The requested authority shall provide the necessary manpower and technical support. It shall take measures to protect the officers referred to in paragraph 1, while they are active in the requested Member State.
5. When depositing its instruments of adoption of this Convention, a Member State may declare that it is not bound by this Article or part thereof. Such declaration may be withdrawn at any time.

Article 24 Joint special investigation teams

1. By mutual agreement, the authorities of several Member States may set up a joint special investigation team based in a Member State and comprising officers with the relevant specializations. The joint special investigation team shall have the following tasks:
 - implementation of difficult and demanding investigations of specific infringements, requiring simultaneous, coordinated action in the Member States concerned,
 - coordination of joint activities to prevent and detect particular types of infringement and obtain information on the persons involved, their associates and the methods used.
2. Joint special investigation teams shall operate under the following general conditions:
 - a. they shall be set up only for a specific purpose and for a limited period;
 - b. an officer from the Member State in which the team's activities take place shall head the team;
 - c. the participating officers shall be bound by the law of the Member State in whose territory the team's activities take place;
 - d. the Member State in which the team's activities take place shall make the necessary organizational arrangements for the team to operate.
3. Membership of the team shall not bestow on officers any powers of intervention in the territory of another Member State.

DECLARATIONS TO BE ANNEXED TO THE CONVENTION AND PUBLISHED IN THE OFFICIAL JOURNAL

Re Article 20(8)

Denmark declares that it accepts the provisions of Article 20, subject to the following conditions:

In case of a hot pursuit exercised by the customs authorities of another Member State at sea or through the air, such pursuit may be extended to Danish territory, including Danish territorial waters and the airspace above Danish territory and territorial waters, only if the competent Danish authorities have received prior notice thereof.

The 2002 Draft Convention

Convention established by the council in accordance with article 34 of the treaty on European Union, on the suppression by customs administrations of illicit drug trafficking on the high seas

The High Contracting Parties to this Convention, Member States of the European Union, acknowledging the need to strengthen the commitments made in the Convention on Mutual Assistance between Customs Administrations, signed in Rome on 7 September 1967, and in the Convention on Mutual Assistance and Cooperation between Customs Administrations, done at Brussels on 18 December 1997.

Taking into account the United Nations Convention on the Law of the Sea, signed in Montego Bay on 10 December 1982, which provides inter alia for the right of hot pursuit, and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done at Vienna on 20 December 1988.

Considering that the customs administrations are responsible within the customs territory of the Community, including its territorial sea and air space and especially at its points of entry and exit, for the prevention, investigation and prosecution of breaches not only of the Community customs rules but also of national laws, and in particular for combating smuggling, including the smuggling of narcotic drugs and psychotropic substances.

Considering that occasionally in the fight against drug trafficking it is necessary and effective for the customs to take action outside Community customs territory, particularly on the high seas.

Considering that the increase in trafficking in narcotic drugs and psychotropic substances at sea is a situation which seriously threatens the health and security of the citizens of the European Union.

Considering that under the special forms of cooperation which have been established between Member States of the European Union both within the Member States themselves and in their respective territorial waters, officials of one Member State are empowered to take action in the territory of another Member State, without prior authorization on occasion.

Convinced that it is necessary to strengthen cooperation between the customs administrations in combating drug trafficking by giving vessels of the competent authorities of a Member State greater scope to take immediate action without prior authorization against vessels from another Member State in emergencies, where currently it is not possible to take action without prior authorization outside territorial waters,

Have agreed on the following provisions:

Article 1 Definitions

For the purposes of this Convention:

- a. "vessels" means any structure or floating craft operating on the high seas suitable for the carriage of goods and/or persons, including hovercraft, non-displacement craft and submersibles;
- b. "intervening State" means the Member State party to this Convention which has taken action under this Convention against a vessel flying the flag or holding the registration of another Member State party to this Convention;
- c. "preferential jurisdiction" means that where both Member States party to this Convention have concurrent jurisdiction over a relevant offence, the flag State has the right to exercise its own jurisdiction to the exclusion of the jurisdiction of the other State;
- d. "relevant offence" means the offences defined in Article 3;
- e. "customs authorities" means the authorities responsible for implementing the customs rules and also the other authorities given the responsibility of implementing the provisions of this Convention. To this end, each Member State shall forward to the other Member States and to the Council General Secretariat the list of competent authorities appointed for the purpose of implementing this Convention.

Article 2 Objective

The customs authorities of the Member States of the European Union shall cooperate to the fullest extent possible to suppress illicit trafficking in narcotic drugs and psychotropic substances by sea, in conformity with the International Law of the Sea.

Article 3 Offences

Each Member State shall adopt the measures necessary to classify as an offence in its national law, and penalize, offences on board vessels or by means of any other craft or floating medium not excluded from the scope of this Convention under Article 4 thereof, involving the possession for distribution, transport, transshipment, storage, sale, manufacture or processing of narcotic drugs or psychotropic substances as defined in the relevant international instruments.

Article 4 Vessels excluded from the scope of the Convention

Warships and official non-commercial public service vessels shall be excluded from the scope of this Convention.

Article 5 Jurisdiction

1. Save as provided for in the Convention on mutual assistance and cooperation between customs administrations, Member States shall exercise sole jurisdiction in relation to offences committed in their territorial and national waters including situations where offences originated or are due to be completed in another Member State.
2. As regards the offences described in Article 3 and committed outside the territorial waters of a Member State, the Member State under whose flag the vessel was flying and on board which or by means of which the offence was committed shall exercise the preferential jurisdiction.

Article 6 Right of representation

1. Where there are good grounds to suspect that one of the offences referred to in Article 3 has been committed, each Member State shall allow the other Member States a right of representation, which shall give legitimacy to action taken by ships or aircraft belonging to their respective customs administrations against vessels from another Member State.
2. In exercising the right of representation referred to in paragraph 1, official ships or aircraft may give pursuit, stop and board the vessel, examine documents, identify and question the persons on board and inspect the vessel and, should their suspicions be confirmed, seize the drugs, detain the persons alleged to be responsible and escort the vessel to the nearest or most suitable port where it shall be detained prior to being returned, informing — beforehand if possible or immediately afterwards — the State whose flag was being flown by the vessel.
3. This right shall be exercised in accordance with the general provisions of international law.

Article 7 Safeguards

1. Where action has been taken pursuant to Article 6, due account shall be taken of the need not to endanger the safety of life at sea or the security of the vessel and cargo, or to prejudice the commercial and legal interests of the flag State or the commercial interests of third parties.
2. In any case, should the action have been taken without adequate grounds for carrying out the operation, the Member State which carried it out shall be held responsible for damage and losses incurred unless the action was taken at the request of the flag State.
3. A vessel's period of detention shall be reduced to the absolute minimum and the vessel returned to the flag State or given the right to free passage as soon as possible.
4. Persons detained shall be guaranteed the same rights as those enjoyed by nationals, especially the right to have an interpreter and be assisted by a lawyer.
5. The period of detention shall be subject to supervision by the courts and to the time limits laid down by the law of the intervening Member State.

Article 8 Surrender of jurisdiction

1. Each Member State shall have preferential jurisdiction over its vessels but may surrender it in favor of the intervening State.
2. Before taking initial proceedings, the intervening State shall forward to the flag State — by fax if possible or other means — a summary of the evidence assembled pertaining to all the relevant offences committed, to which the flag State shall respond within one month stating whether it will exercise its jurisdiction or surrender it and possibly asking for further information should it deem it necessary.
3. If the time limit referred to in paragraph 2 has lapsed without any decision being notified, the flag Member State shall be deemed to have surrendered its jurisdiction.
4. If the State whose flag is being flown by the vessel surrenders its preferential jurisdiction, it shall send the other Member State the information and documents in its possession. Should it decide to exercise its jurisdiction, the other State shall transfer to the preferential State the documents and evidence it has assembled, the *corpus delicti* and the persons detained.
5. Urgent mandatory judicial proceedings to be completed, such as the request to waive the exercise of preferential jurisdiction, shall be governed by the law of the intervening State.
6. Surrender of detained persons shall not be subject to formal extradition proceedings; an order for detention of the person concerned or an equivalent document shall suffice, provided that the fundamental principles of each Party's legal system are observed. The intervening State shall certify the length of time spent in detention.

The 2002 Draft Convention

7. The length of time for which a person was deprived of his liberty in one of the Member States shall be deducted from the penalty imposed by the State having exercised its jurisdiction.
8. Without prejudice to the general powers of Member States' Ministries of Foreign Affairs, any communication provided for in this Convention shall, as a rule, pass through their Ministries of Justice.

The 2003 Agreement

Agreement concerning co-operation in suppressing illicit maritime and air trafficking in narcotic drugs and psychotropic substances in the Caribbean area

The Parties to this Agreement,

Bearing in mind the complex nature of the problem of illicit maritime narcotics traffic in the Caribbean area;
Desiring to increase their co-operation to the fullest extent in the suppression of illicit traffic in narcotic drugs and psychotropic substances by sea in accordance with international law of the sea, respecting freedom of navigation and overflight;

Recognizing that the Parties to this Agreement are also Parties to the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereinafter, “the 1988 Convention”);

Having regard to the urgent need for international co-operation in suppressing illicit traffic by sea, which is recognized in the 1988 Convention;

Recalling that the 1988 Convention requires Parties to consider entering into bilateral or regional agreements or arrangements to carry out, or enhance the effectiveness of the provisions of Article 17 of that Convention;

Recalling further that some of the Parties have consented to be bound by the 1996 Treaty Establishing the Regional Security System, the 1989 Memorandum of Understanding Regarding Mutual Assistance and Cooperation for the Prevention and Repression of Customs Offences in the Caribbean Zone, which established the Caribbean Customs Law Enforcement Council, and the 1982 United Nations Convention on the Law of the Sea;

Recognizing that the nature of illicit traffic urgently requires the Parties to foster regional and sub-regional co-operation;

Desiring to promote greater co-operation among the Parties, and thereby enhance their effectiveness in combating illicit traffic by and over the sea in the Caribbean area, in a manner consistent with the principles of sovereign equality and territorial integrity of States including non-intervention in the domestic affairs of other States;

Recalling that the Regional Meeting on Drug Control Co-ordination and Co-operation in the Caribbean held in Barbados in 1996 recommended the elaboration of a Regional Maritime Agreement;

Have agreed as follows:

NATURE AND SCOPE OF AGREEMENT

Article 1 Definitions

In this Agreement:

- a. “illicit traffic” has the same meaning as that term is defined in the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereinafter, “the 1988 Convention”).
- b. “competent national authority” means the authority or authorities designated pursuant to paragraph 7 of Article 17 of the 1988 Convention or what has been otherwise notified to the Depositary.
- c. “law enforcement authority” means the competent law enforcement entity or entities identified to the Depositary by each Party which has responsibility for carrying out the maritime or air law enforcement functions of that Party pursuant to this Agreement.
- d. “law enforcement officials” means the uniformed and other clearly identifiable members of the law enforcement authority of each Party.
- e. “law enforcement vessels” means vessels clearly marked and identifiable as being on government service, used for law enforcement purposes and duly authorized to that effect, including any boat and aircraft embarked on such vessels, aboard which law enforcement officials are embarked.
- f. “law enforcement aircraft” means aircraft clearly marked and identifiable as being on government service, used for law enforcement purposes and duly authorized to that effect, aboard which law enforcement officials are embarked.
- g. “aircraft in support of law enforcement operations” means aircraft clearly marked and identifiable as being on government service of one Party, providing assistance to a law enforcement aircraft or vessel of that Party, in a law enforcement operation.
- h. “waters of a Party” means the territorial sea and the archipelagic waters of that Party.
- i. “air space of a Party” means the air space over the territory (continental and insular) and waters of that Party.
- j. “Caribbean area” means the Gulf of Mexico, the Caribbean Sea and the Atlantic Ocean west of longitude 45-degrees West, north of latitude 0-degrees (the Equator) and south of latitude 30-degrees North, with the exception of the territorial sea of States not Party to this Agreement.
- k. “suspect aircraft” means any aircraft in respect of which there are reasonable grounds to suspect that it is engaged in illicit traffic.

1. “suspect vessel” means any vessel in respect of which there are reasonable grounds to suspect that it is engaged in illicit traffic.

Article 2 Objectives

The Parties shall co-operate to the fullest extent possible in combating illicit maritime and air traffic in and over the waters of the Caribbean area, consistent with available law enforcement resources of the Parties and related priorities, in conformity with the international law of the sea and applicable agreements, with a view to ensuring that suspect vessels and suspect aircraft are detected, identified, continuously monitored, and where evidence of involvement in illicit traffic is found, suspect vessels are detained for appropriate law enforcement action by the responsible law enforcement authorities.

Article 3 Regional and sub-regional co-operation

1. The Parties shall take the steps necessary within available resources to meet the objectives of this Agreement, including, on a cost effective basis, the enhancement of regional and sub-regional institutional capabilities and the co-ordination and implementation of cooperation.
2. In order to meet the objectives of this Agreement, each Party is encouraged to co-operate closely with the other Parties, consistent with the relevant provisions of the 1988 Convention.
3. The Parties shall co-operate, directly or through competent international, regional or sub-regional organizations, to assist and support States party to this Agreement in need of such assistance and support, to the extent possible, through programmes of technical co-operation on suppression of illicit traffic. The Parties may undertake, directly or through competent international, regional or sub-regional organizations, to provide assistance to such States for the purpose of augmenting and strengthening the infrastructure needed for effective control and prevention of illicit traffic.
4. In order to enable Parties to better fulfill their obligations under this Agreement, they are encouraged to request and provide operational and technical assistance from and to each other.

Article 4 Facilitation of co-operation

1. Each Party is encouraged to accelerate the authorizations for law enforcement vessels and law enforcement aircraft, aircraft in support of law enforcement operations, and law enforcement officials of the other Parties to enter its waters, air space, ports and airports in order to carry out the objectives of this Agreement, in accordance with its provisions.
2. The Parties shall facilitate effective co-ordination between their law enforcement authorities and promote the exchange of law enforcement officials and other experts, including, where appropriate, the posting of liaison officers.
3. The Parties shall facilitate effective co-ordination among their civil aviation and law enforcement authorities to enable rapid verification of aircraft registrations and flight plans.
4. The Parties shall assist one another to plan and implement training of law enforcement officials in the conduct of maritime law enforcement operations covered in this Agreement, including combined operations and boarding, searching and detention of vessels.

MARITIME AND AIR LAW ENFORCEMENT OPERATIONS

Article 5 Suspect vessels and suspect aircraft

Law enforcement operations to suppress illicit traffic pursuant to this Agreement shall be carried out only against suspect vessels and suspect aircraft, including those aircraft and vessels without nationality, and those assimilated to ships without nationality.

Article 6 Verification of nationality

1. For the purpose of this Agreement, a vessel or aircraft has the nationality of the State whose flag it is entitled to fly or in which the vessel or aircraft is registered, in accordance with domestic laws and regulations.
2. Requests for verification of nationality of vessels claiming registration in, or entitlement to fly the flag of one of the Parties, shall be processed through the competent national authority of the flag State Party.
3. Each request should be conveyed orally and later confirmed by written communication, and shall contain, if possible, the name of the vessel, registration number, nationality, homeport, grounds for suspicion, and any other identifying information.
4. Requests for verification of nationality shall be answered expeditiously and all efforts shall be made to provide such answer as soon as possible, but in any event within four (4) hours.
5. If the claimed flag State Party refutes the claim of nationality made by the suspect vessel, then the Party that requested verification may assimilate the suspect vessel to a ship without nationality in accordance with international law.

