1988年联合国禁止非法贩运麻醉药品和精神药物公约
第17条规定的国家主管当局实用指南
1988年联合国
禁止非法贩运麻醉药品和精神药物公约
第17条规定的国家主管当局
实用指南
本文所用名称及其材料的编排格式并不意味着联合国秘书处对任何国家、领土、城市或地区、或其当局的法律地位，或对其边界或界限的划分表示任何意见。
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第一部分
国家主管当局
承认，需要在各国间进行有效的国际合作和协调，共同打击海上非法药物贩运，并要求各缔约国承担起采取适当行动的责任。

麻醉药品委员会反复强调了这一需要。联合国大会专门讨论共同处理世界性毒品问题的第二十届特别会议也进一步强调了这一点。该次会议于 1998 年 6 月 10 日通过了关于促进司法合作措施的第 S-20/4C 号决议。决议的第四节包含了对抗海上非法贩运药物的具体建议。

在过去的 10 年里，联合国国际药物管制规划署（药管署）
为支持和促进这方面的国际合作作出了努力。麻醉药品委员会通过其第 9（XXXVII）号决议要求药管署执行主任设立和召集一个海事合作工作组。工作组于 1994 年 9 月和 1995 年 2 月在维也纳开了会（见 E/CN.7/1995/13），建议药管署为执法人员编写一本培训指南。委员会后来在其第 8（XXXVIII）号决议中对这一建议表示了赞同，于是起草了培训指南并进行了广泛的散发。为便于参考，附件九中摘录了《指南》中的相关内容。

继执法《培训指南》出版之后，药管署与有关政府合作召集了一次非正式不限名额的海事合作工作组会议（维也纳，2000 年 12 月 5 日至 8 日）。会议确定的目标中有评价迄今取得的进展；评估剩下的挑战和确定进一步加强国际合作的具体措施（见 UNDCP/2000/MAR.3）。根据会议的报告，委员会在第 44/6 号决议中要求药管署提供技术援助，并建议此类援助务必包括：

“编写便于用户使用的培训参考指南，以协助根据《1988 年联合国禁止非法贩运麻醉药品和精神药物公约》第 17 条提出请求的缔约国和负责接受和答复提出请求的主管当局，同时牢记需要避免对合法贸易的不当影响。”

本《实用指南》是根据这一要求起草的。

*8 现已完全并入联合国药物和犯罪问题办事处（UNODC）。
二、《1988 年公约》海上合作方法

由于在禁止海上非法贩运方面存在着物质上和技术上的固有困难，海上运输可使贩运者运输大量的毒品，而且风险甚小。毒品贩运者长期以来一直在利用私人船只和商用船只。事实上，远洋船似乎是受人青睐的一种非法贩运可卡因的手段，它们也被广泛用于大麻的贩运。

海上贩运涉及到两种不同的做法：集装箱贩运和使用特制内层船舶的贩运。在第一种情况下，船长和船员一般对贩运情况一无所知，而第二种情况，他们是积极参与了的。

打击这两种贩运类型的措施是不同的。在船舶携带集装箱的情况下，大多数监控措施可以，也必须在港口采取（除了非常例外的情况），因为在海上检查货物和集装箱一般是不切实可行的。在第二种情况下，贩运者可能会避开所确定的港口，这需要在海上采取执法措施。在这方面，对地理上和执法方面的可行性考虑可能会导致需要在领海以外的海区实施打击行动。

尽管海上走私毒品的影响是明显的，但是过去的国际法几乎没有对制止工作的监管作出具体规定。因此，对于合法拦截领海以外海域的毒品贩运者，各国一直不得不依赖于紧追和诸如推定存在等一般的刑事执法概念，这些概念列入了《海洋法公约》第 111 条，在这之前还列入了 1958 年《日内瓦公海公约》第 23 条。

只是在《1988 年公约》，特别是其第 17 条通过之后，在为拦截一国领海外的船舶贩毒的国际合作提供指导原则方面才真正取得了进展。《1988 年公约评注》详细分析了 17 条中具有
创新的和错综复杂的规定，本指南的附件七摘录了《评注》的一些内容。以下段落全面概述了第 17 条确立的合作框架。

第 17 条详细阐述了《海洋法公约》第 108 条中规定的义务，即通过建立怀疑贩运活动的第三方国家可谋求船舶国授权对位于领海以外的海区采取拦阻行动的框架开展合作的义务。具体地说，现已建立了怀疑贩运活动的第三方国家可谋求船旗帜国授权采取拦阻行动的框架。

不像《海洋法公约》第 108 条的第 2 款，第 17 条还预计到可能会要求在拦阻无国籍船只方面加以合作。不过，第 17 条的较大一部分是专门阐述为一国在领海范围之外对别国船只采取执法行动提供方便的程序和做法的。第 3 和第 4 款包含了这方面的主要规定：

“3. 缔约国如有正当理由怀疑悬挂另一缔约国旗帜或展示该国注册标志的船只虽按照国际法行使航行自由却从事非法贩运，可将此事通知船旗帜国，请其确认注册情况，并可在注册情况获得确认后，请船旗帜国授权对该船采取适当措施。

“4. 按照本条第 3 款，或按照请求国和船旗帜国之间有效的条约，或按照其相互达成的任何其他协议或安排，除其他事项外，船旗帜国还可授权请求国：

(a) 登船；

(b) 搜查船只；

(c) 如查获涉及非法贩运的证据，对该船只、船上人员和货物采取适当行动。”

在这方面，怀疑外国船只在其领海范围外从事毒品贩运的缔约国可请求并获得船旗帜国的授权，采取拦阻行动。应该强调的是，对所涉船只的任何执法行动均取决于船旗帜国事先的迅速

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9 应该指出的是，《海洋法公约》在其第 110 条中并没有规定登临和登船检查无国籍船只的一般权利。
同意，它可以在附有条件，包括那些与责任有关的条件（第 17 条第 6 款）。

就本指南而言，对于第 17 条方案需要指出的另外几点包括：

(a) 每一个缔约国必须对要求授权的请求作出迅捷答复，并指定一部门负责接受和答复请求；

(b) 一旦行动得到授权，必须将结果及时通报船旗国；

(c) 执法行动只能由军舰军用飞行器，或者是具有执行公务的明显可识别标志并获得有关授权的其他船只或飞行器进行；

(d) 它对沿海国家有权在领海外采取行动的有限的一系列情况作了规定。重要的是，如上文所指出的，这包括紧追和在毗邻区行使管辖权。

然而，求助第 17 条中规定的措施并非在所有情况下都是合适的。船只的大小、可疑活动的性质和单在下一个停靠港进行搜查的可行性，都是可能影响提出允许采取行动的请求或同意此请求的因素。此外，在某些情况下，或许要对诉诸可供选择的执法策略（如控制下交付等）的行动加以说明。主要是出于此类原因，第 17 条为决策提供了广泛而灵活的框架。事实上，第 17 条规定了一种制度，使得各缔约国在怀疑海上非法贩运的具体事例方面能有尽可能多的机会获得执法管辖权。

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10 在这方面，责任不仅涉及人员的安全和尊严及财产的安全和完整性，还涉及对船只和（或）合法货物的可能损害。
三、建立适当的国内立法框架

为了确定第 17 条规定的行动的职权范围，《1988 年公约》的缔约国必须像第 3 条 11 中规定的那样进行国内立法，确定它可根据《公约》对其采取行动的具体的刑事罪。第 3 条提供了一些必须列入此类立法范围的犯罪活动的具体例子。

一旦在国内立法中确定了此类罪名，《1988 年公约》要求各缔约国采取措施，在看到此类犯罪发生在其领土上或在犯罪时悬挂其国旗的船上时建立管辖权。

然而，当涉及对悬挂他国国旗的船只建立管辖权时，第 4 条作了非强制性规定，将是否采取行动一事留给了各缔约国自行决定（第 4 条 1(b)(ii) 款）。

此外，第 4 条没有触及对无国籍船只或类似于无国籍船只的船只建立管辖权的问题。《海洋法公约》第 110 条也没有涉及这一问题。

不过，自 1988 年以来，专家意见同意以下观点：有效的立法方案应包括在上述所有三种类别方面对管辖权的适当维护。1995 年在欧洲委员会主持下缔结的《执行〈联合国禁止非法贩运麻醉药品和精神药物公约〉第 17 条的〈海上非法贩运协定〉》的第 3 条，要求各缔约国在所有三种情况下建立管辖权。

它强烈建议各国采取这类国际最佳做法，尽管无论在《1988 年公约》还是《海洋法公约》中都没有对这样做的正式法律义务作出规定。

11附件六载列《1988年公约》第3条的全文。
如《1988年公约评注》所强调的，在执行方面制定适当的立法对第17条规定的合作制度的恰当运作是十分必要的。

第一次进行此类审查的国家往往发现，它们已经将刑事司法系统的义务扩大到了悬挂它们国旗的船只。另一方面，对无国籍船只或外国船只在公海上所犯罪行的管辖权的具体立法主张，相对来说是不常见的，采取补充的立法行动通常是必要的。

如果对国内法的审查暴露了立法方面的不足，它们只能由或最好由新的立法加以弥补，那么各缔约国或许会认为考虑一下以下可能性将是有益的，即达成执行第17条（第9款）规定或增强其有效性的双边或地区协议或安排。还有一些缔约国甚至可能会谋求确保如习惯国际法所允许的，它们的国内法律延伸至在非缔约国同意下采取的行动，或者在《1988年公约》的背景之外通过别的途径。

尽管确保适当的处罚规定适用于海上贩运是至关重要的，但是还必须考虑其他因素，使得合作安排能有效地付诸实施。例如，关键的一点是，经船旗国授权允许在外国船只上采取行动的执法人员有必要的权力并向他们提供必要的保护。原则上，他们至少应该拥有像犯罪发生在本国领土上或悬挂外国国旗的船只上一样的权力并获得同样的保护。药管署的2000年药物滥用问题示范法案12（在普通法体系下）通过实例重点论述了以下方面：

(a) 要求停船、登船、让船改道和扣留船只的权力；

(b) 搜查船只及其船上货物和人员以及通过其他途径获得信息的权力；

(c) 处理涉嫌犯罪方面的权力，包括逮捕和获取证据的权力；

(d) 向被授权的官员提供援助；

12 示范法案可在www.unodc.org上找到。
(e) 使用合理的武力；

(f) 由官员提供他（或她）得到授权的证据；

(g) 适当保护执法人员，免除其刑事和民事责任；

(h) 将相关的刑事犯罪，如在执法军官执行任务中阻挠其执法等，扩大到发生在船上的事件。

还应该注意确保扣留和没收毒品、工具及所得的国内权力也适用于海上非法贩毒的情况，如《1988 年公约》第 5 条中所考虑的。

联合国药物和犯罪问题厅保存各国政府提供的建立毒品问题海上管辖权的国家立法记录。负责审查国家法律框架适宜性的部门可在执行任务中查阅这一有价值的参考文献。
四、国家主管当局

建立国家主管当局

1988 年公约

《1988 年公约》第 17 条第 7 款要求各缔约国“以迅捷的方式答复另一缔约国要求确定悬挂其国旗的船只是否有此权利的请求，并答复根据第 3 款规定提出的授权请求”。为此，每一个缔约国在加入《公约》时应建立一个或数个接受和答复此类请求的机构。建议这类主管当局对要求针对悬挂该国国旗的船只和无国籍船只提供援助的请求负起责任，如第 17 条第 2 款中所设想的。按照第 17 条指定的国家主管当局，可在执行海上执法措施和尽最大可能促进合作以制止海上非法贩运中发挥关键作用。第 17 条承认主管当局可起轴心作用，其第 7 款要求联合国秘书长在各国指定主管当局后的一个月内将此类机构通知各缔约国。

有些国家是通过立法来建立国家主管当局的，有些则是通过行政手段。尚未建立此类机构的国家应该考虑是否有必要进行立法，但也应该考虑通过行政手段建立此类机构的问题，这在法律上应该是有效的。

国家主管当局的定位

关于国家主管当局技术方面的职权范围，《1988 年公约》对于诸如结构、联系渠道或甚至机构定位等问题提供的指导是十分有限的。关于对收进请求和外发请求的决策，《公约》也几乎
没有提到应采取什么样的政策和程序。然而，世界各地的经验提供了足以确定最佳做法最低限度参数的标准。

对于国家主管当局在政府结构内的最佳定位，《1988 年公约》始终没有提到，各缔约国在决定最佳定位时的做法也不尽一致。这就是说，迄今经常选择的定位是司法部、内政部和外交部。其他定位可有五花八门，从海关、海岸警卫队和其他业务部门到海洋局、港务局和负责运输、药品的机构都有，甚至还有负责卫生事务的机构。

为所指定的机构确定最合适的定位是每个国家自身的事情，但在作出此类决定时有种种因素需要加以考虑。第一个重要的标志是所涉机构是否更能充当被请求机构或请求机构。如果能设想由指定的机构接受要求授权对位于领海外海区的船只采取拦阻行动的请求，则显然需要此类机构能同所涉执法当局建立密切的联系。

所有国家，包括内陆国家，都有可能收到在第 17 条范围内要求授权登上悬挂它们国旗的船只的请求。在这方面，尤其是以下因素，可能会证明在确定指定机构的适当定位时它们是有重大关系的：

(a) 易于获得国家船舶注册情况，以便对注册加以确认；

(b) 存在适当的联系渠道；

(c) 存在正常办公时间外的政府办公安排，最好是一星期 7 天，每天 24 小时；

(d) 随时可提供法律意见（包括国际海洋法方面的意见）；

(e) 可提供外语技能；

(f) 易于同相关政府机构和部门进行协调。

建立一个有效的国家主管当局，并不一定需要建立一个庞大的花钱很多的政府机构。就人员配备而言，在很大程度上取
第一部分 国家主管当局

决于计划的请求数量和频率。在某些情况下，只需给现有机构或部门内的一个办公室增加这一责任就足够了。当然，此类办公室中的官员需要熟悉适用的条约、国内法律要求、国家政策和在因请求或接到请求时有效履行这些责任的程序。他们还需要有足够的时间和机会建立和维持与国家结构内对决策进程负有责任的或实际参与提供与决策进程有关的信息的其他相关机构和部门的联系。在任何可能的情况下，应该鼓励工作人员加强与他们在其他国家主管当局工作的同行的联系，特别是那些实际上很有可能提出请求的国家的同行。访问、通信、交流和电话联系，都有助于打开联系渠道，促进互相熟悉和互相信任。

正如本指南前面所强调的，第 17 条第 7 款要求通过联合国秘书长将指定主管当局的决定通知《公约》的其他所有缔约国。同样，有必要采取适当步骤，确保不断更新指定机构中所包含的联系信息。

联合国药物和犯罪问题办事处将保存国家主管当局的地址录并定期散发，这些地址录载有基本的联系资料（地址、电话号码、传真号和办公时间）。麻醉药品委员会在其第 43/5 号决议中敦促缔约国定期审查和增补这一基础性的但是是至关重要的资料。不这样做有可能严重危及打击海上非法贩运的努力。

国内法基础

执行第 17 条的经验表明，为由国家主管当局开展的或通过它开展的关键活动建立健全的国内法基础是十分重要的。明确赋予授权别的《公约》缔约国对悬挂其国旗的船只采取行动的权力和行使此类权力的能力具有特殊的意义。反过来，确保对发出要求授权对外国船只采取行动的请求加以适当处理并服从可能提出的条件和限制，这也很重要。在执行公约的立法中通常包括与证明收到所涉外国授权有关的规定。考虑到所涉立法制度的性质和特性、相关政策的敏感性和类似的事宜，有一系列其他事项或许值得注意。
国家主管当局的职能

按照第17条第7款的规定，当其他缔约国提出要求确定悬挂
其国旗的船只是否有资格这样作和要求授权对该船采取适当措
施的请求时，国家主管当局将有责任作出迅速答复。在多数情
况下，完全可以希望该机构同时负责提出和发出对《1988年
公约》其他缔约国的同类请求。因此，国家主管当局在技术方
面的作用应该是充当接受和发出与第17条有关的请求的指定
渠道的作用。一个高效率的部门，其实质性作用是确保迅速有
效地考虑和执行收进的请求和监督外发请求的质量和有效性。

除了上述职能外，国家主管当局应该有充分的资格通过向
别国同行提供信息和意见为国际合作提供方便。能就与提出请
求有关的法律方面和其他方面的要求和限制提供意见，将可以
t大大减少在事实上收到请求时遇到的问题。对于能在领海之外
采取海上拦阻行动的国家的国家主管当局来说，能就向外国提
出授权请求的要求为国内相关部门提供意见也同等重要。

国家主管当局还负有对外向其他国家提出请求的责任。它
应该具备接受国内相关部门请求的能力，同时能协助向外国递
送请求。这要求国内的相关部门，诸如海关、警察和其他执法
机构，知道该部门的存在、它的作用和联系方式等详细情况。

接受请求

在多数国家，收进的请求是主要的工作来源，因此国家主管当
局必须具备接受请求和按请求办事的能力。就与确认船舶注册
情况有关的这些请求而言，它要求具备尽快核对这件事情的能
力。为此，各缔约国应该保持对有资格悬挂其国旗的船只的船
舶登记册，国家主管当局应该始终能查阅船舶登记册。应该指
出的是，《海洋法公约》在其第94条中事实上要求各缔约国保
持对所有船舶的登记册，除了那些因体积过小而在普遍接受
的国际规定范围之内的那些船只。如海事合作工作组所建议的，
各缔约国应该尽一切努力保持对所有船舶的登记册，以便于有
效地行使船旗国的管辖权，还应尽一切努力使登记册中的船舶
的详细数据实现计算机化，以方便识别（见 E/CN.7/1995/13，
第 1 段和第 5 段）。

正如多次提到的，对根据第 17 条提出的请求应尽快作出回
复，这一点对于开展有效的国际合作是至关重要的。这一因素
应该在制定国家政策中和有关政策执行的程序中成为一致的参
照点。以下的指导意见主要是力求确保在实践中能最大限度地
do 行动快捷。

有关接受请求的政策和程序

第 17 条丝毫没有提到适用于请求的程序规则和一般规则。因
此，各缔约国可以自由地决定一系列事项，从同意此类请求到
递送请求的方式和语言。在这些情况下，如果有效合作的目标
不会因为出现了国家相互冲突的做法和期望而受到非故意的破
坏，那么统一一下方法是有好处的。

主要是出于这个原因，海事合作工作组于 1995 年提出了一
种使每次请求包含的信息标准化的示范格式，同时强调船旗
国依然有权要求提供补充信息。工作组认为，请求应该包含以
下信息（见 E/CN.7/1995/13，第 3 段）：

“1. 请求方身份，包括发出请求的当局和负责采取措施
的机构；
2. 船舶说明，包括船名、船旗和登记港及其他与船舶
有关的信息；
3. 已知的有关航程和船员的详细情况；
4. 目测情况和天气报告；
5. 提出请求的原因（列明作为干预理由的种种情况）；
6. 打算采取的行动；
7. 其他任何相关信息；

8. 干预国请求采取的行动（包括确认船舶的注册情况和允许视情况登船搜查），以及拟议的时限。”

本指南力求按照国家惯例完善和充分叙述那种方法。为此，为国家主管当局可能的使用拟定了三种示范格式。它们是请求示范格式（见附件二），答复示范格式（见附件三）和所采取行动报告示范格式（见附件四）。

所有此类重要联系应该采用书面形式。可以使用现代通信手段，诸如传真和电子邮件等。尽管预计不会有纯粹的口头请求，但这不是说所有口头联系均应被禁止。

经验证明，所涉主管当局之间的电话联系能发挥至关重要的作用。各国或许会发现，确定一个最初联系点，由它而不是国家当局来协助初步传送最终在正式请求中使用的信息，那是有好处的。在此类情况下，可以就请求的准备提供有价值的意见，从而在传送请求供被请求国正式考虑时进一步减少出现问题的可能性。有些机密信息和行动情报来源为得出有正当理由怀疑有关船只从事了非法贩运的结论作出了贡献，这些信息和情报需要予以保护，这是应该加以考虑的问题之一。同样，在接到请求和答复请求这段时间内保持相关国家主管当局之间的对话，能有助于避免误解，有助于通报请求国的行动决策。因此，国内政策和程序应该允许进行此类联系并为此提供方便。

然而，对于各国是否应该对拟定行动请求的语言提出要求的问题，本指南不便表态。在这方面，迄今的做法强调的是灵活性和可行性。

正如《1988 年公约》的正式《评注》中所强调的（见第 17.33 段），每个国家“还需要拟订既定的政策框架，根据该政策框架可以决定是否对请求作出肯定答复，如果是的话，要服从什么条件”。尽管无法预料在实践中可能出现的一切相关情况，但是事先确定对授权的限制，制定有关具有特定敏感性的
事项的指导原则以及相关因素一览表，都将有助于快速决策。

尽管可以看作相关因素的一系列因素从理论上讲是没有限制的，但重要的是，充分了解第 17 条的性质和目的将会对政策制定过程起到支持作用。在这方面，认真考虑附件七中翻印的文本是有益的。

例如，尽管在提出请求时的船舶位置和有关船上可疑药物预计目的地的证据等因素或许与是否给予授权有着很大关系，但在第 17 条中没有提出任何此类要求。

同他国的国家主管当局分享国家政策方面的信息，如同意登船搜查的先决条件等，似乎也是有益的。此类信息既能有助于外国有关当局拟定要求授权的请求，同时有助于避免递送可能在那种国家政策下遭到拒绝的请求。

**决策结构**

国家主管当局是否有能力就以肯定的方式或否定的方式答复外国的请求作出必要的国内决定，对于国家主管当局能否为国际合作提供方便来说是非常关键的。在这里，第 17 条再次将达成此类决定的最佳方式的决定权留给了每个当事方。

在这方面，各国在做法上也有很大差异。在某些情况下，决定是由主管当局内部指定的某位官员或某些官员来作的，选择这种方式好处是明显的。在另一些国家，在作决定前先要获得一个以上的政府部门（多数包括外交部和（或）司法部）的批准或事先征求它们意见。在另一些情况中，则由指定的某位部长或某些部长在政治高层提供最后授权。

