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## **Introduction - International Legal Control and Action Against Illicit Drug Trafficking by Sea – *A Historical Perspective***

The fight against illicit drugs trafficking by sea, at an international level has been and remains an on-going process. It is interesting however to examine the legislative developments and innovations in the field. The 1958 Convention on the Territorial Sea and the Contiguous Zone contains a provision which allows the exercise, by a coastal state, of criminal jurisdiction in respect of crimes committed on board ships whilst passing through the territorial sea where the action is necessary for the suppression of illicit traffic in narcotic drugs<sup>1</sup>. The 1958 Geneva Convention on the high seas, for its part, does not contain similar rules for illicit drugs trafficking.

International legal control of dangerous drugs was consolidated and updated in the Single Convention on Narcotic Drugs, 1961, and amended by the 1972 Protocol of New York. It represents the foundation of the current system of drug control. It came into force on the 13<sup>th</sup> of December 1964 but encountered a great deal of confrontation before it was finally adopted. The issues that were raised were partly of a political nature, but others were due to the more practical problems of attempting to codify into a single enactment the eight previous conventions which governed international control. *"The previous conventions had some provisions which became obsolete, others which had never worked satisfactorily, and others which needed updating to fit into the complexities of the post-world war two era"* <sup>2</sup>. This convention lists controlled drugs in four schedules subject to amendments by the Commission on Narcotic Drugs. Within the definition of this 1961 Convention the terms 'import' and 'export' mean in their respective connotations *"the physical transfer of drugs from one state to*

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<sup>1</sup> Vide, article 19 paragraph 1(d).

<sup>2</sup> Philip Bean, *The Social Control of Drugs*.

*another state, or from one territory to another territory in the same state"* <sup>3</sup>. It requires parties to prohibit, *inter alia*, the export and import of, and trade in, any controlled drug except for amounts which may be necessary for medical and scientific research only. The latter include clinical trials which should be conducted under or subject to the direct state supervision and control. Limits are imposed on the amount of drugs that are imported (article 24) and exports are equally restricted (article 31). Special provisions concern the carriage of drugs in first-aid kits of ships or aircraft in international traffic - such drugs, so carried, are not to be considered to be import, export, or passage through a country or territory within the meaning of the convention.

More pertinent still to the aspect under review, there are detailed rules concerning action against illicit traffic in general, with one specific reference to mutual assistance at state level "*in the campaign against the illicit traffic in narcotic drugs*" (article 35(b)). Having due regard to their constitutional, legal and administrative systems, the Parties thereto are to make arrangements at the national level for co-ordination of preventive and repressive action against the illicit traffic. To this end they may usefully designate an appropriate agency to be responsible for such co-ordination and assist each other in this campaign. Parties are moreover to cooperate also with the competent international organisations of which they are members with a view to maintaining a co-ordinated action against illicit traffic. Parties are to ensure that such co-operation among the appropriate agencies be conducted in an expeditious manner and that where legal papers are transmitted internationally for prosecution purposes, the transmission be also done expeditiously to the bodies designated by the Parties (article 35(e)).

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<sup>3</sup> Vide, article 1 (1).

Finally, an independent body to be known as the International Narcotics Control Board (INCB) was created. Its task is to report to the Economic and Social Council of the United Nations through the Commission on Narcotic Drugs already referred to. The major responsibility of INCB is to limit the cultivation, production, manufacture and utilization of the drugs that are controlled by the conventions to the amount that are necessary for medical and scientific purposes. The Board also receives information about illicit drugs activity within national borders and utilizes this information, together with other data about licit drugs trade, to determine whether the aims of the convention are being endangered by any country.<sup>4</sup>

The 1971 Convention on Psychotropic Substances extended international controls to new types of psychoactive substances such as amphetamines, barbiturates and LSD, which have proved harmful and the subject of abuse. This Convention too contains a specific provision relating to action against illicit traffic<sup>5</sup>. The relative text generally follows very closely article 35 of the earlier 1961 Single Convention on Narcotic Drugs substituting however the term "*narcotic drugs*" by "*psychotropic substances*".

Unlike the subsequent 1988 Vienna Convention, the 1961 and 1971 Conventions did not contain specific provisions concerning 'transit states', previously referred to as 'staging countries'. At the same time, merchandise 'in transit' was subjected to the import and export control provisions. Article 31 of 1961 Convention and article 12(3) of 1971 Conventions are virtually the same namely,

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<sup>4</sup> There are thirteen members of the INCB who are proposed by the member states of the United Nations through ECOSOC. Once in the Board, however, they serve impartially in their personal capacities for a five year period at a time. Three members, nominated by the World Health organisation have medical, pharmacological in pharmaceutical experience.

<sup>5</sup> Article 21

*“A Party shall not permit any drugs or substances consigned to another country to pass through its territory whether or not the consignment is removed from the conveyance in which it is carried, unless a copy of the export authorization for consignment is provided to the competent authorities of such party.”*

Another interesting point in these two Conventions is that parties thereto *“shall exercise in free ports and zones the same supervision and control as in other parts of their territories, provided that they may apply more drastic measures”*<sup>6</sup>. Incidentally, the Malta Freeports Act<sup>7</sup> does provide for specific supervision and control for fiscal purposes but not for the purpose of suppressing illicit drug trafficking specifically. On this particular point, however, Dr Leslie Cuschieri opines that<sup>8</sup>,

*“This end is nonetheless reached through indirect means: the Freeport Authority is bound to ensure that every Freeport is equipped with adequate control systems to prevent evasions of customs... and all persons and vehicles entering or leaving such zones can be searched by the comptroller of customs or any other person authorized to represent him. Illicit carriage of drugs necessarily entails evasion of customs and the examination of suspicious merchandize will hit two birds with one stone”.*

In actual fact the importation of illicit drugs in our country involves much more than customs evasion and is considered to be a serious criminal offence.

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<sup>6</sup> Vide article 31 (2), 1961 Convention; article 12(3)(a), 1971 Convention.

The 1982 United Nations Convention on the Law of the Sea (hereinafter referred to as "the Montego Bay Convention") not only contains a provision similar to that found in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone above referred to, but goes a step further in that it contains specific provisions dealing with illicit traffic on the high seas. It is hardly surprising that the Montego Bay Convention is often seen as expressing much of the current perception of what constitutes the international law as regards issues of relevance concerning illicit traffic by sea. At the same time, some have criticized it<sup>9</sup> on account of the fact that despite the obligation on States to co-operate in suppressing that trade, few powers exist in the case of ships suspected of illicitly trafficking in drugs. All that is allowed, these commentators maintain, is that States, with reasonable grounds for suspecting that their own ships are engaged in the trade, may request the co-operation of other states in suppressing the traffic, although presumably there is an implication that other states should normally accede to such a request<sup>10</sup>.

At the sixth meeting, in October 1982, of the Permanent Correspondents of the Co-operation Group to Combat Drug Abuse, commonly known as the Pompidou Group<sup>11</sup>, the Italian

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<sup>7</sup> Act XXVI of 1989, Chapter 334 Laws of Malta.