Article 7 National measures with regard to suspect vessels and suspect aircraft

1. Each Party undertakes to establish the capability at any time to:
 - a. respond to requests for verification of nationality;
 - b. authorize the boarding and search of suspect vessels;
 - c. provide expeditious disposition instructions for vessels detained on its behalf;
 - d. authorize the entry into its waters and air space of law enforcement vessels and law enforcement aircraft and aircraft in support of law enforcement operations of the other Parties.
2. Each Party shall notify the Depositary of the authority or authorities defined in Article 1 to whom requests should be directed under paragraph 1 of this Article.

Article 8 Authority of law enforcement officials

1. When law enforcement officials are within the waters or territory, or on board a law enforcement vessel or law enforcement aircraft, of another Party, they shall respect the laws and naval and air customs and traditions of the other Party.
2. In order to carry out the objectives of this Agreement, each Party authorizes its designated law enforcement and aviation officials, or its competent national authority if notified to the Depositary, to permit the entry of law enforcement vessels, law enforcement aircraft and aircraft in support of law enforcement operations, under this Agreement into its waters and air space.

Article 9 Designation and authority of embarked law enforcement officials

1. Each Party (the designating Party) shall designate qualified law enforcement officials to act as embarked law enforcement officials on vessels of another Party.
2. Each Party may authorize the designated law enforcement officials of another Party to embark on its law enforcement vessel. That authorization may be subject to conditions.
3. Subject to the domestic laws and regulations of the designating Party, when duly authorized, these law enforcement officials may:
 - a. embark on law enforcement vessels of any of the Parties;
 - b. enforce the laws of the designating Party to suppress illicit traffic in the waters of the designating Party, or seaward of its territorial sea in the exercise of the right of hot pursuit or otherwise in accordance with international law;
 - c. authorize the entry of the law enforcement vessels on which they are embarked into and navigation within the waters of the designating Party;
 - d. authorize the law enforcement vessels on which they are embarked to conduct counter-drug patrols in the waters of the designating Party;
 - e. authorize law enforcement officials of the vessel on which the law enforcement officials of the designating Party are embarked to assist in the enforcement of the laws of the designating Party to suppress illicit traffic; and
 - f. advise and assist law enforcement officials of other Parties in the conduct of boardings of vessels to enforce the laws of those Parties to suppress illicit traffic.
4. When law enforcement officials are embarked on another Party's law enforcement vessel, and the enforcement action being carried out is pursuant to the authority of the law enforcement officials, any search or seizure of property, any detention of a person, and any use of force pursuant to this Agreement, whether or not involving weapons, shall, without prejudice to the general principles of Article 11, be carried out by these law enforcement officials. However:
 - a. crew members of the other Party's vessel may assist in any such action if expressly requested to do so by the law enforcement officials and only to the extent and in the manner requested. Such a request may only be made, agreed to, and acted upon if the action is consistent with the applicable laws and procedures of both Parties; and
 - b. such crew members may use force in accordance with Article 22 and their domestic laws and regulations.
5. Each Party shall notify the Depositary of the authority responsible for the designation of embarked law enforcement officials.
6. Parties may conclude agreements or arrangements between them to facilitate law enforcement operations carried out in accordance with this Article.

Article 10 Boarding and search

1. Boarding and searches pursuant to this Agreement shall be carried out only by teams of authorized law enforcement officials from law enforcement vessels.

2. Such boarding and search teams may operate from law enforcement vessels and law enforcement aircraft of any of the Parties, and from law enforcement vessels and law enforcement aircraft of other States as agreed among the Parties.
3. Such boarding and search teams may carry arms.
4. A law enforcement vessel of a Party shall clearly indicate when it is operating under the authority of another Party.

LAW ENFORCEMENT OPERATIONS IN AND OVER TERRITORIAL WATERS

Article 11 General principles

1. Law enforcement operations to suppress illicit traffic in and over the waters of a Party are subject to the authority of that Party.
2. No Party shall conduct law enforcement operations to suppress illicit traffic in the waters or air space of any other Party without the authorization of that other Party, granted pursuant to this Agreement or according to its domestic legal system. A request for such operations shall be decided upon expeditiously. The authorization may be subject to directions and conditions that shall be respected by the Party conducting the operations.
3. Law enforcement operations to suppress illicit traffic in and over the waters of a Party shall be carried out by, or under the direction of, the law enforcement authorities of that Party.
4. Nothing in this Agreement shall be construed as authorizing a law enforcement vessel, or law enforcement aircraft of one Party, independently to patrol within the waters or air space of any other Party.

Article 12 Assistance by vessels for suppression of illicit traffic

1. Subject to paragraph 2 of this Article, a law enforcement vessel of a Party may follow a suspect vessel into the waters of another Party and take actions to prevent the escape of the vessel, board the vessel and secure the vessel and persons on board awaiting an expeditious response from the other Party if either:
 - a. the Party has received authorization from the authority or authorities of the other Party defined in Article 1 and notified pursuant to Article 7; or
 - b. on notice to the other Party, when no embarked law enforcement official or law enforcement vessel of the other Party is immediately available to investigate. Such notice shall be provided prior to entry into the waters of the other Party, if operationally feasible, or failing this as soon as possible.
2. Parties shall elect either the procedure set forth in paragraph 1a or 1b, and shall so notify the Depositary of their election. Prior to receipt of notification by the Depositary, Parties shall be deemed to have elected the procedure set forth in paragraph 1a.
3. If evidence of illicit traffic is found, the authorizing Party shall be promptly informed of the results of the search. The suspect vessel, cargo and persons on board shall be detained and taken to a designated port within the waters of the authorizing Party unless otherwise directed by that Party.
4. Subject to paragraph 5, a law enforcement vessel of a Party may follow a suspect aircraft into another Party's waters in order to maintain contact with the suspect aircraft if either:
 - a. the Party has received authorization from the authority or authorities of the other Party defined in Article 1 and notified pursuant to Article 7; or
 - b. on notice to the other Party, when no embarked law enforcement official or law enforcement vessel or law enforcement aircraft of the other Party is immediately available to maintain contact. Such notice shall be provided prior to entry into the waters of the other Party, if operationally feasible, or failing this as soon as possible.
5. Parties shall elect either the procedure set forth in paragraph 4a or 4b, and shall so notify the Depositary of their election. Prior to receipt of notification by the Depositary, Parties shall be deemed to have elected the procedure set forth in paragraph 4a.

Article 13 Assistance by aircraft for suppression of illicit traffic

1. A Party may request aircraft support from other Parties for assistance, including monitoring and surveillance, in suppressing illicit traffic.
2. Any assistance under this Article within the air space of the requesting Party shall be conducted in accordance with the laws of the requesting Party and only in the specified areas and to the extent requested and authorized.
3. Prior to the commencement of any assistance, the Party desiring to assist in such activities (the requested Party) may be required to provide reasonable notice, communication frequencies and other information relative to flight safety to the appropriate civil aviation authorities of the requesting Party.
4. The requested Parties shall, in the interest of safe air navigation, observe the following procedures for notifying the appropriate aviation authorities of such overflight activity by participating aircraft:

The 2003 Agreement

- a. In the event of planned bilateral or multilateral law enforcement operations, the requested Party shall provide reasonable notice and communications frequencies to the appropriate authorities, including authorities responsible for air traffic control, of each Party of planned flights by participating aircraft in the air space of that Party.
 - b. In the event of unplanned law enforcement operations, which may include the pursuit of suspect aircraft into another Party's air space, the law enforcement and appropriate civil aviation authorities of the Parties concerned shall exchange information concerning the appropriate communications frequencies and other information pertinent to the safety of air navigation.
 - c. Any aircraft engaged in law enforcement operations or activities in support of law enforcement operations shall comply with such air navigation and flight safety directions as may be required by each concerned Party's aviation authorities, in the measure in which it is going across the airspace of those Parties.
5. The requested Parties shall maintain contact with the designated law enforcement officials of the requesting Party and keep them informed of the results of such operations so as to enable them to take such action as they may deem appropriate.
6. Subject to paragraph 7 of this Article, the requesting Party shall authorize aircraft of a requested Party, when engaged in law enforcement operations or activities in support of law enforcement operations, to fly over its territory and waters; and, subject to the laws of the authorizing Party and of the requested Party, to relay to suspect aircraft, upon the request of the authorizing Party, orders to comply with the instructions and directions from its air traffic control and law enforcement authority, if either:
 - a. authorization has been granted by the authority or authorities of the Party requesting assistance defined in Article 1, notified pursuant to Article 7; or
 - b. advance authorization has been granted by the Party requesting assistance.
7. Parties shall elect either the procedure set forth in paragraph 6a or 6b, and shall so notify the Depositary of their election. Prior to receipt of notification by the Depositary, Parties shall be deemed to have elected the procedure set forth in paragraph 6a.
8. Nothing in this Agreement shall affect the legitimate rights of aircraft engaged in scheduled or charter operations for the carriage of passengers, baggage or cargo or general aviation traffic.
9. Nothing in this Agreement shall be construed as authorizing aircraft of any Party to enter the air space of any State not party to this Agreement.
10. Nothing in this Agreement shall be construed as authorizing an aircraft of one Party independently to patrol within the air space of any other Party.
11. While conducting air activities pursuant to this Agreement, the Parties shall not endanger the lives of persons on board or the safety of civil aviation.

Article 14 Other situations

1. Nothing in this Agreement shall preclude any Party from otherwise expressly authorizing law enforcement operations by any other Party to suppress illicit traffic in its territory, waters or air space, or involving vessels or aircraft of its nationality suspected of illicit traffic.
2. Parties are encouraged to apply the relevant provisions of this Agreement whenever evidence of illicit traffic is witnessed by the law enforcement vessels and law enforcement aircraft of the Parties.

Article 15 Extension to internal waters

Upon signing, ratification, acceptance or approval of this Agreement, or at any time thereafter, a Party may notify the Depositary that it has extended the application of this Agreement to some or all of its internal waters directly adjacent to its territorial sea or archipelagic waters, as specified by the Party.

OPERATIONS SEAWARD OF THE TERRITORIAL SEA

Article 16 Boarding

1. When law enforcement officials of one Party encounter a suspect vessel claiming the nationality of another Party, located seaward of any State's territorial sea, this Agreement constitutes the authorization by the claimed flag State Party to board and search the suspect vessel, its cargo and question the persons found on board by such officials in order to determine if the vessel is engaged in illicit traffic, except where a Party has notified the Depositary that it will apply the provisions of paragraph 2 or 3 of this Article.
2. Upon signing, ratification, acceptance or approval of this Agreement, a Party may notify the Depositary that vessels claiming the nationality of that Party located seaward of any State's territorial sea may only be boarded upon express consent of that Party. This notification will not set aside the obligation of that Party to respond expeditiously to requests from other Parties pursuant to this Agreement, according to its capability. The notification can be withdrawn at any time.

3. Upon signing, ratification, acceptance or approval of this Agreement, or at any time thereafter, a Party may notify the Depositary that Parties shall be deemed to be granted authorization to board a suspect vessel located seaward of the territorial sea of any State that flies its flag or claims its nationality and to search the suspect vessel, its cargo and question the persons found on board in order to determine if the vessel is engaged in illicit traffic, if there is no response or the requested Party can neither confirm nor deny nationality within four (4) hours following receipt of an oral request pursuant to Article 6. The notification can be withdrawn at any time.
4. A flag State Party that has notified the Depositary that it shall adhere to paragraph 2 or 3 of this Article, having received a request to verify the nationality of a suspect vessel, may authorize the requesting Party to take all necessary actions to prevent the escape of the suspect vessel.
5. When evidence of illicit traffic is found as the result of any boarding conducted pursuant to this Article, the law enforcement officials of the boarding Party may detain the vessel, 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 the boarding and search conducted pursuant to this Article, in accordance with paragraph 1 of Article 26 of this Agreement.
6. Notwithstanding the foregoing paragraphs of this Article, law enforcement officials of one Party may board a suspect vessel located seaward of the territorial sea of any State, claiming the nationality of another Party for the purpose of locating and examining the documents of that vessel when:
 - a. it is not flying the flag of that other Party;
 - b. it is not displaying any marks of its registration;
 - c. it is claiming to have no documentation regarding its nationality
 - d. on board; and
 - e. there is no other information evidencing nationality.
7. In the case of a boarding conducted pursuant to paragraph 6 of this Article, should any documentation or evidence of nationality be found, paragraph 1, 2 or 3 of this Article shall apply as appropriate. Where no evidence of nationality is found, the boarding Party may assimilate the vessel to a ship without nationality in accordance with international law.
8. The boarding and search of a suspect vessel in accordance with this Article is governed by the laws of the boarding Party.

Article 17 Other boardings under international law

Except as expressly provided herein, this Agreement does not apply to or limit boarding of vessels, conducted by any Party in accordance with international law, seaward of any State's territorial sea, whether based, inter alia, on the right of visit, the rendering of assistance to persons, vessels, and property in distress or peril, or an authorization from the flag State to take law enforcement action.

IMPLEMENTATION

Article 18 Identification of point of contact

In designating the authorities and officials as defined in Article 1 that exercise responsibilities under this Agreement, each Party is encouraged to identify a single point of contact with the capability to receive, process and respond to requests and reports at any time.

Article 19 Maritime law enforcement co-operation and co-ordination programmes for the Caribbean area

1. The Parties shall establish regional and sub-regional maritime law enforcement co-operation and co-ordination programmes among their law enforcement authorities. Each Party shall designate a co-ordinator to organize its participation and to identify the vessels, aircraft and law enforcement officials involved in the programme to the other Parties.
2. The Parties shall Endeavour to conduct scheduled bilateral, subregional and regional operations to exercise the rights and obligations under this Agreement.
3. The Parties undertake to assign qualified personnel to regional and sub-regional co-ordination centers established for the purpose of coordinating the detection, surveillance and monitoring of vessels and aircraft and interception of vessels engaged in illicit traffic by and over the sea.
4. The Parties are encouraged to develop standard operating procedures for law enforcement operations pursuant to this Agreement and consult, as appropriate, with other Parties with a view to harmonizing such standard operating procedures for the conduct of joint law enforcement operations.

Article 20 Authority and conduct of law enforcement and other officials

1. Subject to its constitutional principles and the basic concepts of its legal system, each Party shall take such measures as may be necessary under its domestic law to ensure that foreign law enforcement officials, when conducting actions in its water under this Agreement, are deemed to have like powers to those of its domestic law enforcement officials.
2. Consistent with its legal system, each Party shall take appropriate measures to ensure that its law enforcement officials, and law enforcement officials of other Parties acting on its behalf, are empowered to exercise the authority of law enforcement officials as prescribed in this Agreement.
3. In accordance with the provisions in Article 8 and without prejudice to the provisions in Article 11, each Party shall ensure that its law enforcement officials, when conducting boardings and searches of vessels, and air activities pursuant to this Agreement, act in accordance with their applicable national laws and procedures and with international law and accepted international practices.
4. In taking such action under this Agreement, each Party shall take due account of the need not to endanger the safety of life at sea, the security of the vessel and cargo, and not to prejudice any commercial or legal interest. In particular, they shall take into account:
 - a. the dangers involved in boarding a vessel at sea, and give consideration as to whether this could be more safely done in port; and
 - b. the need to avoid unduly detaining or delaying a vessel.

Article 21 Assistance by vessels

1. Each Party may request another Party to make available one or more of its law enforcement vessels to assist the requesting Party effectively to patrol and conduct surveillance with a view to the detection and prevention of illicit traffic by sea and air in the Caribbean area.
2. When responding favorably to a request pursuant to paragraph 1 of this Article, each requested Party shall provide to the requesting Party via secure communication channels:
 - a. the name and description of its law enforcement vessels;
 - b. the dates at which, and the periods for which, they will be available;
 - c. the names of the Commanding Officers of the vessels; and
 - d. any other relevant information.