然而，在选择最合适的程序时，各国应该考虑各种选择引起的实际困难。特别应该记住，第 17 条中提到的请求在时间问题上往往是高度敏感的。正常办公时间，周末或公共假日都不适用于负责制止海上贩毒活动的执法机构。因此，应该针对
那种紧急情况对各种选择作出评估，至少是对部分的选择评估。采用涉及到多个机构或部门的高度复杂的体系，或要求尽快报告多位部长的程序，或许根本无法做到迅速决策。

不管选定什么样的授权体系，国家主管当局均必须建立能使它迅速和有效地采取行动的明确的程序和指导原则。尤其是，对于指定参与决策进程的那些人的代理人一事，需要加以认真考虑，以便确保始终有人能给予必要的授权，或提供所要求的情况。

国籍和登记问题

应该指出的是，《海洋法公约》要求一个国家确定指导给予船舶国籍，使船舶能在该国领土上登记并有权悬挂该国国旗的条件（第 91 条）。船舶只能悬挂一国国旗（第 92 条）。船舶拥有它有资格悬挂其国旗的那个国家的国籍，“船旗国”一词一般是指船舶拥有其国籍的那个国家。

给予国籍不只是一种行政手续，它涉及到国家同意承担对船舶实行控制的责任。《海洋法公约》第 94 条确定了船旗国的职责范围，特别规定每个国家必须在行政、技术和社会事项方面对悬挂其国旗的船只有效地行使其管辖权和实行控制。一国必须保持一本船舶登记册，载列悬挂其国旗的船舶名称及其详细情况，除了那些因体积过小而在普遍接受的国际规定范围之内的那些船只。《公约》没有详细说明管理登记的条件。然而，人们可以从第 91 和 92 条得出如下看法：双重国籍，因此而造成双重登记，那是不允许的，国际条约明文规定的那些除外。1993 年的《关于捕鱼船安全的托雷莫利诺斯国际公约议定书》，提供了对不属于国际规定适用范围的捕鱼船的尺寸的指导意见，该议定书适用于长度在 24 米以上的捕鱼船。

《1988 年公约》的第 17 条第 3 款对确认可疑船只登记情况的概念作了以下陈述：
“3. 缔约国如有正当理由怀疑悬挂另一缔约国国旗或显示该国注册标志的船只虽按照国际法行使航行自由但却在从事非法贩运，可将此事通知船旗国，请其确认注册情况，井可在注册情况获得确认后，请船旗国授权对该船采取适当措施。”

某些国家的做法是，将重点主要放在国家主管当局建立与国家船舶登记部门的适当联系上。在这方面，国家当局应该有能力查对可疑船只的登记情况，为此缔约国应该维护好包含悬挂其国旗的船舶情况的登记册，并如海事合作工作组在1995年建议的那样，尽一切努力使登记册中有关船舶的一系列详细数据实现计算机化，以方便查对有权悬挂其国旗的船只（E/CN.7/1995/13，第5段）。此外，事实或许会证明，建立决定是否正在对同一船只采取其他执法行动的程序对国家当局是会有帮助的。

目前，许多国家当局还缺少在线访问国家船运登记册的手段，往往发现查对相关性是困难而费时的，尤其是在非常办公时间。结果，查对登记册往往成了造成延误的重要原因。然而，这里重要的一点是要记住，关于是否授权请求国采取行动的决定不仅取决于所涉船舶的登记情况，还取决于对政治、经济和其他因素的评估。

实际上，经验证明，查对登记册的过程应该尽可能与船旗国的授权程序分开。一旦需在完成登记册的查对之前对是否给予授权一事作出政策决定，则应考虑及时将决定通知请求国的问题。必须指出的是，目前出现了这样一种做法，即将授权建立在以下假设之上，即查对登记一定会取得积极的结果。这在有些时候称为“临时船旗国授权”或“推定船旗国权力”，这在《海洋法公约》的背景下似乎是合适的。按照该公约，船旗国将根据船舶悬挂的国旗来识别，它对悬挂其国旗的船只拥有管辖权和控制权。
正如上面所解释的，这种做法是建立在国际海洋法的基础之上的，即船舶悬挂的国旗是其国籍的象征的规则基础上的，登记是授予船舶国籍的一种程序。伪称登记的船只被视为无国籍船只。《海洋法公约》第 92 条第 2 款部分反映了这一点，它说：

“2. 悬挂两国或两国以上旗帜航行并视方便而换用旗帜的船舶，对任何其他国家不得主张其中的任一国籍，并可视同无国籍的船舶。”

这样一来，如果一船只自称拥有被请求国国籍而它没有资格这样做时，那么它可以被适当地划为那个意义上的无国籍。反过来，根据国际海洋法，这赋予了其他国家某些独立的行动权（见以下无国籍船舶一节）。在这方面，应该回顾一下以下情况：在 2000 年 3 月通过的第 43/5 号决议，麻醉药品委员会指出了船长参与此类骗人把戏的可能性，强调了国际海洋法的这一特定规则。

在这方面另一个可能有关的因素是，各国通常都不要求诸如游艇和其他游船等特定类别的小型船只进行国内法规定的登记。这样一来，从法律上讲，除列入国家登记册的船只以外的船只可能有资格悬挂被请求国的国旗并得到国籍保护。

在此类情况下，《海洋法公约》第 91 条第 2 款的惟一要求是，赋予一艘船舶悬挂其国旗的权利的国家，必须给该船颁发授予该权利的文件。在这些情况下，事实证明，对船舶文件进行检查是弄清国籍主张是否有效的惟一手段。导致临时授权的旗帜国权力推定可能是应对这类情况的有用手段。

尽管允许根据临时授权或推定的船旗国权力登船搜查，可为加快授权过程提供一种有用的手段，但是它不否定实际查对登记并随后将结果通知干预国必要性。虽然在所有情况下都是这样的，但是值得特别重视的是，这类允许的给予一直都得

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13 这是一项关于船舶国籍的具体要求，对于游艇和其他小型船舶不作任何豁免。
服从条件的。一旦收到对登记和有关事项的澄清，则请求国需要明确此类条件是否继续有效。一旦船只在国际法中被视同无国籍船只，此类条件将不再适用，只要国家法律允许，干预国可根据其独立的行动权自由行事。

决策考虑

《1988 年公约》第 17 条第 4 款规定：

“……船旗国还可授权请求国：

(a) 登船；
(b) 搜查船只；
(c) 如查获涉及非法贩运的证据，对该船只、船上人员和货物采取适当行动。”

《公约》并未规定必须对请求作出赞同的答复，因此，是否这样做将由船旗国当局根据个案作出决定。然而，第 17 条第 1 款中有明确规定，应尽可能充分合作，制止海上非法贩运。

关于可能被认为与作出决定有重大关系的考虑范围，《公约》没有对被请求国加以限制。然而，第 17 条第 5 款提供了一个非详尽无遗的清单：

“5. 如依本条采取行动，有关缔约国应适当注意不得危及海上生命安全，该船只和货物的安全，也不得损害该船旗国或任何其他有关国家的商业和法律利益。”

答复请求

国家主管当局有责任直接或间接地对要求登上悬挂其国旗的船只进行搜查并视情况对船只及船上人员和货物采取必要行动的收进请求作出迅速和适当的考虑和答复。这可能包括拟定任何授权均须服从的条件。如果对这些至关重要的事项的决定权不在这一国家当局，它有责任启动必要的决策进程。如果授权
对登上悬挂其国旗的船只进行搜查和采取行动需要一个以上的政府部门批准（例如外交部和司法部），则应有一个使该当局能迅捷得到必要批准的既定程序。为了做到这一点，一种方法是由每个相关部建立一个协调中心。这一协调职能的另一个重要任务是，弄清是否已经在对同一船只采取其他执法行动，包括控制下交付。

不管能否安排，还是应该建立适当的行政基础结构，为国家主管当局以有效的和迅捷的方式履行责任提供方便。提供现代的联系渠道，诸如电话和传真等，在可能的情况下还有电子邮件联系，也是非常重要的。在海上环境中，时间是至关重要的。经验表明，依靠缓慢的外交渠道会给行动造成困难，这一点业已得到证明。正如对《1988 年公约》第 17 条第 7 款的评注（第 17.21 段）所指出的：

“本文设想与指定机构直接联系而不是通过非直接的办法，如通过外交渠道，鉴于这类请求的紧迫性，这种直接联系是十分可取的。”

自《1988 年公约》生效以来，麻醉药品委员会的各种决议都强调需要有快捷的程序。大会在其第 S-20/4C 号决议中建议，各国应审查主管当局间的联系渠道和程序，以便于协调和合作，目的是确保快速作出反应和决定（第 6 (b) 段）。

不能迅速授权采取拦阻行动，则很有可能导致丧失对海上贩毒者采取行动的时机。例如，天气条件有可能恶化，船只有可能进入第三国领海，或者贩运者可能毁掉违禁货物或他们参与非法贩运的其他证据。被请求国方面的行动需要按小时来论而不能按天来论。例如，为此，欧洲委员会《执行 1988 年公约第 17 条的协议》的第 7 条要求授权决定应“……在可行的情况下，在接到请求后的 4 个小时内”通知对方。相关的正式解释性报告指出，按照协议这一时限“……在多数情况下应该视为通知决定的最迟时间”。从上得出结论，最佳做法要求国家主管当局能一周 7 天，一天 24 小时接受请求和答复请求。
赞同请求的答复

当国家主管当局决定对请求作出赞同的答复时，它有权要求其授权服从干预国应满足的条件。第 17 条第 6 款对此有明确规定，它申明：

“6. 只要符合本条第 1 款所规定的义务，船旗国可使其授权服从它与请求国之间相互议定的条件，包括关于责任的条件。”

第 17 条的评注（见第 17.20 段）指出，凡是提到上述规定中的责任，应该包括“在登船或搜查船只，或采取进一步适当行动过程中，或作为其结果，对船舶或其货物或对任何第三方造成损害，或对船员造成伤害”应负的责任。”

当然，也可具体规定其他各种条件。实际上条件已包括，例如：

(a) 在船只被带往第三国管辖区域前干预国有义务征求船旗国的意见；
(b) 对在行动中打算诉诸武力一事加以限制或规定一些标准；
(c) 权力的授予不得损害船旗国对船主或船上人员所犯罪行行使管辖权的权利。

然而，相比之下，在各国惯例中，对费用规定一些条件相对说来是不经常的事。然而，一般原则规定，此类行动的费用通常由干预国承担。正如海事合作工作组在 1995 年指出的（见 E/CN.7/1995/13，第 19 段），“除非另有协议，与登船活动有关的费用应由干预国承担”。本指南的这一节就是根据这一点起草的。

如果条件为船旗国保留了在知道登船搜查的结果后采取某种行动的权利，负责授权的机构应该确保能有得到正式授权的官员迅速发出指令。
尽管各缔约国可以自由制定像它们所要求的那类条件，但需要指出的是，第 17 条第 6 款要求应就那些条件相互达成一致意见。因此，只应该在认为绝对必要的范围内提出那些条件。

拒绝请求

正如早先指出的，对于要求授权登船搜查其某一船只的请求，船旗国不负有满足这一请求的法律义务。然而，“以迅捷方式对请求作出答复”的义务也扩大到了国内决策的结果否定了请求的那些情况。迅捷将拒绝授权的决定通知请求国，将能使它采取必要步骤，中止有可能成为复杂的和代价高的海上执法行动。

第 17 条中没有规定必须为否定的决定提供理由。然而，正如对《1988 年公约评注》所指出的（见第 17.37 段），“在适当的情况下指出作出决定的依据将符合本公约的精神。”为此，附件三中载列的答复示范格式赋予了提供这方面信息的机会，我们敦促各缔约国在适当的情况下利用这一可能。

后续行动

按照第 17 条第 8 款，“已按照本条采取了任何行动的缔约国，应将行动的结果迅速通知有关船旗国。”

向船旗国国家主管当局快捷提供有意义的反馈，将有助于促进和巩固互相信任和互相信赖的精神，这种精神对有效的国际合作是至关重要的。当船旗国保留了根据干预结果拟定最后指令的权利时，快速递交后续行动报告（其示范格式可见附件四）甚至更为重要。正如工作组在 1995 年所指出的（见 E/CN.7/1995/13, 第 18 段）：

“……两国应在适当考虑到国际法确认的船旗国权限的基础上，商定应采取的适当措施。根据登船搜查获得的证据，船旗国可以明示放弃行使其管辖权而交由干预国处理。”
如果船旗国决定对船舶及船上的货物和人员行使其管辖权，那就需要同干预国展开对话。与负责缉毒执法、起诉及类似事项的其他相关的国家当局进行广泛协调，对确保管辖权和责任的无缝交接将是必要的。

当船旗国为了，特别是使得干预国能按照其国内法律启动法律诉讼而放弃其专属管辖权时，船旗国指定机构的作用通常将是有限的，在时间上也不怎么敏感。

外发请求

提出请求的决定

国家主管当局应该确保要求给予第 17 条规定的授权的请求只在适当的情况下提出和递送。为此，应该作出安排，使得每一案件的情况都受到严密监视。船只的特点和航行的性质应该加以考虑。例如，在许多情况下，对于为乘客提供定期服务的船只或参与商贸活动的大型船只，由下一个停靠港的当局采取行动可能更为有效。在这方面应该提请注意的是，根据第 17 条第 5 款的规定，一旦采取行动，有关缔约国（包括干预国）“应适当注意不得危害海上生命安全，该船只和货物的安全，也不得损害该船旗国或任何其他有关国家的商业和法律利益。”应该探索采用其他执法策略的问题，包括控制下交付。

还需要使国家主管当局的官员确信，相关条约的所有要求都已经得到了满足，或将得到满足。例如，根据第 17 条第 3 款，必须有怀疑船只从事非法贩运的“正当理由”。同样，按第第 10 款，执法行动“只能由军舰或军用飞行器，或具有执行公务的明显可识别标志并获得有关授权的船舶或飞行器进行。”

最后，在传递请求之前，国家主管当局应该确信，在国内法律中对谋求授权的一系列行动均有规定（见上面第三节）。
请求的內容与递送

请求一旦拟定，需要递送给船旗国国家主管当局。它需包含足够明确的信息，使它能得到迅捷考虑和答复。尽管此类请求的内容在第 17 条中没有专门规定，但附件二中的示范格式力求体现最佳做法。

然而，在可能的情况下与被请求国的指定机构建立电话或其他类似的实时联系是有好处的，以便事先弄清所提出的请求在形式和内容上对该国是否足够，是否合适。另外，一个高效的国家主管当局将不仅仅是负责递送请求和等待答复。它还将视情况保持同被请求国对等机构对话，以便协助解决出现的困难或问题，并监测事情的进展情况。正如前面所论述的，各国或许会发现，确定一个国家当局以外的最初联系点协助初步递送最终在正式请求中使用的信息，那是有好处的。

协调与后续行动

正如本指南前面所指出的，国家主管当局的参与不能停留在接受来自船旗国的授权上。按照第 17 条第 8 款，它必须迅速将所采取行动的结果通知船旗国。附件四中列出了这方面的示范格式。

在国内一级，国家当局必须有能力对收到的授权作出评估，特别是可能施加的条件的可接受性。它还必须能将此类条件和限制通知相关的行动当局（按照《1988 年公约》，它们必须遵守这一点）。

特殊考虑：无国籍船只和本国旗帜船只

无国籍船只

尽管出现的绝大多数情况实际上与要求对其他《1988 年公约》缔约国的船只采取执法行动有关，第 17 条第 2 款也考虑了在以下两种情况下提供合作的问题：
“2. 缔约国如有正当理由怀疑悬挂其国旗或未挂旗或未展示注册标志的船只在进行非法贩运，可请求其他缔约国协助，以制止将该船用于此种目的。被请求的缔约国应尽其所能提供此种协助。”

大家普遍同意，上述提法既包括悬挂本国旗帜的船只，也包括无国籍船只，或者视同国际法中无国籍船只的那些船只。对于后一类，每个国家都拥有与国际海洋法一致的某种采取行动的单方面的权利。按照《联合国海洋法公约》第 110 条的规定，如果有正当的理由怀疑一外国船只属于无国籍船只，军舰有权登上它在公海上遇到的这艘船只。在此类情况下，军舰可对该船悬挂该国国旗的权利进行核查，为此，它可以派一艘小艇，由一军官指挥接近受怀疑的船只。如果在查对文件后怀疑依然存在，它可登船作进一步检查，在检查时必须考虑到所有可能的情况。

在这方面，《1988 年公约》第 17 条预计，一个有正当理由怀疑无国籍船只从事非法贩运的国家，自身可能因地理或执法可行性等原因无力制止该船用于那种目的。在此类情况下，它可以请求《公约》的其他缔约国提供援助。任何此类请求必须使用在第 17 条规定的国家主管当局之间建立的联系渠道。

对《1998 年公约》第 17 条的《评注》确定了面临此类请求的国家所具有的如下地位（见第 17.47 段）：

“只有被请求国可以决定什么行动是适当的。不过，被请求国的义务应尽其所能提供协助并且……它可以在作出决定时适当考虑经济因素，包括进行任何有关执法行动的预期费用。在某些情况下，可能被认为适当的做法是，是否对一项请求作出肯定的答复取决于对分摊这种费用的协议。”
悬挂本国旗帜的船只

第 17 条第 2 款还设想了这样一点，当船旗国有理由怀疑它的船只之一从事非法贩运时，它可能会在制止使用其船只方面寻求《公约》其他缔约国的援助。这一条款是建立在《海洋法公约》第 108 条第 2 款的基础上的，该款维持了以下原则：只有船旗国有资格对悬挂其国旗的从事非法贩运的船只采取行动，除非它请求别的国家提供援助。此类请求不可能经常提出。

在大多数情况下，请求将包括第 17 条第 4 款规定的某些措施或所有措施。然而，也可以为其他广泛的目的适当地寻求协助，例如，包括在以下方面提供帮助：确定所涉船只的位置、参与对船只的监视和随后向船旗国的公务船通报监视情况，或者允许船旗国执法人员登上被请求国的公务船等。

所有此类较广泛的请求应通过第 17 条确定的国家当局的网络谨慎提出。在提出和答复此类请求时，有必要记住在对《1988 年公约评注》中所包含的以下阐明的话 ( 见第 17.44 段 )：

“船旗国可使其协助请求服从它认为合适的条件和限制，这一点在步骤的性质上未讲明。……同样，被请求国似宜阐明它准备作出肯定答复的条件。”

在这方面，国际惯例既没有充分形成，也不是完全统一的。因此，对于有关的国家当局来说，一旦涉及像费用和损害那样的关键事项，事先考虑一下应该采取何种立场将是有益的。

可能的附加责任

1988 年以来的这段时间，各国签署了与海上走私毒品有关的大量协议和安排，第 17 条第 9 款对这一进程加以了鼓励：

“9. 缔约国应考虑达成双边和区域协定或安排，以执行本条各项规定或增强其有效性。”
在发生海上贩毒的地区，如加勒比地区，现已出现了有关此类合作的规定。例如，在美利坚合众国与该地区的国家订立了20多项协议，它们涵盖了像以下方面的那些事项：船只搭乘安能、登船、紧追击、进入领海调查、为飞机着陆提供空和中转许可证等。还还签署了联合巡逻协定。该地区的其他国家相互之间也签署了协定，包括在加勒比有海外领地的欧洲国家（法国、荷兰和大不列颠及北爱尔兰联合王国）。加勒比国家和毗邻加勒比的国家缔结了关于在更广泛的加勒比盆地地区合作制止海上非法贩运麻醉药品和精神药物的协定。

是否根据《1988年公约》第17条向国家主管当局分配执行此类协议和安排的责任，这是一件需由每一缔约国决定的事情。在切实可行的情况下，一国的主管当局应该对所有此类协议或安排负责；然而，采取有关步骤，确保运行这一系统的官员实际上能区分《1988年公约》指导的情况及其他协议和安排监管的情况，并有效地执行与每项协议和安排相关的程序与做法，这将是十分必要的。
第二部分
附件
附件一

《实用指南》提要

实践中各国主管当局

《1988年联合国禁止非法贩运麻醉药品和精神药物公约》
第17条规定的各国主管当局的业务指导原则

实际考虑

### 主要职责

各国主管当局负责：
- 确保快速和高效审议和答复收进的请求。
- 检查外发请求的质量和效果。
- 向其他国家的对应机构提供信息和咨询意见。

### 基本要求

各国主管当局必须：
- 有能力及时和高效处理和答复请求。
- 能与其他国家的对应机构并与本国相关当局（海关、警方和海岸警卫队等）沟通和联络。
- 准备好就与提出和处理请求相关的法律与其他要求和制约因素提供咨询意见。
- 让其他国家的对应机构和本国相关当局在它们的存在、作用和如何与之联系的具体方面了解它们。

### 关键问题

- **第17条** 未规定如何处理请求的细则。不过，经验证明国家为处理此类请求规定明确而清楚的政策和程序，是确保及时而高效处理请求的最佳方法。
- **最好**，接受来自《1988年公约》缔约国的请求和向其递送请求都由同一个国家主管机构负责。不过，这不是第17条规定的一项要求。
- **通常**，请求涉及对船舶注册情况的确认。国家主管当局因此应作好准备查阅船舶国家注册情况。
收进的请求

一項重要的先決條件是
規定請求必須載列的不可
或缺的數據

例如

請求必須載列：
- 请求方的身份，其中包括发出请求的机构以及负责采取措施的机构。
- 对船舶的描述，其中包括其船名、船旗和注册港以及可获得的任何其他资料。
- 关于航程和船员的已知细节。
- 所在位置资料和天气报告。
- 提出请求的理由（说明证明要进行干预的具体情况）。
- 拟采取的行动。
- 任何其他相关的信息。
- 干预国请求采取的行动（包括对船舶注册情况的确认以及在适用情况下允许登船搜查）以及是否有时限。