<sup>8</sup> Dr Leslie Cuschieri LL.D., *The legal Control of Drug Trafficking, A Comparative Study*, 1993; page 27.

<sup>9</sup> R.R. Churchill and A. V. Lowe, *The Law of the Sea* (vide page 172).

<sup>10</sup> LOSC, Article 108.

<sup>11</sup> The Pompidou Group, which now has 40 Member States, has been actually engaged to foster co-ordination and co-operation between governments in this field, in close collaboration with the other international and European organisations and institutions. Formed in formally in 1971, it was later decided (on 27<sup>th</sup> March 1980) that the group should continue its activities within the framework of the Council of Europe. It does not have an independent legal capacity.

Since 1989, it has devoted special attention to co-operation with Central and Eastern European countries. Many of the activities conducted in this context are run jointly with the United Nations International Drug Control Programme (UNDCP) and the European Union (PHARE programme). It should be further pointed out that in its efforts to foster a global and integrated approach to problems related to drug abuse and illicit drug trafficking, the Pompidou Group has always aimed at optimal co-operation between all the authorities concerned at national and international levels, including police and customs authorities. It organises highly successful meetings at which these authorities consider practical problems at airports, and more recently, river ports.

At the last ministerial conference held in Tromso, Norway, on 15-16 May 1997, Ministers adopted a Political Declaration and a new work programme for the Group for the three-year period 1997-2000.

In the light of the working programme adopted in Tromso, one cannot, unfortunately, help noticing that as far as illicit traffic is concerned, the area of concern shifted to drug-control services at European airports and

Permanent Correspondent highlighted the fact that his authorities considered combating drug trafficking on the high seas as a priority objective. The other correspondents shared this concern and it was agreed that this aspect of international criminal law needed further clarification and elaboration.

Following this initiative an *ad hoc* group of experts embarked upon a project in the shape of drafting a regional agreement to combat illicit drugs trafficking by sea after a series of meetings held between 1983 and 1986. At global level, however, the United Nations Organization was moving forward with its own agenda on the same subject. For this reason, due consideration had to be given to these international developments in order to avoid duplicity of effort and expense, as well as ensuring harmonization as much as possible. In view of the work undertaken by the United Nations in drafting a comprehensive convention to combat illicit drugs trafficking, therefore, the work of the Pompidou Group was temporarily kept on hold, awaiting the outcome of the discussions on the United Nations Convention held in Vienna.

The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereinafter referred to as the Vienna Convention) was adopted in Vienna on 20<sup>th</sup> of December 1988, by the United Nations Conference convened for the purpose. This new Convention further consolidated various rules already dealt with by the two earlier Conventions and in some instances, covered some new ground as well. It concerned itself chiefly with improving international co-operation in general and with confiscating and otherwise hindering the use and transfer of funds and property connected with drug-

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aviation in general. There are only two activities in the law enforcement field in relation to action against trafficking. Apart from the Airports Group, the other is the group on International River Navigation, which examines the potential problems of drug trafficking via inland water ways in Europe.

trafficking. It also provided for the control of equipment and substances that are used in the manufacture of controlled drugs.

Article 3(2) of the Vienna Convention moreover required members to adopt measures to establish as a criminal offence the possession or purchase of controlled drugs for personal consumption. Article 3(4), on the other hand, explicitly provided for an obligation of parties to make the commission of the offences established in accordance with paragraph 1 of this Article - drug offences, including money-laundering - 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<sup>12</sup>. A definition of what is considered to be a 'transit state' was also given. A transit State is one through the territory of which illicit narcotic drugs, psychotropic substances are being moved and which is neither the place of origin nor the place of ultimate destination.

A very important part of the Vienna Convention, from our stand-point is Article 17 containing rules relating to illicit traffic by sea. This article, in particular, quite clearly seeks to expand on the general provisions contained in the Montego Bay Convention with the aim of furnishing a firmer basis for practical co-operation to suppress illicit traffic by sea.

Accordingly, the parties thereto are to co-operate to the fullest extent possible to suppress illicit traffic by sea, "*in conformity with the international law of the sea*" (article 17(1)). 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

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<sup>12</sup> At the Council of Europe level, Recommendation Number 2 (9217), on consistency in sentencing aims at increasing consistency and coherence in sentencing whilst preserving fiducial independence. This Recommendation contains a comprehensive set of rules and principles the observations of which enables member states to establish a common standard of sentencing.



in suppressing its use for that purpose. The Parties so requested are to render such assistance within the means available to them (article 17(2)).

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 (article 17(3)). The flag State may authorise the requesting state to:

- (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.

In so proceeding, due account must be taken 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<sup>13</sup>. Each State party is to designate an authority to receive and respond expeditiously to a request from another party to determine whether a vessel that is flying its flag is engaged in illicit drug trafficking. The flag state concerned shall promptly be informed of the results of such an action. Moreover, any action taken by the requested State to determine whether a vessel is engaged in illicit drug trafficking, is to be carried out by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect<sup>14</sup>. Finally, in taking such an action, due account is to be made to the need of not interfering with or affecting the

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<sup>13</sup> Vide Article 5, Vienna Convention.

rights and obligations and the exercise of jurisdiction of coastal states in accordance with the international law of the sea<sup>15</sup>.

Paragraph 9 of article 17 of the Vienna Convention, is of paramount importance as far as illicit drug trafficking by sea is concerned. Indeed it formed the basis for the regional Agreement on Illicit Traffic by Sea implementing Article 17 of 1995.

### **Article 17(9) of the 1988 Vienna Convention**

Paragraph 9 of Article 17, although short, has generated a lot of discussion and contributed towards the formulation of international agreements. In so doing, it has contributed to the evolution and formulation of new rules of international law concerning illicit drug trafficking by sea. It would first of all be opportune to reproduce the said paragraph here *in toto*:

*“ 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”.*

The operative wording of this paragraph is clear and straightforward. Evidently, it formulates an enabling provision in that it directs and encourages State Parties to seek and forge agreements or arrangements, bilateral or multi-lateral in kind, with a view to better accomplish the general objectives set out in Article 1 (1), that is, to achieve inter-state co-operation “*to the fullest extent possible to suppress illicit traffic by sea, in conformity with the international law of the sea*”.

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<sup>14</sup> Ibid Articles 6,7,8,10.

<sup>15</sup> Ibid Article 11.

## **The Agreement on Illicit Traffic by Sea Implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1995.**

After the adoption of the Vienna Convention in 1988, the *ad hoc* group of the Pompidou Group was reconvened in order to bring its draft to completion taking into consideration the preparatory work undertaken it adopted the text of that Convention. With the desire to increase their co-operation to the fullest possible extent in the suppression of illicit drug traffic by sea and in full respect of the principle of right of freedom of navigation, the member States of the Council of Europe, gave their support towards supplementing the Vienna Convention by a regional agreement as proposed in Article 17.