Article 22 Use of force

1. Force may only be used if no other feasible means of resolving the situation can be applied.
2. Any force used shall be proportional to the objective for which it is employed.
3. All use of force pursuant to this Agreement shall in all cases be the minimum reasonably necessary under the circumstances.
4. A warning shall be issued prior to any use of force except when force is being used in self-defense.
5. In the event that the use of force is authorized and necessary in the waters of a Party, law enforcement officials shall respect the laws of that Party.
6. In the event that the use of force is authorized and necessary during a boarding and search seaward of the territorial sea of any Party, the law enforcement officials shall comply with their domestic laws and procedures and the directions of the flag State.
7. The discharge of firearms against or on a suspect vessel shall be reported as soon as practicable to the flag State Party.
8. Parties shall not use force against civil aircraft in flight.
9. The use of force in reprisal or as punishment is prohibited.
10. Nothing in this Agreement shall impair the exercise of the inherent right of self-defense by law enforcement or other officials of any Party.

Article 23 Jurisdiction over offences

Each Party shall take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with Article 3, paragraph 1, of the 1988 Convention, when:

- a. the offence is committed in waters under its sovereignty or where applicable in its contiguous zone;
- b. the offence is committed on board a vessel flying its flag or an aircraft which is registered under its laws at the time the offence is committed;
- c. the offence is committed on board a vessel without nationality or assimilated to a ship without nationality under international law, which is located seaward of the territorial sea of any State;
- d. the offence is committed on board a vessel flying the flag or displaying the marks of registry or bearing any other indication of nationality of another Party, which is located seaward of the territorial sea of any State.

The 2003 Agreement

Article 24 Jurisdiction over detained vessels and persons

1. In all cases arising in the waters of a Party, or concerning a Party's flag vessels seaward of any State's territorial sea, that Party has jurisdiction over a detained vessel, cargo and persons on board including seizure, forfeiture, arrest, and prosecution. Subject to its Constitution and its laws, the Party in question may consent to the exercise of jurisdiction by another State in accordance with international law and in conformity with any condition set by it.
2. Each Party shall ensure compliance with its notification obligations under the Vienna Convention on Consular Relations.

Article 25 Dissemination

1. To facilitate implementation of this Agreement, each Party shall ensure that the other Parties are fully informed of its respective applicable laws and procedures, particularly those pertaining to the use of force.
2. When engaged in law enforcement operations under this Agreement, the Parties shall ensure that their law enforcement officials are knowledgeable concerning the pertinent operational procedures of other Parties.

Article 26 Results of enforcement action

1. A Party conducting a boarding and search pursuant to this Agreement shall promptly inform the other Party of the results thereof.
2. Each Party shall, on a periodic basis and consistent with its laws, inform the other Party on the stage which has been reached of all investigations, prosecutions and judicial proceedings resulting from law enforcement operations taken pursuant to this Agreement where evidence of illicit traffic was found on vessels or aircraft of that other Party. In addition, the Parties shall provide each other with information on results of such prosecutions and judicial proceedings, in accordance with their national legislation.
3. Nothing in this Article shall require a Party to disclose details of the investigations, prosecutions and judicial proceedings or the evidence relating thereto; or affect rights or obligations of Parties derived from the 1988 Convention or other international agreements and instruments.

Article 27 Asset seizure and forfeiture

1. Assets seized, confiscated or forfeited in consequence of any law enforcement operation undertaken in the waters of a Party pursuant to this Agreement shall be disposed of in accordance with the laws of that Party.
2. Should the flag State Party have consented to the exercise of jurisdiction by another State pursuant to Article 24, assets seized, confiscated or forfeited in consequence of any law enforcement operation of any Party pursuant to this Agreement shall be disposed of in accordance with the laws of the boarding Party.
3. To the extent permitted by its laws and upon such terms as it deems appropriate, a Party may, in any case, transfer forfeited property or proceeds of their sale to another Party or intergovernmental bodies specializing in the fight against illicit traffic in and abuse of narcotic drugs and psychotropic substances.

Article 28 Claims

Claims against a Party for damage, injury or loss resulting from law enforcement operations pursuant to this Agreement, including claims against its law enforcement officials, shall be resolved in accordance with international law.

FINAL PROVISIONS

Article 29 Preservation of rights and privileges

1. Nothing in this Agreement shall be construed as altering the rights and privileges due to any individual in any legal proceeding.
2. Nothing in this Agreement shall be construed as altering the immunities to which vessels and aircraft are entitled under international law.
3. For the purposes of this Agreement, in no case shall law enforcement vessels or law enforcement aircraft be considered suspect vessels or suspect aircraft.

Article 30 Effect on claims concerning territory or maritime boundaries

Nothing in this Agreement shall prejudice the position of any Party under international law, including the law of the sea; nor affect the claims to territory or maritime boundaries of any Party or any third State; nor constitute a precedent from which rights can be derived.

Article 31 Relationship to other agreements

1. The Parties are encouraged to conclude bilateral or multilateral agreements with one another on the matters dealt with in this Agreement, for the purpose of confirming or supplementing its provisions or strengthening the application of the principles embodied in Article 17 of the 1988 Convention.
2. Nothing in this Agreement shall alter or affect in any way the rights and obligations of a Party which arise from agreements in force between it and one or more other Parties on the same subject.

Article 32 Meetings of the parties

1. There shall be a meeting of the Parties at the end of the second year following the year in which this Agreement enters into force. After this term, subsequent meetings of the Parties shall be held no sooner than ninety (90) days after a request of fifty percent of the Parties made in conformity with the usual diplomatic practice.
2. Meetings of the Parties shall examine, inter alia, compliance with the Agreement, and adopt, if necessary, measures to enhance its effectiveness, and review measures in the field of regional and sub regional co-operation and co-ordination of future actions.
3. Meetings of the Parties convened pursuant to paragraph 2 of this Article shall consider amendments to this Agreement proposed in accordance with Article 33.
4. All decisions taken by the meetings of the Parties shall be by consensus.

Article 33 Amendments

1. Any Party may at any time after entry into force of the Agreement for that Party propose an amendment to this Agreement by providing the text of such a proposal to the Depositary. The Depositary shall promptly circulate any such proposal to all Parties and Signatories.
2. An amendment shall be adopted at a meeting of the Parties by consensus of the Parties therein represented.
3. An amendment shall enter into force thirty days after the Depositary has received instruments of acceptance or approval from all of the Parties.

Article 34 Settlement of disputes

If there should arise between two or more Parties a question or dispute relating to the interpretation or application of this Agreement, those Parties shall consult together with a view to the settlement of the dispute by negotiation, inquiry, mediation, conciliation, arbitration, recourse to regional bodies, judicial process or other peaceful means of their choice.

Article 35 Signature

This Agreement shall be open for signature by any State party to the 1988 Convention that is located in the Caribbean area, or any State that is responsible for the foreign relations of a territory located in the Caribbean area, at San José, Costa Rica, from 10 April, 2003.

Article 36 Entry into force

1. States may, in accordance with their national procedures, express their consent to be bound by this Agreement by:
2. signature without reservation as to ratification, acceptance or approval; or
3. signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval.
4. This Agreement shall enter into force 30 days after five States have expressed their consent to be bound in accordance with paragraph 1 of this Article.
5. For each State consenting to be bound after the date of entry into force of this Agreement, the Agreement shall enter into force for that State 30 days after the deposit of its instrument expressing its consent to be bound.

Article 37 Reservations and exceptions

Subject to its Constitution and laws and in accordance with international law, a Party may make reservations to this Agreement, except when they are incompatible with the object and purpose of the Agreement. No reservations may be made regarding Articles 2, 12, 13 and 16.

Article 38 Declarations and statements

Article 37 does not preclude a State, when signing, ratifying, accepting or approving this Agreement, from making declarations or statements, however phrased or named, with a view, inter alia, to the harmonization of its laws and regulations with the provisions of this Agreement, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Agreement in their application to that State.

The 2003 Agreement

Article 39 Territorial application

1. This Agreement shall only apply to the Caribbean area, as defined in Article 1, paragraph j.

Article 40 Suspension

Parties to this Agreement may temporarily suspend in specified areas under their sovereignty their obligations under this Agreement if such suspension is required for imperative reasons of national security. Such suspension shall take effect only after having been duly published.

Article 41 Withdrawal

1. Any Party may withdraw from this Agreement. Withdrawal will take effect twelve months after receipt of the notification of withdrawal by the Depositary.
2. This Agreement shall continue to apply after withdrawal with respect to any administrative or judicial proceedings arising out of actions taken pursuant to this Agreement in respect of the withdrawing Party.

Article 42 Depositary

1. The original of this Agreement shall be deposited with the Government of the Republic of Costa Rica, which shall serve as the Depositary.
2. The Depositary shall transmit certified copies of the Agreement to all signatories.
3. The Depositary shall inform all signatories and parties to the Agreement of:
 - a. all designations of law enforcement authorities pursuant to Article 1, paragraph c;
 - b. all designations of authorities to whom requests for verification of registration are to be made, and for authorization to enter national waters and air space and board and search, and for disposition instructions, pursuant to Articles 6 and 7;
 - c. all officials designated as being responsible for the designation of embarked law enforcement officials pursuant to Article 9, paragraph 5;
 - d. all notification of elections regarding authorization for pursuit or entry into territorial waters and air space to effect boardings and searches pursuant to Article 12;
 - e. all notification of elections regarding authorization for aircraft support pursuant to Article 13;
 - f. all declarations of territorial applicability under Article 15;
 - g. all notifications of elections not to provide advance authorization for boarding pursuant to Article 16, paragraphs 2 and 3;
 - h. all proposals to amend the Agreement made pursuant to Article 33;
 - i. all signatures, ratifications, acceptances, and approvals deposited pursuant to Article 36;
 - j. the dates of entry into force of the Agreement pursuant to Article 36;
 - k. all reservations made pursuant to Article 37;
 - l. all declarations made pursuant to Article 38;
 - m. all declarations made pursuant to Article 40;
 - n. all notifications of withdrawal pursuant to Article 41.
4. The Depositary shall register this Agreement with the United Nations pursuant to Article 102 of the Charter of the United Nations.

In Witness Whereof, the undersigned, being duly authorized by their respective Governments, have signed this Agreement.

Done at San José, 10th day of April, 2003, in the English, French, and Spanish languages, each being duly authentic.

Bilateral maritime drug-interdiction treaties

The 1990 Treaty between Spain and Italy

Treaty between the Kingdom of Spain and the Republic of Italy to Combat Illicit Drug Trafficking at Sea

The Kingdom of Spain and the Italian Republic

Concerned by the growing illicit international traffic in narcotic drugs and psychotropic substances and its impact on rising crime rates in their countries,

Aware that the sea is one of the channels of distribution of these substances,

Desiring to cooperate by means of a bilateral treaty with the worldwide objective of eradicating this type of traffic, thus complementing the Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the Geneva Convention on the High Seas of 29 April 1958,

Have decided to conclude a treaty to combat illicit trafficking in narcotic drugs and psychotropic substances and to this end have agreed as follows:

Article 1 Definitions

Solely for the purpose of this Treaty:

- d. "Ship" means any seagoing craft or surface vessel that contains or transport goods and/or persons;
- e. (b) "Warship" means any duly authorized ship conforming to the definition in article 8, paragraph 2, of the Geneva Convention on the High Seas of 29 April 1958, the actions of which must be coordinated by the competent national authorities;
- f. Solely for the purposes covered by articles 4, 5 and 6, the expressions "flag displayed by the ship" and "under whose flag the ship was sailing" signify not only a ship sailing under the flag of its own State, but also a ship flying no flag but belonging to a natural person or legal entity in one of the Parties.

Article 2 Offences

1. Each Contracting Party shall treat as an offence, and punish accordingly, all acts committed on board ships or through the use of any boat or surface vessel which are not excluded from the scope of this Treaty under the terms of article 3, connected with the possession of narcotic drugs and psychotropic substances, as defined by the international treaties by which the Parties are bound, for the purposes of distribution, transport, storage, sale manufacture or processing.
2. Attempting to commit an offence, failing to commit an offence for reasons beyond the control of the perpetrator, participation and complicity are likewise punishable.

Article 3 Ships excluded from the scope of the Treaty

This Treaty shall apply neither to warships nor to non-commercial public service vessels used by either of the Parties.

Article 4 Jurisdiction

1. Each Party shall exercise sole jurisdiction over acts in its territorial waters, free zones or free ports, even if the said acts were initiated or terminated in the other State.
Should there be a discrepancy with regard to the extent of territorial water of each Contracting Party, solely for the purposes of this Treaty the limit of the territorial waters of each Party shall correspond to the maximum limit stipulated by the law of one of the Parties.
2. In the case of acts covered by article 2 committed outside the territorial waters of one of the States, preferential jurisdiction shall be exercised by the State under whose flag the ship was sailing, on board which or by means of which offence was committed.

Article 5 Right of intervention

2. Should there be reasonable grounds to suspect that offences covered by article 2 are being committed, each Party recognizes the other's right to intervene as its agent in waters outside its own territorial limits, in respect of ships displaying the flag of the other State. On ships sailing under national flags, police powers granted by the respective legal systems remain valid.
3. In exercising this authority, warships or military aircrafts, or any other duly authorized ship or aircraft visibly displaying exterior markings and identifiable as ships or aircraft in the service of the State of one of the Parties, may pursue, arrest and board the ship, check the documents, question persons on board, and if rea-

sonable suspicion remains, search the ship, seize the drugs and arrest the persons involved and, where appropriate, escort the ship to the nearest suitable port, informing –if possible before, otherwise immediately on arrival- the State under whose flag the ship is sailing.

4. This authority shall be exercised in accordance with the general rules of international law.
5. When action is taken pursuant to this article, the Parties concerned shall take due account of the need not to endanger the safety of life at sea or the security of the ship and the cargo, or to damage the commercial and legal interests of the flag State in question, or of any other interested State.
 - i. In any event, if a Party intervenes without adequate grounds for suspicion, it may be held liable for any loss or damage incurred, unless the intervention was at the request of the State under whose flag the ship was sailing.
6. In the event of the legal action over liability for any loss or damage arising from intervention as described under points 1 and 2 of paragraph 4, or over the extent of compensation, each Party recognizes the jurisdiction of the International Chamber of Commerce in London.

Article 6 Renunciation of jurisdiction

1. If a Party has carried out any of the measures provided for in article 5, it may request the State under whose flag the ship was sailing to renounce its preferential jurisdiction.
2. The State under whose flag the ship was sailing shall examine the request in good faith and, in arriving at its decision, shall take into consideration, among other criteria, the place of seizure, the conditions under which evidence was obtained, any correlation between proceedings, the nationality of those involved and their place of residence.
3. If the State under whose flag the ship was sailing renounces its preferential jurisdiction, it shall provide the other State with the information and documents in its possession. If it decides to exercise its jurisdiction, the other State shall transfer to it any document obtained, items to be used in evidence, the persons arrested, and any other element relevant to the case.
4. The decision to exercise jurisdiction must be notified to the requesting Party within 60 days of the date of receipt of the request.

The necessary urgent legal measures which custom requires be carried out and the request and the request to renounce the exercise of preferential jurisdiction shall be governed by the legal system of the intervening State.

If the deadline provided for in the present article expires without any decision having been notified, jurisdiction will be deemed to have been renounced.