关键问题

- **缔约国**完全有自由决定请求的内容、请求递送应采用的方式以及提出请求应使用的语言。不过，显然有必要协调其方法，以避免产生阻碍有效合作的相互冲突的国家做法。
- **即使**在必须提出书面请求时，各国主管当局利用现有所有其他沟通方式，已证明会大大减少延迟处理请求和种种复杂情况。
# 作出决定

第17条 让缔约国在收到请求后对要采取的最适当的程序作出决定，其中包括在哪一级将作出决定。缔约国可以采用不同的方法。例如，

让国家主管机构对作出决定和对请求作出答复负全责

- 与其他机构的协商必须不花费很多时间
- 没有必要找到可能一时不在的高级官员与其联系
- 可直接向外国对应机构提出疑问、问题和需补充的数据

除国家主管当局外与一个或更多必要的机构协商后作出决定

- 对不属于国家主管当局职权范围的问题，可允许进一步澄清
- 可能大大延迟答复收进的请求

要求必须由一位部长或其他高级官员作出决定答复收进的请求

- 可有利于确保让规定的政治级别官员随时了解可能是敏感的发展态势并对之承担责任
- 可能严重延误答复，致使请求国无法采取行动

### 关键问题

- 尽管缔约国完全有自由决定哪一种方法更符合本国的情况，但是授权国家主管机构作出相关决定显然比较有利。
- 在决定要确立的程序时，缔约国应认真考虑一切有关的实际和法律因素并确保程序一旦确立，它是清楚的、全面的而且为所有有关方面完全熟悉。
# 国籍和注册问题

## 1982 年联合国海洋法公约

### 所有缔约国的主要义务

公约的所有缔约国必须：
- 确定对船舶给予国籍、船舶在其领土上注册及船舶悬挂该国旗帜的权利的条件（第 91 条）。
- 向其给予悬挂该国旗帜权利的船舶颁发给予该权利的文件（第 91 条）。
- 保持一本船舶登记册，载列悬挂该国旗帜的船舶的名称和详细情况，但体积过小的船舶除外（第 94 条）。
- 根据其国内法，就有关每艘悬挂该国旗帜的船舶的行政、技术和社会事项，对该船船长、高级船员和船员行使管辖权（第 94 条）。

### 基本原则

- 船舶具有其给予悬挂该国旗帜所属国家的国籍（第 91 条）。
- 船旗国与船舶之间必须有真正联系（第 91 条）。
- 船舶航行应仅悬挂一国的旗帜（第 92 条）。
- 除例外情形外，“船舶在公海上应受其船旗国的专属管辖（第 92 条）。
- 视方便悬挂两国或两国以上旗帜航行的船舶不得主张其中的任一国籍，并可视同无国籍的船舶（第 92 条）。

*如《联合国海洋法公约》和其他国际条约所下的定义。*
《1988 年联合国禁止非法贩运麻醉药品和精神药物公约》

根据第17条被请求缔约国的主要义务

被请求国必须：

- 尽可能充分合作，制止海上非法贩运（第1款）。
- 以迅捷方式答复另一缔约国要求确定悬挂其国旗的船只是否有此权利的请求，并答复根据第3款规定提出的授权请求（第7款）。
- 指定一个机构或必要时指定若干机构接受并答复这类请求。

基本原则

- 国家主管机构应有能力核对可疑船只的注册情况。
- 国家主管机构还应有能力在提出请求的外国机构与可负责对有关请求作出决定的无论任何人之间进行沟通和充当联络人。

关键问题

- 经验：证实注册情况核对过程应尽可能与船旗国授权机制分开。
- 现今：一项日益常见的做法是根据注册情况核对肯定的结果的假定给予授权，有些人又称之为船旗国临时授权。也可从船旗国推定权力的角度来考虑。
- 这一做法大大加快了授权过程的速度。不过，这不是压根儿不需要注册情况的实际核对并在之后将结果通报请求国。
## 作出决定的考虑

第 17 条 预见到船旗国可能授权请求国对被怀疑进行海上非法贩运的船只采取若干行动。

### 可能被请求采取行动的例举

第 4 段
- 登船
- 搜查船只
- 如查获涉及非法贩运的证据，对该船只、船上人员和货物采取适当行动。

## 关键问题

在考虑授权对悬挂其旗帜的船只采取行动时，缔约国应牢记：

- **上述** 清单不是详尽无遗的，因为在每一案件中，提出给予授权采取行动的数目及其类型可能是不同的。
- **该清单** 或第 17 条的任何其他部分均不产生对收进的请求给予赞同答复的义务。答复是否赞同是一个由船旗国当局在每一具体案件中决定的事项。
- **需要** 不危及海上生命安全、船只与货物的安全或不损害任何其他国家的商业和合法利益。
- **在各国** 决定授权针对其自己的船只采取行动时对它们可能设想的考虑类型和数目并没有限制。《1988 年公约》在这方面未设下任何规范。
对请求的答复

正确处理根据第17条提出的请求的要求

允许国家主管机构有效扮演它们被指定扮演的角色。各国应确保具备某些基本规章和结构方面的条件，例如：

程序方面

- 国家主管机构必须直接或间接负责对请求的快速和恰当考虑和答复。
- 如果该国家机构不掌握对此类事项的决定权力，它至少有权起动必要的作出决定的过程。
- 如果有关授权必须得到一个政府机构（如两个或两个以上的部）的核准，那么应有既定的程序使该国家机构能以迅速的方式获得必要的核准。

结构方面

- 国家主管机构必须有能力查与该船只有关的其他执法行动，包括控制下交付是否已在进行之中。
- 应建立一个适当的行政基础结构以便于履行国家机构的职责。
- 应具备现代通讯渠道，如电话、传真以及可能时的电邮联系。

关键问题

不能及时授权拦阻，十分可能导致丧失针对海上贩毒者采取行动的机会，例如，因为
- 天气情况可能恶化。
- 船只可能抵达第三国的领海。
- 贩运者可能销毁非法货物和其他罪证。
对请求的赞同答复

第 17 条决不会让被请求国在答复赞同一项请求时必须简单授权请求国采取其请求中预期采取的全部行动。相反，第 6 款明文规定授权应服从请求国同意的条件。

可能的条件

施加的条件可能包括：
- 在船只接受一个第三国管辖之前干预国有义务与船旗国会商。
- 对行动中使用武力硬性规定限制、标准或特定义务。
- 船旗国对船主或船上的那些人所犯的罪行最终行使管辖权的保证。

关键问题

- 在实践中具体载明有关费用的条件是比较少见的。
- 已形成一般原则：此类行动的费用通常由干预国承担。
- 当船旗国保留在登船搜查后决定可能采取哪些行动的权利时，应确保有正式授权的官员给予及时的指令。
- 尽管缔约国完全有自由提出它们认为合适的条件，但谨慎小心为好。只应在确实有必要时才可施加条件。例如，如果请求国不能接受条件，它完全有可能不进行干预了。
拒绝请求

第 17 条并不强迫《1988 年公约》的缔约国非要给予请求赞同的答复。相反，被请求国如认为在此情况下这是最适当的行动方针，就可按照第 17 条拒绝授权采取任何所请求的行动。但是，国家主管当局在拒绝授权时依旧应当牢记若干注意事项。

考虑因素包括：

- “以迅捷方式答复”的义务还适用于否定答复的情况。及时通报拒绝授权的决定，将使请求国可中断也许是复杂而费用不菲的海上执法行动。

- 尽管第 17 条并未规定对任何否定的决定提供理由的义务，但正如《评注》指出的，“在适当的情况下指明所作决定的根据是符合《公约》的精神的。”
外发的请求

第 17 条在外发请求方面仅在第 3 款提出一项具体要求，即请求国必须有正当理由怀疑船只从事海上非法药物贩运。不过，经验表明国家主管机构应确保要求第 17 条授权的请求只可在适当的时候提出和递送。为此，必须有一套每一案件的具体情况受到仔细检查的机制，同时应顾虑一些考虑因素。

考虑因素包括：

- 所寻求授权的一系列行动在国内法中是否有适当的规定。
- 船只的特征和航行的性质。
- 行动能否由下个停靠港当局更有效地采取。
- 采取其他执法手段，包括控制下交付的可能性。
- 所有相关的条约要求是否已得到或将得到满足。

关键问题

请求国在考虑提出第 17 条规定的行动请求时应牢记《1988 年公约》在计划和实施海上执法干预方面所规定的一些基本要求。

- **需要不危及** 海上生命安全、船舶安全和货物安全或不损害船旗国或任何其他有关国家的商业或合法利益。
- **任何行动必须** 由军舰或军用飞行器或有清楚标志和可识别为政府服务和授权为政府服务的其他船只或飞行器才能实施。
请求的内容和递送

第 17 条 未具体规定请求的内容和递送方式，但请求国主管当局应牢记以下重要考虑：

- 请求需载明充分明确的资料和证明文件以使请求能得到及时的考虑和答复。
- 最好与被请求国的国家机构建立电话和其他类似实时联系，以尽快查明所提出请求是否充分，形式和内容是否适合该国。
- 另外最好与被请求国的应对机构保持对话以协助解决产生的问题或争议以及监测进展情况。

协调和后续情况

第 17 条，第 8 款对已按照第 17 条采取了行动的缔约国规定一项将该项行动的结果迅速通知有船旗国的明确义务。除此项义务外，干预国也得牢记这样做的其他考虑因素。

考虑因素包括：

- 在最基层一级，向船旗国主管机构迅速提供富有意义的反馈将有助于促进和巩固相互信赖和信任，这对开展有效的国际合作极为重要。
- 在船旗国保留了根据干预结果作出最终指令的权利时，及时提交后续报告显得更为重要。
- 在船旗国决定对船只和船上人员行使管辖权的情况下，将仍然需要与干预国进行对话，以成功提起公诉。

关键问题

- 在国内一级，国家主管机构必须有能力对所授权的授权、特别是对可能实施的任何条件是否可接受作出评估。还必须有能力通知相关执法当局根据《1988 年公约》具有法律约束力的此类条件和限制。
特殊考虑因素 - 本国旗帜船只和无国籍船只

第 17 条 产生的大部分实际上是指针对其他缔约国船只的行动请求。然而，《1988年公约》和国际海洋法都设想在其他两种情况下提供合作：

- 当有关船只悬挂的是请求国的旗帜（本国旗帜船只）时。
- 当该船只是无国籍船只或在国际法上视同无国籍的船只时。

### 关键问题

- 在一国有正当理由怀疑其本国旗帜船只或无国籍船只正从事非法贩运，而该国本身不论出于哪种原因无能力进行干预时，根据上述两项规定进行合作的可能性可能特别有益。
- 对于根据第 17 条通过各国主管当局网络提出的请求，都将持审慎态度。
- 还能为其他目的寻求协助，例如确定所述船只的位置、监视该船只或允许船旗国执法人员登上被请求国的政府船只等。
- 船旗国可使其请求服从它认为合适的条件。同样，被请求国宜规定它可提供所请求的协助，其中包括费用分摊的条件。
- 关于无国籍船只，《联合国海洋法公约》对某些可采取行动的权利作出了规定。
附件二

根据《1988 年联合国
禁止非法贩运麻醉药品和精神药物公约》
提出的授权请求示范格式

遵照《1988 年联合国
禁止非法贩运麻醉药品和精神药物公约》第 17 条对

船采取指定行动的授权请求

1. 日期：_________________ 请求 / 递送的时间 (GMT)：________
   年 / 月 / 日

2. 发件人：_________________ 电话：______________
   （官员姓名 / 职衔）
   传真：______________
   （说明国家主管机构）

3. 收件人：_________________ 电话：______________
   （官员姓名 / 职衔）
   传真：______________
   （说明国家主管机构）

4. 对可疑船只的描述（填上掌握的适当资料）：
   船名：__________________ 船舶类型：__________________
   母港：__________________ 悬挂旗帜：__________________
   登记要求：□ □ 是 否 有何要求：__________________

__________________
有关船舶其他相关情况（如有）：

5. 位置：

6. 其他相关情况（如有）：

7. 提出请求的理由：

8. 您请求贵方采取（酌情打钩）：
   
   初步行动：
   
   □ 确认国籍和视情况适宜确认注册情况。
   □ 给予拦截、登船和搜查的授权。
   □ 给予采取其他行动的授权（说明）：

   后续行动：
   
   □ 给予如查获非法贩运的证据在收到快速处置指令前代表[被请求国]（酌情）扣押船只、证据和船上人员的授权。
   □ 给予如查获非法贩运的证据，（酌情）拘捕船上人员并扣押船只和证据以允许根据[被请求国]的法律提起公诉和有关的法律诉讼的授权。
   □ 给予采取其他行动的授权（说明）：

本请求的提出基于遵照给予授权所采取的行动只有由军舰或军用飞行器或者有清楚标志和可识别为政府服务和受权为政府服务的其他船只或飞行器才能进行。

9. 允许采取此类干预行动的最晚答复时间是（填上可用时间）：
   
   ____________________________（格林尼治时间）

10. 为《1988 年公约》第 17 条目的正式被授权官员的签字：

   ____________________________
附件三

根据《1988 年联合国禁止非法贩运麻醉药品和精神药物公约》
第 17 条对另一缔约国授权请求的
答复示范格式

遵照《1988 年联合国禁止非法贩运麻醉药品和精神药物公约》
第 17 条对来自___________________（国名）
国家主管机构要求对
________________________________（船名）
采取指定行动的___________________（日期）
授权请求的答复

1. 日期：___________________ 答复 / 递送的时间 (GMT)：__________
   年 / 月 / 日

2. 发件人：___________________ 电话：______________
   （官员姓名 / 职衔）
   （说明国家主管机构）
   传真：___________________

3. 收件人：___________________ 电话：______________
   （官员姓名 / 职衔）
   （说明国家主管机构）
   传真：___________________

4. （酌情打钩）:
   □ 根据我们对国籍问题（情况适用时包括注册情况）的审议，该船悬挂我国旗帜的权利被驳斥。
根据我们对国籍问题（情况适用时包括注册情况）的审议，兹授权贵国采取：

初步行动：

- 拦截、登船和搜查。
  特殊条件：

- 采取其他行动（说明）：
  特殊条件：

后续行动：

- 如查获非法贩运的证据，在贵国收到快件处置指令以前，代表[被请求国]（酌情）扣押船只、证据和船上人员。

- 如查获非法贩运的证据，（酌情）拘捕船上人员并扣押船只和证据，以允许根据[被请求国]法律提起公诉和其他法律诉讼。

采取其他行动（说明）：

特殊条件：

或

- 贵国的请求被拒绝（理由）：

5. 为《1988 年公约》目的正式被授权官员的签字：

_____________________________
附件四

根据《1988 年联合国禁止非法贩运麻醉药品和精神药物公约》第 17 条授权后所采取行动报告的示范格式

遵照《1988 年联合国禁止非法贩运麻醉药品和精神药物公约》第 17 条授权

所采取行动的报告

1. 日期: __________________________ 请求 / 递送的时间 (GMT): __________
   年 / 月 / 日
2. 发件人: __________________________ 电话: _________________
   (说明国家主管机构)
   传真: _________________
3. 收件人: __________________________ 电话: _________________
   (官员姓名 / 职衔)
   传真: _________________
4. 船舶检查方位:
   纬度: __________________________ 经度: __________________________
5. 检查日期: __________________________
   年 / 月 / 日
6. 下个停靠港: __________________________
7. 航行目的和货物性质的一般说明：


8. 所采取行动的结果：


9. 其他相关情况（如有）：


10. 为《1988年公约》目的被授权官员的签字：


附件五

词语汇编

《1988年公约》

《1988年联合国禁止非法贩运麻醉药品和精神药物公约》。

麻醉药品委员会

在其1946年2月16日第9（1）号决议中设立的经济及社会理事会的一个职司委员会。决议授权该委员会审议关于国际药物管制条约各项目标的所有事项。1991年12月20日大会第46/185号决议扩大了该委员会的任务，使其能行使作为药管署理事机构的职能。

《评注》

由联合国秘书长遵照1993年7月27日经济及社会理事会第1993/42号决议编写的《1988年联合国禁止非法贩运麻醉药品和精神药物公约评注》。《评注》相关的摘录载列于本《指南》的附件七。

国家主管机构

缔约国指定的政府办公室/机构，负责接收和答复根据《1988年公约》第17条提出的请求。它也可能被赋予提出请求的权力。

推定存在

在紧追情况下，从《联合国海洋法公约》第111条产生的一个概念。在此种情况下，即使母船在领海以外的海区，如果作为团队一起工作并利用被追逐船舶作为母船的小艇或另一小船在领海或毗连区内，它仍可推定被认为在领海内存在。

毗连区

见《海洋法公约》第33条。毗连区可被称为毗连沿海国领海的区域，在其中沿海国可防止和惩治违犯其领土范围内其海关、财政、移民和卫生法律的行为。毗连区从测算领海的基线量起不得超过24海里。
控制下交付
系指一种技术，即在一国或多国主管当局知情或监督下，允许货物中非法或可疑的麻醉药品、精神药物、前体化学品和它们的替代物质运出、通过或运入其领土，以期查明涉及犯罪的人（《1988年公约》第1条(g)项）。

专属管辖权
船旗国对悬挂其旗帜的船只行使行政、技术和社会事项的权力和管制并对属于其国籍的船舶、货物和船上所犯行为的人员实施其国家法规的专属权利。

船旗国
对给定船舶授予其国籍并从而授予悬挂其旗帜的权利的国家（《海洋法公约》第91条）。该条要求国家与船舶之间有真正的联系。

紧追
沿海国有充分理由认为外国船舶违反该国法律和规章而针对该船采取的行动。此项行动只有在外海或其小部分地区在追逐外国的内水、群岛水域、领海或毗连区内时才可开始进行。如追逐未曾中断，可在领海或毗连区继续进行（《海洋法公约》第111条）。又见建设性存在。

干预国
对怀疑从事海上非法贩运的船舶实行执法活动的国家。通常多数情况下干预国与请求国将是同一国。

国际海洋法
支配海洋空间和海上或有关海洋活动的国际法领域，很大程度上反映在1982年《联合国海洋法公约》内。

船舶的国籍
船舶具有其有权悬挂的旗帜所属国家的国籍（《海洋法公约》第91条）。

临时船旗国授权
被请求国据此假定悬挂其旗帜的船舶具有其国籍的原则并因而给予请求国临时授权，按照《1988年公约》第17条对该船舶采取行动。此种授权有时也称作推定船旗国权力。

船舶登记册
每一国保持的正式船舶登记册，载列悬挂该国旗帜的船舶名称和详细情况，但因体积过小而不在一般接受的国际规章规定范围内的船舶除外。
被请求国  
接收根据《1988 年公约》第 17 条提出请求的国家。

请求国  
根据《1988 年公约》第 17 条提出请求的国家。也见上文干预国。

领海  
见《海洋法公约》第二部分第 2 至第 4 条。领海可被称为沿海国行使主权、有规定宽度但从基线向海测量不超过 12 海里的水域带。

《海洋法公约》  
1982 年《联合国海洋法公约》的简写。

药管署  
联合国国际药物管制规划署。根据 1990 年 12 月 21 日大会第 45/179 号决议设立。

军舰  
属于一国武装部队、具备辨别军舰国籍的外部标志，并由该国政府正式委任并名列相应的现役名册或类似名册的军官指挥和配备有服从正规武装部队纪律的船员的船舶（《海洋法公约》第 29 条）。
附件六

《1988年联合国禁止非法贩运麻醉药品和精神药物公约》(摘录)

第三条

犯罪和制裁

1. 各缔约国应采取可能必要的措施将下列故意行为确定为其国内法中的刑事犯罪：

   (a) (i) 违反《1961年公约》、经修正的《1961年公约》或《1971年公约》的各项规定，生产、制造、提炼、配制、提供、兜售、分销、出售、以任何条件交付、经纪、发送、过境发送、运输、进口或出口任何麻醉药品或精神药物；

   (ii) 违反《1961年公约》和经修正的《1961年公约》的各项规定，为生产麻醉药品而种植罂粟、古柯或大麻植物；

   (iii) 为了进行上述(i)目所列的任何活动，占有或购买任何麻醉药品或精神药物；

   (iv) 明知其用途或目的是非法种植、生产或制造麻醉药品或精神药物而制造、运输或分销设备、材料或表一和表二所列物质；

   (v) 组织、管理或资助上述(i)、(ii)、(iii)或(iv)目所列的任何犯罪；

   (b) (i) 明知财产得自按本款(a)项确定的任何犯罪或参与此种犯罪的行为，为了隐瞒或掩饰该财产的非法来源，或为了协助任何涉及此种犯罪的人逃避其行为的法律后果而转换或转让该财产；

   (ii) 明知财产得自按本款(a)项确定的犯罪或参与此种犯罪的行为，隐瞒或掩饰该财产的真实性质、来源、所在地、处置、转移、相关的权利或所有权；

   (c) 在不违背其宪法原则及其法律制度基本概念的前提下：

   (i) 在收取财产时明知财产得自按本款(a)项确定的犯罪或参与此种犯罪的行为而获取、占有或使用该财产；
(ii) 明知其被用于或将用于非法种植、生产或制造麻醉药品或精神药物而占有设备、材料或表一和表二所列物质；

(iii) 以任何手段公开鼓动或引诱他人去犯按照本条确定的任何罪行或非法使用麻醉药品或精神药物；

(iv) 参与进行，合伙或共谋进行，进行未遂，以及帮助、教唆、便利和参谋进行按本条确定的任何犯罪。

2. 各缔约国应在不违背其宪法原则和法律制度基本概念的前提下，采取可能必要的措施，在其国内法中将违反《1961年公约》、经修正的《1961年公约》或《1971年公约》的各项规定，故意占有、购买或种植麻醉药品或精神药物以供个人消费的行为，确定为刑事犯罪。