This supplementary, additional agreement was not the first or the only one of its kind. A number of other agreements exist and some were in fact negotiated before the Vienna Convention itself came into force. For instance, the Exchange of Notes between the Government of the United Kingdom and Northern Ireland and the Government of the United States of America of the 13<sup>th</sup> of November 1981 is a case in point. A further bilateral agreement was concluded between Spain and Italy on the 23<sup>rd</sup> of March 1990. The Portuguese speaking countries (including Portugal, Mozambique and Brazil) had likewise adopted, in 1986, a mutual assistance convention under which action could be authorised against vessels suspected of involvement in drug trafficking. All of these agreements contain detailed provisions on the legal relationship between the interviewing State and the flag State, the authorisation procedures and the scope of application of the agreement itself.

The Agreement on Illicit Traffic by Sea was drawn up within the Council of Europe by a committee of governmental experts from the Pompidou Group, under the direct authority of the European Committee on Crime Problems (CDPC). It was opened for signature on the 31<sup>st</sup>

January, 1995. This Agreement introduces an international co-operation system to combat drugs trafficking that takes place outside territorial waters. Article 17 of the Vienna Convention presented a variety of choices as to the scope and nature of the suggested agreements. At the same time, it raised difficult issues such as rights of sovereignty, the interpretation of the law of the sea, the use of force on board the vessel of another state and the surrender of persons to another state. The Agreement was made with the aim of implementing at regional level the said Article 17 and for this reason it includes the administration and legislative provisions necessary to give effect to the provisions of the Vienna Convention. One basic, underlying consideration was that the Agreement would ultimately have to be applied and implemented by like-minded states which had either become Parties to the European Convention on Human Rights and Fundamental Freedoms<sup>16</sup> in the case of European States, or would at some eventual stage join the Convention within the near future, or would apply similar principles of the Rule of Law and human rights as embodied in that Convention.

Before reviewing in greater detail and from the legal aspect, the preparatory work involved in drafting the final text, it would be proper at this juncture to mention briefly the general outline of its more salient contents. Under the terms of the Agreement, a state in possession of information leading it to believe that a vessel is engaged in committing a drug trafficking offence may, with the permission of the flag State, intervene to verify the nature of the offence being committed and whether the perpetrators could be prosecuted. It sets out the arrangements for prosecution of drug traffickers and the handing over of persons arrested, the ship, its cargo and any evidence seized to the flag state.

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<sup>16</sup> Signed in Rome on the 4<sup>th</sup> of November 1950; in force 3<sup>rd</sup> September 1953.

## **Legal Aspects of the Agreement on Illicit Traffic by Sea**

A Committee of Experts on the Implementation of Article 17 of the Vienna Convention was entrusted with the task of continuing the elaboration of the draft regional agreement prepared by the experts of the Pompidou Group in consultation with the permanent correspondents of the Group. The final draft agreement was subsequently approved by the European Committee on Crime Problems on the 24<sup>th</sup> of June 1994 and the text was transmitted to the Committee of Ministers.

In their Explanatory Report, the Committee of Experts (PC-NU) stated that it had just to consider whether the agreement should formally implement Article 17 of the Vienna Convention or whether it should become a free-standing convention<sup>17</sup>. This choice, it explained, would affect matters such as the content of the instrument, the eligibility to become a party to it, the settlement of disputes mechanism and the reporting system to the secretary general of the United Nations on the practical application of the convention. It was agreed that *“no matter what the final choice would be, the Agreement should be seen as fully compatible with the Vienna Convention and merely supplementing and strengthening it, in accordance with Article 17, paragraph 9”*. A *“functional relationship”* had to subsist between the two instruments. Consequently, the possibility of joining the instrument was limited to those member states of the Council of Europe which had ratified the Vienna Convention.

Another basic point that was moved was concerned with whether the Agreement should be limited to illicit drugs trafficking by sea or whether it could or should be made applicable also

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<sup>17</sup> Vide Explanatory Report, Agreement on IT by the Council of Europe 1996, paragraph 11, page 31-32.

to other kinds of offences committed on the high seas<sup>18</sup>. It was concluded that the obtaining situation did not make it imperative to include additional offences. It would be relatively easy for States that so wished to conclude appropriate bilateral agreements concerning other offences on the basis of procedures provided for in the Agreement.

The Committee also gave consideration to a number of issues relating to what it called “*the territorial reach of the Agreement*”<sup>19</sup>. It was agreed that the text should only contemplate action being taken beyond the territorial sea of any State. This would include the high seas, the contiguous zone and the exclusive economic zone within the meaning of the Montego Bay Convention and customary international law. In order to protect fully the relevant rights of coastal states, a non-derogation provision was inserted<sup>20</sup>. Furthermore the Committee decided that it would be inappropriate to seek to restrict the territorial ambit of the Agreement by reference to some vague concept or term of “*European waters*” or otherwise.

More likely than not, “*the practical operation of the provisions of the Agreement would occur in a difficult environment; often during extreme conditions on the high seas where human judgement has to be confronted with the caprices of nature*”<sup>21</sup>. It was therefore important that the provision should give serious consideration to the risk involved in such operations. On the other hand, it was equally important to keep in mind that the operational personnel should not be hampered by rigid rules which would not give enough lee-way to take decisions which were adapted to the factual situation. Several provisions therefore seek to reflect such a balanced approach.

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<sup>18</sup> Ibid, pages 32-33, paragraph 12.

<sup>19</sup> Ibid page 33 paragraph 13.

<sup>20</sup> Vide Article 2, paragraph 3, Agreement on ITS.

<sup>21</sup> Explanatory Report page 34 paragraph 16.

The provisions of the Agreement are closely inter-linked and reflect, as a whole, a choice which is based on a number of considerations<sup>22</sup>. For example, the rules of compensation and liability for damage are closely connected with the powers of visit; the choice of authorisation procedures depends upon the rules for jurisdiction and so on. The treaty provisions therefore should be seen holistically, and its interpretation should be construed in such a way as to further the co-operative spirit within which it was elaborated. The Agreement was devised in a way so that in principle, it would work on the basis of a scheme similar to other schemes of international criminal law co-operation elaborated within the framework of the Council of Europe<sup>23</sup>.

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<sup>22</sup> Explanatory Report page 34 paragraph 17.

<sup>23</sup> Explanatory Report pages 30-31, paragraph 9.

## **The Legislative Drafting Project – *The Suppression of Illicit Drugs Traffic by Sea Act.***

*“All countries are affected by the devastating consequences of drug abuse. Rapidly changing social and economic circumstances, the global availability of illicit drugs, and the rising demand for them have all contributed to the increasing magnitude of this serious global problem”*,

- Reducing Illicit Demand for Drugs, UNDCP, Fact Sheet No.4, New York, 1988

On a global scene, it may be said that methods and distribution schemes for narcotic drugs and psychotropic substances are changing rapidly. The drug problem is an ever increasing one and States now are aware of the fact that the only way in which drug trafficking can be combated is only through co-operation and multinational operations. Set in this environment, the Agreement which I undertook to incorporate within a local domestic sphere was drawn up.