In addition to the usual channels of communication, the Parties shall specify which of their central authorities are empowered to forward requests for exercise of jurisdiction.

Article 7 Judicial assistance

1. Judicial assistance shall be provided in accordance with the relevant international treaties by which the Parties are bound.
2. Periods spent in remand on the territory of one of the States Parties shall be conducted from the sentence passed by the State exercising jurisdiction.

Article 8 Repeated offences

1. Verdicts reached by the courts of one of the parties against its own nationals for offences covered by this Treaty, and for any other offence concerning traffic in narcotic drugs or psychotropic substances and those handed down against persons who are in any case subject to the jurisdiction of either Party, shall be taken into consideration by the courts of the other Party when dealing with repeated offences.
2. On request, the Parties shall communicate to each other in good time any verdicts as referred to in the previous paragraph handed down on nationals of the other Party or on any other person convicted of offences in connection with narcotic or psychotropic substances.

The 1981 Agreement between the USA and UK

Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America Concerning Co-operation in the Suppression of the Unlawful Importation of Narcotic Drugs into the United States

Bearing in mind the special nature of this problem and having regard to the need of international co-operation in suppressing the illicit traffic in narcotic drugs, which is recognized in the Single Convention on Narcotic Drugs of 1953, I have the honor to propose the following:

1. The Government of the United Kingdom of Great Britain and Northern Ireland agree that they will not object to the boarding by the authorities of the United States, outside the limits of the territorial sea and contiguous zone of the United States and within the areas described in paragraph 9 below of private vessel under the British flag in any case in which those authorities reasonably believe that the vessel has on board a cargo of drugs for importation into the United States in violation of the laws of the United States.
2. On boarding the vessel the authorities of the United States may address enquiries to those on board, examine the ship's papers and take such other measures as are necessary to establish the place of registration of the vessel. When these measures suggest that an offence against the law of the United States relative to the importation of narcotic drugs is being committed, the Government of the United Kingdom agrees that they will not object to the authorities of the United States instituting a search of the vessel.
3. If the authorities of the United State then believe that an offence against the laws referred to in paragraph 2 above is being committed, the Government of the United Kingdom agrees that they will not object to the vessel being seized and taken into the United States port.
4. The Government of the United Kingdom may, within 14 days of the vessel's entry into port, object to the continued exercise of United States jurisdiction over the vessel for purposes of the laws referred to in paragraph 2 above, and the Government of the United States shall thereupon release the vessel without charge. The Government of the United States shall not institute forfeiture proceedings before the end of the period allowed for objection.
5. The Government of the United Kingdom may, within 30 days of the vessel's entry into port, object to the prosecution of any United Kingdom national found aboard the vessel, and the Government of the United States shall thereupon release such person. The Government of the United Kingdom agree that they will not otherwise object to the prosecution of any person found on board the vessel
6. Any action by the authorities of the United States shall be taken in accordance with this Agreement and the United States law.
7. In any case where a vessel under the British flag is boarded the authorities of the United States shall promptly inform the authorities of the United Kingdom of the action taken and shall keep them fully informed of any subsequent development.
8. If any loss or injury is suffered as a result of any action taken by the United States in contravention of these arrangements or any improper or unreasonable action taken by the United States pursuant thereto, representatives of the two Governments shall meet at the request of either to decide any question relating to compensation. Representatives of the two Governments shall in any case meet from time to time to review the working of these arrangements.
9. The areas referred to in paragraph 1 above comprise the Gulf of Mexico, the Caribbean Sea, that portion of the Atlantic Ocean West of longitude 55° West and South of 30° North and all other areas within 150 miles of the Atlantic coast of the United States.

The 1998 Agreement between the US and the UK/UKCOT

Agreement between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning Maritime and Aerial Operations to Suppress Illicit Trafficking by Sea in Waters of the Caribbean and Bermuda

The Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, on its own behalf and on behalf of the Governments of Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands, Montserrat, and the Turks and Caicos Islands, (hereinafter, the "Parties");

Bearing in mind the complex nature of the problem of illicit trafficking by sea;

Having regard to the urgent need for international cooperation in suppressing illicit trafficking by sea, which is recognized in the 1961 Single Convention on Narcotic Drugs and its 1972 Protocol, in the 1971 Convention on Psychotropic Substances, in the 1982 United Nations Convention on the Law of the Sea, and in the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereinafter, the "1988 Convention");

Recalling the Agreement between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland to facilitate the interdiction by the United States of vessels of the United Kingdom suspected of trafficking in drugs, effected by an Exchange of Notes at London, November 13, 1981 (hereinafter, the "1981 Agreement");

Recalling also the Memorandum of Understanding between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, on behalf of the Government of the British Virgin Islands, concerning maritime narcotics interdiction operations, signed in Tortola, February 6, 1990, as extended to the United States Customs Service by Exchange of Notes dated December 2 and 10, 1992 (hereinafter, the "1990 MOU");

Further recalling the Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland including the Government of the Turks and Caicos Islands, the Government of the Bahamas and the Government of the United States of America, signed in Washington, July 12, 1990 (hereinafter, "the 1990 TRIPART MOU"); and

Desiring to promote greater cooperation between the Parties in combating illicit trafficking by sea in the waters of the Caribbean and Bermuda;

Have agreed as follows:

Article 1 Nature and Scope of Agreement

The Parties shall continue to cooperate in combating illicit trafficking by sea to the fullest extent possible, consistent with available law enforcement resources and priorities related thereto.

Article 2 Definitions

In this Agreement, unless the context otherwise requires:

1. "Illicit traffic" has the same meaning as in Article 1(m) of the 1988 Convention.
2. "Territory, waters and airspace of the Parties" means:
 - i. For the Government of the United Kingdom of Great Britain and Northern Ireland: United Kingdom Overseas Territories (UKOT) territory, waters and airspace, comprised of the territory, territorial sea and internal waters of Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands, Montserrat, and the Turks and Caicos Islands, and the air space over such territory and waters.
 - ii. For the Government of the United States of America: the territory, territorial sea and internal waters of Puerto Rico, the United States Virgin Islands, Navassa Island and other territories and possessions in the Caribbean sea over which the United States exercises sovereignty, and the air space over such territory and waters.
3. "Law enforcement vessels" means warships and other ships of the Parties, clearly marked and identifiable as being on government non-commercial service and authorized to that effect, including any boat and aircraft embarked on such ships, aboard which law enforcement officials are embarked.
4. "Law enforcement aircraft" means aircraft of the Parties engaged in law enforcement operations or operations in support of law enforcement activities clearly marked and identifiable as being on government non-commercial service and authorized to that effect.
5. "Law enforcement authorities" means:
 - i. For the Government of the United Kingdom of Great Britain and Northern Ireland: the Royal Anguillan Police and HM Customs of Anguilla, the Bermuda Police Force, the Royal Virgin Islands Police Force and HM Customs of the Virgin Islands, the Royal Cayman Islands Police and HM

Customs of the Cayman Islands, the Royal Montserrat Police and HM Customs of Montserrat, and the Royal Turks and Caicos Police and HM Customs of Turks and Caicos, for the respective areas for which they have competence.

- ii. For the Government of the United States of America: the United States Coast Guard and the United States Customs Service.
6. "Law enforcement officials" means:
- i. For the Government of the United Kingdom of Great Britain and Northern Ireland: authorized members of the Royal Anguillan Police and HM Customs of Anguilla, the Bermuda Police Force, the Royal Virgin Islands Police Force and HM Customs of the Virgin Islands, the Royal Cayman Islands Police and HM Customs of the Cayman Islands, the Royal Montserrat Police and HM Customs of Montserrat, and the Royal Turks and Caicos Police and HM Customs of Turks and Caicos, for the respective areas for which they have competence.
 - ii. For the Government of the United States of America: uniformed members of the United States Coast Guard and authorized members of the United States Customs Service.
7. "UKOT law" means, where appropriate, the laws of Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands, Montserrat, and the Turks and Caicos Islands.
8. "Shiprider" means a law enforcement official of one Party authorized to embark on a law enforcement vessel of the other Party.
9. "Suspect vessel or aircraft" means a vessel or aircraft used for commercial or private purposes in respect of which there are reasonable grounds to suspect it is engaged in illicit traffic.

Article 3 Operations in and over National Waters

Operations to suppress illicit traffic in and over the waters of each Party are the responsibility of, and subject to the authority of, that Party.

Article 4 Shiprider Programme

1. The Parties shall establish a joint law enforcement shiprider programme between their respective law enforcement authorities. Each Party may designate a coordinator or coordinators to organize its programme activities and to identify the vessels and officials involved in the programme to the other Party.
2. Each UKOT may designate qualified officials of each of its law enforcement authorities to act as shipriders. Subject to applicable UKOT law, each shiprider may, in appropriate circumstances:
 - i. embark on US law enforcement vessels;
 - ii. authorize pursuit, into UKOT waters for which the shiprider has competence, by the US law enforcement vessels on which they are embarked, of suspect vessels and aircraft fleeing into or over such UKOT waters;
 - iii. authorize the US law enforcement vessels on which they are embarked to conduct patrols in UKOT waters for which the shiprider has competence under this Agreement;
 - iv. enforce applicable UKOT law in UKOT waters for which the shiprider has competence, or seaward there from in the exercise of the right of hot pursuit or otherwise in accordance with international law; and
 - v. authorize the US law enforcement vessels on which they are embarked to assist in the enforcement of UKOT law for which the shiprider has competence.
3. The United States of America may designate qualified officials of its law enforcement authority to act as shipriders. Subject to applicable US law, each shiprider may, in appropriate circumstances:
 - i. embark on UKOT and UK law enforcement vessels;
 - ii. authorize pursuit into US waters, by the UKOT and UK law enforcement vessels on which they are embarked, of suspect vessels and aircraft fleeing into or over US waters;
 - iii. authorize the UKOT and UK law enforcement vessels on which they are embarked to conduct patrols in US waters under this Agreement;
 - iv. enforce the laws of the United States in US waters, or seaward therefrom, in the exercise of the right of hot pursuit or otherwise in accordance with international law; and
 - v. authorize the UKOT and UK law enforcement vessels on which they are embarked to assist in the enforcement of US law.

Article 5 Authority of Law Enforcement Officials

When a shiprider of one Party is embarked on the other Party's vessel, and the enforcement action being carried out is pursuant to the shiprider's authority, any search or seizure of property, any detention of a person, and any use of force pursuant to this Agreement, whether or not involving weapons, shall be carried out by the shiprider, except as follows:

- i. crew members of the other Party's vessel may assist in any such action if expressly requested to do so by the shiprider and only to the extent and in the manner requested. Such request may only be made, agreed to, and acted upon in accordance with the applicable laws and policies of both Parties; and
- ii. such crew members may use force in self-defense, in accordance with the applicable laws and policies of their Government.

Article 6 Operations in National Waters

1. Neither Party shall conduct operations to suppress illicit traffic in or over the territory or waters of the other Party without the permission of the other Party, as provided by this Agreement or otherwise agreed to by the Parties. This Agreement constitutes permission by each Party for the other Party to conduct operations to suppress illicit traffic in any of the following circumstances:
 - i. an embarked shiprider of the other Party so authorizes;
 - ii. a suspect vessel or aircraft, encountered by one Party ("the first Party") flees into the waters or airspace of the other Party and, if no law enforcement vessel of the other Party is immediately available to investigate, the law enforcement vessel of the first Party without a shiprider of the other Party embarked may pursue the suspect vessel or aircraft into the waters or airspace of the other Party, in which case the suspect vessel may be boarded and searched, and, if the evidence warrants, detained pending instructions from the law enforcement authority of the other Party as to the exercise of jurisdiction in accordance with Article 10 of this Agreement; or
 - iii. a shiprider of the other Party is not embarked on a law enforcement vessel of the first Party, and no law enforcement vessel or official of the other Party is immediately available to investigate, in which case the law enforcement vessel or aircraft of the first Party may enter the waters or airspace of the other Party in order to investigate any suspect aircraft or board and search any suspect vessel located therein, other than a vessel flying the flag of the other Party. If the evidence warrants, law enforcement officials of the first Party may detain the suspect vessel and persons on board pending instructions from the law enforcement authority of the other Party as to the exercise of jurisdiction in accordance with Article 10 of this Agreement.
2. The law enforcement authority of each Party shall provide prior notice to the law enforcement authority of the other the Party of action to be taken under subparagraphs (ii) and (iii) of this Article, unless not operationally feasible to do so. In any case, notice of the action shall be provided to the law enforcement authority of the other Party without delay.

Article 7 Overflight Operations for Suppression of Illicit Traffic

- Each Party agrees to permit law enforcement aircraft operated by the other Party under this Agreement:
- i. subject to Article 8 of this Agreement, to overfly its territory and waters with due regard for its laws and regulations for the flight and maneuver of aircraft; and
 - ii. subject to the laws of each Party, to relay orders from its competent authorities to aircraft suspected of trafficking in illegal drugs to land in the territory overflowed.

Article 8 Overflight Procedures

Each Party shall, in the interest of flight safety, observe the following procedures for facilitating flights within the airspace of one Party by law enforcement aircraft of the other Party:

- i. In the event of planned bilateral or multilateral law enforcement operations, each Party shall provide reasonable notice and communications channels to the appropriate aviation authorities responsible for air traffic control in respect of the other Party of planned flights by its aircraft over territory or waters of the other Party.
- ii. In the event of unplanned operations, which may include the pursuit of suspect aircraft into the airspace of the Parties pursuant to this Agreement, the law enforcement and appropriate aviation authorities shall exchange information concerning the appropriate communications channels and other information pertinent to flight safety.
- iii. Any law enforcement aircraft operating in accordance with this Agreement shall comply with such air navigation and flight safety directions as may be required by the aviation authorities in whose airspace such aircraft is operating, and with any written operating procedures developed for flight operations within its airspace under this Agreement.

Article 9 Operations Seaward of the Territorial Sea

1. With regard to suspect vessels claiming registry in or the right to fly the flag of a UKOT or of the United States, as the case may be, in those circumstances to which the 1981 Agreement does not apply, whenever the law enforcement officials of one Party (the "first Party") encounter such a vessel located seaward of any

State's territorial sea, the first Party may request, in accordance with Articles 11 and 12 of this Agreement, the other Party to:

- i. confirm the claim of registry in or the right to fly the flag of the other Party; and
 - ii. if such claim is confirmed:
 - (a) to authorize the boarding and search of the suspect vessel, cargo and the persons found on board by the law enforcement officials of the first Party; and
 - (b) if evidence of illicit traffic is found, for permission for the law enforcement officials to detain the vessel, cargo and persons on board pending instructions from the law enforcement authorities of the other Party as to the exercise of jurisdiction in accordance with Article 10 of this Agreement.
2. Except as expressly provided herein, this Agreement does not apply to or limit boardings of vessels, conducted by the law enforcement officials of either Party, seaward of any nation's territorial sea in accordance with international law.

Article 10 Jurisdiction over Detained Vessels

1. In all cases arising in UKOT territory, waters, or airspace, or concerning vessels registered in or flying the flag of a UKOT seaward of any State's territorial sea to which the 1981 Agreement does not apply, the UKOT shall have the primary right to exercise jurisdiction over a detained vessel, cargo and/or persons on board (including seizure, arrest, prosecution and forfeiture), provided, however, that the UKOT may, subject to its law, waive its primary right to exercise jurisdiction and authorize the enforcement of US law against the vessel, cargo and/or persons on board.
2. In all cases arising in US territory, waters, or airspace, or concerning vessels registered in or flying the flag of the United States seaward of any State's territorial sea, the United States of America shall have the primary right to exercise jurisdiction over a detained vessel, cargo and/or persons on board (including seizure, arrest, prosecution and forfeiture), provided, however, that the United States may, subject to its law, waive its primary right to exercise jurisdiction and authorize the enforcement of UKOT law against the vessel, cargo and/or persons on board.
3. Instructions as to the exercise of jurisdiction pursuant to this Article shall be given without delay.