3. 构成本条第 1 款所列罪行的知情、故意或目的等要素，可根据客观事实情况加以判断。

4. (a) 各缔约国应使按本条第 1 款确定的犯罪受到充分顾及这些罪行的严重性质的制裁，诸如监禁或其他形式剥夺自由，罚款和没收。

(b) 缔约国还可规定除进行定罪或惩罚外，对犯有按本条第 1 款确定的罪行的罪犯采取治疗、教育、善后护理、康复或回归社会等措施。

(c) 尽管有以上各项规定，在性质轻微的适当案件中，缔约国可规定作为定罪或惩罚的替代办法，采取诸如教育、康复或回归社会等措施，如果罪犯为嗜毒者，还可采取治疗和善后护理等措施。

(d) 缔约国对于按本条第 2 款确定的犯罪，可以规定对罪犯采取治疗、教育、善后护理、康复或回归社会的措施，以作为定罪或惩罚的替代办法，或作为定罪或惩罚的补充。

5. 缔约国应确保其法院和拥有管辖权的其他主管当局能够考虑使按照第 1 款所确定的犯罪构成特别严重犯罪的事实情况，例如：

(a) 罪犯所属的有组织的犯罪集团涉及该项犯罪；

(b) 罪犯涉及其他国际上有组织的犯罪活动；

(c) 罪犯涉及由此项犯罪所便利的其他非法活动；

(d) 罪犯使用暴力或武器；

(e) 罪犯担任公职，且其所犯罪行与该公职有关；

(f) 危害或利用未成年人；

(g) 犯罪发生在监狱管教场所、或教育机构或社会服务场所，或在紧邻这些场所的地方，或在学童和学生进行教育、体育和社会活动的其他地方；

(h) 以前在国外或国内曾被判罪，特别是类似的犯罪，但以缔约国国内法所允许的程度为限。
6. 缔约国为起诉犯有按本条确定的罪行的人而行使其国内法规定的法律裁量权时，应努力确保对这些罪行的执法措施取得最大成效，并适当考虑到需要对这种犯罪起到威慑作用。

7. 缔约国应确保其法院或其他主管当局对于已判定犯有本条第 1 款所列罪行的人，在考虑其将来可能的早释或假释时，顾及这种罪行的严重性质和本条第 5 款所列的情况。

8. 各缔约国应酌情在其国内法中对于按本条第 1 款确定的任何犯罪，规定一个长的追诉时效期限，当被指称的罪犯已逃避司法处置时，期限应更长。

9. 各缔约国应采取符合其法律制度的适当措施，确保在其领土内发现的被指控或被判定犯有按本条第 1 款确定的罪行的人，能在必要的刑事诉讼中出庭。

10. 为了缔约国之间根据本公约进行合作，特别包括根据第五、六、七和九条进行合作，在不影响缔约国的宪法限制和基本的国内法的情况下，凡依照本条确定的犯罪均不得视为经济犯罪或政治犯罪或认为是出于政治动机。

11. 本条规定不得影响其所述犯罪和有关的法律辩护理由只应由缔约国的国内法加以阐明以及此种犯罪应依该法予以起诉和惩罚的原则。

### 第四条

管辖权

1. 各缔约国：

   (a) 在遇到下述情况时，应采取可能必要的措施，对其按第三条第 1 款确定的犯罪，确立本国的管辖权；

      (i) 犯罪发生在其领土内；

      (ii) 犯罪发生在犯罪时悬挂其国旗的船只或按其法律注册的飞行器上；

   (b) 在遇到下述情况时，可采取可能必要的措施，对其按第三条第 1 款确定的犯罪，确立本国的管辖权：

      (i) 进行该犯罪的人为本国国民或在其领土内有惯常居所者；

      (ii) 犯罪发生在该缔约国已授权按第十七条具体规定和采取适当行动的船舰上，但这种管辖权只应根据该条第 4 和第 9 款所述协定或安排行使；

      (iii) 该犯罪属于按第三条第 1 款 (c) 项 (iv) 目确定的罪行之一，并发生在本国领土外，而目的是在其领土内进行按第三条第 1 款确定的某项犯罪。

2. 各缔约国：

   (a) 当被指控的罪犯在其领土内，并且基于下述理由不把他引渡到另一缔约国时，也应采取可能必要的措施，对其按第三条第 1 款确定的犯罪，确立本国的管辖权；
(i) 犯罪发生在其领土内或发生在犯罪时悬挂其国旗的船只或按其法律注册的飞行器上；或

(ii) 进行犯罪的人为本国国民；

(b) 当被指控的罪犯在其领土内，并且不把他引渡到另一缔约国时，也可采取可能必要的措施，对其按第三条第 1 款确定的犯罪，确立本国的管辖权。

3. 本公约不排除任一缔约国行使按照其国内法确立的任何刑事管辖权。

第十一章
控制下交付

1. 在其国内法律制度基本原则允许的情况下，缔约国应在可能的范围内采取必要措施，根据相互达成的协定或安排，在国际一级适当使用控制下交付，以便查明涉及按第 3 条第 1 款确定的犯罪的人，并对之采取法律行动。

2. 使用控制下交付的决定应在双方基础上作出，并可在必要时考虑财务安排和关于由有关缔约国行使管辖权的谅解。

3. 在有关缔约国同意下，可以拦截已同意对之实行控制下交付的非法交运货物，并允许将麻醉药品或精神药物原封不动地继续运送或在将其完全或部分取出或替代后继续运送。

第十七条
海上非法贩运

1. 缔约国应尽可能充分合作，依照国际海洋法制止海上非法贩运。

2. 缔约国如有正当理由怀疑悬挂其国旗或未悬挂或未示注册标志的船只在进行非法贩运，可请求其他缔约国协助，以制止将该船视为具此种目的。被请求的缔约国应尽其所能提供此种协助。

3. 缔约国如有正当理由怀疑悬挂另一缔约国国旗或显示该国注册标志的船只虽按照国际法行使航行自由但实际上从事非法贩运，可将此事通知船旗国，请其确认注册情况，并可在注册情况获得确认后，请求本国授予对该船采取适当措施。

4. 按照本条第 3 款，或按照请求国和船旗国之间有效的条约，或按照其相互达成的任何其他协议或安排，除其他事项外，船旗国还可以授权请求国：
   (a) 登船；
   (b) 搜查船只；
   (c) 如查获涉及非法贩运的证据，对该船只、船上人员和货物采取适当行动。
5. 如依本条采取行动，有关缔约国应适当注意不得危害海上生命安全，该船只和货物的安全，也不得损害该船旗国或任何其他有关国家的商业和法律利益。

6. 只要符合本条第 1 款所规定的义务，船旗国可使其授权服从它与请求国之间相互议定的条件，包括关于责任的条件。

7. 为本条第 3 和第 4 款的目的，缔约国应以迅捷的方式答复另一缔约国要求确定悬挂其国旗的船只是否有此权利的请求，并答复根据第 3 款规定提出的授权请求。各缔约国在成为本公约缔约国时，应指定一个机构，或必要时指定若干机构接受并答复这类请求。这类指定应在指定后一个月内通过秘书长通知其他所有缔约国。

8. 已按照本条采取了任何行动的缔约国，应将行动的结果迅速通知有关船旗国。

9. 缔约国应考虑达成双边和区域协定或安排，以执行本条各项规定或增强其有效性。

10. 根据本条第 4 款采取的行动只能由军舰或军用飞机，或具有执行公务的明显可识别标记并获得有关授权的船舶或飞机进行。

11. 根据本条采取任何行动均应适当注意有必要不干预或影响沿海国依国际海洋法具有的权利和义务及其管辖权的行使。
附件七

《1988 年联合国禁止非法贩运麻醉药品和精神药物公约评注》*（摘录 **）

第三条
犯罪和制裁

一般评论

3.1 第三条对促进序言 106 所阐明的公约的目标和实现第二条第 1 款说明的公约主要宗旨即“促进缔约国之间的合作，使它们可以更有效地对付国际范围的非法贩运麻醉药品和精神药物的各个方面”是重要的。107 为此，它要求缔约国进行必要的立法以制定有关非法贩运各个方面的现代刑事犯罪法典，并确保每个缔约国的司法和检察当局将此种非法贩运作为严重犯罪加以处理。

3.2 第三条体现的基本原理是提高国内刑事司法制度处理毒品贩运的效力，这是增强国际合作的先决条件。不过，虽然第三条第 2 款作出裁定，处理用作个人消费而占有、购买或种植的犯罪，但认识到由于种种原因，包括费用和行政方面切实可行性的考虑，某些关键领域规定的义务如引渡（第六条）、设收（第五条）和相互法律协助（第七条）等将限于按第 1 款确定的较严重的贩运犯罪，就如同在其他场合指出的那样：“该条的着重点具有最大国际影响的那些犯罪和对这些犯罪规定最大的国际义务”。108

3.3 从实践的角度评价，鉴于第三条的范围和追求的目标以及所规定义务的性质，特别是在犯罪方面，想成为公约缔约国的许多国家将需要制定复杂的执行立法，以便能够充分遵守或执行第 2 款的条款。应着重指出公约谋求对执行情况确立一种最低共同标准，但没有任何规定不让缔约国采取比文内规定的更严厉的措施，

* 联合国出版物，出售品编号：E.98.XL5。
** 保留了脚注的原来编号。有些脚注提及的是未载列本摘录的《1988 年公约评注》一些部分。
106 见上文关于序言的评论。
107 也见上文关于第二条第 1 款的评论。
108“出席联合国关于通过一项禁止非法贩运麻醉药品和精神药物公约会议的美国代表团的报告”，第 101 届国会议，参议院，行政报告 101-15，第 26 页。
如果它们认为这样做合适的话，

第 1 款 引言部分

1. 各缔约国应采取可能必要的措施将下列故意行为确定为其国内法中的刑事犯罪：

评注

3.4 非法贩运的刑事定罪和惩罚是公约的基本特色之一，而且第 1 款中的行动对所有缔约国都是强制性的。

3.5 《1961 年公约》、经修正的《1961 年公约》和《1971 年公约》中有关刑罚规定的条文的相应规定表明保障条款“以不违反缔约国的宪法上的限制为限”。《1988 年公约》判定这一条款不适当，不过在第三条第 1 款 (a) 项的特定上下文中使用了类似的话，因为公约的编写者渴望使本文本具有充分的强制性，不让缔约国钻任何空子。在《1961 年公约》的上下文中，联合国秘书处公开表明，它不知道有任何宪法上的限制使具有该项公约缔约国不能执行公约有关规定的效力，以保障条款几乎肯定是多余的。

3.6 缔约国的义务是采取必要的措施确定某些“其国内法中的刑事犯罪”。这句话不谈某一特定法律制度中可能见到的任何犯罪分类（例如“重罪”），选用它的目的是顾及关于非法贩运毒品的国内法中存在的各种做法。如果某一特定法律制度要区分刑事犯罪与违规，公约系指前一类。

3.7 要求将第三条第 1 款所列各类行为只“在故意行为时”确定为刑事犯罪；不包括非故意行为。它符合刑法的一般原则，即对于禁止行为的每一事实要素，均要求证明故意要素。不需要证明行为者知道行为违反法律。故意要素的证明

109 见下文关于第二十四条的评论；也见《1961 年公约》第三十九条和《1971 年公约》第二十三条，这两条对这个问题采取类似做法。
110 《麻醉品滥用和非法贩运毒品问题国际会议报告，维也纳，1987 年 6 月 17 日至 26 日》（联合国出版物，出售品编号：C.87.I.18），第 13 条 A 节，第 223 段。
111 《1961 年公约》第三十一条第 1 款，经修正的《1961 年公约》第三十一条第 1 款 (a)，《1971 年公约》第二十一条第 1 款 (a) 项。
112 《1961 年公约评注》，关与第三十一条评论的第 13 段。
113 例如，德国的《社会安宁法》。
是第三者第 3 款一项具体规定的主题。当然，各缔约国可在其国内法中规定，
鲁莽或过失行为应予惩罚，或甚至应施加重罚的责任而无须证明任何过失要素。

第 1 款 (a) 项 (i) 目

(a) (i) 违反《1961 年公约》、经修正的《1961 年公约》或《1971 年公约》
的各项规定，生产、制造、提炼、配制、提供、兜售、分销、出售，
在任何地点交付、经纪、发送、过境发送、运输、进口或出口任何
麻醉药品或精神药物；

评注

3.8 在第 1 款 (a) 项 (i) 目中，如在第三条其他有些部分一样，114 明确提到早先
公约的规定。有人争辩说，《1988 年公约》的文本在这方面应自成一体和独立
于早先的条约，这一观点被认为与可能成为《1988 年公约》缔约国而从未
成为早先公约缔约国的国家而言将大。不过，大多数的观点赞成明示的联系：
早先公约在制定国际药物管制制度时提供了能够据以衡量新公约所列活动的
非法性质的标准，而且作为前史一致的处理是十分可取的做法。115 文本中由此产
生的提及有助于识别有关类别的麻醉药品和精神药物，并区别合法与非法用途。

3.9 关于“违反”早先公约“规定”的某些种类行为的说明，应当指出，由于
这些公约必须在国际法层面上操作，本身不禁止某一个人或个人集团的任何
行为。《1961 年公约》要求缔约国采取措施使某些种类的行为成为应加惩罚的
犯罪，116 所以它不可能是一项自行生效条约。正如《1971 年公约》法律顾问的
解释，正是认识到《1971 年公约》的语言甚至更不直接这一事实，117 缔约国应
将“违反为履行本公约义务所订法律或规章之任何行为”作为应加惩罚的犯罪。118

3.10 不过，提及早先公约的规定似乎意在缩小该目本非凡概括的语言范围。
公的解释似乎是，所列举的各类行为是应在引起早先公约缔约国注意义务的
情况下予以刑事定罪。例如，如《1961 年公约》附表二所列药物受要求不那么严
格的制度的管制，因为该制度考虑到此类药物存在着大量合法零售的情况。119
显然不打算使《1988 年公约》第三条另加规定，要求各缔约国将兜售此种药物
定为刑事犯罪。同样，《1971 年公约》规定，缔约国可发出通知，禁止进口该
公约附表二、附表三或附表四所列物质中的某些物质，而且其他缔约国必须采

114 第三条第 1 款 (a) 项 (ii) 目和第 2 款。
115《正式记录》，第一卷……，E/CN.82/3 号文件第三章第 35 段。
116《1961 年公约》第三十六章第 1 款有关类别的活动被称作“违反本公约的规定”。
117《联合国关于通过一项精神药物法制定书会议的正式记录，维也纳，1971 年 1 月 11 日至
1971 年 2 月 21 日》，第二卷（联合国出版物，出售品编号：E.73. XI. 4）。全体会议简要记录，
第 12 次全体会议，第 10 段；以及《1971 年公约附注》，关于第二十二条第 1 款 (a) 项的评论第
2 段。
118《1971 年公约》，第二十二条第 1 款 (a) 项。
119《1961 年公约》，第二条第 1 款和第三十条第 6 款。
取措施确保不将所通知物质中的任何物质出口到有关国家。\[120\]因此，(i) 目中物质的“出口”必须参照《1971年公约》第十三条的规定来作解释。

3.11 简言之，提及早先公约的作用是要用提及的办法引入可适用于特定类别麻醉药品和精神药物的制度。为此，《1988年公约》的缔约国在履行将禁止的行为定为刑事犯罪的义务时，必须顾及早先公约的规定，即使它并不是这些公约的缔约国。

3.12 第 1 款 (a) 项 (i) 目的行文基本上以《1961年公约》第三十六条第 1 款为蓝本。在该项规定中列举的各类活动中，第 1 款 (a) 项 (ii) 和 (iii) 目及第 2 款单独谈到了“种植”、“占有”和“购买”。在种植、占有和购买的情况下，这种编排方式便利查阅这些活动的目的和第 2 款所述为了个人消费的此类犯罪的具体处理办法。

3.13 (i) 目所列的某些类别的活动在《1961年公约》中下了定义；依次审议每一种活动较为方便

“生产”

3.14 “生产”在《1961年公约》中\[121\]定义为“将鸦片、古柯叶、大麻及大麻脂自其所从出之植物析离。”该定义具体针对它们从其获取的产品和植物，而且是不可能普遍通用的，因为在其他国际文献中，涉及在许多国家法律和制药工业中，“生产”通常是“制造”的同义词。《1971年公约》未用“生产”一词。

“制造”


“提炼”

3.16 《1961年公约》使用“提炼”一词而未下定义。提炼系指采用任何手段物理手段，化学手段，或两者皆用，从一种混合物分离或集取一种或多种物质。

“配制”

3.17 《1961公约》载有“配制”一词的定义，\[125\]但是该定义系指各词（用于《1961年公约》多条）\[26\]指配制某种东西的过程的结果而不是过程本身。因此，

\[120\] 《1971年公约》，第十三条。
\[121\] 《1961年公约》，第一条第 1 款 (i) 项。
\[122\] 《1961年公约》，第一条第 1 款 (m) 项。
\[123\] 《1971年公约》，第一条第 (i) 项。 “制造”在第一条 (f) 项中定义，但是见下文第 3.17 和 3.18段关于该词的讨论。
\[124\] 《1961年公约评注》，关于第一条第 1 款 (m) 项的评论；以及《1971年公约评注》，关于第一条 (i) 项的评论。
\[125\] “含有麻癖品的固体或液体混合剂”（《1961年公约》，第一条第 1 款 (a) 项）。
\[26\] 例如，第二条第 3 和第 4 款。
研究本公约可以不拘《1961年公约》的定义。

3.18 “配制”也称“复合”，系指将一定量的药物与一种或多种物品（缓冲剂、稀释剂）混合，然后分为单位或进行包装供治疗或科学之用。这种理解得到所用单词的顺序的验证：“配制”紧排在“提供”和“兜售”之前。

“提供”和“兜售”

3.19 “提供”和“兜售”这两个用语的类似性使得便于合在一起审议，但这种类似性可能使人产生误解。在法文文本中，不出现此种类似性，l’offre与la mise en vente能够形成鲜明的对照。

3.20 “提供”某种东西系指拿出来或使之可为人获得，以便另一人可以接受它。虽然该目未明确提及将麻醉药品或精神药物作为礼品提供某人，但送礼的过程通常将涉及“提供”，或如果受礼人没有拒收的机会，则涉及“交付”。

3.21 “兜售”包括货物的任何展示或它们可供购买的其他表示。看来它将包括任何招揽，例如询问“你有兴趣买某物吗？”。

“分销”

3.22 虽然在若干人分享某样东西时，可以使用“分配”一词，但更贴切的提及是指“分销权”的概念，即确保货物从制造商或进口商转到批发商或零售商的商业角色。换言之，它指通过供应系统货物的流动。127

“出售”

3.23 “出售”一词无需解释。不过要指出，本目未包括“购买”。128

“以任何条件交付”

3.24 “交付”一词显然包括货物实际交付给某人或某目的地，而且这是出售、赠送还是收受人据以将货物带至或传送至某个其他地方的安排的结果都无关紧要。在有些法律制度中，有关货物所有权的文件或存放货物的仓储设施的钥匙的转让，可能等于货物本身的“交付”。列入“以任何条件”这些词表明可完全包括交付的这些延伸理解。

“经纪”

3.25 “经纪人”指受雇代表另一人订约或订立合同的代理人。他或她充当中间人，谈判者或“仲介人”。在有些法律制度中，该用语限于本人不占有有关货物的个

127 比较《1961年公约》第三十条的标题“贸易及分配”。
128 见下文关于第一条第1款(a)项(iii)目的评论。
人占有的货物的代理人是一个“代理商”而不是“经纪人”。在另一些法律制度中，经纪人将被视为参与了主要犯罪。

“发送”和“过境发送”

3.26 用语“发送”和“过境发送”均包括将发送在途中的货物送至发货人已知的固定目的地或送至某承运人，由他将货物运至发货人可能不知的目的地。

“运输”

3.27 “运输”包括以任何方式（陆上、海上或空中）运送。看来不需要订立承运合同；完全免费承运也包括在本目范围之内。

“进口或出口”

3.28 “进口”和“出口”两词在《1988 年公约》中未下定义，但“进口”和“出口”在《1961 年公约》中下了定义。29 它们意指将麻醉品自一国实际运至他国，或自一国的一领土运至同一国的另一领土”，定义的后一部分指按《1961 年公约》第三十一条发给的证明书和准许证制度定为独立实体的领土。

第 I 款 (a) 项 (ii) 目

(ii) 违反《1961 年公约》和经修正的《1961 年公约》的各项规定，为生产麻醉药品而种植罂粟、古柯或大麻植物；

评注

3.29 (a) 项 (ii) 目包括为了生产麻醉药品而实际种植规定的植物。30 为个人消费而种植的问题在第三条第 2 款中处理。本目提及《1961 年公约》和经修正的该公约的规定很重要；根据这些文本，有的种植是合法的。《1961 年公约》第二十二条使缔约国能够禁止种植罂粟、古柯或大麻植物，但不要求在所有情况下都这样做。如果允许合法种植，必须实施管制制度。31 《1961 年公约》对销毁非法种植的古柯和经修正的《1961 年公约》对销毁非法种植的罂粟和大麻植物都作了规定。32

第 I 款 (a) 项 (iii) 目

(iii) 为了进行上述 (i) 目所列的任何活动，占有或购买任何麻醉药品或精神药物；

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29《1961 年公约》，第一条第 1 款 m) 项。
30 关于“罂粟”、“古柯”和“大麻植物”的定义，见《1961 年公约》第一条。
31 见《1961 年公约》第二十三条（罂粟，也见第二十五条），第二十六条（古柯和古柯叶，也见第二十七条）和第二十八条（大麻）。
32 见《1961 年公约》第二十六条第 2 款和经修正的《1961 年公约》第二十二条第 2 款；关于适用于罂粟、古柯和大麻植物的管制措施的概略情况，见经修正的《1961 年公约》第二条第 7 款。
评注
3.30 如果占有或购买麻醉药品和精神药物是为了从事按第三条第 1 款 (a) 项 (i) 目确定为刑事犯罪的活动，不论购买者是否实际占有，根据 (a) 项 (ii) 目，缔约国必须把此种占有或购买定为刑事罪。本条规定不包括为了个人消费的占有或购买，它在第三条第 2 款中处理。