Such Agreement assumes a more important role within a domestic sphere when one considers political and geographical implications. To begin with Malta has acceded to the 1988 UN Convention referred to above, and therefore the implementation of this Agreement will no doubt enhance Malta's obligation under the said Convention. Moreover the said Agreement is beneficial in that it provides a realistic and working framework for serious co-operation between States parties and consequently provides an effective front against drug trafficking. Malta, being an island in the middle of the Mediterranean, and also in the middle of the major drug trafficking sea routes from the African to the European continent, stands to benefit from the implementation of such an Agreement.



The Act in its interpretation section sets out some innovative concepts namely, “intervening state” and “preferential jurisdiction”. These were specifically defined in the Agreement because the committee of governmental experts<sup>24</sup> believed that the said concepts were not properly defined in international law. It is interesting to point out that the inclusion of the concept of preferential jurisdiction reaffirms the priority given to flag state jurisdiction under international law.

Reference in the interpretation section is also made to the Malta Maritime Authority (MMA) as being the competent authority. The choice fell on the MMA as being the designated authority owing to the responsibilities, rights and duties given to it by the Malta Maritime Authority Act<sup>25</sup> and the Merchant Shipping Act<sup>26</sup>. It was felt fitting that this Authority should be the central authority in the Act and consequently given *inter alia* the power to grant authorisation to a foreign authority to board Maltese vessels on the High Seas. Such choice also crystallises the decision taken in a controversial case concerning a Maltese registered vessel, the *Simon De Danser*. In this case, the Maltese registered yacht was on the High Seas, and English authorities in virtue of the 1988 UN Convention requested authority to board the vessel. The MMA, in turn granted this authorisation. However subsequently a problem arose – was the MMA the competent authority to grant such request, especially in the light of the fact that it was the Attorney-General’s Office which was the designated authority under the said Convention? The problem in reality arose from the lack of statutory regulation of this fact. However it is generally agreed that the MMA has an implied authority to grant such authorisation. Therefore this Act also purports to expressly lay down what is otherwise implicit.

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<sup>24</sup> Acting under the authority of the European Committee on Crime Problems (CDPC).

Part II of the Act lays down certain general provisions either in the form of declarations, such as principles of international co-operation and the exchange of information between authorities; and rules of general application such as the principle of *non bis in idem*, non-interference and immunities of warships and government vessels. On a specific level there are rules regarding the translation of written documents and formalities relating thereto.

Part III of the Act defines the offences which fall within the scope of the Act. These offences were taken, as stipulated in the Agreement, from Article 3, paragraph 1 of the UN Vienna Convention.

Part IV of the Act, then, sets out to lay down the principles governing jurisdiction. Extra-territoriality, and in particular jurisdiction in the Contiguous Zone and the High Seas are key elements of the Act. However, in accordance with State practice in the field, jurisdiction, especially on the High seas is not granted automatically to local authorities, but rather there must be specific authorisation to that effect by the flag state. Enforcement of jurisdiction is also made possible with the introduction of a section specifically dealing with the right of hot pursuit. This right as established in the Act is in conformity with the rule laid down in the Law of the Sea Convention (1982). However the part dealing with hot pursuit of the mother vessel when smaller vessels connected with it are acting in violation of the Act has been omitted. Hot pursuit is limited solely against the particular vessel involved. This was done specifically to be in conformity with the intent of the drafters of the Agreement which is being incorporated by the Act under review.

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<sup>25</sup> 1991

<sup>26</sup> Cap 234 Laws of Malta

The Act also provides for the exercise of preferential jurisdiction by the flag State and also the arrest and punishment of offenders once the person has been convicted by a Maltese Court in accordance with the Act. This Act makes reference both to the substantive and procedural rules of the Dangerous Drugs' Ordinances<sup>27</sup> and the Criminal Code<sup>28</sup> and this in order to avoid duplicity of and the creation of parallel punishments and proceedings. Clarity and simplicity, especially when dealing with criminal offences (and the possibility of subsequent recourse to the European Courts of Human Rights in case of breach of a fundamental human right) is of the essence.

Part V then lays down the rules governing authorisation, that is, both how the MMA can grant authorisation to a foreign authority to board a Maltese registered vessel and also how to handle a grant of authorisation to the MMA to board a foreign registered vessel. The Act also deals with ships without nationality or assimilated with vessels without nationality. Of particular interest is the section dealing with the request for assistance. The Act provides that in the case that the MMA receives a request for assistance, the said Authority is to refer the matter to the Commissioner of Police and the Commander of the Armed Forces of Malta and to also inform the Ministry of Foreign Affairs. It must be remembered that the ultimate power to decide as to whether action pursuant to the request should be taken will solely vest with the Authority. However it is important to refer the matter to the Executive Police and the Armed Forces of Malta as ultimately they will carry out the operations, board the vessel and detain the vessel if need be. Therefore the Authority must consult them in order to determine whether it is possible for Malta to perform an action as that requested by the foreign authority. Informing the Ministry of Foreign Affairs is also of the essence for political reasons, in the sense that it is the said Ministry which deals with Maltese foreign

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<sup>27</sup> Cap 101, Laws of Malta

policy, and it in turn might advise the MMA as to what action it may take or refrain from taking to avoid political or diplomatic incidents.

Part VI of the Act covers the rules governing action taken pursuant to the Act. The Authority acting under the Act can *inter alia*: stop and board the vessel; establish effective control of the vessel and over any person thereon, or any other action which is considered necessary to establish whether a relevant offence has been committed and to secure any evidence thereof; require the vessel and any persons thereon to be taken into Maltese territory and detain the vessel there for the purpose of carrying out further investigations. Furthermore, having established effective control of the vessel, the Authority may: search the vessel, anyone on it and anything in it, including its cargo; open or require the opening of any containers, and test or take samples of anything on the vessel; require any person on the vessel to give information concerning himself or anything on the vessel; 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 Authority has the power to require; or seize, secure and protect any evidence or material discovered on the vessel.

Again the Act provides for further collaboration with Executive police, this time, in the arrest of persons and detention of the vessel for offences committed against the Act. The Act also provides for the possibility of there being a third party intervening State. In such case the MMA must consult the Attorney-General, especially because once there has been established the commission of a relevant offence, and the police have arrested persons and detained the vessel in connection with that offence, then it is up to the Attorney-General to take up the case and to prosecute in the name of the Republic of Malta. Therefore if there is going to be

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<sup>28</sup> Cap 9, Laws of Malta

a form of renunciation of prosecution in Malta for those offences, the Attorney-General must be consulted.

The Act also provides for immunities from prosecution for officials acting in the exercise of their functions whether they be officials of Maltese authorities or officials of foreign authorities.

The Act also provides a balance between the need to combat drug trafficking by sea on the one hand, and the inviolable right of innocent, lawful, passage in territorial sea on the other. It upholds the right of freedom of navigation in the High Seas and also takes into consideration commercial and legal interests. In fact the Act in section 29(1) lays down that:

*“Any action taken pursuant to the provisions of this Act 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”.*

Moreover the use of force against a vessel shall be reduced to a minimum and in no case should it go beyond that which is necessary to overcome any resistance to comply with the instructions given.