Article 11 Points of Contact

Each Party shall provide the other Party, and keep current, the points of contact for notifications under Article 6, for processing requests under Article 9 for verification of registration and the right to fly its flag and authority to board, search and detain suspect vessels, and for instructions as to the exercise of jurisdiction under Article 10.

Article 12 Content of Requests

1. Each request should contain, if possible, the name of the vessel, basis for suspicion, registration number, homeport, and any other identifying information.
2. If a request is conveyed orally, it shall later be confirmed in writing.

Article 13 Responses to Requests

1. Requests by a Party for verification of registration or the right to fly the flag of the other Party and for permission to board and search shall be answered by the other Party within two (2) hours from receipt of the request.
2. If the registration or the right to fly its flag is verified, the requested Party may:
 - i. decide to conduct the boarding and search with its own law enforcement officials;
 - ii. authorize the boarding and search by the law enforcement officials of the requesting Party;
 - iii. decide to conduct the boarding and search together with the requesting Party; or
 - iv. deny permission to board and search.
3. If the registration or the right to fly its flag is not verified within the two (2) hours, the requested Party may:
 - i. nevertheless authorize the boarding and search by the law enforcement officials of the requesting Party; or
 - ii. refute the claim of the suspect vessel to registration or the right to fly its flag under its laws.
4. If there is no response from the requested Party within two (2) hours of its receipt of the request, the requesting Party will be deemed to have been authorized to board the suspect vessel for the purpose of inspecting the vessel's documents, questioning the persons on board, and searching the vessel to determine if it is engaged in illicit traffic.
5. The authorization to board, search and detain includes the authority to use force in accordance with Article 17 of this Agreement.

Article 14 Cases of Suspect Vessels and Aircraft

Operations to suppress illicit traffic pursuant to this Agreement shall be carried out only against suspect vessels and aircraft, including vessels and aircraft without nationality or vessels assimilated to a vessel without nationality.

Article 15 Notification of Results of Shipboardings

Each Party shall promptly notify the other Party of the results of any boarding and search of the vessels of the other Party conducted pursuant to this Agreement.

Article 16 Conduct of Law Enforcement Officials

1. Each Party shall ensure that its law enforcement officials, when conducting boardings and searches and air interception activities pursuant to this Agreement, act in accordance with its applicable national laws and policies and with international law and accepted international practices.
2. Boardings and searches of vessels pursuant to this Agreement shall only be carried out by law enforcement officials from law enforcement vessels. Boarding and search teams may carry standard law enforcement weapons.
3. The boarding and search teams may also operate pursuant to this Agreement seaward of the territorial sea of any State, from vessels and aircraft of other States, including any boat or aircraft embarked on vessels, clearly marked and identifiable as being on government non-commercial service and authorized to that effect, as may be agreed to in writing by the Parties.
4. While conducting air intercept activities pursuant to this Agreement, the Parties shall not endanger the lives of persons on board and the safety of civil aircraft.

Article 17 Use of Force

1. All uses of force by a Party pursuant to this Agreement 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, except that neither Party shall use force against civil aircraft in flight.
2. Nothing in this Agreement shall impair the exercise of the inherent right of self-defense by law enforcement or other officials of the Parties.

Article 18 Exchange and Knowledge of Laws and Policies of Other Party

1. To facilitate implementation of this Agreement, each Party shall ensure that the other Party is fully informed of its respective applicable laws and policies, particularly those pertaining to the use of force.
2. Each Party shall ensure that all of its law enforcement officials are knowledgeable concerning the applicable laws and policies of both Parties.

Article 19 Disposition of Seized Property

1. Assets seized in consequence of any operation undertaken pursuant to this Agreement shall be disposed of in accordance with the laws of that Party exercising jurisdiction in accordance with Article 10 of this Agreement.
2. To the extent permitted by its laws and upon such terms as it deems appropriate, the seizing Party may, in any case, transfer forfeited assets or proceeds of their sale to the other Party. Each transfer generally will reflect the contribution of the other Party to facilitating or effecting the forfeiture of such assets or proceeds.

Article 20 Technical Assistance

The law enforcement authority of one Party (the "first Party") may request, and the law enforcement authority of the other Party may authorize, law enforcement officials of the other Party to provide technical assistance to law enforcement officials of the first Party for the boarding and search of suspect vessels located in the territory or waters of the first Party.

Article 21 Consultations

In case a question arises in connection with implementation of this Agreement, either Party may request consultations between the Parties to resolve the matter.

Article 22 Settlement of Claims

Responsibility for meeting any successful claim for damage, injury or loss resulting from an operation carried out under this Agreement shall rest with the Party whose law enforcement officials conducted the operation. In the event of a successful claim being made against the other Party in respect of such operation, that Party may seek compensation from the Party whose law enforcement officials conducted the operation.

Article 23 Miscellaneous Provisions

Nothing in this Agreement:

- i. precludes each Party from otherwise expressly authorizing operations to suppress illicit traffic by the other Party in the territory, waters or airspace of the first Party, or involving suspect vessels or aircraft flying or displaying the flag of the first Party, or from providing other forms of cooperation to suppress illicit traffic;
- ii. is intended to alter the rights and privileges due any individual in any legal proceeding;
- iii. is intended to modify, replace or affect in any way the provisions of the 1981 Agreement or the 1990 TRIPART MOU.

The Model Shiprider Agreement

Agreement between the government of the United States of America and the government of XXX concerning maritime counter drug cooperation to suppress illicit traffic by sea

PREAMBLE

The Government of the United States of America and the Government of XXX (hereafter, the "parties"); bearing in mind the special nature of the problem of illicit maritime drug traffic; having regard to the urgent need for international cooperation in suppressing illicit maritime drug traffic which is recognized in the 1961 Single Convention on Narcotic Drugs and its 1972 Protocol in the 1971 Convention on Psychotropic Substances, and in the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereinafter, the "1988 Convention"), and in the 1982 United Nations Convention on the Law of the Sea; recalling that paragraph 9 of Article 17 of the 1988 Convention requires the Parties to consider entering into bilateral agreements to carry out, or enhance the effectiveness of, its provisions; desiring to promote greater cooperation between the parties, and thereby enhance their effectiveness in combating illicit traffic by sea; Have agreed as follows:

NATURE AND SCOPE OF AGREEMENT

Article 1

The parties shall cooperate in combating illicit maritime drug traffic to the fullest extent possible, consistent with available law enforcement resources and related priorities.

DEFINITIONS

Article 2

In this agreement, unless the context otherwise requires:

- a. "illicit traffic" has the same meaning as that term is defined in the 1988 Convention.
- b. "XXX territory" means the land [and islands] under the sovereignty of XXX.
- c. "XXX waters" means the territorial sea (insert archipelagic waters, if applicable) and internal waters of XXX.
- d. "XXX airspace" means the airspace over XXX territory and waters.
- e. "law enforcement vessels" means warships and other ships, of the Parties or of third States, aboard which law enforcement officials are embarked, clearly marked and identifiable as being on government service and authorized to that effect, including any embarked boat or aircraft.
- f. "law enforcement authority" means: for the Government of the United States of America, the United States Coast Guard; and for the Government of XXX, the XXX.
- g. "law enforcement officials" means: for the Government of the United States of America, uniformed members of the United States Coast Guard; and for the Government of XXX, uniformed members of XXX.

SHIPRIDER PROGRAM AND ENFORCEMENT IN AND OVER WATERS

Article 3

Maritime counter-drug operations in XXX waters are the responsibility of, and subject to the authority of, the Government of XXX.

Article 4

The parties shall establish a joint law enforcement shiprider program between their respective law enforcement authorities. Each Party may designate a coordinator to organize its program activities and to identify the vessels and officials involved in the program to the other Party.

Article 5

The Government of XXX may designate qualified law enforcement officials to act as law enforcement shipriders. Subject to XXX law, these shipriders may in appropriate circumstances:

- a. embark on US law enforcement vessels;

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- b. authorize the pursuit, by the US law enforcement vessels on which they are embarked, of suspect vessels and aircraft fleeing into XXX waters;
- c. authorize the US law enforcement vessels on which they are embarked to conduct counter-drug patrols in XXX waters;
- d. enforce the laws of XXX in XXX waters or seaward there from in the exercise of the right of hot pursuit or otherwise in accordance with international law; and
- e. authorize the US law enforcement officials to assist in the enforcement of the laws of XXX.

Article 6

The Government of the United States of America may designate qualified law enforcement officials to act as law enforcement shipriders. Subject to United States law, these shipriders may, in appropriate circumstances:

- a. embark on XXX law enforcement vessels;
- b. advise and assist XXX law enforcement officials in the conduct of boardings of vessels to enforce the laws of XXX.
- c. enforce, seaward of the territorial sea of XXX, the laws of the United States where authorized to do so; and
- d. authorize the XXX law enforcement vessels on which they are embarked to assist in the enforcement of the laws of the United States seaward of the territorial sea of XXX.

Article 7

When a shiprider is embarked on the other Party's vessel, and the enforcement action being carried out is pursuant to the shiprider's authority, any search or seizure of property, and detention of a person, and any use of force pursuant to this agreement whether or not involving weapons, shall be carried out by the shiprider except as follows:

- a. crew members of the other Party's vessel may assist in any such action if expressly requested to do so by the shiprider and only to the extent and in the manner requested. Such request may only be made, agreed to and acted upon in accordance with the applicable laws and policies of both parties; and
- b. such crew members may use force in self-defense in accordance with the applicable laws and policies of their government.

Article 8

The Government of the United States of America shall not conduct maritime counter-drug operations in XXX waters without the permission of the Government of XXX granted by this agreement or otherwise.

This agreement constitutes permission by the Government of XXX for United States maritime counter-drug operations in any of the following circumstances:

- a. an embarked XXX shiprider so authorizes;
- b. a suspect vessel or aircraft, detected seaward of the territorial sea of XXX enters XXX waters or airspace and no XXX shiprider is embarked on a US law enforcement vessel in the vicinity, and no XXX law enforcement vessel is immediately available to investigate, the US law enforcement vessel may follow the suspect vessel or aircraft into XXX waters in order to investigate, and board and search the vessel, and, if the evidence warrants, detain the vessel and the persons on board pending expeditious disposition instructions from XXX authorities; and
- c. no XXX shiprider is embarked on a US law enforcement vessel in the vicinity, and no XXX law enforcement vessel is immediately available to investigate, in which case the US law enforcement vessel may enter XXX waters in order to investigate a suspect vessel or aircraft located therein, and board and search the suspect vessel. If the evidence warrants, US law enforcement officials may detain the suspect vessel and persons on board pending disposition instructions from XXX authorities.

Article 9

Nothing in this agreement precludes the Government of XXX from otherwise expressly authorizing United States maritime counter-drug operations in XXX waters or involving XXX flag vessels suspected of illicit traffic.

Article 10

The Government of XXX shall permit aircraft of the Government of the United States of America (hereafter, "US aircraft") when engaged in law enforcement operations or operations in support of law enforcement agencies to:

- a. overfly the territory and waters of XXX subject to Article 10 and with due regard for the laws and regulations for its laws and regulations for the flight and maneuver of aircraft; and

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- b. relay, subject to the laws of each Party, orders from the competent authorities to aircraft suspected of trafficking in illegal drugs to land in XXX.

Article 11

The Government of the United States of America shall, in the interest of flight safety, observe the following institute procedures for facilitating flights by US aircraft within XXX airspace.

- a. In the event of planned bilateral or multilateral law enforcement operations, the US shall provide reasonable notice and communications channels to the appropriate XXX aviation authorities of planned flights by its aircraft over XXX territory or waters.
- b. In the event of unplanned operations, which may include the pursuit of suspect aircraft into XXX airspace pursuant to this Agreement, the law enforcement and appropriate aviation authorities of the Parties may exchange information concerning the appropriate communications channels and other information pertinent to flight safety.
- c. Any aircraft engaged in law enforcement operations or operations in support of law enforcement activities in accordance with this Agreement shall comply with such air navigation and flight safety directions as may be required by the XXX aviation authorities, and with any written operating procedures developed by XXX for flight operations within its airspace under this Agreement.

OPERATIONS SEAWARD OF THE TERRITORIAL SEA

Article 12

Whenever US law enforcement officials encounter a vessel flying the XXX flag or claiming to be registered in XXX, located seaward of any nation's territorial sea and have reasonable grounds to suspect that the vessel is engaged in illicit traffic, this Agreement constitutes the authorization of the Government of XXX for the boarding and search of the suspect vessel and the persons found on board by such officials. If evidence of illicit traffic is found, United States law enforcement officials may detain the vessel, persons on board, evidence and cargo pending expeditious disposition instructions from the Government of XXX.

Article 13

Except as expressly provided herein, this agreement does not apply to or limit boarding of vessels conducted by either Party in accordance with international law, seaward of any nation's territorial sea, whether based, inter alia, on the right of visit, the rendering of assistance to persons, vessels, and property in distress or peril, the consent of the vessel master, or an authorization from the flag state to take law enforcement action.

JURISDICTION OVER DETAINED VESSELS

Article 14

In all cases arising in XXX waters or concerning XXX flag vessels seaward of any nation's territorial sea the Government of XXX shall have the primary right to exercise jurisdiction over a detained vessel and/or persons on board (including seizure, forfeiture, arrest, and prosecution), provided, however, that the Government of XXX may, subject to its constitution and laws, waive its primary right to exercise jurisdiction and authorize the enforcement of United States law against the vessel and/or persons on board.

IMPLEMENTATION

Article 15

Counter-drug operations pursuant to this agreement shall be carried out only against vessels and aircraft used for commercial or private purposes and which either of the Parties has reasonable grounds suspect are involved in illicit traffic, including vessels and aircraft without nationality.

Article 16

A Party conducting a boarding and search pursuant to this agreement shall promptly notify the other Party of the results thereof. The relevant Party shall timely report to the other Party, consistent with its laws, on the status of all investigations, prosecutions and judicial proceedings resulting from enforcement action taken pursuant to this agreement where evidence of illicit traffic was found.

Article 17

Each Party shall ensure that its law enforcement officials, when conducting boardings and searches pursuant to this agreement act in accordance with the applicable national laws and policies of that Party and with international law and accepted international practices.

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Article 18

Boardings and searches pursuant to this agreement shall be carried out by law enforcement officials from law enforcement vessels. The boarding and search team may carry standard law enforcement small arms.

Article 19

All use of force by a Party pursuant to this agreement shall be in strict accordance with applicable laws and policies of the respective Party and shall in all cases be the minimum reasonably necessary under the circumstances. Nothing in this agreement shall impair the exercise of the inherent right of self-defense by law enforcement or other officials of either Party.

Article 20

To facilitate implementation of this agreement, each Party shall ensure the other Party is fully informed concerning its applicable laws and policies, particularly those pertaining to the use of force. Each Party has the corresponding responsibility to ensure that all of its officials engaging in law enforcement operations pursuant to this agreement are knowledgeable concerning the applicable laws and policies of both parties.

Article 21

Unless their status is specifically provided for in another agreement, all law enforcement and other officials of the Government of the United States of America present in XXX waters or territory or on XXX vessels in connection with this agreement shall be accorded the privileges and immunities equivalent to those of the administrative and technical staff of a diplomatic mission under the 1961 Vienna Convention on diplomatic relations.