第 1 款 (a) 项 (iv) 目

(iv) 明知其用途或目的是非法种植、生产或制造麻醉药品或精神药物而制造、运输或分销设备、材料或表一和表二所列物质；

评注
3.31 (a) 项 (iv) 目的规定要求设定刑事犯罪并形成第十二和第十三条管制规定的对应规定。第十二条规定，缔约国必须采取其认为适当的措施，防止表一和表二所列物质挪用于非法生产或制造麻醉药品或精神药物。第十三条涉及买卖和挪用非法生产麻醉药品和精神药物所用的材料和设备。本目使用了若干用语，其含义已经审议过。应将它与第三条第 1 款 (c) 项 (ii) 目作比较，它谈的是占有设备、材料和物质，而不是它们的制造、运输或分销。“占有”规定受 (c) 项中保障条款的制约，但是制造、运输和分销犯罪的确定对所有缔约国都是强制性的。

第 1 款 (a) 项 (v) 目

(v) 组织、管理或资助上述 (i)、(ii)、(iii) 或 (iv) 目所列的任何犯罪；

评注
3.32 本规定的重点是非法贩运集团的领导，而且它被视为对于瓦解主要贩运网的努力具有极重大的意义。据认为，该规定的重要性在于有可能触及毒品非法买卖最高层人物。应当指出，此条规定加强和扩大了《1961 年公约》第三十六条第 2 款 (a) 项 (ii) 目的范围，该目仅限于有关贩运的财务活动，而且这项义务还得不违反一项限制性的起首部分，即“以不违背缔约国宪法上的限制及其法律制度与国内法为限”。公约后面一项规定即第三条第 1 款 (c) 项 (iv) 目一前面有一保障条款一较笼统地论述参与犯罪的各种类别，包括共谋和便利犯罪。本项设有保障条款，强制缔约国规定涉及特定类别行为的犯罪，其中有些类别本来可能认为属于 (c) 项 (iv) 目规定的范围。

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133 关于“种植”，见上文第 3.29 段。关于“分销”，见上文第 3.22 段。关于“制造”，见上文第 3.15 段；关于“生产”，见上文第 3.14 段；以及关于“运输”，见上文第 3.27 段。

134 见《1961 年公约评注》。关于第三十六条第 2 款 (a) 项 (i) 目的评论和关于第三十六条第 2 款 (a) 项 (ii) 目的评论第 6 至 8 段。
3.33 “组织”和“管理”未下定义，但易于说明这些行为者在有组织犯罪中的活动，他们远离直接参与非法活动，但他们却指挥下属的活动。“资助”包括向非法活动提供所需的资本，似乎比《1961年公约》使用的“财务活动”面窄；"后一种表达方式涉及的其他类型的行为，将在第三章第1款(b)项的洗钱规定中处理。

执行考虑：第1款(a)项

3.34 如上所述，根据第1款(a)项，各缔约国应把所列相当全面的具有重大国际影响的一系列活动的“故意行为确定为其国内法中的刑事犯罪”。这一项谋求加强和补充在联合国主持下谈判达成的先前多边文书所载的刑罚措施。135《1916年公约》和经修正的该公约第三十六条及《1971年公约》第二十二条在这方面特别有关系。与这些文书的密切关系在头两项中尤其明显，它们对有关的禁止活动下定义，称之为“违反”有关公约的“规定”。

3.35 这种起草方法确保，已成为经修正的《1961年公约》和《1971年公约》缔约国并在其国内法律制度中有效地执行了它们的许多国家，建立起遵守公约的基本框架，包括必要的制度确定哪些物质受受制和为了什么样的合法目的能制造、占有和转让这些物质。不过，即使此类国家，也需要严密审查原已存在的法律以及确保完全遵守(a)项(i)目和(ii)目所载义务。这是因为事实是这些义务是绝对的，而且与以前的刑罚规定不一样，不受保障条款限制效力的制约。

3.36 对于任何即将成为或已经成为《1988年公约》缔约国的任何国家而言，成为经修正的《1961年公约》和《1971年公约》缔约国并有效执行这些公约是十分可取的步骤。在目前情况下，不参加所有其他药物管制公约的任何国家面临的任务都更加复杂和艰难。首先需要严密审查现有的国内法律对于合法种植、生产、制造和买卖麻醉药品、精神药物及其制造所用的化学物质的分类和管理是否适当。如果哪个国家断定它目前在这方面的条件尚不充分，就必须采取适当的措施，如果有的国家打算进行重大立法变革，也许可考虑起草有关这些问题的单一国家法律。136

3.37 在设法搞清现行国内刑法在多大程度上符合第1款(a)项的要求时，应当记住，遵循以前的惯例，有关义务的陈述是有意笼统的。因而，留给每个缔约国相当大的灵活性，他们可以根据其道德、文化和法律传统，决定如何最有效地保证实现法定的目标。第11款进一步强调了这一重要因素。137因此，有关的国内刑法不必具体提及第1款(a)项所述的每种不同犯罪和要素。要求做到的倒是，每个缔约国的刑法在整体上覆盖应全面。要求是确定刑事犯罪。因此，在这种情况下采用设定行政犯罪的作法将满足不了公约的要求。

135《1961年公约》，第三十六条第2款(a)项(ii)目。

136例如，见联合国国际药物管制规划署，“关于合法种植、生产、制造和买卖麻醉药品、精神药物和前体分类和管理的示范法”，《示范立法》(1992年6月)，第一卷。

137见下文关于第三条第11款的评论。
3.38 现行法律中很可能缺少的一个领域是第 1 款 (a) 项 (iv) 目涉及的领域。大家还记得，这项新规定要求将明知其用途和目的是非法种植、生产或制造《1961 年公约》或《1971 年公约》所管制的物质而仍故意制造、运输或分销设备、材料和表一和表二所列物质（经常用于非法制造麻醉药品或精神药物的物质）的行为定为刑事罪。这里除了整个 (a) 项的序言性措辞载明犯罪应为故意行为的要求外，还列入应知道物质的最终用途这一具体要求，这着重说明了将刑法引 入合法商业活动占主导地位的领域的难度。在制定处理这个问题的合适的国家 处理方针时，重要的是应注意到与第三条第 1 款 (c) 项 (ii) 目设想的刑法措施以及与缔约国依照第十二和第十三条的条款拟采取的管制措施和其他措施的密切相关。138

3.39 有效执行方面引致困难的又一个领域是 (a) 项 (v) 目涉及的领域，即组织、管理或资助 (a) 项别处提及的任何严重犯罪。

3.40 在处理这些问题时，有些国家能够主或完成依靠措辞广泛的立法规定，常常与未遂共谋等结合一起处理。139 在其他的情况下，传统的刑法机制已由新的立法战略补充或取代，新的立法策略是专门为了解决毒品贩运或更一般地说解决有组织犯罪的财务和管理层方面问题而制定的。140

第 1 款 (b) 项

(b) (i) 明知财产得自按本款 (a) 项确定的任何犯罪或参与此种犯罪的行为，为了隐瞒该财产的非法来源，或为了协助任何涉及此种犯罪的人逃避其行为的法律后果而转换或转让该财产；

(ii) 明知财产得自按本款 (a) 项确定的犯罪或参与此种犯罪的行为，隐瞒或掩饰该财产的真实性质、来源、所在地、处置、转移、相关的权利或所有权；

评注

3.41 第 1 款 (b) 项的规定打击洗钱，而且像 (a) 项的规定一样，使犯罪的设定对所有缔约国都是强制性的。它们的内容和起草风格很大程度上借鉴了当时美国在该领域通行的立法。141 在这些规定涉及的所有情况中，犯罪只适用“故意”行为。142 (b) 项分为两部分，第一部分专门处理财产的交换或转让，而第二部分较为广泛地涉及为隐瞒或掩饰财产及其实权和利益而采取的步骤。

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138 见下文关于第十二和第十三条的评论。
139 见下文关于第三条第 1 款 (c) 项的评论（也见意大利 1990 年 10 月 9 日第 309 号法令）。
140 美国的法律为此种活动设立了特殊的刑事罪。刑法连续犯罪企业种类，《美国法典》，第二十一卷第 848 条及诈骗影响和舞弊组织，《美国法典》，第十八卷第 1961 至 1964 条特别重要。1994 年《法兰克司法典》第 222.34 条在这方面设定了具体的刑事责任。
141 《美国法典》，第十八卷第 1956 至 1957 条，后来被撤销和更替。
142 第三条第 1 款引言段。
3.42 文本未涉及 1998 年以后时期给立法者造成一些困难的一个问题。使用的语言，特别是对“转让”的提及可以适用于原犯罪（原发罪）的人。不过，有人认为，洗钱有别于原发罪，而且洗钱基本上是为帮助原发罪的另一人所犯。公约似乎并未要缔约国非接受此问题上的一种观点不可。

3.43 在所有情况下，罪犯都必须已经知道有关的财产得自按第 1 款 (a) 项确定的一项犯罪（或得自一项以上此种犯罪），或得自参与此种犯罪的行为。“参与”犯罪“行为”的解释不是没有困难的。公约本条第 1 款 (c) 项 (iv) 项规定设定参与罪，但该项规定得受一项保障条款的制约，所以可能有一些缔约国，根据其法律参与行为本身不构成犯罪。不过，本项规定的文本指的是参与的“行为”而不是参与的“犯罪”。看来缔约国必须根据 (b) 项设定洗钱罪，而不管其本国的法律制度在设定参与犯罪问题上可能存在什么限制。

3.44 罪犯的知情必须与一种犯罪（原发罪）或与参与犯罪的行为相联系。在谈判的过程中似乎没有审议原先罪或参与行为的地点问题。如果某人知道财产得自在他国的犯罪而在一国转让财产，就发生这个问题。可以设想更加复杂的例子，例如财产的转让在两个国家之间进行，或原发罪在一个国家，但在另一国也发生参与行为，规定的文本中没有表示有领土限制，而且，如果执行立法打算反映原发罪发生在颁布立法国家以外的一个国家这一可能性，这也将符合最近的做法。

3.45 罪犯必须知道财产得自“任何”规定的犯罪。这表明无须证明他意识到了已犯下确切罪行。不过，只知道财产得自某种不明确的有组织犯罪或诈骗活动将是不够的。当然，缔约国可自由地以它们选择的广度界定洗钱，例如，将洗钱罪的范围扩大到原发罪属毒品贩运罪以外的案件。

3.46 这方面的多数现代立法使用“收益”一词说明直接或间接得自犯罪活动的财产。《1988 年公约》正是使用了“收益”一词的这种含义，将它定义为“直接或间接地通过按第三条第 1 款确定的犯罪而获得或取得的任何财产”。第三条第 1 款 (b) 项不使用“收益”一词的决定很可能是一种失误，但它确实提出了这样一个问题：提及财产“得自”某种犯罪是否能理解为包括从这些犯罪“直接或间接取得的”财产。根据对“得自”的广义理解，看来也可包括某些“间接得自”的情况。

3.47 (b) 项 (i) 目处理财产的“转换或转让”。如系有形资产，这些用语可用来包括以不变的状态将资产转让给另一人，以及将资产转换为另一形式（例如销售或交换，以便财产的价值以钱款或得到的其他资产表示）。财产经常采取钱款的形式，它可以转换为另一种货币或某种其他形式的财产，例如存入银行或购买股票或债券。转换新形式后，也许可用电子方式转到另一管辖区。

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143 第一条 (p) 项：也见上文第 1.17 和第 1.18 段中的评论。
3.48 人们通常认为财产的“转让”是转让人而不是受让人即收受人的行为。就财产的“转让”而言（例如通过交换），可将双方都视为行为者。不过，从单独处理财产的“获取”来看，本规定似乎不包括收受人。

3.49 转换或转让的行为必须不仅是故意（见上文第 3.7 和第 3.41 段）和在规定的知情（见上文第 3.44 和 3.45 段）的情况下干的；而且还必须为了文中规定的两个目的之一。很显然，这两个目的在相当程度上是同时存在的。一个目的用财产表示：隐瞒或掩饰财产非法来源的目的。财产的任何转换或转让都可能具有隐瞒或掩饰财产来源的作用；所要求的是这样做是出于此种目的，即具有此种动机。另一个目的用协助“任何人”（而且因为文本不说“任何其他人”，因此罪犯本人可以包括在内）逃避其参与犯罪的法律后果来表示。在许多情况下，两个目的都将是显而易见的：掩饰财产的非法来源以减少财产被没收和罪犯被定罪的可能性。

3.50 (b) 项 (ii) 目措辞起草得较为广泛，未明确提及“目的”要素，尽管所用的措辞似乎隐含这层意思。它包括明知财产非法所得而采取的任何故意行为，这等于隐瞒或掩饰财产的“真实性质、来源、所在地、处置、转移、相关的权利或所有权”。财产的“来源”可包括它的实际来源（例如，从其进口的国家），以及它的由来。有些其他用语显然在含义上有所重叠；货物的转移通常将涉及其所在地。

执行考虑：第 1 款 (b) 项

3.51 如已看到的，第三条第 1 款 (a) 项 (v) 目表明了这样一个概念，即打击现代国际毒品贩运活动的有效战略的主要要求之一是必须向执法界提供必要的工具以摧毁毒品犯罪集团和网络的财力。1980 年代末，国际社会形成了广泛的共识，洗钱的刑事定罪是此种战略的一个必不可少的组成部分。与第 1 款 (c) 项 (i) 目结合起来看，第 1 款 (b) 项的目的在于满足这种需要，尽管由于“洗钱”一词相对而言是一个新词而且是存在翻译问题，文本中未使用该词本身。鉴于任何以前的多国文书均未处理过这些问题，因此较为详细地表明了概念本身。尽管如此，《1988 年公约》的缔约国拥有很大的灵活性可确定最合适的方式来履行有关义务。在实践中，有些缔约国制定了用语与第三条第 1 款 (b) 项相似的立法，而另一些缔约国则发现使用替代语言很方便，例如修改先前已有的刑事罪的范围。只要对全部各种行为定刑事罪，两种做法都是可以接受的。

3.52 自从《1988 年公约》出台以来，在理解洗钱过程及其构成的威胁的性质和程度方面有了很大提高。此外，因实际操作有关国内立法以及在各种论坛上完善和进一步发展打击洗钱对策而获得了宝贵的经验。因此，对于主管执行这项重要规定的机构来说，熟悉此类发展情况特别重要，这样它们可以断定利

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144 见上文第三条第 1 款 (b) 项的评论。  
145 见 W. Gilmore，《不义之财：打击洗钱对策的发展》（斯特拉斯堡，欧洲委员会出版社，1995 年）；和 R. Palour 编，《巴特沃思打击洗钱法律和做法指南》（伦敦，巴特沃思，1995 年）。
用第二十四条赋予的灵活性是否适宜，从而采取比公约严格要求的更为大胆的措施。

3.53 这种问题之一是在执行立法过程中对洗钱罪定之何范围。第 1 款 (b) 项所载的义务限于给洗刷得自严重毒品贩运的财产定刑事罪，但近年来出现一种趋势，主张将刑事罪的范围扩大到麻醉品原发罪之外。例如，此种做法体现在 1990 年《欧洲委员会关于洗钱、追查、扣押和没收犯罪收益的公约》第 6 条中。而且得到 1990 年洗钱问题财务工作发展队通过的 40 条建议中第五条的鼓励。这些国际先例日益反映在各国刑法的内容中，其中有些国家已把此种犯罪扩大到所有的罪行，而另一些国家则选择只针对某些确定的性质严重的犯罪才加以扩大。146 这些国内和国际的事项发展反映了不少评论人员、执法官员和其他官员的认识，他们认为仅针对毒品的做法有诸多弊端。例如，可能难以证明特定的收益应属于毒品贩运活动，在有关人员涉及多项犯罪活动时尤其如此。147

3.54 需要审议的又一个问题，与其雇员有别的公司是否应当承担洗钱的刑事责任。这是《1988 年公约》和 1990 年《欧洲委员会公约》尚未涉及的问题。不过，在国际一级对这个问题已有所讨论。1990 年财务工作发展队在其第 7 条建议中采取了该一种观点，即“在可行的情况下”应施加此种责任。148 在《关于与非法贩毒及有关罪行有联系的洗钱罪行的示范条例》的第 14 条找到又一个有益先例，它是美洲国家组织 (美洲组织)1992 年大会核可的。建立法人刑事责任制度，有助于解决通过法人从事洗钱活动时可能产生的若干问题。例如，复杂的管理体制可能使得难以或无法鉴定对犯罪负有责任的人。在这种情况下，如果想对有关活动绳之以法，对法人施加责任也许是惟一的选择。同样，对一个机构而不是个人实施制裁可能起促进作用，推动改组管理层和监督体制以确保防止发生类似行为。

3.55 鉴于人们广泛认识到许多复杂的洗钱活动具有明显的跨国特点，因此对于一个国家来说普遍认为重要的是应能起诉参与此种活动的个人，即使产生可疑收益的基本犯罪活动发生在别的国家。《1988 年公约》没有具体涉及这个问题，但自那时以来在国际实践中已常见这样做。例如，1991 年 6 月 10 日欧洲共同体部长理事会发布的《关于防止利用金融系统进行洗钱的指令》第 1 条规定的


147 例如，见《洗钱与相关问题: 国际合作的必要性》(E/CN.15/1992/4/Add.5) 和《关于预防和制止洗钱和使用犯罪收益：全球性做法的国际会议的报告和建议》(E/CONE/88/7)。

洗钱定义很大程度上借鉴于《1988年公约》采取的做法，它也规定“甚至要洗刷的财产的活动是在另一成员国或第三国领土上干的”，也“应将洗钱视为就是洗钱”。

3.56《1988年公约》中洗钱的规定仅限于保证改进国家刑法制度，国际合作规范的扩大和效果的提高只是随之产生的好处。这些规定不涉及包含预防性原理的旨在打击洗钱活动的战略的那些要素。更广泛的国际战略的这个方面反映在不少国际和区域先例中，其中包括巴塞尔银行条例和监督制度委员会1988年12月发表的《防止非法利用银行系统从事洗钱活动问题巴塞尔原则声明》、《1991年欧洲共同体指令》和《1992年美洲组织示范条例》。增强金融系统作用以图给洗钱者造成一种格格不入的不利环境的效用，对于财务工作规程的方案也至关重要。虽然这些不同的倡议在范围和追求的目标方面存在着若干重大差异，但它们也揭示了一些共同的重要原则的形成。它们还着重说明形成了强烈的共同信念，即要有效打击洗钱活动，就需要共同的意愿和口径和私营部门携手合作的承诺。鉴于这些事态发展，对于负责执行第1款(b)项的机构来说，稳健的做法是从国家政策的角度审议现代国际做法的这个方面能在多大程度上为各国所接受以及是否适合当地情况。

3.57 防风险性战略的核心一直是普遍认识到必须要求已参加该战略的金融机构采取适当步骤辨别其客户以及保留设立定期时期内各种交易的特性和具体类别的记录。鉴辨别客户与鉴别受益所有人经常联系在一起，这种鉴别的要求反映人们相信，有关的信用、金融等机构比执法当局和其他当局更能判断某个客户或一笔特定的交易是否正当。保留记录被认为是对“了解客户”原则的重要补充，因为它确保审计线索的保存以备协助当局鉴别洗钱者和查去非法收益的转移，以期对它实施最终没收。

3.58 这种做法的第二个关键要素是确保有关机构和有关监督机构及负责打击洗钱活动的机构之间的充分合作。这种合作原则应经常延伸到前者主动将可能表明洗钱端倪的任何事实通知后者。想采用这种做法的所有国家都必须决定将获准接受此种报告的洗钱管理机构的职能和权力。许多国家已责成一个适当的执法机构负责此项目任务，而其他国家则选择另建国家机构，例如设在财政部内，如果采用后一种做法，主管实施此种战略的机构必须特别注意在报告机构与有

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149 也见美洲组织《关于与非法贩毒及有关犯罪有关的洗钱罪行示范条例》第3条和欧洲委员会《关于洗钱、追查、扣押和没收犯罪收益的公约》第6条第2款(a)项（斯特拉斯堡，1990年）。
150 例如，见《欧洲共同体指令》第3条和《美洲组织示范条例》第10条。
151 例如，见《欧洲共同体指令》第4条。
152 例如，见J.C.Westerweel和J.L.Hillen，《打击洗钱活动的措施》（海牙，财政部，1995年），第4页。
153 也见下文关于第五条的评论。
154 例如，也见《欧洲共同体指令》第10条。
关的国家执法机构之间建立有效的联系。通常，为了加强报告“可疑交易”的
制度要求此类情报知主管当局的事实不要泄露给有关客户或任何第三方。155
这样做的目的是保障日后任何调查的真实性。违反此种义务经常会招致刑事制裁。

3.59 要充分意识到，在以这种方式与信用和金融等机构打交道并让它们参与的
过程中，务必确保它们事实上能够充分和有效地发挥这种作用。为此，经常向
它们提供法律上的豁免，使它们免受违反合同或有关为客户保密等其他法律义
务的起诉。156

3.60 有些国家认为，如果主管国家当局能够了解本国领土内发生的所有大额现
金交易的情况，就将增强打击洗钱活动的努力。为此，少数接受预防性做法的
国家实行了一项强制性制度，要求这些机构例行报告某些超过固定限额的
交易。157 不过，对于此种做法的效用和实用性尚未形成共识。158 较常见的做法是，
有些国家选择要求金融机构报告可疑或不寻常的交易。

3.61 相形之下，人们普遍认为要求预防性做法有效，有关机构应建立适当的内
部控制和通信系统。此外，现在通常的做法还要求有关机构开始进行员工培训
计划，使他们了解法律要求并帮助他们认识可能同洗钱有关的交易，以及教会
他们如何最有效地处理此类情况。159

3.62 鉴于日益加强的打击洗钱活动的国际努力的这个方面具有很大的侵扰性，
审慎的做法将是尽量确保所采用的战略对受影响的经济部门的商业现实具有敏
感性。因此，与有关的经济部门进行对话和密切合作，以便最大限度地缩小对
正当商业活动行为的任何不利影响是十分可取的。