Part VII then deals with the rules governing the exercise of jurisdiction. This part lays rules regarding the evidence obtained in relation to a relevant offence, the commission of offences falling outside the scope of the Act, the arrest of persons and detention of vessels other than that for relevant offences, the exercise of preferential jurisdiction by the MMA and the notification to the foreign authorities to that effect and finally the prosecution of offenders in

accordance with this Act. It must be remembered that the Act does not in itself create new procedures for trials in Court but merely refers to already existing special proceedings, namely those for drug offences falling under the Dangerous Drugs' Ordinance. Moreover, at all times the fundamental rights and freedoms of the individual enshrined in the Constitution of Malta and in Act XIV of 1987 apply.

Part VIII then deals with the surrender of vessels, cargoes and evidence and the extradition of persons. In this part there are laid down the rules concerning the surrender of goods detained and arrested and the relative evidence and the extradition of persons who committed or are suspected to have committed some relevant offence. These processes of surrender and extradition are not automatic but have to be referred to Court. Moreover in the case of extradition, the Act specifically provides that the Extradition Act shall govern the proceedings. Moreover at all times the fundamental rights and freedoms of the individual shall apply in favour of the person to be extradited. Therefore no person can be extradited for an offence constituting a political offence or for an offence punishable by death (an eventuality specifically provided for in the Act) and no person can be extradited to a country where he will be subjected to inhuman or degrading treatment. An interesting point in dealing with extradition is that the Vienna Convention in article 6 paragraph 3 provides that,

*“If a party which makes extradition conditional on the existence of a treaty receives a request for extradition from another Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of any offence to which this article applies. The Parties which require detailed legislation in order to use this Convention as a legal basis for extradition shall consider*

*enacting such legislation as may be necessary”.*

From a local point of view this article is of great importance. The Constitution specifically lays down that an extradition can only take place in virtue of a treaty. Therefore, if the person accused is to be extradited to a country where there is no extradition treaty, extradition is still possible on the basis of the Vienna Convention, if such other country is also a State Party to the said convention.

This Part also lays down rules governing confidentiality regarding information sent or received by the MMA in their dealings with other foreign authorities. Moreover such information and documents are deemed to be privileged in terms of the Code of Organisation and Civil Procedure.

Part IX finally, deals with the costs and damages. Cost is to be borne by that authority which would have carried out some action in accordance with this Act. In the cases of damages, these broadly speaking arise in the cases of negligent action or unjustified action.

*.../ Table of Statutes*

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## **Letter of Reference**

## **IMLI (IMO) Legislative Drafting Project**

The Suppression of Illicit Traffic by Sea of Narcotic Drugs and  
Psychotropic Substances Act

*An Act to make provision for the substantive Articles 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.*

SUPPRESSION OF ILLICIT DRUGS TRAFFIC BY SEA Act

*AN ACT to make provision for the substantive Articles 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.*

Arrangement of Sections

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*AN ACT to make provision for the substantive Articles 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.*

BE IT ENACTED by the President, by and with the advice and consent of the House of Representatives, in this present Parliament assembled, and by the authority of the same, as follows:-

*Part I*

Preliminary

*Short Title*

1. This Act may be cited as the Suppression of Illicit Drugs Traffic by Sea Act.

*Interpretation*

2. In this Act unless the context otherwise requires:

“Agreement” means the Agreement on Illicit Traffic by Sea implementing Article 17 of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, opened for signature on 31<sup>st</sup> January, 1995;

“Authority” means the Malta Maritime Authority established by the Malta Maritime Authority Act, 1991;

“Contiguous zone” means the breadth of sea, adjacent to the Maltese coast and which extends outwards to 24 nautical miles, measured from the baselines from which the breadth of the territorial sea is measured;

“Courts of Criminal Judicature” means the Criminal Courts (Superior) or the Courts

of Magistrates (Malta) or Courts of Magistrates (Gozo) as the case may be;

“1961 Convention” means the Single Convention in Narcotic Drugs adopted at New York on the 30 March, 1961, as subsequently amended by the Protocol adopted in Geneva on the 25 March, 1972;

“Internal waters” includes any harbour, port, bay, cove, creek or seashore;

“Intervening State” means a State Party to the Agreement on Illicit Traffic by Sea which has requested or proposes to request authorisation to take action under this Act in relation to a vessel flying the flag or displaying the marks of registry of that other State Party;

“Malta” has the same meaning as is assigned to it by section 124 of the Constitution of Malta;

“Master” when used in relation to any vessel, means the person having command or charge of the vessel for the time being, but does not include a pilot;

“Minister” means the Minister responsible for the Interior;

“Narcotic drug” means any of the substances, natural or synthetic, listed in Schedule I to this Act;

“Owner” in relation to a vessel includes the charterer or operator of the vessel;



“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;

“Psychotropic Substance” means any substances, natural or synthetic, or any natural material listed in Schedule II to this Act;

“Relevant offence” refers to any of the actions mentioned in section 10 of this Act;

“Ship” means every description of vessel used in navigation, whether self-propelled or not;

“Territorial sea” means all parts of the open sea within twelve nautical miles off the coast of Malta, or such other distance as may be established under section 3 of the Territorial Waters and Contiguous Zone Act, measured as in that Act provided and includes any waters enclosed between the baselines therein mentioned and the coast;

“Vessel” means a ship or any other floating craft of any description, including hovercrafts and submersible crafts;

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*Part II*

General Provisions

*International Co-operation*

3. The Authority together with the Minister shall co-operate with other foreign authorities to suppress illicit traffic in narcotic drugs and psychotropic substances by sea, in conformity with any other relevant laws in force at the time and with international law.

*Non-interference*

4. Any action taken in pursuance of this Act 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.

*Exchange of Information*

5. The Authority is to gather and exchange information concerning vessels registered in Malta, and their cargo. It shall also exchange information with other foreign authorities whenever it considers such exchange necessary to assist a Party to the Agreement in the suppression of illicit traffic in narcotic drugs and psychotropic substances by sea.

*Immunities of Warships and Government Vessels*

6. Nothing in this Act shall affect the immunity enjoyed by warships and other government vessels operated for non-commercial purposes under national and international law.

*Formal Requisites*

7. (1) All written documents and requests made to the Authority in a language other than English or Maltese have to be accompanied with an English or Maltese translation.

(2) All requests for assistance or authorisation and the respective decisions or notifications shall be made in writing.

(3) Writing includes any writing by electronic means capable of confirming receipt, including telefax and other electronic devices.

### *Formalities*

8. Documents transmitted in virtue of this Act shall be exempt from all legalisation formalities and sections 627 and 628 of the Code of Organisation and Civil Procedure shall apply.