Article 22

Assets seized in consequence of any operation undertaken in XXX waters pursuant to this agreement shall be disposed of in accordance with the laws of XXX. Assets seized in consequence of any operation undertaken seaward of the territorial sea of XXX pursuant to this agreement shall be disposed of in accordance with the laws of the seizing Party. To the extent permitted by its laws and upon such terms as it deems appropriate, a Party may, in any case, transfer forfeited assets or proceeds of their sale to the other Party.

Article 23

In case a question arises in connection with implementation of this agreement, either Party may request consultations to resolve the matter. If any loss or injury is suffered as a result of any action taken by the law enforcement or other officials of one Party in contravention of this agreement or any improper or unreasonable action is taken by a Party pursuant thereto, the parties shall, without prejudice to any other legal rights which may be available, consult at the request of either Party to resolve the matter and decide any questions relating to compensation.

Article 24

Except as provided in paragraph 21, nothing in this agreement is intended to alter the rights and privileges due any individual in any legal proceeding.

Article 25

Situations not provided for by this agreement will be determined in accordance with international law.

Article 26

Nothing in this agreement shall prejudice the position of either Party with regard to the international law of the sea.

ENTRY INTO FORCE AND DURATION

Article 27

This agreement shall enter into force upon signature by both parties.

Article 28

This agreement may be terminated at any time by either Party upon written notification to the other Party through the diplomatic channel, such termination to take effect one year from the date of notification.

Article 29

This agreement shall continue to apply after termination with respect to any administrative or judicial proceedings arising out of actions taken pursuant to this agreement.

The Model Shiprider Agreement

In Witness Whereof, the undersigned, being duly authorized by their respective governments, have signed this agreement.

Done at....., this.....; day ofof 20.., in the English and languages, each text being duly authentic.

**For the Government of the
United States**

.....

**For the Government
of State XXX**

.....

Samenvatting

Het gebruik van drugs, een verzamelnaam voor verdovende middelen en psychotrope stoffen, en de verslaving eraan is een wereldwijd probleem. Het illegale gebruik van drugs heeft zijn weerslag op sociale en economische structuren van de samenleving evenals op het milieu en op het politieke systeem van sommige staten, met name van onderontwikkelde staten.

De Verenigde Naties zijn, in hun meest recente rapportage, gematigd positief over de resultaten van de wereldwijde bestrijding van productie, handel en gebruik van verdovende middelen en psychotrope stoffen. Uit hetzelfde rapport blijkt echter ook dat de handel in drugs, ondanks de aanzienlijke bestrijdingsinspanningen, de laatste jaren niet is afgenomen. Tevens blijkt dat met name de sluikhandel in illegale drugs voornamelijk plaats vindt in het Caribische gebied en Europa. Deze handel is een onderdeel van het wereldwijde drugsprobleem, indien men de handel kan verminderen, dan bestaat de kans dat ook het verbruik van drugs zal minderen. Aangezien een zeer groot gedeelte van de illegale handel in drugs over zee plaats vindt is ligt het in de lijn dat er veel moeite dient te worden gestoken in de bestrijding van sluikhandel in illegale drugs over zee.

Iedere staat heeft soevereiniteit in de eigen territoriale zee en de volle zee mag door eenieder vrij gebruikt worden. Deze internationaal erkende juridische beginselen bieden staten belangrijke voordelen. Ze voorkomen ondermeer dat andere staten zich kunnen bemoeien met de interne aangelegenheden. Er kleeft echter ook, voor maritieme drugsbestrijding, een nadeel aan deze beschermende regelgeving. Ze maakt de bestrijding van deze grensoverschrijdende criminaliteit vaak zeer complex.

Deze studie richt zich op een gedeelte van het drugprobleem, namelijk het probleem van de illegale handel in drugs, meer specifiek op de illegale drugshandel over zee. De bestrijding van deze sluikhandel wordt onderzocht, kort gezegd: maritieme drugsbestrijding. De studie concentreert zich op het juridische raamwerk van het internationale recht dat zich bezig houdt met de bestrijding van de sluikhandel van illegale drugs overzee. Het algemene deel van dit raamwerk bestaat uit het recht van de zee zoals vastgelegd in het 'Verdrag van de Verenigde Naties inzake het recht van de zee' van 1982 (Zeerechtverdrag), en uit het 'Verenigde Naties verdrag voor de bestrijding van de sluikhandel in verdovende middelen en psychotrope stoffen' uit 1988 (1988 Verdrag). Het meer specifieke raamwerk bestaat uit maritieme-drugsbestrijding verdragen.

Het doel van de studie is om te onderzoeken wat de rechtsmacht is van kuststaten en van interveniërende staten in verschillende maritieme rechtzones waarin de oceanen zijn verdeeld. Een interveniërende- of optredende staat is een staat die een vreemd verdacht schip aanhoudt op zee. Verder wordt er onderzocht of er een relatie bestaat tussen de drugsbestrijdingverdragen, daartoe worden de meest relevante maritieme-drugsbestrijdingverdragen onderzocht. Ook wordt er onderzocht of deze verdragen hebben bijgedragen aan de vorming van internationaal gewoonterecht. Als laatste wordt de ontwikkeling van maritieme drugsbestrijding door de tijd heen bekeken.

Hoofdstuk 2 beschrijft de ontwikkeling van controle over legale drugs in het internationale recht, vanaf de eerste internationale afspraken in 1909 tot aan de verdragen die werden gesloten voor het 1988 Verdrag, omdat dit verdrag een omslagpunt is in de maritieme drugsbestrijding; voor het eerst vond maritieme sluikhandel in drugs een plaats in het volkenrecht.

De internationale controle op legale drugs kan verdeeld worden in drie periodes. Aangezien de Volkenbond in 1919 werd belast met de internationale controle op legale drugs is dit een

tijdgrens. Voor de oprichting van de Volkenbond werden er enkele stappen gezet op het gebied van internationale controle op legale drugs. De Nederlandse staat was toen het centrale orgaan dat de controle op legale drugs regelde; dit was vastgelegd in een verdrag uit 1912. Vervolgens nam de Volkenbond in 1919 deze controle over. Tot aan de ontbinding van de Volkenbond werden er relatief veel verdragen gesloten op het gebied van internationale controle van legale drugs. Er kwamen vergunningen voor staten die deze drugs im- en exporteerde. Deze verdragen werden overigens niet altijd nageleefd door de lidstaten en de verdragen hadden veel ontsnappingsclausules. De internationale controle op legale drugs heeft in ieder geval niet de handel in illegale drugs voorkomen in die tijd.

De laatste periode begint bij de oprichting van de VN in 1945, deze nam de drugscontrole over van de Volkenbond. Tot aan de tachtiger jaren werden er verdragen gesloten op het gebied van internationale controle op legale drugs. De partijen bij deze verdragen werden verplicht om strafbare feiten te definiëren, om het gebruik van drugs te beheersen en om toezicht te houden op de productie, teelt en handel in drugs. Na de tachtiger jaren van de vorige eeuw kwam de nadruk te liggen op het verbieden van het vervoer van illegale drugs en kwam de bestrijding van de sluikhandel meer in het teken te staan van rechtshandhaving.

Hoofdstuk 3 bestudeert het algemeen juridische raamwerk van het internationale recht dat betrekking heeft op maritieme drugsbestrijding. Daar waar Hoofdstuk 2 de internationale controle over legale drugs onderzocht is het onderwerp van Hoofdstuk 3 de bestrijding van illegale drugs, met name de sluikhandel van illegale drugs over zee. Dit wordt gedaan aan de hand van het recht dat een kuststaat heeft om schepen aan te houden die van drugssmokkel worden verdacht en aan de hand van de rechtsmacht die een staat heeft die een van drugssmokkel verdacht schip aan wil houden en onderzoeken op zee; de interveniërende staat.

Aangezien het internationale recht en met name het recht van de zee de oceanen in verschillende maritieme rechtsmachtzones heeft verdeelt zullen eerst deze zones belicht worden, evenals een korte ontwikkeling van het internationale zeerecht

Met name tijdens de laatste eeuw hebben zich belangrijke ontwikkelingen voorgedaan met betrekking tot de gebruiksmogelijkheden van de zee. De zee is voor de wereldeconomie als transportmedium steeds belangrijker geworden waardoor de zeescheepvaart is toegenomen. In het verleden waren zeerechtverdragen vaak het gevolg van geschillen tussen twee staten. Deze verdragen waren daarom meestal bilateraal van aard. In de zich steeds sneller ontwikkelende wereld voldeden deze bilaterale verdragen niet meer. De versnelde ontwikkeling in de gebruiksmogelijkheden en daarmee ook de misbruikmogelijkheden van de zee betekende dat er een behoefte ontstond voor algemeen bindende regelgeving.

Op 29 april 1958 heeft men in Genève, tijdens de eerste zeerechtconferentie van de VN, voor het eerst het traditionele zeerecht en de meest recente ontwikkelingen daarvan vastgelegd in een viertal internationale zeerechtverdragen. Al heel snel bleek echter dat deze verdragen ontoereikend waren voor het opvangen van nieuwe ontwikkelingen. De Verenigde Naties besloten daarom, in het begin van de jaren 70 van de vorige eeuw, om een conferentie bijeen te roepen die een allesomvattend nieuw regime voor de zee moest ontwikkelen. Het uiteindelijke resultaat van deze derde zeerechtconferentie van de VN is vastgelegd in Zeerechtverdrag van 1982.

Hoofdstuk 3 onderzoekt de rechtsmacht gebaseerd op het Zeerechtverdrag en het 1988 Verdrag, van de kuststaat en van de interveniërende staat daar waar het handelt over van drugssmokkel verdachte schepen in verschillende maritieme jurisdictiezones, deze zones worden in het kort beschreven in dit hoofdstuk.

Het 1988 Verdrag is het eerste verdrag dat een specifieke bepaling bevat op het gebied van maritieme drugsbestrijding. De definities uit dit verdrag zijn ook bepalend voor de in de volgende hoofdstukken te onderzoeken specifieke maritieme-drugsbestrijding verdragen. Ook

stelt het verdrag dat elke partij bij dit verdrag de sluikhandel in illegale drugs strafbaar dient te stellen, ook daar waar dit gebeurt op schepen die onder de vlag van die lidstaat vallen. Elke lidstaat mag strafbaar stellen indien de sluikhandel plaatsvindt aan boord van een schip van een andere nationaliteit. Het 1988 Verdrag gaat dus verder dan de voorgaande verdragen: de partijen worden verplicht overtredingen van de verdragsbepalingen, waaronder handel in drugs, in hun nationale strafrecht aan te merken als een strafbaar feit.

In Hoofdstuk 3 wordt de rechtsmacht op het gebied van maritieme drugsbestrijding van de kuststaat en van de interveniërende staat onderzocht. Dit gebeurt successievelijk in verschillende zeegebieden. Het eerste zeegebied is de wateren onder soevereiniteit van de kuststaat, deze omvatten de maritieme binnenwateren, de archipelwateren en de territoriale zee. Het tweede zeegebied bestaat uit de wateren onder functionele jurisdictie van de kuststaat, dit zijn de aansluitende zone (AZ) en de Exclusieve Economische Zone (EEZ). Het laatste zeegebied is de wateren buiten de jurisdictie van enige kuststaat, met name de volle zee.

Van de wateren die onder de soevereiniteit van de kuststaat vallen is de territoriale zee de belangrijkste. De territoriale zee mag zich uitstrekken tot maximaal 12 zeemijl van uit de basislijn, dit is in het algemeen de laagwaterlijn langs de kust. Vreemde schepen hebben het recht van onschuldige doorvaart in de territoriale zee.

Artikel 27 Zeerechtverdrag gaat over de jurisdictie aan boord van een vreemd schip binnen de territoriale wateren van een kuststaat. Het artikel stelt dat in deze territoriale zee in principe de jurisdictie van de kuststaat geldt. In het verdrag wordt echter een uitzondering gemaakt voor vreemde schepen die gebruik maken van het recht van onschuldige doorvaart. Artikel 27 maakt hier echter ook een aantal uitzonderingen op. Een van deze uitzonderingen geldt voor situaties waarbij sprake is van drugsmokkel of de verdenking daarvan. Als er maatregelen benodigd zijn om de illegale smokkel van verdovende middelen of psychotrope stoffen tegen te gaan, is de kuststaat gerechtigd om deze maatregelen te nemen. Het Zeerechtverdrag geeft een kuststaat daarmee vergaande bevoegdheid om op te treden tegen smokkel van verdovende middelen door haar territoriale wateren. Ook als deze smokkel wordt uitgevoerd door schepen die onder een andere vlag varen.

In zeestraten die door de internationale scheepvaart worden gebruikt tussen het ene deel van de volle zee of van de EEZ en het andere deel van de volle zee of van een EEZ genieten alle schepen het recht van doortocht, dat niet mag worden belemmert door de kuststaat. Er zijn meer dan 120 van dit soort straten, bijvoorbeeld de Straat van Gibraltar of Straat Hormoes. De kuststaat hebben binnen deze straten beperkte rechtsmacht. Hoever deze rechtsmacht geldt is een niet onbesproken leerstuk uit het internationale recht van de zee. In de studie wordt gesteld dat de kuststaat geen rechtsmacht heeft over van drugsmokkel verdachte schepen die onder het regiem van doortocht vallen. Dit geldt ook voor het recht van doorgang via scheepvaartroutes in een archipel.

Concluderend kan gesteld worden dat een kuststaat binnen de wateren die onder haar soevereiniteit vallen verdachte schepen kan aanhouden en onderzoeken, ook vreemde schepen. Dit geldt niet voor schepen die vallen onder het regiem van doortocht of onder het recht van doorgang via scheepvaartroutes in de archipel.

De aangrenzende zone valt onder de functionele jurisdictie van de kuststaat. Artikel 33 Zeerechtverdrag geeft de kuststaat een beperkte vorm van jurisdictie (toezicht) binnen de aangrenzende zone. Dit is een zone die aan de zeezijde tegen de territoriale zee aan ligt en, net als de territoriale zee, in principe 12 nautische mijlen breed is. De kuststaat mag in deze aangrenzende zone toezicht houden, teneinde overtredingen van douane-, fiscale-, immigratie- en volksgezondheidswetgeving in haar territoriale zee te kunnen vaststellen. Als bepaald wordt dat deze wetten zijn overtreden, mogen de overtredingen door de kuststaat worden bestraft. Aangezien de invoer en uitvoer van illegale verdovende middelen in de douanewetgeving

verboden is, houdt dit in dat opsporingsambtenaren in deze zone kunnen optreden tegen de illegale smokkel van verdovende middelen van en naar de kuststaat.

De EEZ valt ook onder de functionele jurisdictie van de kuststaat. De EEZ is een zone van maximaal 200 nautische mijlen breed die zich zeewaarts uitstrekt vanaf de basislijn. In de EEZ geldt een beperkte jurisdictie voor de kuststaat. Deze jurisdictie beperkt zich tot die zaken die worden beschreven in artikel 56 Zeerechtverdrag, dit zijn met name economische zaken. Ofschoon de EEZ een aparte legale status heeft in het internationale zeerecht zijn er een aantal regels die zowel op volle zee als in de EEZ gelden. In de EEZ geldt bijvoorbeeld, net als op de volle zee, de vrijheid van navigatie. Artikel 58 lid 2 Zeerechtverdrag stelt bovendien dat de artikelen 88 tot en met 115 van dat verdrag, die van toepassing zijn op de volle zee ook onveranderd van toepassing zijn op de EEZ.