3.63 在实行打击洗钱活动综合战略的过程中，应当预计到产生一个后果将使
管制较少的管辖区的吸引力增大。例如，非法资金管理者可能谋求将洗钱活
动的初步或部署阶段安排在这样一个管辖区中。采用这种易地策略反过来又
增加易被识破的因素，可为执法当局所利用。越来越多的国家选择建立有关的
法律体制，允许采取行动制止某些种类的跨境现金运送。有些国家对超过规定
限额的货币的输出或输入（或二者都包括）实施强制性报告。如果不能遵守，可
实行处罚和没收货币。在其他管辖区，如果情况使人有合理的理由认为输入或
输出的巨额现金是贩毒收益，有关的执法当局就有权进行扣留。另有一些管
辖区能够援用其外汇管制或其他类似立法的规定。为了进一步限制洗钱分子可加

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155 例如，见《美洲组织示范条例》第 13 条第 3 款。
156 例如，见《欧洲共同体指令》第 8 条。
157 澳大利亚和美国已采用这种做法。
158 例如，见“洗钱问题财务行动工作队；报告”，巴黎，1990 年 2 月 7 日，24 号建议。
159 例如，见《欧洲共同体指令》第 11 条。
利用的办法，可考虑扩大此类措施的范围，以包括现金等价的货币工具、贵重金属、珠宝和其他高流动贵重物品。\(^{160}\)

3.64 不管对洗钱罪及有关事项的性质和范围所采用的国内考虑的结果如何，许多国家要做到有效执行，将面临巨大的挑战。在许多国家，执法部门将不得不根据给予什么样的新任务考虑传统的培训方法是否适当。\(^{161}\) 金融调查、资产管理和洗钱问题调查的国际合作与协调方面技术人材的培养和留住，属于必须解决的许多问题之列。在此过程中，有些国家也许希望从其他国家获得培训和技术援助。在联合国组织系统范围内，这方面负责协调的任务已交给了联合国国际药物管制规划署 ( 见大会第 45/179 号决议 )。它视情况或者单独行动，或者与其他组织一起行动，对各种形式援助的请求作出反应，其中包括组织提高认识的培训方案，也包括传播为供执法官员使用而准备的手册和其他有用的工具 ( 见经济及社会理事会第 1991/41 号决议 )。\(^{162}\)

### 第 1 款 (c) 项引言部分

(c) 在不违背其宪法原则及其法律制度基本概念的前提下：

**评注**

3.65 缔约国设定第 1 款 (a) 项和 (b) 项所列的犯罪的义务是无条件的，但 (c) 项以这一“保障条款”作为其开头。这一特定条款缩小《1961 年公约》第三十六条第 2 款使用的类似条款的范围，它提到“缔约国宪法上之限制及其法律制度与国内法”。这句话不易解释，而且正式评注表明它系指缔约国的基本法律原则及其国内法的普遍适用的概念。\(^{163}\) 虽然有些代表团在会议上表示对保障条款的新语言不满，但文本赢得了普遍接受。

3.66 会议列入保障条款的目的是承认有些国家难以接受第 1 款 (c) 项规定的犯罪的潜在范围。在某些国家，如果定义得宽，其中有些犯罪可能违反宪法上言论自由的保障。必须超出涉及“宪法原则”的范围以包括涉及缔约国法律制度的“基本概念”。这些概念无论体现在文义法、司法裁决还是根本庞固的惯例中，都可能与 (c) 项在具体犯罪方面采取的做法无法调和。在共谋犯罪和有关犯罪方面尤其如此，这些罪行在有些制度中鲜为人知；即使仅仅同意行为而不是行动，有些国家也可能将它们视为违反基本自由。在有些国家，存在着检察官自由裁量权的惯例，它有助于保护其无辜行为可能被判定属于措辞笼统的犯罪的范围的人；如果不允许行使这种自由裁量权，犯罪的定义可能需要更加严格的措辞。

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\(^{161}\) 见下文关于第九条第 2 款的评论。

\(^{162}\) 也见《联合国禁同执法培训手册：执法官员指南》 ( 维也纳，1991 年 )。

\(^{163}\) 《1961 年公约评注》，关于第三十六条第 2 款引言分段评论的第 5 段。应当记住，宪法原则和基本概念是可以改变的。缔约国政府对于批准《1988 年公约》发表了如此内容的声明。
第 1 款 (c) 项 (i) 目

(i) 在收取财产时明知财产得自按本款 (a) 项确定的犯罪或参与此等犯罪的行为而获取、占有或使用该财产。

评注

3.67 这里提到了早先对知情的审查，必须证明罪犯知情 (见上文第 3.43 至第 3.45 段)。

3.68 在本目上下文中，规定的知情必须在“收取时”知情。如果某人不论作为馈赠还是相当的回报收取货物并继续使用，后来才开始怀疑或知道货物得自毒品犯罪，就不作犯罪论处。

3.69 虽然违禁行为定义为包括“获取”、“占有”和“使用”，但基本的条件是（由于界定知情要素的方式）罪犯应当收取了货物；必须有“收取”。如果将获取理解为系指占有一似乎必须这样理解——（而不是获取货物的所有权或某种其他利益），严格说来提及“占有”和“使用”也许是多余的。由于发现罪犯占有或使用货物，犯罪才可能暴露；但他或她在明知有关情况下获取货物的证据本身将足以使犯罪成立。

第 1 款 (c) 项 (ii) 目

(ii) 明知其被用于或将用于非法种植、生产或制造麻醉药品或精神药物而占有设备、材料或表一和表二所列物质；

评注

3.70 如已指出 (见上文第 3.31 段)，对本规定中明确规定设备、材料或物质的制造、运输或分销的刑事定罪，按第三条第 1 款 (a) 项 (iv) 目是强制性的。仅仅占有这些东西的情况，在有保障条款的 (c) 项中处理。

3.71 货物的获取或收取在一个场合发生；占有与货物的关系是一种持续的关系。因此，重要的是，在这一条规定中，规定的知情应发生在首次获取时这一点并非最重要。有人合法地收取设备，但后来知道设备拟用于生产毒品并在以后继续占有该设备，将属于犯罪。在此种情况下，货物的善意买方可能面临刑事控告；对此种情况的担心一定程度上是支持 (c) 项中保障条款的论据。

第 1 款 (c) 项 (iii) 目

(iii) 以任何手段公开鼓动或引诱他人去犯按照本条确定的任何罪行或非法使用麻醉药品或精神药物；
评注

3.72 这项措辞广泛的规定涉及许多不同类型的活动：订立这一规定是由于对杂志和电影炫耀使用毒品和鼓吹毒品文化的关注。\textsuperscript{164} 虽然英文文本并非完全有一点含糊之处，但看来副词“公开”对“鼓动”和“引诱”都管。失去公开因素的类似行为很可能成为“参谋进行”，而且在有些背景下可能按第1款 (c) 项 (iv) 目定罪。

3.73 “公开”一词意在表明什么意思是很不清楚的。可能存在鼓动或引诱针对被识别的人的情况（不过也可能被他人无意中听到）；在其他情况下，如电台广播或扩音器宣布那样，这类听众是不事先确定的。另一个办法是询问有关场合是不是“公开”场合，区分非公开会议或聚会与公开的会议。实际上，这个措辞将不得不参照有关行为的特定环境和有关法律制度的类似情况加以解释。

3.74 被广为援用的南非的鼓动者定义是“主动上前谋求影响另一人的想法去犯罪。由于这种人犯罪手段巧妙，阴谋诡计多端，对他人进行攻心的手段形形色色，例如提示，提议，请求，规劝，做动作示意，论证，说服，引诱，唆使或激发贪婪之心”。\textsuperscript{165} 引诱属于涉及给钱或给值钱的东西的那种形式的鼓动。“以任何手段”这些字眼的存在表明应当广泛地解释用语。在有些法律制度中，在有关的立法中详细规定鼓动的手段也许是合适的。

3.75 鼓动或引诱的行为是：(a) 犯按第三条确定的任何罪行；或 (b) 非法使用麻醉药品或精神药物。根据公约，不要求将非法使用本身定罪，但要求对鼓动者的行为定罪。

第 I 款 (c) 项 (iv) 目

(iv) 参与进行、合伙或共谋进行，进行未遂，以及帮助、教唆、便利和参谋进行按本条确定的任何犯罪。

评注

3.76 本规定涉及各种形式参与或卷入犯罪活动的行为，特别是按第三条确定的任何犯罪。

3.77 不同国家的法律制度对个人卷入犯罪活动的各种形式进行不同的分类。除了主犯外，还可能有从犯或共犯。他们实际参与犯罪活动的程度可能有所不同（例如在场）；他们可能提供某种程度的协助（“帮助和教唆”或“便利”）；他们可能参与犯罪的策划（“合伙”或“共谋”）；他们可能鼓励犯罪或提供技术咨询（“参谋”或“便利”）；他们可能实际参与从事违禁行为的一项未遂罪。

\textsuperscript{164} 在通过公约的时候未设想到日后有关使用电子媒体特别是因特网做毒品广告和鼓吹滥用麻醉品的取态发展，但这由“以任何手段”这些措辞所包括。

\textsuperscript{165} J. A. Holmes,《思科锡耶那》, 1996 年 (4) 南非, 第 655 段, 在第 658 页, 附录。
3.78 这些介入形式不仅是不同分类办法的根据，而且对于刑事责任的适当界限，各国法律制度的意见也不一致。例证之一是在未遂领域。许多法律制度区分（必然不准确）“仅仅准备的行为”与“未遂”，前者不应惩处，而后者（与行为者意志无关的外部干涉制止犯罪的完成）确实引起刑事责任。抱着如果价格可以接受就购买的打算询问非法市场上毒品的价格将是一种“仅仅准备的行为”而不是购置未遂行为。166 本规定的语言比《1961 年公约》相应规定的语言较为全面，后者提及了“准备行为”。167

3.79 如已指出的，人们感到，做法方面的这些变动是为了要求在 (c) 项引言中列入保障条款，使缔约国能够使本规定的目标与它们本国刑法采取的特定做法并行不悖。

执行考虑：第 1 款 (c) 项

3.80 第 1 款 (c) 项 (i) 目和 (ii) 目都以重要的方式补充第三条第 1 款所载的早先义务。前者处理通过动用刑事司法措施打击洗钱的任何综合方案所应包括的罪行的经济方面。168 后者意在完成防止利用设备、材料和物质非法生产麻醉药品和精神药物的努力的综合处理。169 在制定该领域适当立法或其他措施时，各缔约国拥有很大的自由裁量权。例如，通过使用第二十四条授予的授权，有如此愿望的那些缔约国能够考虑扩大 (c) 项 (i) 目的覆盖范围以包括获取后知情的处理。

3.81 第 1 款 (c) 项 (iii) 目和 (iv) 目处理极不一样的关切领域，但它们却有一个共同点，即对缔约国所定的义务扩大到按第三条规定的任何犯罪，而不仅仅是第 1 款列举的较严重的非法贩运罪。因此，它包括属于第 2 款范围的旨在个人使用的犯罪。对于主管起草适当立法以确保遵守《1988 年公约》规定的人来说，这是一个特别重要的事实。

3.82 第 1 款 (c) 项 (iv) 目处理参与或卷入非法贩运的各种形式。从共谋到便利都包括在内。各国法律制度处理这些事项的做法如此大不相同以至于给它们定罪的义务需不违背“保障条款”，但执法的实践证明，这类犯罪对于打断错综复杂的贩毒网络特别有效。这有助于起诉那些本人极少实际接触麻醉药品和精神药物的毒枭。因此，(c) 项补充重点放在努力捣毁贩运组织上的 (a) 项 (v) 目和 (b) 项。

3.83 鉴于宪法原则和有关法律制度基本概念，在实践上迫切需要确保这些准准备行为的覆盖面尽可能全面。有的国家拥有部分或全部处理这些犯罪的必要的灵
活性，但对诸如“未遂”\(^{170}\) 或“共谋”\(^{171}\)。概念尚未充分掌握，在这些国家负责执行工作的人员可以借鉴已对这些事项采取特定毒品做法的其他国家的经验，这是很有益的。

3.84 作为《1988 年公约》缔约国的所有国家无论如何都必须至少部分地处理这个问题。这是由于第 1 款（b）项所载的对有关毒品的洗钱定罪的非子定义务的性质决定的。此种犯罪的说明使用措辞“或参与此种犯罪的行为”。各缔约国必须以这些用语设定洗钱的犯罪，而不管本国法律制度中可能存在的关于设定参与的限制。\(^{172}\)当然，可将洗钱犯罪本身视为参与犯原发罪。

第 2 款

2. 各缔约国应在不违背其宪法原则和法律制度基本概念的前提下，采取可能必要的措施，在其国内法中将违反《1961 年公约》，经修正的《1961 年公约》或《1971 年公约》的各项规定，故意占有、购买或种植麻醉药品或精神药物以供个人消费的行为，确定为刑事犯罪。

评注

3.85 第 2 款处理占有、购买或种植供个人消费这个有争议的问题。在此需要对本款所述的早先公约所持的立场略作说明。

3.86 根据《1961 年公约》，缔约国必须“以不违背宪法上的限制为限”将麻醉品的种植、占有和购买定罪。\(^{173}\) 一些国家认为，该款中的“占有”不包括供个人消费的占有。虽然这个问题通常从“占有”的角度讨论，但这些国家对“种植”一词采用了类似的解释。《1961 年公约》的另两规定与此相关：第四条第 1 款，其中各缔约国“应采取必要的立法和行政措施……(c) 除本公约另有规定外，麻醉品……的使用及持有，以专供医药及科学上的用途为限”；以及第三十三条，其中各缔约国“除对于依法得持有麻醉品者外，不得准许麻醉品的持有”（不过，该条没有要求刑事制裁）。

3.87 就《1961 年公约》的立场提出的论据归纳在关于该公约第四条的评注中。略去足注的有关段落如下：

“17．问题是这些规定在多大程度上和以什么方式管理受管制药物的占有；是它们不考虑持有麻醉品是为了非法分销或只为了个人消费都适用还是仅仅适用于为了分销而占有麻醉品？

“18．第四条第 (c) 款无疑指两类占有；但是在执行此项规定时是否一定对供个人消费的占有实施刑事制裁，则是一个不同国家答复可能不同的问题。

\(^{170}\) 例如，见泰国，《汇票法》，2534．1991 年，第 17 条。

\(^{171}\) 例如，见意大利，1990 年 10 月 9 日 309 号法令，第 74 条。

\(^{172}\) 见上文关于第三条第 1 款 (b) 项的评论。

\(^{173}\) 《1961 年公约》，第三十六条第 1 款。
有些国家政府似乎认为，它们不一定要惩处供个人使用而非法占有麻醉品的成瘾者。这种看法似乎基于这样的考虑：第三十六条第 1 款的规定要求缔约国在不违背宪法的限制的前提下对违反《单一公约》规定的麻醉品占有进行惩处。其意图在于打击非法贩运，而不要求惩处不参与非法贩运的成瘾者。作为全权代表会议工作文件的第三草案第四十五条在其第 1 款 (a) 项中得‘占有’列入了需要进行惩处的行动之列。这一款与《单一公约》第三十六条第 1 款的第一部分一致，它将‘占有’作为应惩处的犯罪之一。第三草案第四十五条列入标题为‘打击非法贩运者的措施’的第九章。这看来支持了认为只有为了分销的占有而不是为了个人消费的占有才应属《单一公约》第三十六条进行惩处的犯罪的那些人的意见。草案分章的做法未被《单一公约》接受，这正是删除刚才提到的章标题以及所有其他章标题的惟一原因。第三十六条仍在《单一公约》处理非法贩运的那一部分。它的前面是标题为‘取缔非法产销的行动’的第三十五条，而后面是标题为‘缉获和没收’的第三十七条。

“19. 不持有此种观点并认为一定要根据第三十六条第 1 款惩处供个人消费而占有麻醉品的缔约国无疑不会选择规定监禁被查出这种占有者，而只实行轻微的罚金如罚款或甚至罚款。根据第三十六条第 1 款，可以认为供个人消费占有少量麻醉品不是‘严重’犯罪，而只有‘严重’犯罪才应受到‘适当的惩处，特别是监禁或其他剥夺自由的刑罚’。

“20. 处罚用于个人消费的麻醉品占有实际上等于处罚个人消费。

“21. 另一方面也有人，特别是执法人员指出，处罚所有擅自占有麻醉品，包括供个人使用的麻醉品，便利起诉贩毒者并对其定罪，因为证明持有麻醉品的意图非常困难。如果有的国家政府决意不惩处用于个人消费的占有或只进行轻微的惩罚，它们的立法可以不无益地规定某种法律推定。即使在某一规定的少量的任何数量都是为了分销。也可以规定，如果罪犯占有的数量超过某种限量，这种推定就变成不容置疑的推定。也可以说，宪法上的限制能够使缔约国免除惩处第三十六条第 1 款提及的行动的义务，但它一般不阻止处罚擅自占有麻醉品。” 174

### 3.88《1971 年公约》有关规定的意思也存在类似的不确定性。论述罚则的第二十二条在第 1 款 (a) 项规定，‘以不违背缔约国本国宪法上之限制为限，每一缔约国对于违反为履行本公约义务所订法律或规章之任何行为，其系出于故意者，悉应作为可科处刑之犯罪行为处分之’。

### 3.89 有人说，意思不是使供个人消费的占有成为犯罪。还有人就《1961 年公约》提出了一般性考虑，认为目的是打击非法贩运而不是要求惩处管制物品的滥用

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174 《1961 年公约注释》，关于第四条第 1 款的评论的第 17 至 21 段。
者。除此之外，还有人提出，“占有”不是“行动”，因而不受第二十二条第 1 款 (a) 项的影响。175

3.90 正是鉴于这种背景，《1988 年公约》的谈判者解决了问题，而且产生的文本反映出若干观点上的妥协。

3.91 首先，一致同意在第二条第 2 款中列入提及宪法原则和缔约国法律制度基本概念的保障条款。

3.92 第二，一致同意写入最后的措辞，要求必须是“违反”早先公约“各项规定”的行为。这可被解释为使各缔约国能够保持它们对这些早先文本的解释所采取的态度。176 不过，这需要重视第 2 款文本中明文列人的“个人消费”这一提及以便加以平衡。更为一致的理解是“违反”早先公约的“各项规定”这些字眼体现了受管制物质附表及这些公约对合法消费与非法消费的区分。

3.93 第三，把第 2 款的规定与第 1 款的规定分开。其作用是公约后面规定中对于犯罪所实施制裁的性质的提及 177 能够容易区分按第 2 款确定的犯罪与依据第 1 款制定的较严重重的犯罪；而且关于确定域管辖权 178、没收、179 引渡 180 和相互法律协助 181 的规定限于依第 1 款制定的犯罪。这些后面的措施花费大，而且有时很麻烦，据判断不适用于较轻微但为数众多的按第 2 款确定的犯罪。

执行考虑：第 2 款

3.94 如上文指出的，公约不应忽视个人使用犯罪的问题这一观点占了上风，并体现在第三条第 2 款中。182 虽然第一条所载的非法贩运的定义扩大至第 1 款确定的那些犯罪以外的犯罪，但在整个公约框架中对于前者的处理有着巨大的差异。特别是人们公认，从国际合作方面讲，费用和行政可行性这两方面的考虑，要求对两类犯罪加以区分。此外，把犯罪划分为这两类便于有区别的处理制裁这个密切相关的问题。这样，第三条第 4 款 (d) 项在此种背景下处理个人使用犯罪方面使缔约国有较大的回旋余地。183 或者作为按第 2 款确定的犯罪的定罪或惩罚的补充，或者更重要的是作为有关定罪或惩罚的替代办法，它规定对罪犯采取治疗、教育、善后护理、康复或回归社会的措施。

175 《1971 年公约评注》，关于第二十二条第 1 款 (a) 项的评论的第 9 至 16 段。

176 见玻利维亚代表的发言 (《正式记录》，第二卷……，全体委员会会议简要记录，第一委员会第 24 次会议，第 65 段)。他说，如果《1988 年公约》打算在古柯叶方面超出《1961 年公约》，“成批成批的人将陷入危险境地，而且监狱将人满为患”。

177 第三条第 4 款。

178 第四条第 1 和第 2 款。

179 第五条第 1 款。

180 第六条第 1 款。

181 第七条第 1 款。

182 也见下文第 14.32 段，关于消除麻醉药品和精神药物需求的密切相关的问题。

183 第三条第 4 款 (c) 项采取了类似的做法处理按第 1 款确定的轻微性质的犯罪。
3.95 可以指出，如同《1961 年公约》和《1971 年公约》一样，第 2 款不要求将此种麻醉品消费定为应受惩处的犯罪。相反，它通过提及故意占有、购买或种植管制物质供个人消费的方式间接处理非医疗消费的问题。不过，与《1961 年公约》和《1971 年公约》的立场形式鲜明对照，第 2 款明确要求缔约国将此种行为定刑事罪，除非这样做违反宪法原则及缔约国法律制度的基本概念。

3.96 在决定有关第 2 款列举的个人使用方面各种犯罪的执行战略时，也许值得研究一下许多国家采用的做法，它们通过提及例如在重量方面规定的限额要求，将这种犯罪与性质较为严重的犯罪区分开来。从供个人消费而占有方面来看，这可能特别有用。

第 3 款

3. 构成本条第 1 款所列罪行的知情、故意或目的等要素，可根据客观事实情况加以判断。

评注

3.97 第三条规定的犯罪需要犯罪意图：即公约不要求对过失行为定罪。不论决定的国家法律制度采取何种举证制度，知情或；即公约不要求对过失行为定罪。不论特定的国家法律制度采取何种举证制度，知情或犯罪意图的证明都应该产生困难；在实践中，被告通常否认不可少的知情程度，因此必须以可接受的证据向法庭证明知情的。例如，“知情”的严格分析必须处理“故意视而不见”的情况，即行为者“在明显的情况面前闭起他的双眼”；处理间接欺诈行为案件，即罪犯冒明显风险的案件；以及处理这样的情况：处在行为者地位的任何人都必然知情。