### *Powers of Amendment*

9. The Minister may, from time to time, by regulation, amend Schedules I, II, III and IV of this Act.

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## *Part III*

### *Offences*

#### *Relevant Offence*

10. A person shall be guilty of a relevant offence against this Act, in all such cases where such person intentionally commits any of the following acts:

- (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;
- (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;
- (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 Schedules 1 and 2, 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) (i) the conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with paragraph (a) of this section, 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 paragraph (a) of this section or from an act of participation in such an offence or offences;

(c) (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 paragraph (a) of this section or from an act of participation in such offence or offences;

(ii) the possession of equipment or materials or substances listed in Schedules III and IV, 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) 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 counselling the commission of any of the offences mentioned in (a) and (b) above.
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#### *Part IV*

#### Jurisdiction

##### *Offences subject to prosecution*

3. (1) The commission of a relevant offence on board a vessel registered in Malta, wherever it may be, may be prosecuted in Malta and section 5 of the Criminal Code shall apply

*mutatis mutandis.*

- (2) Section 5 of the Criminal Code shall also apply in those cases where the commission of relevant offences is 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 the Agreement, or on board a vessel which is without nationality, or which is assimilated to a vessel without nationality, when such vessels are found within Maltese territorial waters or within the contiguous zone;
- (3) With respect to the relevant offences mentioned in (1) and (2) above, the rules mentioned in the Criminal Code and the Dangerous Drugs' Ordinance shall apply *mutatis mutandis.*
- (4) Saving the provisions of section 5 of the Criminal Code and of the Dangerous Drugs' Ordinance, in all those cases where a foreign registered vessel is or is suspected to be committing any relevant offence, the Courts of Criminal Judicature shall be empowered to exercise jurisdiction and the Authority empowered to act on or against a foreign registered vessel in all those cases where a formal request in writing for assistance to that effect is received by the Authority in Malta from the authorising state which is the flag state and which also is a party to the Agreement, in accordance with the rules specified hereunder;

Provided that this jurisdiction shall be exercised only in conformity with this Act;

Provided further that such vessel at the time of the commission of the relevant offence is found on the High Seas.

(5) Subsection (4) above shall *mutatis mutandis* apply in all those cases where a vessel without nationality, or assimilated to a vessel without nationality is committing or is suspected of committing any relevant offence, and in which case the Courts of Criminal Judicature shall be empowered to exercise jurisdiction and the Authority empowered to act over such vessel where a formal request in writing for assistance to that effect is received by the Authority in Malta from the requesting state on the grounds that Malta is most closely affected by the vessel.

#### *Hot pursuit*

3. (1) Warships or military aircraft, or other vessels or aircraft clearly marked and identifiable as being on government service and authorised to that effect and acting upon orders of the Authority in accordance with this Act shall have the right of hot pursuit against any foreign vessel if there are reasonable grounds to believe that the vessel has acted in violation of this Act.

(2) Such pursuit must be commenced when the vessel is within the internal waters, the territorial sea or the contiguous zone of Malta, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted and it is not necessary that, at the time when the foreign vessel within the territorial sea or the contiguous zone receives the order to stop, the vessel giving the order should likewise be within the territorial sea or the contiguous zone.



- (3) The right of hot pursuit shall cease in all cases where the vessel 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 vessel has satisfied itself by such practicable means as may be available that the vessel pursued is within the limits of the territorial sea, or, as the case may be, within the contiguous zone. 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 vessel.
- (5) Where hot pursuit is effected by an aircraft:
- a) the provisions of subsections (1) to (4) above shall apply *mutatis mutandis*;
  - b) the aircraft giving the order to stop must itself actively pursue the vessel until a vessel or another aircraft of the coastal state, summoned by the aircraft, arrives to take over the pursuit, unless the aircraft is itself able to arrest the vessel. It does not suffice to justify an arrest outside the territorial sea that the vessel was merely sighted by the aircraft as an offender or suspected offender, if it was not both ordered to stop and pursued by the aircraft itself or other aircraft or vessels which continue the pursuit without interruption.

### *Preferential Jurisdiction*

3. The Courts of Criminal Judicature will be vested with preferential jurisdiction where the relevant offence is committed on board a vessel registered in Malta.

*Arrest and punishment*

4. (1) Without prejudice to section 13 and any other section in this Act, in all those cases where the Courts of Criminal Judicature and the Authority are seized with jurisdiction, and a person, or persons, is arrested upon a reasonable suspicion that he has committed or attempted to commit any relevant offence mentioned in this Act, he shall be summoned before the Court forthwith.

(2) Every person charged with the commission or attempt to commit a relevant offence shall be tried in the Criminal Court or before the Court of Magistrates (Malta) or the Courts of Magistrates (Gozo), as the Attorney General may direct, and if he is found guilty shall, in respect of each offence be liable:-

- a) on conviction by the Criminal Court:
  - (i) where the offence is any of the relevant offences mentioned in sub-paragraphs (i), (ii), (iii), (iv) and (v) of paragraph (a) of section 10, or sub-paragraphs (iii) or (iv) of paragraph (c) of section 10, to imprisonment for life;

Provided that:

- aa) where the Court is of the opinion that, when it takes into account the age of the offender the previous conduct of the offender, the quantity of the drug and the nature and quantity of the equipment or materials, if any, involved in the relevant offence and all other circumstances of the relevant offence the

punishment of imprisonment for life would not be appropriate; or

bb) where the verdict of the jury is not unanimous,

then the Court may sentence the person convicted to the punishment of imprisonment for a term of not less than four years but not exceeding thirty years and to a fine (*multa*) of not less than one thousand Maltese liri but not exceeding fifty thousand Maltese liri; and

(ii) for any other relevant offence, for a term of not less than twelve months but not exceeding ten years and to a fine (*multa*) of not less than two hundred Maltese liri but not exceeding ten thousand Malta liri; or

b) on conviction by the Courts of Magistrates (Malta) or the Court of Magistrates (Gozo):

(i) where the offence is any of the relevant offences mentioned in sub-paragraphs (i), (ii), (iii), (iv) (v) of paragraph (a) of section 10, or sub-paragraphs (iii) or (iv) of paragraph (c) of section 10, to imprisonment for a term of not less than six months but not exceeding ten years and to a fine (*multa*) of not less than two hundred Maltese liri but not exceeding five thousand liri; and;

(ii) for any other relevant offence, for a term of not less than three months but not exceeding twelve months or to a fine (*multa*) of not less than two hundred Maltese liri but not exceeding one

thousand Maltese liri or to both such imprisonment and fine;

(3) Any reference, in the Criminal Code to the Dangerous Drugs' Ordinance shall be construed as extending also to this Act.

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*Part V*

Authorisation

*Request for assistance*

15. (1) A State party to the Agreement 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 in Maltese territorial waters, contiguous zone or the High Seas, may request in writing the assistance of the Authority in preventing its further use for that purpose.

(2) The requesting state may demand action to be taken in accordance with this Act, in particular action to be taken pursuant to section 12 above, sections 22 and 23 hereunder and any other action which is at the time appropriate in the circumstances, including search for a suspected vessel and notification to the flag state of the vessel's position, or the prevention of any attempt by the suspected vessel to unload suspected cargo.