De volle zee valt buiten de jurisdictie van enige kuststaat. Artikel 108 Zeerechtverdrag handelt over illegaal vervoer van verdovende middelen en psychotrope stoffen op volle zee. In het eerste lid van dit artikel wordt gesteld dat staten ook op de volle zee moeten samenwerken bij de onderdrukking van het illegale vervoer van deze stoffen. Op grond van het tweede lid van dit artikel mag een staat, die het vermoeden heeft dat een schip, varende onder haar vlag en zich bezighoudt met de sluikhandel van verdovende middelen op volle zee, de medewerking verzoeken van andere staten. Aangezien het eerste lid geen enkele bevoegdheid toekent en het tweede lid alleen de situatie beschrijft waarin er sprake is van een schip onder eigen vlag is dit artikel slechts zeer beperkt bruikbaar. Het artikel zegt bijvoorbeeld helemaal niets over een drugsmokkelaar onder een vreemde vlag en dit is nu juist de situatie die op de volle zee het meest voorkomt. Ondanks de beperkte bruikbaarheid is dit artikel toch belangrijk. Het eerste lid legt staten immers een samenwerkingsverplichting op. Om de smokkel van drugs op volle zee effectief aan te kunnen pakken zonder de soevereiniteit van de vlaggenstaat met voeten te treden is echter aanvullende regelgeving nodig.

Artikel 111 Zeerechtverdrag gaat over het achtervolgingsrecht vanuit de territoriale wateren, de aangrenzende zone of de EEZ naar de volle zee. De beter bekende Engelstalige term voor dit verschijnsel is *'hot pursuit'*. Artikel 111 geeft een kuststaat het recht om een schip, dat verdacht wordt van het schenden van de wetten van deze kuststaat, te achtervolgen als het de territoriale wateren, de aangrenzende zone of de EEZ uit vlucht. Het verdachte schip mag vervolgens door de betrokken kuststaat buiten deze zones worden aangehouden, gebaseerd op de relevante wetgeving binnen deze zones. Dit recht vervalt als het betreffende schip de territoriale zee van een andere staat binnen vaart.

Het artikel 17 van het 1988 Verdrag geeft onder andere aan dat een partij die het vermoeden heeft dat illegaal vervoer van drugs plaats vindt, aan de vlaggenstaat van het verdachte schip toestemming mag vragen om actie te mogen ondernemen. De vlaggenstaat mag de verzoevende partij autorisatie verlenen om aan boord te gaan, toestemming geven om het vaartuig te onderzoeken en, indien bewijs voor illegaal drugsvervoer wordt gevonden, toestemming geven om op toepasselijke wijze actie te nemen. Deze toepasselijke actie dient het gevolg te zijn van onderling overleg of gebaseerd te zijn op een onderlinge afspraak tussen de betrokken staten. Op deze wijze blijft de territoriale integriteit van de vlaggenstaat in stand. Een feit dat nog eens wordt onderstreept door artikel 4 van het 1988 Verdrag waar duidelijk in wordt aangegeven wanneer een partij jurisdictie heeft over een geconstateerd vergrijp. Hiermee wordt een belangrijke voorwaarde geschapen om de drugsmokkel op zee effectief aan te kunnen pakken zonder het soevereiniteitsbeginsel geweld aan te doen.

Buiten de territoriale zee bestaat het recht van vrijheid van navigatie. Alleen de vlaggenstaat heeft hier jurisdictie over schepen die verdacht worden van drugsmokkel. Hierop bestaan twee uitzonderingen. In de aangrenzende zone heeft de kuststaat rechtsmacht over verdachte schepen indien de verdovende middelen die deze vervoeren bestemd zijn voor of afkomstig

zijn uit de kuststaat. De tweede uitzondering is het achtervolgingsrecht dat de kuststaat heeft in bepaalde gevallen.

De rechtsmacht van een interveniërende- of optredende staat is, onder de onderzochte verdragen, alleen van toepassing in wateren buiten de territoriale zee van een kuststaat, met uitzondering van schepen die onder een andere vlag varen dan die van de interveniërende staat.

Hoofdstuk 4 en 5 onderzoeken de rechtsmacht van een kuststaat en van een interveniërende staat gebaseerd op de specifieke maritieme drugsbestrijdingverdragen. Hoofdstuk 4 doet dit voor Europa en hoofdstuk 5 voor het Caribische gebied. Hoofdstuk 4 onderzoekt het 1995 Verdrag, het 2002 Concept Verdrag en enkele bepalingen uit het 1997 Verdrag (Naples II). De verdragen worden onderverdeeld algemene, juridische en operationele bepalingen. Dit gebeurt consequent in de gehele studie om zodoende alle bepalingen met elkaar te kunnen vergelijken.

Artikel 17 van het 1988 Verdrag beoogt de vrij algemene toepassing van artikel 108 van het Zeerechtverdrag te verruimen en te preciseren en een solide basis te leggen voor praktische samenwerking tussen de aangesloten landen als het erom gaat een einde te maken aan de illegale drugshandel op zee. Het 1988 Verdrag zwijgt echter als het om bepaalde kwesties gaat en geeft geen precieze richtsnoeren om te zorgen voor een optimale praktische toepassing. Teneinde overeenkomstig artikel 17 lid 9 van het 1988 Verdrag voor meer doelmatigheid te zorgen, sloot de Raad van Europa derhalve op 31 januari 1995 een akkoord (1995 Verdrag), dat op 1 mei 2000 van kracht werd en dat onder meer uitvoerige voorschriften bevat voor de juridische betrekkingen tussen het optredende land en de vlagstaat, voor de toestemmingsprocedures en de toepassing, enz. Vergeleken met het 1988 Verdrag is het 1995 Verdrag een goede vooruitgang. De details worden goed beschreven en bovendien wordt het leerstuk van stateloze schepen beter geadresseerd. Met name artikel 3 van het 1995 Verdrag is een verbetering omdat dit artikel bepaalt dat sluikhandel aan boord van vreemde schepen ook strafbaar gesteld dient te worden door de lidstaten bij dit verdrag. Het 1995 Verdrag is een adequate internationale overeenkomst op het gebied van maritieme drugsbestrijding. Internationale samenwerking op het gebied van drugsbestrijding op zee wordt tot in detail geregeld, gebaseerd op de toestemming die een staat moet vragen aan de vlaggenstaat van een vreemd schip, om dit op zee aan te houden en te onderzoeken naar illegale drugs.

Het 1997 Verdrag (Naples II) regelt voor de lidstaten het achtervolgingsrecht van de territoriale zee van de ene staat in de territoriale zee van een andere staat. Artikel 20 van dit verdrag autoriseert opsporingspersoneel van de ene staat om op te treden binnen het territorium, inclusief de territoriale zee, van een andere staat. Dit zelfs zonder toestemming van de laatste staat indien haast hiertoe noopt.

Het 2002 Concept Verdrag stelt dat indien momenteel, een oorlogsschip of een ander officieel schip van een lidstaat op volle zee een schip aantreft dat wordt verdacht van illegale drugshandel en dat de vlag van een andere staat voert, dan mag dit oorlogsschip geen actie ondernemen zonder voorafgaande toestemming van de vlaggenstaat. Dit is vastgelegd in artikel 17 van het 1988 Verdrag, en meer uitvoerig in het 1995 Verdrag van de Raad van Europa dat een uitwerking is van het eerdergenoemde artikel 17. Deze noodzaak van voorafgaande toestemming en de nodige tijd voor het verkrijgen daarvan maken dat veel acties ter bestrijding van de drugshandel al op volle zee tot mislukken zijn gedoemd. De tijd voor het verkrijgen van de voorafgaande toestemming is cruciaal, omdat tegen de tijd dat toestemming om te kunnen optreden is verkregen, het verdachte schip tijd heeft gehad om te vluchten of de bewijzen van het misdrijf te vernietigen, met als gevolg dat de gehele actie moet worden afgeblazen.

Het voornaamste doel van het 2002 Concept Verdrag moet tegen deze achtergrond worden beschouwd, namelijk als niets meer of minder dan een poging om de samenwerking tussen de lidstaten van de Europese Unie bij de bestrijding van de handel in verdovende middelen en

psychotrope stoffen te intensiveren, zodat een oorlogsschip of ander officieel schip van een lidstaat op volle zee, met vooraf vastgelegde toestemming van de vlaggenstaat, tegen een vreemd schip kan optreden indien er gegronde redenen bestaan om aan te nemen dat dit wordt gebruikt voor illegale handel in verdovende middelen. Om deze situatie in het juiste licht te kunnen beoordelen, dient er rekening mee te worden gehouden dat als een oorlogsschip of een ander officieel schip binnen zijn territoriale wateren een schip achtervolgt dat wordt verdacht van illegale drugshandel, het de vervolging om dringende redenen kan voortzetten zonder voorafgaande toestemming op volle zee op grond van artikel 111 van het Zeerechtverdrag óf in de territoriale wateren van een andere lidstaat, op grond van artikel 20 van het 1997 Verdrag (Naples II). Het zal, volgens dit artikel, mogelijk en gangbaar kunnen worden dat een oorlogsschip of een ander officieel schip van een lidstaat de achtervolging van een verdacht schip tot in de territoriale wateren van een andere lidstaat voortzet en dit schip betreedt, zonder dat het vooraf toestemming om dringende redenen van laatstgenoemde lidstaat heeft verkregen. Als we daarentegen een ander scenario nemen waarbij beide schepen zich op volle zee bevinden, is vervolging alleen mogelijk met voorafgaande toestemming na een verzoek hiertoe van de lidstaat wiens vlag het schip voert, wat veelal het mislukken van de actie betekent vanwege de spoed waarmee moet worden opgetreden. Het 2002 Concept Verdrag stelt daarom dat de lidstaten moeten instemmen met de buitengewone mogelijkheid dat een oorlogsschip of een ander officieel schip van de lidstaat op volle zee optreedt tegen een schip dat de vlag van een andere lidstaat voert, ook zonder voorafgaande toestemming na verzoek in dringende gevallen wanneer er redenen zijn om te vermoeden dat het schip in overtreding is, omdat dit in bepaalde gevallen de enig mogelijke manier is om de grote criminaliteit te bestrijden. De toestemming om een verdacht schip van een andere lidstaat te stoppen en te onderzoeken wordt dus reeds van te voren vastgelegd in een overeenkomst. In het 2002 Concept Verdrag is het vertegenwoordigingsrecht neergelegd: "Indien er redelijkerwijs vermoed kan worden dat een schip verdacht wordt van drugsmokkel dan verleent elke lidstaat de overige lidstaten een vertegenwoordigingsrecht op grond waarvan de oorlogsschepen of andere officiële schepen kunnen optreden tegen de schepen van een andere lidstaat"

We kunnen concluderen dat de Raad van Europa en de Europese Unie beide betrokken zijn bij maritieme drugsbestrijding. De Raad van Europa met het adequate 1995 Verdrag en de Europese Unie met het 1997 Verdrag (Naples II) voor samenwerking in de territoriale zee van een kuststaat, terwijl het 2002 Concept Verdrag vastlegt dat elke lidstaat vooraf toestemming geeft om een schip van die lidstaat te mogen aanhouden en onderzoeken op volle zee.

Hoofdstuk 5 handelt over een maritieme drugsbestrijdingverdrag in het Caribische gebied. In dit hoofdstuk wordt het 'Verdrag inzake de samenwerking bij de bestrijding van sluikhandel in verdovende middelen en psychotrope stoffen over zee en door de lucht in het Caribische gebied' (2003 Verdrag) onderzocht, dit verdrag kwam in 2003 te San José, Costa Rica tot stand.

Teneinde de drugsbestrijding in het Caribische gebied naar waarde te kunnen schatten dient deze in een context gezet te worden. Het Caribische gebied ligt strategisch tussen de drugs producerende landen zoals Colombia en Venezuela en de regio's waar de drugs worden gebruikt, te weten de Verenigde Staten en Europa. Het uitgestrekte Caribische gebied is een regio met aanzienlijke verschillen. Er worden er vier hoofdtalen gesproken, Engels, Spaans, Frans en Nederlands. Er is een variëteit aan juridische systemen en een veelheid aan etnische, culturele, religieuze en politieke verschillen. Toch wordt het Caribische gebied vaak als een onafhankelijke eenheid beschouwd en niet als een gebied met meer dan dertig staten. Geografisch gezien is het Caribische gebied een verzameling van eilanden, eilandjes en riffen die de Caribische zee omarmen. Tussen deze eilanden varen honderden vissersbootjes, vracht en cruiseschepen, zeil en kajuitjachten. Ook een zeer druk luchtverkeer vindt plaats tussen al

deze eilanden. Voeg hier aan toe de migratie en mobiliteit van de Caribische bevolking en de ontelbare toeristen vanuit en naar de drugsgebruikerlanden. Al deze factoren maken duidelijk dat het arme en minder ontwikkelde Caribische gebied bijna ideaal is voor doorvoer van drugs van Zuid-Amerika naar de Verenigde Staten en Europa.

In 1996 werd in het kader van de drugsbestrijding een team van Europese experts naar het Caribische gebied gestuurd. Deze Europese experts kwamen tot de conclusie dat er zeer fundamentele zwakheden zaten in de bestrijding van het drugsprobleem in het Caribische gebied. O.a. de volgende zwakheden werden geïdentificeerd:

- gebrek aan besef en tevens onderschatting van het drugsprobleem bij de politieke leiders en het publiek;
- gebrek aan coördinatie tussen de Caribische landen onderling, tussen de donorlanden onderling en bovendien tussen de Caribische landen en de donorlanden;
- gebrek aan voldoende en efficiënte uitrusting voor de wetshandhavers;
- gebrek aan communicatie en informatie;
- gebrek aan voldoende wetgeving en effectieve juridische systemen;
- gebrek aan maritieme controle.

Kortom: een gebrek aan samenwerking en coördinatie tussen de vele belanghebbende staten, verder een gebrek aan politieke wil, personeel en middelen met als gevolg dat het aanhouden van drugsmokkelaars in het Caribische gebied, voor vele staten in die dagen een kwestie van toeval en geluk was. De drugsmokkelaars zijn op de hoogte van al deze fundamentele gebreken en vertrouwen daarom meer en meer op het transport via zee. Dit zijn enkele redenen dat er jaarlijks nog steeds honderden tonnen illegale drugs gesmokkeld worden in het Caribische gebied.

In mei 1996 vond er een regionale bijeenkomst plaats op Barbados onder auspiciën van de VN. Op deze bijeenkomst werd geconstateerd dat de effectiviteit van de drugsbestrijding baat zou hebben bij een verbetering van de regionale samenwerking en er werd daarom, onder andere, een aanbeveling gedaan om in de geest van artikel 17 van het 1988 Verdrag een regionaal maritiem verdrag op te stellen. Met steun van de EU werd vervolgens een projectteam samengesteld met deskundigen uit de verschillende betrokken landen. Uiteindelijk werd het nieuwe verdrag op 10 april 2003 tijdens een officiële ondertekeningplechtigheid in San José Costa Rica door negen landen ondertekend.

Het 2003 Verdrag is een logisch vervolg op het Zeerechtverdrag en het 1988 Verdrag. In het laatste verdrag wordt specifiek aangegeven dat de partijen moeten overwegen om bilaterale afspraken, regionale afspraken of overeenkomsten aan te gaan om de effectiviteit van de samenwerking bij de bestrijding van drugsmokkel over zee te verhogen.