3.98 第 3 款不打算详尽地研究这些问题。不过，它的确明确指出，一般情况下采用供认的方式的直接证明不是不可或缺的。有关的智力要素可根据指称罪犯行为的环境来判断。不过，国家法律和做法方面的差异并没有消除。

3.99 该款涉及可由法院或审理事实问题的其他人员作出的判断。它不涉及，因此也不要求改变各国法律制度采用的举证程序。可以指出，第 3 款谈及的是按第三条第 1 款确定的犯罪，而且略去对该条第 2 款的提及，但事实审理人员通常将在任何似乎正当的情况下得出此种推断。

执行考虑：第 3 款

3.100 第 3 款是任意的而不是强制的。它旨在澄清按第 1 款确定的各种犯罪的说明所载明的知情、故意或目的等必不可少要素可以依据情况证明这一点；就是说，它们“可根据客观事实情况加以判断”。这种措辞为日后许多国际文本和条约文书一字不差地沿用，应与第 11 款结合起来理解，该款除其他外规定

184 见《1961 年公约》第四和第三十六条及《1971 年公约》第五和第二十二条。

185 由上文关于第三条第 2 款的评论也见《1992 年国际麻醉品管制局报告》（联合国出版物，出售品编号：C.93.XI.1），第一章。

186 例如，见 1990 年《欧洲委员会关于洗钱、追查、扣押和没收犯罪收益的公约》第 6 条第 2 款 (c) 项（斯特拉斯堡，1990 年 11 月 18 日）。
三条所载的任何规定“不得影响其所述犯罪和有关的法律辩护理由只应由缔约国的国内法加以阐明的原则”。

3.101 尽管第 3 款提供了灵活性，但在实践中满足洗钱案的知情要求方面仍遇到了特殊困难。而这又导致国际上对在这种情况下采用何种替代办法处理犯罪意图的概念进行各种各样的讨论。例如，《美洲组织示范条例》第 2 条的洗钱定义在处理不依赖其他罪的独立的犯罪行为时使用惯用的语言程式“知情、应当知情或故作不知情”。187 1990 年《欧洲委员会公约》第 6 条第 3 款 (a) 项允许但不要求对失洗钱定刑事罪。不少管辖区的有关国内法现在都表达此种关注。188 因此，负责起草关于第 1 款的授权立法的人似乎考虑采用这些方法或其他方法保证国家立法倡议尽量增强效力的可取性和可接受性。189 在这样做的过程中，重要的是应最大限度地确保，采用不同的知情标准不致对缔约国谋求或接受国际合作和法律协助的能力或意愿产生不利影响。190

第 4 款 (a) 项

4. (a) 各缔约国应使按本条第 1 款确定的犯罪受到充分注意这些罪行的严重性质的制裁，诸如监禁或其他形式剥夺自由，罚款和没收。

评注

3.102 在《1961 年公约》和《1971 年公约》中，相应的规定详细规定“其情节重大者，科以适当的刑罚，尤应科以徒刑或其他剥夺自由的刑罚”。191 1988 年《公约》的谈判者决心加强这些规定，超越早先文本的范围。根据第 4 款的结构，较重的刑罚放在 (a) 项中给予优先，并且通过例外或限定等方式在 (c) 项中允许对“性质轻微的案件”科以较轻的刑罚。

3.103 第 4 款 (a) 项要求实行充分反映第三条第 1 款规定的犯罪的“严重性质”的制裁。所列的制裁类型既不是排他性的，也不一定是累加性的。这些制裁措施无论单独还是合并执行，都属于应执行之列。

3.104 根据“其他形式剥夺自由”的规定，列入了有些法律制度规定的诸如“劳役监禁”或劳改或监禁等刑事判决。该短语也可包括某些非拘禁措施，例如软禁或宵禁，它可与其他监禁形式如电子监测等合并执行。192

3.105 在有些法律制度中和有些情况下，通过实施罚款或其他罚金而不是没收具体的资产剥夺罪犯的犯罪收益所得。措辞的广度足以包括这些不同的安排。

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187 见洗钱问题财务行动工作队，“1996 年报告”，附件，第 5 号建议。
188 例如，见《挪威民事总刑法典》，第 317 条。
189 澳大利亚的做法扩大至知道“或应当有理由知道”有关钱财是不义之财的人 (见《犯罪收益法》，1987 年，第 87(1987)，81(3) 号法)。
190 见洗钱问题财务行动工作队，“1996 年报告”，附件，第 33 号建议，以及对载入附件 2 的这个专题的解释性说明。
191 《1961 年公约》，第三十六条第 1 款；和《1971 年公约》，第二十二条第 1 款 (a) 项。
192 也见大会第 45/110 号决议，载有《联合国非拘禁措施最低限度标准规则》(《东京规则》)。
第 4 款 (b), (c) 和 (d) 项

(b) 缔约国还可在规定除进行定罪或惩罚外，对犯有按本条第 1 款确定的罪行的罪犯采取治疗、教育、善后护理、康复或回归社会等措施。

(c) 尽管有以上各项规定，在性质轻微的适当案件中，缔约国可规定作为定罪或惩罚的替代办法，采取诸如教育、康复或回归社会等措施，如果罪行为嗜毒者，还可采取治疗和善后护理等措施。

(d) 缔约国对于按本条第 2 款确定的犯罪，可以规定对罪犯采取治疗、教育、善后护理、康复或回归社会的措施，以作为定罪或惩罚的替代办法，或作为定罪或惩罚的补充。

注

3.106《1971年公约》和经《1972年议定书》修正的《1961年公约》包括一项规定（两个文本用语一样），内容为当嗜毒者犯了公约规定的罪，缔约国可以规定或者作为定罪或惩罚的替代办法，或者作为定罪或惩罚的补充，对此类嗜毒者采取治疗、教育、善后护理、康复或回归社会等措施。《1988年公约》第 4 款 (b), (c) 和 (d) 项在利用事先规定的的同时，适用于已扩大到一般的毒品犯，而且不是嗜毒者。它们还根据所犯罪行的严重程度进行区分：对于属第三条第 1 款的严重犯罪，治疗、教育等措施只能作为定罪或惩罚的补充；对于属第三条第 1 款的轻微犯罪，以及属第三条第 2 款的旨在个人消费的犯罪，此措施可作为定罪或惩罚的替代办法。

3.107 (b), (c) 和 (d) 项未将补充或替代治疗和护理措施的适用限于嗜毒者，这一事实表明，这些措施可以超出嗜毒者的医疗和社会问题的范畴，而且可以从治疗一般罪犯的措施的更广泛的角度加以看待，其目的是减少他们重犯的可能性。不过，嗜毒者实际上是这些针对毒品罪的措施的主要目标群体。

3.108 (b), (c) 和 (d) 项将“定罪或惩罚”称作为可予以规定补充或替代措施的阶段。不过，应当指出，也可以设想在刑事诉讼的其他阶段，其中包括检索阶段（例如，在参加治疗方案的条件下有条件地上等刑事诉讼；在法国由地方检察官宣布的治疗命令）或在监禁判决执行阶段（从监狱转移到治疗机构或在某些情况下转移到治疗中心），架设刑事司法制度与治疗制度之间的桥梁。

3.109 “治疗”一般将包括个别咨询、集体咨询或介绍转到某个支援团体，它可能有门诊白天护理、白天支援、住院护理或治疗中心支援。不少治疗机构可能

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193《1971年公约》, 第二十二条第 1 款 (b) 项和经修正的《1961年公约》, 第三十六条第 1 款 (b) 项。注意，关于替代措施的规定由《1972年议定书》引入《1961年公约》。

194 附有第 5 款所列因素的“特别严重的”犯罪按定义将不属于“轻微”类。

195 见联合国预防犯罪和刑事司法标准和规范。
規定药理治疗，例如美沙酮维持剂量，但治疗转诊病人最经常接受的是戒毒方案。进一步的治疗服务可能包括戒毒教育、行为调整培训、针炙治疗、家庭治疗、防止重毒培训和培养与人相处和人际关系技能。保持不沾染毒品的能力也可通过康复和回归社会方案来增加，例如提供进修教育、安排工作和培训技能等。因此，治疗、善后护理、康复、回归社会和教育等措施在实践中通常是互相联系和同时进行的。作为替代措施，有时将治疗作为避免坐牢的一个条件，目的是使罪犯在摆脱治疗机会极少而进一步吸毒的机会又很大的环境的同时顾及到医疗条件。因此，此种措施未必比监禁的条件优厚，或与刑罚的概念有多少区别。应当指出，使用药物治疗作为刑罚的替代措施或作为避免判处拘禁的条件引起了有争议的问题：强制性治疗能否取得持久的效果或吸毒者是否必须有一定的程度的意愿或合作；负责治疗的执业医师与司法当局建立何种关系；护理作用与执法作用如何结合；以及无限期地拘留引起的公民权利问题。

3.110 "善后护理" - 一词常由刑罚学家用来说明从解除监禁判决 (特别是有条件释放或提前释放) 后的监管和开导的阶段，使已释放囚犯进行调整以适应正常社会的条件。从目前的情况看，这仍然是一种可能的解释，但同样可以接受关于早先文献的注释中提出的看法，即这个阶段 “主要包括 [吸毒者] 戒绝他滥用过的物质后或在维持方案 196 的情况下他非自发地限量服用方案要求的物质后可能需要的精神治疗、精神分析或心理学措施”。197

3.111 有人提出，“康复”一词包括使前吸毒者在身体、职业和精神等方面适于过上社会有用成员正常生活可能所需的措施（治疗疾病、残障人员身体康复、职业培训、有指导和鼓励相结合的监管，循序渐进地恢复正常的生活的措施，等等)。

3.112 特别难以在 “康复” 与 “回归社会” 之间划一条分界线。有人提出，“康复”一词主要指提高吸毒者个人素质的措施（健康、心理稳定、道德水准、职业技能等）而 “回归社会” 这一用语包括旨在使吸毒者能够生活在更有利于他或她的环境中的措施。这样，“回归社会” 这一用语可能包括这样一些措施，如提供工作机会或过渡性住房，以及也许使前吸毒者能够脱离原先的环境并转移到较不可能助长吸毒的社会氛围中。为了减少伴随吸毒而来的社会污点可能给前吸毒者造成的伤害，变换环境也可能是可行的。可考虑让他进行社区服务，采取义务的形式，为社区公益干数小时的无偿劳动，作为回归社会的有效措施，以及采取教育措施，这可以设想用于轻罪，以取代监禁。

3.113 “教育” 可指普通教育或关于滥用麻醉药品和精神药物有害后果的具体讲课。此种教育可安排在治疗期间或监禁期间进行，同样可以成为善后教育、康复或回归社会方案的组成部分。

196 即这样的方案：根据吸毒者本人的健康状况，有关物质的服用量减少到医疗上证明合理的最低量。
197《1971 年公约注释》，关于第二十条第 1 款评论的第 4 段；以及《1972 年议定书注释》，关于第三十八条第 16 款评论的第 4 段。
3.114 (b), (c) and (d) 项所列的补充措施不是排他性的。不妨碍缔约国根据本国的法律制度下令采取任何认为适合于罪犯具体情况的措施。

第 5 款 引言部分

5. 缔约国应确保其法院和拥有管辖权的其他主管当局能够考虑使按照第 1 款所确定的犯罪构成特别严重犯罪的事实情况，例如：

评注

3.115 虽然早先的公约使用了“严重犯罪”的概念，但未尝试确定说明犯罪严重性的加重处罚情节。第 5 款提供了此种指导，开创了有关事实情况的非详尽无遗的清单。各缔约国的义务是确保它们的法院或其他主管当局（例如，有些国家用来审理涉及有关毒品犯罪的案件的特别法庭）能够在判决时考虑到这些情况。当然，如果法院的做法已经符合这一条件，就不需要具体的立法了。不要求缔约国确保法院或其他当局在实践中确实利用此种权力，也不尝试说明这些情况对实施的制裁应具有什么影响。

第 5 款 (a) 项

(a) 罪犯所属的有组织的犯罪集团涉及该项犯罪；

评注

3.116 重要的情况是犯罪不是某个个人单独进行的。文本不仅要求罪犯应属于某个有组织的犯罪集团，而且这个集团主动介入了犯罪。由于第 5 款所列的情况为加重处罚情节而不是犯罪定义的要素，不必更具体地确定集团介入的性质。

第 5 款 (b) 项

(b) 罪犯涉及其他国际上有组织的犯罪活动；

评注

3.117 这里的焦点不是有组织犯罪集团与所犯的罪行的关系，而是罪犯介入了其他国际有组织的犯罪活动的事实。这些活动必须具有国际性。虽然它们必须是“其他”活动，但这不必排除以某种方式同麻醉药品或精神药物非法贩运相关联的其他活动。在谈判过程中提出的两个例子是武器走私和国际恐怖主义。

第 5 款 (c) 项

(c) 罪犯涉及由此项犯罪所便利的其他非法活动；

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198 《1961 年公约》，第三十六条第 1 款；和《1971 年公约》，第二十二条第 1 款 (a) 项。
评注
3.118 在许多情况下，得自非法贩卖或其他有关毒品的犯罪的利润被用来资助其他类型的犯罪活动或非法活动。这可能包括涉及赌博或卖淫活动，有些法律制度可能把它视为非法活动（例如，如果不接受官方的管制或监督）但不视为犯罪活动；因此使用含义较广的形容词“非法”。

第 5 款 (d) 项

(d) 罪犯使用暴力或武器；

评注
3.119 虽然 (d) 项的文本未予详细说明，但所指的意思显然是罪犯在作案过程中使用了暴力或武器。尽管有理由假定编写者原来打算指枪支，但有人提出对“武器”应最广义地予以理解。法文文本使用单个词 “armes” (武器) 而不是更具体的“armes à feu” (枪支)，这也支持较广泛的解释。

第 5 款 (e) 项

(e) 罪犯担任公职，且其所犯罪行与该公职有关；

评注
3.120 对于“公职”未下定义，其范围需要参照缔约国法律制度中使用的概念来确定。所担任的公职与犯罪必须存在联系；当罪犯担任公职是不够的（不过不排斥法院不管公约规定的指导原则将此作为重大的考虑因素）。这种联系通常将表现为履职务的权力和影响力，但是文本未具体说明任何特定的联系形式。

第 5 款 (f) 项

(f) 危害或利用未成年人；

评注
3.121 (f) 项的意图是清楚的，而且将由缔约国参照它们国家法律制度的概念来界定“未成年人”。“利用”包括但不限于利用未成年人谋利。例如，利用未成年人充当送信人，本项就可适用。

第 5 款 (g) 项

(g) 犯罪发生在监禁管教场所，或教育机构或社会服务场所，或在紧邻这些场所的地方，或在学童和学生进行教育、体育和社会活动的其他地方；

评注
3.122 (g) 项反映了一些关切。其一是许多监禁管教机构存在吸毒问题，这被视为有碍于罪犯康复，他们在出狱时可能沾染了服刑开始时没有的毛病。关切的另一个问题是希望尽量保护儿童和处境特别容易染上毒瘾的其他群体。因此，当出现儿童、学生或参加社会服务机构的人员可能有染的情况时，正确的做法
将是援用本项。文本中未提及可能在靠近规定的机构之一的地方发生犯罪但发生犯罪时该机构已关闭和无别人在场的可能性；不过难以理解单是地理位置靠近就将得到如此的重视。无论如何，“紧邻”的概念没有明确定义。

第 5 款 (h) 项

(h) 以前在国外或国内曾被判罪，特别是类似的犯罪，但以缔约国内法所允许的程度为限。

评注

3.123 许多国家法律制度希望执行刑事制裁的机构顾及惯犯和已决犯的记录的其他方面。 (h) 项的一个明显的特点是明确提及在外国有关被判罪的记录。由于各国法律制度处理这类事项的方式存在很大的差异，据认为有必要在该项的最后列入相当于补充保障条款的内容。

第 6 款

6. 缔约国为起诉犯有按本条确定的罪行的人而进行其国内法所规定的法律裁量权时，应努力确保对这些罪行的执法措施取得最大成效，并适当考虑到需要对此种犯罪起到威慑作用。

评注

3.124 第 6 款起因于一项提案，它要求各缔约国确保它们的检察当局严格实施关于第三条所涉事项的法律。在有些国家，自由裁量权的缺乏产生这样的效应：起诉是强制性的。在存在自由裁量权的地方，采用不适当的手段能够保证撤回指控，就犯罪的量刑程度或可能的制裁 (求得“认罪求情协议”)，或获得其他的减让，而且有些国家的检察当局可能需要某种程度的保护；不受与有组织的犯罪有联系的势力强大的集团的影响。

3.125 不过，还有一些抵消性的考虑。赋予检察当局以自由裁量权的通常目的是便利合理的起诉政策，也是由于认识到一种完全恰当的关切，即在资源的使用方面确定轻重缓急。很可能存在这样的情况：减轻刑罚的许诺可能说服被告供出牵连他人的情报；同意作为控方证人的被告对于保证有效的执法能够起到极大的作用。对于有组织犯罪下层所涉人员作出减让，能够使调查机构查清的起诉高层所涉人员。

3.126 最后的文本反映了这两种立场之间的妥协。公约中列入这种妥协方案说明存在着使用起诉自由裁量权太宽容的危险，而且强调必须适当考虑对犯罪起到威慑作用的必要性。不过，检验的标准是获得文本所指的“执法措施的成效”的必要性，而且这使上文第 3.125 段归纳的考虑能够得到适当的重视。
第 7 款

7. 缔约国应确保其法院或其他主管当局对于已判定犯有本条第 1 款所列罪行的人，在考虑其将来可能的早释或假释时，顾及这种罪行的严重性质和本条第 5 款所列的情况。

评注

3.127 第 4 和第 5 款涉及应对定罪实行的制裁。第 7 款确认，最初实行的制裁，如果采取监禁或其他剥夺自由的形式，可能因后来裁决允许早释或假释已决犯而受到重大影响。此种裁决在许多国家很常见，并且构成它们判决做法和政策的不可分割的组成部分，不过另一些国家完全禁止这样做。该款告诫缔约国确保，如果根据其国家法律制度作出此种裁决，负责作此裁决的机构应顾及有关犯罪的严重性，以及第 5 款所列的任何加重处罚情节的存在。

第 8 款

8. 各缔约国应酌情在其国内法中对于按本条第 10 款确定的任何犯罪，规定一个长的追诉时效期限，当被指称的罪犯已逃避司法处置时，期限应更长。

评注

3.128 许多国家的刑事案件没有时效法规；还有许多国家虽规定了时效期限，但要么普遍适用，要么有严格限制的例外。第 8 款与无此种时效法规的缔约国没有关系；因此使用“酌情”这一短语。要求确实有效时法规的缔约国对于按第 1 款确定的犯罪制定“长的”期限；“长的”一词未作进一步界定。此外，它们还必须规定，如果被指称的罪犯逃避了司法审判，应延长该期限。采用后一点时考虑到了嫌疑犯从缔约国领土潜逃出去的情况，但是在最后文本中，采用较为一般的语言归纳了这种特殊情况。其结果不易解释：似乎要求被指称罪犯采取某种断然行为“逃避”起诉，因为结果仅仅不对被指称罪犯起诉（他因而逃避司法审判）成为延长时效期限的理由，时效法规就变得毫无意义了。必须记住，确立人权规范的国际公约要求，为使刑事诉讼程序公正，起诉不得过度地拖延。

第 9 款

9. 各缔约国应采取符合其法律制度的适当措施，确保在其领土内发现的被指控或被判定犯有按本条第 1 款确定的罪行的人，能在必要的刑事诉讼中出庭。

评注

3.129 第 9 款的现有草案特别提到准予保释，并提请注意贩毒者通常掌握巨额钱款。删除了这一材料，但此款处理的仍是这些问题。它不处理引渡即第六条
的主题；也不排除缺席审判，如果被指称的罪犯不“在 [缔约国] 领土内发现”及有关的法律制度允许此种审判。相反，如同前几款一样，它旨在鼓励有效的执法。鉴于许多与毒品相关的犯罪涉及事前性巨大且具有国际性，轻率地使用审判前释放的做法可能严重危及有效的执法。

第 10 款

10. 为了缔约国之间根据本公约进行合作，特别是根据第五、六、七和九条进行合作，在不影响缔约国的宪法限制和基本的国内法的情况下，凡依照本条确定的犯罪均不得视为经济犯罪或政治犯罪或认为是出于政治动机。

评注

3.130 第 10 款涉及政治犯罪和经济犯罪例外的敏感问题，这是引渡领域最为常见的问题。如果将犯罪定性为政治或经济犯罪，就拒绝予以协助，这是国家做法的一个共同特点。其归类并不是毋需解释的。例如，在政治背景下（如武装起义）采取的行为，如果出于私人或个人原因，就不能视为政治行为。在本款上下文中，如果允许缔约国将按第三条所确定的犯罪归类为经济犯罪或政治犯罪或出于政治动机，就将妨碍采取第五条（没收）、第六条（引渡）、第七条（相互法律协助）和第九条（其他形式的合作和培训）规定的国际合作措施。列举的合作方式不是详尽无遗的。第 10 款中的保障条款使用“宪法限制和基本的国内法”而不是“法律制度的基本概念”措辞上的差异，看来并不影响意思，旨在特别保护要求拒绝引渡请求的宪法保证的权利。可将本规定与第六条第 6 款比较，它表达了引渡情况下有关的概念。

第 11 款

11. 本条规定不得影响其所述犯罪和有关的法律辩护理由只应由缔约国的国内法加以阐明以及此种犯罪应依该法予以起诉和惩罚的原则。

评注

3.131 第 11 款引自《1961 年公约》第三十六条第 4 款，其本意不是作为一条补充保障条款。它确保不将第三条的任何规定视为自行生效的规定。虽然它要求缔约国设定犯罪，但这些犯罪及其连在一起制裁，将是国家法律制度的产物并将使用该制度的框架和术语。对于该款也提及的“法律辩护理由”而言，这也许具有甚至更重要的意义。