- (3) The flag State may subject its request to any conditions or limitations it deems fit.
- (4) Upon receipt of such request for assistance the Authority shall forthwith refer the request to the Commander of the Armed Forces of Malta, the Commissioner of Police and shall also inform the Ministry of Foreign Affairs about the receipt of such request;

Provided that the Authority in referring the matter to the Commander of the Armed Forces of Malta and the Commissioner of Police may seek advice or consultation therefrom as to the action to be taken.

- (5) When the Authority agrees to act upon the authorisation of the flag State given to it in accordance with subsection (2) above, the provisions of this Act in respect of the rights and obligations of the intervening State and the requesting State shall, where appropriate and unless otherwise specified, apply to the Authority and the flag State, respectively.
- (6) When the Authority agrees to act upon the authorisation of the flag state, all action taken must be in conformity with the act of authorisation, no further action beyond that stipulated in the authorisation may be taken, and no action whatsoever, even if expressly stated in the authorisation may be taken if such action is contrary to or is in violation of any law or international obligation, to which Malta is subject and which is in force at the time.

*Request for assistance in respect of Maltese vessels*

15. Where the Authority has reasonable grounds to suspect that a vessel flying a Maltese flag is engaged in or being used for the commission of a relevant offence in the territorial waters or contiguous zone of another foreign State party to the Agreement or on the High Seas, it may request in writing the assistance of the authorities thereof in suppressing its use for that purpose.

(2) In making its request, the Authority may, *inter alia*, authorise the foreign State party, subject to any conditions or limitations which may be laid down in the act of authorisation, to take some or all of the actions specified hereunder.

*Vessel without nationality*

15. If the Authority 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, it shall inform such other Parties as appear most closely affected by it and may request in writing the assistance of any such Party in preventing its further use for that purpose.

*Vessels without nationality to which Malta is most closely affected*

16. Where the Authority, having received information in accordance with section 17, by a foreign State Party, on the grounds that Malta is most closely affected by the vessel involved in the commission of a relevant offence, it shall take all appropriate measures to prevent the further use of the vessel for the commission of relevant offences;

Provided that such action is not contrary to or is not in violation of any law or

international obligation, to which Malta is subject, and which is in force at the time.

- (2) The Authority shall in all cases determine what actions are appropriate in the circumstances.
- (3) The provisions of subsection (4) of section 15 and subsection (2) of section 11 shall apply.
- (4) Where the Authority has taken action under this section, it 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.

*Request by Malta Maritime Authority to act*

15. Where the Authority 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 Authority may request in writing the authorisation 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 Act.

- (v) No such actions may be taken by virtue of this Act, without the authorisation of the flag State.

(3) The provision of subsection (5) of section 15 hereof shall apply.

*Formalities of the request.*

20. A request made under section 19 shall specify:

4. the authority making the request and the authority carrying out the investigations or proceedings;
5. 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;
6. details of the suspected offences, together with the grounds for suspicion;
7. the action it is proposing to take and an assurance that such action would be taken if the vessel concerned had been registered in Malta.

*Decision on the request for authorisation*

- (5) (1) In the case where a request for authorisation mentioned in section 19 above is made by another Party to the Agreement to the Authority in respect of a vessel registered in Malta, then the Authority shall immediately acknowledge receipt of the request for authorisation and shall communicate a decision thereon as soon as possible and, in no event later than four hours from receipt of the request.



(2) Upon receipt of such request the Authority shall forthwith inform the Ministry of Foreign Affairs of such fact.

(3) The Authority may grant the authorisation referred to in subsection (1) hereof subject to the condition that the information or evidence obtained by the intervening state upon boarding and examining the vessel, 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.

4. If the Authority grants the request such authorisation may be made subject to conditions or limitations which may, in particular, provide that its express authorisation be given before any specified steps are taken by the intervening State.

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*Part VI*

Rules governing action

*Authorised actions*

(6) (1) Having received the authorisation of the flag State, and subject to the conditions or limitations, if any, imposed in the act of authorisation, the Authority may take any of the following actions:

- a) stop and board the vessel;
  
- c) establish effective control of the vessel and over any person thereon;
  
- d) take any action provided for in subsection (2) of this section which is considered necessary to establish whether a relevant offence has been committed and to secure any evidence thereof;
  
- e) require the vessel and any persons thereon to be taken into Maltese territory and detain the vessel there for the purpose of carrying out further investigations.

(2) Having established effective control of the vessel as laid down in the preceding subsection of this section the Authority may further:

- 5. search the vessel, anyone on it and anything in it, including its cargo;
  
- 6. open or require the opening of any containers, and test or take samples of anything on the vessel;
  
- 7. require any person on the vessel to give information concerning himself or anything on the vessel;

8. 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 Authority has the power to require;
  9. seize, secure and protect any evidence or material discovered on the vessel.
- b) The vessel so detained, shall not be detained for a period longer than that which is strictly necessary to complete the investigations of relevant offences, and 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. However, persons not suspected of any relevant offence and objects not required as evidence shall be released.

*Enforcement, arrest and detention*

- (iii) (1) Where, as a result of action taken under section 22, the Authority is in possession of evidence that a relevant offence has been committed it shall immediately inform the Commissioner of Police to commence investigative procedures and, if necessary, to arrest and detain the vessel and other suspected persons.
- (iii) In all such cases the Authority shall, without delay, notify the flag

State of steps taken under subsection (1) above.

*Third party intervening state.*

16. (1) Notwithstanding the provisions of the preceding section, the Authority, after consultation with the Attorney-General and the flag State, may agree with a third State Party to the 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 Act as an intervening State.

(2) Subsection (1) shall also apply where the vessel concerned is a vessel registered in Malta.

*Execution of action*

17. (1) Actions taken under section 22 and section 23 shall be governed by the laws of Malta in force at the time.

(2) Actions taken under section 24 shall be governed by the laws of the intervening state in force at the time.

*Warships and government vessels.*

18. Actions under paragraph (a), (b) and (d), of subsection (1) of section 22 shall be carried out only by warships or military aircraft, or by other vessels or aircraft clearly marked and identifiable as being on government service and authorised to that effect.

*Immunity of Official from prosecution*

19. (1) Notwithstanding section 5 of the Criminal Code, an official of the intervening State, in

the performance of any action under section 22 in respect of a Maltese registered vessel, may not be prosecuted in Malta for any act performed in the exercise of his functions.

(7) In any proceedings instituted in Malta in respect of any vessel registered in Malta, offences committed against an official of the intervening State with respect to actions carried out under sections 22, 23 and 24 shall be treated as if they had been committed against an official of Malta.

(8) Where Malta is an intervening state, a Maltese official may only be prosecuted in Malta for any act or omission made while undertaking any authorised action on or against a foreign vessel in pursuance of section 22. Such acts or omissions shall be deemed to have been done within the jurisdiction of Malta.