Een bepaling van Artikel 12 van het 2003 Verdrag is dat een officieel vaartuig van een partij bij dit verdrag een verdacht vaartuig mag volgen tot in de wateren van een andere partij. Binnen deze wateren mogen vervolgens maatregelen genomen worden om ontsnapping van het verdachte vaartuig te voorkomen en mag een *boarding* worden uitgevoerd. Tenslotte mogen de opvarenden worden vasthouden in afwachting van eventuele vervolgacties door de kuststaat. Er zijn twee procedures om te komen tot een implementatie van deze bepaling door een lidstaat. Bij de eerste procedure moet de kuststaat specifiek toestemming geven. Deze toestemming kan gegeven worden door een daarvoor bevoegde geëmbarkeerde *searider* van de betreffende kuststaat, of door een centraal contactpunt van de kuststaat. Bij de tweede procedure hoeft de kuststaat slechts in kennis gesteld te worden van de actie. Dit moet bij voorkeur gebeuren voordat de territoriale wateren worden binnengevaren. Indien dat niet mogelijk is dient de eerstvolgende gelegenheid gebruikt te worden om dit te melden. De partijen moeten vooraf kiezen welke procedure zij toe willen passen. Ook wordt aangegeven dat deze acties in de territoriale wateren onder het gezag van de betrokken kuststaat vallen. Het is onder geen

beding toegestaan om zonder specifieke toestemming, vooraf of op verzoek, van de kuststaat drugsbestrijdingoperaties uit te voeren binnen de territoriale wateren van deze kuststaat.

Op volle zee gaat in de huidige praktijk erg veel tijd verloren met het wachten op toestemming van de vlaggenstaat om aan boord te mogen gaan van een verdacht vaartuig voor een onderzoek. Het 2003 Verdrag beschrijft een viertal maatregelen die genomen kunnen worden. In artikel 7 van het verdrag wordt aangegeven dat partijen op ieder moment in staat moeten zijn om te reageren op verzoeken van andere partijen. Iedere partij stelt een autoriteit aan die deze reactie op ieder moment kan geven. Een vlaggenstaat wordt hiermee verplicht om zo snel mogelijk te reageren op verzoeken voor toestemming om aan boord te mogen gaan van een schip onder haar vlag. Artikel 16 van het 2003 Verdrag geeft drie mogelijkheden weer die een partij heeft om toestemming te verlenen voor het aan boord gaan voor een onderzoek op een verdacht schip dat zeewaarts van de territoriale zee onder haar vlag vaart of dit claimt. Deze toestemming kan vooraf worden gegeven voor alle gevallen, of ieder verzoek wordt afzonderlijk bekeken voordat er al dan niet toestemming wordt gegeven of als laatste mogelijkheid wordt toestemming tijdsgebonden. Als een vlaggenstaat niet binnen vier uur reageert op een verzoek van een andere verdragspartij tot verificatie van de nationaliteit en toestemming om te mogen aanhouden en onderzoeken mag toestemming als gegeven worden beschouwd; stilzwijgende toestemming na vier uur dus.

De eerste mogelijkheid garandeert dat de verzoekende partij niet hoeft te wachten op toestemming. De tweede mogelijkheid ontslaat de partij niet van de verplichting om zo snel mogelijk te reageren. Ook hier is dus een spoedige reactie te verwachten en zal de wachttijd zo kort mogelijk zijn. De derde mogelijkheid garandeert dat er in ieder geval binnen vier uur een vervolgactie kan plaatsvinden. In alle gevallen zal de wachttijd voor de verzoekende partij dus beperkt blijven.

Concluderend kan gesteld worden dat het 2003 Verdrag een belangrijke stap in de goede richting is vanuit het perspectief van de drugsbestrijding. Het verdrag kan de bestrijding van de drugsmokkel over zee voor de drugsbestrijder aanzienlijk vereenvoudigen. Het is een logisch vervolg op eerdere verdragen en laat duidelijk zien dat het internationale recht in beweging is.

Hoofdstuk 6 onderzoekt bilaterale verdragen op het gebied van maritieme drugsbestrijding, met name in het Caribische gebied. Als eerste wordt ingegaan op een bilateraal verdrag binnen Europa, namelijk het verdrag tussen Spanje en Italië uit 1990. Dit verdrag is gebaseerd op artikel 17 van het 1988 Verdrag. Beide landen geven elkaar een vertegenwoordigingsrecht, hetgeen betekent dat indien een staat een verdacht schip van de andere partij op volle zee kan aanhouden en onderzoeken. De preferente jurisdictie van de vlaggenstaat kan in dat geval overgedragen worden aan de andere staat, die daarop de drugsmokkelaars kan vervolgen de drugs in beslag nemen. Kortom: toestemming om een verdacht schip van de andere partij aan te houden op volle zee, vastgelegd in een bilateraal verdrag.

In 1981 reeds werd er een bilateraal verdrag op het gebied van maritieme drugsbestrijding gesloten tussen de Verenigde Staten (VS) en het Verenigd Koninkrijk (VK). In dit verdrag werd vastgelegd dat de VS een verdacht schip van het VK op volle zee mocht aanhouden en onderzoeken en indien nodig de verdachten vervolgen. Dit overigens alleen in het Caribische gebied. In dit verdrag was geen sprake van reciprociteit. Het VK had nog wel enkele bepalingen vast laten leggen om onderdanen van het VK te beschermen.

Het 1981 Verdrag werd later gecompleteerd met het 1998 Verdrag tussen de VS, het VK en de afhankelijke gebieden van het VK. Dit verdrag bevat wel reciprocerende bepalingen tussen de partijen. Dit verdrag kan ook worden beschouwd als een maritieme rechtshandhavingovereenkomst of ook wel genoemd een *Shiprider Agreement*, zoals de VS er vele heeft gesloten met respectievelijke staten in het Caribische gebied. Alle *Shiprider Agreements* zijn telkens door de VS en een andere staat onderhandeld, daarom zijn deze overeenkomsten niet hetzelfde.

de, ze hebben wel de zelfde strekking. Het komt er in veel gevallen op neer dat de VS schepen van de andere partij mag aanhouden op volle zee, indien dit schip verdacht wordt van drugs-smokkel. Ook is in veel van deze overeenkomsten opgenomen dat de VS mag optreden in de territoriale zee van de andere partij. Hier zijn wel veel beperkingen opgeworpen door de kuststaat, zoals dat de VS niet mag gaan patrouilleren door de territoriale zee, maar bij een achtervolging vanuit de volle zee deze wel mag voortzetten in de territoriale zee van de kuststaat. Ook mogen schepen van de VS, indien een opsporingsambtenaar van de kuststaat (*shiprider*) is geëmbarkeerd, drugsbestrijdingoperaties uitvoeren in de territoriale zee van de kuststaat van deze opsporingsambtenaar.

De *Shiprider Agreements* zijn een duidelijke ontwikkeling in de maritieme drugsbestrijding. De benodigde toestemming van de vlaggenstaat van een verdacht schip, om dit te onderzoeken op volle zee, is dan reeds vooraf vastgelegd in overeenkomsten. Evenals eventuele bijstand in de territoriale wateren van de kuststaat, die een *Shiprider Agreement* heeft met de VS.

Hoofdstuk 7 vergelijkt alle onderzochte verdragen onderling en in een bredere context. Alle relevante drugsbestrijdingverdragen zijn tot nu toe alleen in isolatie onderzocht. Vergelijking plaatst deze verdragen in een bredere context, namelijk die in het algemene volkenrechtelijke kader en binnen het specifieke kader van de maritieme drugsbestrijding. Voorts kan ook worden onderzocht of er overlappingen of tekortkoming zijn in de bepalingen van de onderzochte verdragen. Tevens kan worden onderzocht of er aanwijzingen zijn die een ontwikkeling weergeven in de maritieme drugsbestrijding. Het maken van vergelijkingen is mogelijk omdat in de gehele studie een vast onderzoekspatroon is aangehouden. Eerst werden de algemene bepalingen van een verdrag onderzocht, vervolgens de juridische- en de operationele bepalingen.

We kunnen concluderen dat vrijwel alle onderzochte verdragen gebaseerd zijn op het Zee-rechtverdrag uit 1982. Het bilaterale verdrag tussen de VS en het VK uit 1981 vormt hierop een uitzondering. Dit geldt ook voor de relatie tussen de onderzochte verdragen en het 1988 Verdrag, naast het bovengenoemde bilaterale verdrag uit 1981, vormt het 1997 hier ook een uitzondering op.

Uit een vergelijking tussen de algemene bepalingen van de onderzochte verdragen blijkt dat de verdragen niet dezelfde termen definiëren, maar de gebruikte definities komen overeen met die uit het 1988 Verdrag. De beginselen van maritieme drugbestrijding zijn niet overal het zelfde. Het verschil ligt hem vaak in het moment van toestemming verlenen door de vlaggenstaat aan een interveniërende of optredende staat om een verdacht schip aan te houden en te onderzoeken op zee. Het doel van alle onderzochte specifieke verdragen is het bestrijden van de sluikhandel in drugs op zee. De geografische scope van de verdragen zijn verschillend, sommige zijn wereldomvattend terwijl andere zich beperken tot Europa of het Caribische gebied.

Indien men de juridische bepalingen onderling vergelijkt, dan blijkt dat de strafbaarstelling van aan drugs gerelateerde strafbare feiten in alle verdragen adequaat is geregeld en gebaseerd is op het 1988 Verdrag. Het leerstuk van het statenloze schip wordt in de meeste verdragen behandeld, terwijl autorisatie door de vlaggenstaat om een verdacht schip aan te houden op zee in vele vormen voorkomt; van voorafgaande toestemming voor alle verdragspartijen tot autorisatie na een verzoek hiertoe op *ad hoc* basis. De meeste verdragen bepalen dat de wet- en regelgeving van de interveniërende staat van toepassing is gedurende een drugbestrijdingoperatie, enkele verdragen hebben hier niets over opgenomen.

Een vergelijking van de operationele bepalingen geeft aan dat er geen grote verschillen bestaan en dat alle verdragen vrijwel gelijke bepalingen hebben opgenomen over het doen van een verzoek tot autorisatie, wie de drugsbestrijdingoperaties uitvoert en of er geweld mag

worden gebruikt tijdens deze acties. Bovendien hebben verdragen *safeguards* opgenomen die een bepaalde bescherming bieden aan verdachte schepen en de personen aan boord van deze schepen.

Hoofdstuk 8 onderzoekt enkele specifieke aspecten van maritieme drugsbestrijding, naast een kort overzicht van de rechtsmacht van de kuststaat en de interveniërende staat gebaseerd op alle onderzochte verdragen over sluikhandel in drugs op volle zee. Een analyse van het algemene en specifieke raamwerk van het internationale recht geeft aan dat een kuststaat in het algemeen rechtsmacht heeft om een van drugsmokkel verdacht schip aan te houden in wateren die onder haar soevereiniteit vallen. Deze rechtsmacht kan in sommige gevallen ook worden uitgevoerd door andere staten, die kunnen dan interveniëren of optreden in de soevereine wateren van de kuststaat, deze kuststaat blijft wel de controle en het gezag uitoefenen op deze acties. De kuststaat kan geen rechtsmacht uitoefenen over schepen die door zeestraten varen onder het regiem van doortocht of onder het regiem van doorgang via scheepvaartroutes in een archipel.

Interveniërende staten kunnen buiten de territoriale zee rechtsmacht uitoefenen over van drugsmokkel verdachte schepen indien zij hiervoor toestemming hebben van de vlaggenstaat van dat verdachte schip. Deze toestemming of autorisatie kan vooraf worden gegeven, dit wordt dan vastgelegd in verdragen, of er wordt vastgelegd dat een interveniërende staat bij elke gelegenheid die zich voordoet de vlaggenstaat om toestemming vraagt om een verdacht schip van die staat aan te houden en te onderzoeken op zee, daar waar de vrijheid van navigatie geldt.

Concluderend kan worden vastgesteld dat de huidige verdragen op het gebied van maritieme drugsbestrijding adequaat genoeg zijn om succesvol de sluikhandel in drugs op zee te bestrijden, maar dan moeten wel alle staten partij worden bij de relevante verdragen en hun rechtsmacht oefenen.

Hoofdstuk 8 onderzoekt ook of de sluikhandel van drugs over zee valt onder universele jurisdictie, of dat er mogelijk een ontwikkeling valt te ontdekken dat dit in de voorziene toekomst het geval kan zijn. Geconcludeerd kan worden dat dit bijna het geval is met de voorschrijvende jurisdictie, maar niet met de uitvoerende jurisdictie. In de toekomst is het echter niet uitgesloten dat de sluikhandel in drugs over zee komt te vallen onder universele jurisdictie, dit hangt af van de ontwikkeling van de statenpraktijk en van het feit of alle staten partij worden bij de relevante verdragen.

Ook onderzoekt Hoofdstuk 8 of de gestelde doelen van de studie behaald zijn. Het onderzoek naar het algemene en specifieke raamwerk van het internationale recht over maritieme drugsbestrijding is uitgevoerd en uit analyse van dit onderzoek blijkt dat er voldoende en adequate verdragen zijn op het gebied van maritieme drugsbestrijding. Ook is er onderzocht of er relaties te vinden zijn tussen de onderzochte verdragen. Dit blijkt het geval te zijn. Het blijkt dat het Zeerechtverdrag en het 1988 Verdrag een grote invloed hebben gehad op het sluiten van de specifieke verdragen. Verder blijkt dat het 1990 Verdrag tussen Spanje en Italië en het 2002 Concept Verdrag een duidelijke relatie hebben. Beide verdragen gebruiken exacte dezelfde tekst in sommige bepalingen, beide verdragen spreken over vooraf vastgelegde toestemming om een verdacht schip van een andere partij aan te mogen houden en te onderzoeken op volle zee. Hierbij moge worden onopgemerkt dat Spanje de initiatiefnemer is van het 2002 Concept Verdrag.

Ook de *Shiprider Agreements* en het 2003 Verdrag hebben grote overeenkomsten, zeker als we de vergelijking maken met de oorspronkelijke tekst van dit verdrag. De termen in beide verdragen zijn het zelfde en worden overeenkomstig gedefinieerd, bovendien is de structuur van beide verdragen gelijk en op veel plaatsen wordt exact dezelfde taal gebruikt. De geografische scope van deze verdragen is ook dezelfde, namelijk het Caribische gebied.

Verder wordt er in Hoofdstuk 8 geconcludeerd dat alle verdragen, met name de specifieke maritieme drugsbestrijdingverdragen hebben bijgedragen en nog steeds bijdragen tot een mogelijk vorming van internationaal gewoonterecht. Ook blijkt dat de ontwikkeling van maritieme drugsbestrijding vanaf het begin van de vorige eeuw tot de tachtiger jaren van die eeuw suboptimaal was vanuit het oogpunt van rechtshandhaving. Met het sluiten van het 1988 Verdrag en de daaropvolgende specifieke maritieme drugsbestrijdingverdragen is de maritieme drugbestrijding zich meer gaan ontwikkelen, en het is niet uitgesloten dat deze ontwikkeling zich voortzet in welke vorm dan ook. Zo kan maritieme drugsbestrijding een waardevolle bijdrage leveren aan het oplossen van het wereldwijde drugsprobleem.

Curriculum Vitae

P.J.J. van der Kruit was an officer in the Royal Netherlands Navy from 1973 until 2004. During his military career, he worked for quite a long time in the area of maritime drug interdiction at various places on the world, mainly in the Caribbean region. The last part of his military career he worked as a lecturer in Military Law at the Royal Netherlands Naval College at Den Helder. At the moment of writing, Spring 2007, he is employed as an associated professor in Military Law at the Netherlands Defence Academy.

P. J. J. van der Kruit obtained a LL.M in 1997 and a Master in Public Administration in 2002. Since 2002 he is conducting a PhD-research at the University Utrecht, the Netherlands.