*Communication between master and flag State authorities.*

16. The master of a vessel which has been boarded in accordance with this Act 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 Authority, or its officials, may prevent or delay any communication with the owners or operators of the vessel if it has reasonable grounds for believing that such communication would obstruct the investigations into a relevant offence.

*Operational safeguards*

17. (1) Any action taken pursuant to the provisions of this Act shall take due account of the duty to preserve life at sea, the security of the vessel and cargo and shall not, as far as

possible, prejudice any commercial or legal interest.

(2) In particular, such action shall take into account:

- (3) 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;
- (4) the need to minimise any interference with the legitimate commercial activities of a vessel;
- (5) the need to avoid unduly detaining or delaying a vessel;
- (6) the need to restrict the use of force to the minimum necessary to ensure compliance with the instructions given.

(3) The use of firearms against, or on, the vessel shall be reported as soon as possible to the flag State.

*Death or injury*

17. (1) The death, or injury, of any person aboard the vessel shall be reported as soon as possible to the flag State.

(2) The Authority, where Malta is an 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.

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*Part VII*

Rules governing the exercise of jurisdiction

*Evidence of offences*

18. (1) To enable the flag State to decide whether to exercise its preferential jurisdiction, the Authority, in the case where Malta is an intervening State, shall without delay transmit in writing to the flag State a summary of the evidence of any offences discovered as a result of action taken pursuant to section 22.

(5) Where the Authority receives such evidence by another intervening State, regarding a Maltese registered vessel, in respect of action taken pursuant to section 22, it shall acknowledge receipt of the summary forthwith.

*Offences outside the scope of the Act*

16. If, in the case mentioned in subsection (1) of section 31, the Authority discovers evidence which leads it to believe that offences outside the scope of this Act may have been committed, or that suspect persons not involved in relevant offences are on board the vessel, it shall notify the flag State and where appropriate consult the foreign authorities concerned.

*Arrest for offences other than relevant offences*

17. The provisions of this Act shall be so construed as to permit the Authority, after

consultation with the Attorney-General, and where Malta is an intervening State, to take measures, including the detention of persons, in respect of the investigation and prosecution of offences other than relevant offences, provided that:

- a) the flag State gives its express consent; or
- b) such measures are aimed at the investigation and prosecution of a criminal offence under international law.

#### *Exercise of preferential jurisdiction*

21. In all cases where Malta is the flag State, the Authority may, after consultation with the Attorney-General, decide to exercise preferential jurisdiction, which decision shall be taken in accordance with the provisions of the following sections.

#### *Notification of decision*

22. (1) The Authority shall notify in writing 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 sections 31, 32 and 33, otherwise it will be deemed to have waived its right to the exercise of preferential jurisdiction.

(2) Where Malta, being an intervening State receives such notification as is mentioned in subsection (1) above, the exercise of jurisdiction by Maltese authorities shall be suspended, save for the purpose of surrendering persons, vessels, cargoes and



evidence.

*Prosecution*

21. (1) In the event that the Authority exercises preferential jurisdiction, it shall submit the case forthwith to the Attorney-General for the purpose of prosecution.

(2) Save as is otherwise provided in this Act, the rules laid down in the Criminal Code shall *mutatis mutandis* apply.

*Action taken by intervening States*

22. Measures taken by the intervening State against a Maltese registered vessel and persons on board shall be valid under Maltese law as though they were executed by the competent Maltese authorities

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*Part VIII*

Surrender of vessels, cargoes, and evidence and the extradition of persons

*Process of surrender.*

23. Where the flag State, party to the Agreement, has notified the Authority in writing of its intention to exercise its preferential jurisdiction, the Authority shall by application to the Court of Criminal Judicature demand that the vessel, the cargo and the evidence seized by the Authority be surrendered and that the person arrested be extradited to that State in

accordance with the provisions of this Act;

Provided that, where the offence for which the flag State decides to exercise its preferential jurisdiction and in respect of which a person detained in Malta shall be extradited to the other State, is punishable by death under the law of that State, the Court of Criminal Judicature shall refrain from extraditing such person unless the other State gives such assurances as the Court of Criminal Judicature considers sufficient, that the death penalty will not be carried out.

*Request for extradition*

24. The request for the extradition 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.

*Expeditious proceedings.*

25. The Authority shall use its best endeavours to expedite the surrender of vessels, cargoes and evidence and the extradition of persons.

*Extradition proceedings*

26. The extradition of a person detained in accordance with this Part shall be carried out in accordance with the laws in force at the time, and in particular in accordance with the Extradition Act.

*Release of person arrested or vessel detained.*

27. Instead of requesting the extradition of the detained persons or the surrender of the vessel, the flag State party to the Agreement may request their immediate release and in such case, such persons or vessels shall be released forthwith.

*Information for owners and masters of vessels*

28. The Authority shall take such measures as may be necessary to inform in writing the owners and masters of vessels registered in Malta upon registration or renewal of registration, that States Parties to the Agreement may be granted the authority to board vessels beyond the territorial sea of Malta for the purposes specified in this Act 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.

*Confidentiality*

29. Subsections (3), (4), (5) and (6) of section 637 of the Code of Organisation and Civil Procedure shall *mutatis mutandis* apply to any evidence and information provided by another Party in pursuance of this Act;

Provided that this shall not apply where their disclosure is necessary for any investigations or proceedings.

## Costs and damages

### *Costs.*

30. The cost of carrying out any action under sections 22 and 23 shall be borne by the Authority only in so far as Malta is an intervening State, and the cost of carrying out action under sections 15 and 18 shall also be borne by the Authority.

### *Costs in exercise of preferential jurisdiction.*

31. In the exercise of preferential jurisdiction in accordance with section 34, the cost of returning the vessel and of transporting suspected persons and evidence shall be borne by the Authority.

### *Damages in negligent action.*

32. If, in the process of taking action pursuant to sections 22 and 23 above, any person, whether natural or legal, suffers loss, damage or injury as a result of negligence or some other fault attributable to the Authority, it shall be liable to pay compensation in respect thereof.

### *Damages in unjustified action.*

33. (1) Where the action is taken in a manner which is not justified by the terms of this Act, the Authority shall be liable to pay compensation for any resulting loss, damage or injury.

(2) The Authority 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.

*Damages in cases of requests for assistance.*

21. Liability for any damage resulting from action under section 16, shall rest with the Authority in so far as it was requesting assistance from another State Party, which, however, may seek compensation from the requested State where the damage was a result of negligence or some other fault attributable to that State.

**Schedule I**

**Schedule II**

**Schedule III**

Ephedrine  
Ergometrine  
Ergotamine  
Lsyergic acid  
1-pehyl-2-propanone  
Pseudoephedrine

The salts of the substances listed in this Schedule whenever the existence of such salts is possible.

**Schedule IV**

Acetic anhydride  
Acetone  
Anthranilic acid  
Ethyl ether  
Phenylacetic acid  
Piperidine

The salts of the substances listed in this Schedule whenever the existence of such salts is possible.