执行考虑：第 4 至第 11 款

3.132 第三条第 4 至第 11 款主要旨在确保每个缔约国的司法和检察当局以应有的严肃态度处理非法贩运犯罪，特别是第 1 款规定的那些犯罪。为此目的而
采用的起草风格给个国家有关当局进行判断留下相当充裕的余地，以便根据不同的法律、道德和文化传统决定采用何种最佳方式实现有关的目标。这种固有的灵活性又得到第二十四条的扩大，如果认为为了防止或制止非法贩运而可取或必要，它允许采取比公约授权的更为严格或严厉的措施。例如，在考虑第5款所载的一系列加重处罚因素时，这可能证明是有价值的。有些缔约国不妨对对此进行补充，提及有关的事项如某些类别的专业人员或雇员参与有关的犯罪或将有毒物质掺入有关麻醉毒品的做法。200

3.133 第三条第 10 款构成某种程度的例外，因为它对即具有法律实质性和又具有政治微妙性的事项引入了限定的义务。它规定，为了根据《1988年公约》进行国际合作，“……依照本条确定的犯罪均不得视为经济犯罪或政治犯罪或认为是出于政治动机”。就政治犯罪和出于政治动机的犯罪而言，只要指出大会第十七届特别会议通过的《政治宣言》（大会第 S-17/2号决议，附件）中，对非法贩运与恐怖活动之间日益加强的联系表达的关注就足够了。本规定旨在限制个人在这些和其他类似的情况下援用保护所谓的政治犯罪例外的可能性。201 对作为经济犯罪归类的提及具有大致相似的目的。正如在其他地方所指出：“传统上，有几个国家对经济犯罪不引渡罪犯也不提供相互法律协助。因此，本规定通过增加毒品洗钱调查方面合作的机会，是极端重要的”。202

3.134 提供国际合作与第三条这些条款的主题事项之间还有一种联系也应由负责执行的机构加以考虑。在有些国家，已作出决定强调毒品贩运犯罪的严重性，即对这些犯罪适用限制制裁即死刑。不过，许多其他国家采取了这样的立场：如果使用死刑，它们将不提供某些形式的国际合作。这种做法在引渡方面尤其久已存在，203 而且也适用于其他领域的合作活动，如相互法律协助。在制订这一领域的制裁政策时，应当考虑此种案件司法审判中取得逃犯引渡或利用国际合作既定程序的困难或可能性。204

200 《美洲组织示范条例》第 15 条第 1 款指出：“参与非法贩运或有关犯罪的金融机构或其雇员、工作人员、董事、所有人或如此行事的其他受权代表，应受更严厉的制裁。”

201 意大利 1990年 10 月 9 日第 309号法令第 80 条第 1(a)款规定，“如果麻醉药品的精神药物掺入或混入其他物质以提高潜在的危害性”，刑罚将加重三分之一至二分之一。

202 例如，大会第 45/116号决议通过的 1990年《引渡示范条约》第 3 条 (a) 项：例如，也见 1957年《欧洲引渡条约》第 3 条。

203 “出席联合国关于通过一项禁止非法贩运麻醉药品和精神药物公约会议的美国代表团的报告”，第 101届国会，第 1 次会议，参议院，行政报告 101-15，第 32 页。

204 例如，也见 1990年《引渡示范条约》第 4 条 (d) 款（大会第 45/116号决议，附件）；也见 G.Gilbert，《引渡法的方方面面》（伦敦，马丁努斯·奈霍夫出版社，1991年），第 99 至 100 页。

205 也见大会和经济及社会理事会关于死刑的保障的决议（大会第 2857(XXVI)号决议和经济及社会理事会第 1990/29号决议）。
第四条
管辖权

一般评论

4.1 遵照早先的多边公约处理国际关注的罪行所采用的一般方法，在第三条中仅仅要求各国将毒品贩运定为刑事罪，看来是不够的。鉴于围绕习惯国际法规则对各国制定具有域外效力的立法实行的限制问题存在着不确定性和争议，205 人们感到，适当的做法将是采用一项具体的条约规定管理时效管辖权问题。

4.2 第四条的范围限于第三条第 1 款列举的最严重的国际毒品贩运罪，它确立两类管辖权：强制管辖权和任意管辖权。它只管辖权的确定，而不施加行使的义务。后一个问题即执行管辖权的问题在公约其他地方处理。206

4.3 许多管辖权的依据已得到国际公法原则的公认。它们包括“属地”管辖权，这是一个国家对在它的领土上所犯的罪行拥有管辖权的原则；对在该国注册的船只上所犯罪行的公义的“属人”管辖权；以及“属人”管辖权，通常指对本国国民的管辖权。在有关麻醉药品和精神药物的早先公约中，还有这样的规定，如果不能引渡，缔约国可审理在其领土上发现的罪犯的严重犯罪。207 正是在这种背景下会议才讨论了此问题。

4.4 承认确立管辖权的多种依据的有效性，产生了有关行为有可能受到两个或多个国家刑法的管理。在麻醉品贩运领域，这种可能性特别大，因为它具有固有的跨国性。在《1988 年公约》的情况下，势必会产生同时提出管辖权要求的情况，但是文本没有明确解决此种争端提出的要求谁先谁后的问题。同样，习惯国际法现有规范汇编中也没有这个问题的适当解决办法。有关一罪不二审的原则（或一罪不再追诉或一罪不二审规则），常常只解决部分问题，尽管通常是在构成拒绝准予各种形式法律协助的依据的消极的意义上。208

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205 例如，见 M.N.Shaw，《国际法》，第 3 版（剑桥，格罗蒂乌斯出版社，1991 年），第 400 至 419 页。

206 例如，见下文关于第六条第 9 款的评论。但是也见上文关于第和条第 11 款的评论，该款肯定第三条的规定“不得影响……此种犯罪依国内法予以起诉和惩罚的原则”。

207《1961 年公约》，第三十六第第 2 款 (a) 项 (iv) 款，以及《1971 年公约》第二十二第第 2 款 (a) 项 (iv) 款。

208 例如，见英联邦拘留犯计划第 10(4) 段（《英联邦刑事援助计划》（伦敦，英联邦秘书处，1991 年））以及大会第 45/116 号决议通过的《1990 年引渡示范条约》第 3 条 (d) 款。后者第 16 条处理同时要求引渡的问题（见欧洲犯罪问题委员会），《跨国刑事管辖》（斯特拉斯堡，欧洲委员会，1990 年），第 33 至 35 页；以及 R.S.Clark，《联合国预防犯罪和刑事司法方案：标准的拟订及其实施的努力》（费城，费城大学出版社，1994 年），第 208 页，脚注 52），一罪不二审原则适用问题条约由在欧洲共同体成员国外交部长主持下工作的司法合作小组编制。
第 1 款 (a) 项

1. 各缔约国

(a) 在遇到以下情况时，应采取可能必要的措施，对其按第三条第 1 款规定的犯罪，确立本国的管辖权：

(i) 犯罪发生在其领土内；

(ii) 犯罪发生在犯罪时悬挂其国旗的船只或按其法律注册的飞行器上；

评注

4.5 该 1 款 (a) 项对各缔约国是强制性的，它涉及依据“属地”或“准属地”原则的管辖权。在各国的实践中，实际上普遍确立了此种管辖权，但据认为专门列入它是适当的，以便第四条能够载有一组全面的规定。

4.6 与其他国际条约和公约为相同，文本要求“确立”管辖权。不一定总是非得“行使”，第四条故意省略这后一个用语。例如，在有的情况下，如果被指控的罪犯所进行的犯罪活动的主要部分发生在另一国，将他引渡到该国受审可能更合适。

4.7 文本不打算处理这样一个司空见惯的问题，即如果犯罪要素被查明在一个以上国家，确定犯罪应被认为发生在这个国家。这将由各国的法律制度断定在它领土上发生的犯罪是否满足由它自己的法律规定的有关犯罪的定义。

4.8 应当指出，《1988 年公约》没有相当于《1961 年公约》第三十六条第 2 款 (a) 项 (i) 目那样的规定，其中第 1 款规定的每项犯罪，如果发生在不同的国家，“应各自分别论罪”。这项规定深受《1936 年公约》第四条用语的影响，其意图是“在一国法院可能不拥有管辖权情况下，给予它们必要的属地管辖权，特别是确保一国应对从犯罪行为拥有属地管辖权，即使主犯行为不发生在它的领土上和即使一般情况下它把从犯罪行为的管辖权分配归主犯行为发生地区的法院。”209《1961 年公约》的此项规定如同《1971 年公约》第二十二条第 2 款 (a) 项 (i) 目一大意相同一需以一项保障条款为前提；即“以不违背缔约国宪法上的限制及其法律制度与国内法为限”。

4.9 《1988 年公约》英文文本宁愿用“vessel” ( 船只 ) 而不用“ship” ( 船只 ) 一词，这两个词看来没有重大区别，即使在气垫船这种船只的情况也下也是如此。“悬挂其国旗”的表述是习惯用法，当然不是死抠字面理解；国旗未挂在惯常的旗杆上并不取消注册国的管辖权。210 不过，少数国家的法律制度允许在一国注册的船只在有限的短期内悬挂另一国的国旗；在此种情况下，文本将管辖权给予后一个国家。

4.10 飞机的注册方式相类似，但不用“国旗”的措辞。现在在不同国家设立的

209《1961 年公约评注》，关于第三十六条第 2 款 (a) 项的评论第 2 段（也见上文第 4.7 段）。

210 见《联合国海洋法公约》第 91 条 (《海洋法 联合国海洋法公约》联合国出版物、出售品编号 E.83.V.5)。
一家航空公司集团所拥有的飞机越来越多。但是惯例是每架飞机只注册在有关的一个国家的登记簿上。国际民用航空组织理事会的一项有争议的决议中允许进行联合或国际注册，其效力将是使飞机具有双重或多国国籍，而且就此规定目的而言把管辖权给予几个国家。

4.11 从有些飞行情况看，犯罪时间的提及可能至关要。航空公司之间的交换协定有时规定国际飞行的某个部分把飞机的注册从一国暂时转至另一国。在这种情况下，将需要查清犯罪的实际时间，以便发现当时的注册国。

执行考虑：第 1 款 (a) 项

4.12 第 1 款 (a) 项涉及各缔约国对时效管辖权的强制确立。

4.13 一个国家对发生在本国领土上的行为确立管辖权的权力是国际公法一项久已存在的无可争议的规范。实际上，国际社会的所有成员在其法律制度中都给予管辖权的属地原则以中心的地位。这样，遵守这种义务将是自动的。

4.14 尽管如此，许多管辖区并不总是充分利用国际法原则的灵活性来起草它们的刑法法规。该国规则包涵属地主义的主观原则和客观原则，即行为开始的地方和行为结束的地方。对于毒品贩运和罪行构成要素经常发生在一个以上管辖区的其他跨国犯罪，这种灵活性可能特别重要。例如，在某些联邦法系国家，传统的做法是只在犯罪的最后要素发生在本国领土内时才行使管辖权。213 由此产生的覆盖范围缺口不是国际法实施的任何限制的结果，因而可用适当的立法行动来弥补。第 3 条第 1 款 (c) 项 (ii) 目列的犯罪提出了进行考虑的一个明显的焦点，如果这种犯罪是在另一国发生的话。

4.15 应当忆及，每个沿海国除了陆上领土外，根据国际法——包括习惯国际法和协定国际法两者在内——的规则，都拥有其领海和上空的主权。214 为了消除可能出现的被贩毒者利用的漏洞，以及鉴于根除海上贩运的特殊重要性，215 各缔约国应审议现行的立法是否充分覆盖在其领海内的船舶上所犯的罪行。216 当然，只能依照国际海洋法对悬挂旗的船只执行此种立法。217

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211 例子有坦纳的纳维亚航空公司系统和非洲航空公司。
212 国际民用航空组织 8743-C/978 号文件，第 26 页。
213 例如，见 G. Williams, “刑法的地点和范围” (第 9 部分)(《法律季刊》，第 81 期，1965 年，第 158 页）。
214 例如，见《联合国海洋法公约》第 2 条 (《第三次联合国海洋法会议正式记录》，第 17 卷 (联合国出版物，出售品编号：E.84.V3)，A/CONE.62/1221 号文件，附件一）。
215 见下文关于第十七条的评论，它不扩展到领海范围内的贩运活动。
216 例如，见《法兰西刑法典》第 113-2 条，在大不列颠及北爱尔兰联合王国，主要依靠 1979 年《关税和货物税管理法》的有关规定；也见 1988 年《禁止危害航海安全的非法行为公约》第 6 条第 1 款 (b) 项 (《国际法律材料》，第 207 期，1988 年，第 676 页)。
217 特别见《联合国海洋法公约》第 27 条。
4.16 施加第 1 款 (a) 项 (ii) 目所载义务以对发生在悬挂国旗的船舶和注册的飞机上的犯罪确立时效管辖权，在国际上也是无可争议的。审查现有的法律对于这个问题是否适当将是谨慎的，但认为迫切需要在这一领域制定新立法的国家很可能寥寥无几。218 另一方面，应当回顾一下，在这一领域以及第四条涉及的其他领域，可能会发生有关同时要求管辖权的问题。正如欧洲委员会的欧洲犯罪问题委员会所指出：“如果犯罪发生时船舶正在另一国的领水内航行，或飞机在此种领土上空或以内，就发生同时提出管辖权要求的情况：没有证据表明国际法存在着在各国——其中国要求国旗管辖权——间分配权限的一般规则”。219 如上所述，《1988 年公约》不谋求解决同时提出的要求得到管辖权所发生的问题。220 因此，此问题交由国内法和国内政策解决，或在其他多边和双边机制、协定或安排的范围内处理。

第 1 款 (b) 项 (i) 目

(b) 在遇到下述情况时，可采取可能必要的措施，对其按第三条第 1 款确定的犯罪，确立本国的管辖权；

(i) 进行该犯罪的人为本国国民或在其领土内有惯常居所者；

评注

4.17 看来很清楚，第 1 款 (b) 项的每个部分为任择确立管辖权设定一个单独依据。221

4.18 (b) 项 (i) 目论述以“属人”为依据的管辖权，有时也叫做积极属人性原则。与 (a) 项不一样，它是任择的而不是强制的。这反映出国家做法的多样性，许多国家依据国籍确立域外管辖权，为数极少的国家按惯常居留所的情况主张此种管辖权，而且有些国家不利用管辖权“属人”依据。

4.19 本款未打算界定国籍和惯常居所的概念。如遇双重或多重国籍，被指控的罪犯是其国民的每个国家，可依据这种情况确立管辖权。“惯常居所”通常被认为是纯属事实概念。欧洲委员会部长委员会的一项决议提出，“在确定某一居所是否为惯常居所时，应考虑到居所的居住期限和连续性，以及表明个人与他居所之间持久连系的其他个人或专业性的事实”。222

218 在澳大利亚，就是此种审查查明了立法覆盖面的一个缺口，后来由 1990 年《罪行 (贩运麻醉药品和精神药物) 法》(1990 年第 97 号法) 第 11 条消除。
219 欧洲犯罪问题委员会，前引书，第 12 页。
220 见上文关于第四条的一般评论。
221 不能支持 (i)、(ii) 和 (iii) 目的要求是累加的，以便在一个案件中必须满足所有要求，后一个国家才能行使管辖权这一替代观点（见《正式记录》，第二卷……，全体会议要要记录，第 7 次全体会议，第 22 段）；草案的讨论中无人这样提议，讨论时每个项目都是单独审议的。
222 部长委员会第 72(1) 号决议，附件。
第1款 (b) 项 (ii) 目

(ii) 犯罪发生在该缔约国已获授权按第十七条对之采取适当行动的船舰上，但这种管辖权只应根据该条第4款和第9款所述协定或安排行使；

评注

4.20 载入第1款 (b) 项 (ii) 目的确立管辖权的第二个可允许的依据涉及对在领海外行使航行自由权的悬挂外国旗帜的船舰的基于同意的禁止。这一规定涉及这样一种情况：一缔约国谋求在国际法下规定对非法船舰的船旗国的授权，以便对该船舰及船上人员和货物采取适当的强制措施。下文从海上非法船舰的角度审查这个问题，海上非法船舰是第十七条的主题。

第1款 (b) 项 (iii) 目

(iii) 该犯罪属于按第三条第1款 (c) 项 (iv) 目确定的罪行之一，并发生在本国领土外，而目的是在其领土内按第三条第1款确定的某项犯罪。

评注

4.21 第三条第1款 (c) 项 (iv) 目涉及参与进行，合伙或共谋进行，进行未遂，以及帮助、教唆、便利和参谋进行按本条确定的任何犯罪。

4.22 在一缔约国领土上共谋，目的是在另一国采取行动，而不论该国是否为公约缔约国，此种案件属于第1款 (a) 项 (i) 目所指的强制管辖权的范围。本规定的作用是允许各国在下述情况下确立管辖权：这些预备犯罪之一发生在本国领土外，但“为了”在本国领土内进行按第三条第1款确定的犯罪。例子是在一国形成的拟在另一国分销麻醉药品的共谋。另一国可对该项共谋确立管辖权，而不顾它是否最终实际在其领土上分销麻醇品。不过，如果共谋者之间的协议达到了设想在包括几个国家的一个区域进行犯罪活动的阶段但仍在等待进一步的情报以选择活动地点，则该区域任何国家都不能凭本规定作为实行管辖权的依据；不能证明已经发生的情况是“为了”在国犯罪。

执行考虑：第1款 (b) 项

4.23 第1款 (b) 项列举了确立时效管辖权的三种可允许的理由。其中第一种有关国民和惯常居民域外犯罪，在这种情况下，依据罪犯的国籍行使管辖权（有时叫做积极属人性原则）的法律上的可接受性是得到普遍承认的。实际上，在有关国际关注罪行的一些多边公约中，此种管辖权的行使作了强制规定。^{221}

^{221}例如，见1988年《禁止危害航海安全的非法行为公约》第6条第1款 (c) 项 (《国际法律材料》，第27号，1988年，第676页)。
4.24 许多国家，特别是具有大陆法系传统的国家，理所当然或相当经常地使用国籍原则。例如在法国，公民因在国外所犯的任何罪行和许多不法行为而可遭到起诉。224 相形之下，大多数英美法系的国家只在极少的情况下依据罪犯的国籍执行刑罚。不过，鉴于有关犯罪的严重性，有些国家似宜考虑到按第三条第 1 款确定的犯罪设定进一步的例外。例如，澳大利亚已采取了此种步骤。1990 年《罪行 ( 贩运麻醉药品和精神药物 ) 法》225 起草成适用于 “这样的澳大利亚国民，他们在澳大利亚国外从事交易毒品的行为，此种行为是一种违反某一外国的法律的行为，而且也将是一种违反此人在其中从事的一个国家或领土中生效的法律的犯罪。如果此人日后出现在澳大利亚，他或她可能被指控犯有属本规定的犯罪”。226

4.25 依据某一个人惯常居所行使管辖权的做法在国际惯例中 227 尚未获得充分确认，而且国内立法也不太经常援用。228 例如，泰国就属于利用此种选择方案的国家之列。229

4.26 在审议有关管辖权的这样那样的可允许依据时，应当注意任何此种管辖权的主张在国际合作领域可能产生的效力，例如在犯罪问题上的引渡和相互法律协助。举例说，在引渡的法律和做法中，如果被请求国在类似情况下起诉域外犯罪国的规定，无法进行合作是常见的。230 不过，有些管辖区认为，能在更广泛的条件下，例如在请求国以罪犯国籍作为行使管辖权的依据的情况下，交出逃犯是符合司法利益的。231

4.27 载入第 1 款 (b) 项 (ii) 目的确立管辖权的第二个依据采用非约束性用语撰写，但毋庸置疑，如果打算有效利用第十七条提供的可能性，行使时效管辖权事实上将是必要的。产生这种结论是由于这样一个事实：如果在发现非法麻醉品的情况下不能考虑进行起诉，那么在国际水域登上船只可能是清一色外国国民的外国船舶进行搜查将没有什么意义了。232 不过，迄今为止，极少国家制定了这类立法。在有些情况下，例如爱尔兰 233 和大不列颠及北爱尔兰联合王国 234 的情况，有关

224《法兰西刑事诉讼程序法典》，第 689 条。
2251990 年第 97 号法，第 12 条。
226《1989 年罪行 ( 贩运麻醉药品和精神药物 ) 法案：解释性备忘录》( 堪培拉，澳大利亚联邦议会，众议院，1989 年 )，第 6 页。
227 一个备选提法将确立时效管辖权的依据限于作为惯常居所的无国籍人员 ( 例如，见 1979 年《反对劫持船舶国际公约》第 6 条第 2 款 (a) 项和第 6 条第 1 款 (b) 项 ( 大会第 34/146 号决议，附件 )。)
228 但是见《法律复述第三版 - 美国对外关系法》 ( 明尼苏达州圣保罗，美国法律研究所出版社，1987 年 )，第 1 卷，第 239 至 240 页。
229 见 1991 年《打击毒品罪犯措施法》第 5(1) 条。
230 例如，见 1957 年《欧洲引渡公约》第 7 条第 2 款，转栽于《欧洲引渡公约解释性报告》( 斯特拉斯堡，欧洲委员会，1985 年 )，和 1990 年《引渡示范条约》第 4 条 (c) 项 ( 大会第 45/116 号决议，附件 )。
231 例如，见大不列颠及北爱尔兰联合王国，1989 年引渡法，第 33 章第 2 节。
232 值得注意的是，在 1995 年欧洲委员会《执行 <1988 年公约 > 第十七条关于海上非法贩运的协定》 (《欧洲条约集》第 156 号 ) 第 3 条第 2 款中，规定确立此种管辖权是强制性的。
233 爱尔兰，1994 年《第 15 号刑事司法 ( 国际合作 ) 法令》第 34-36 条。
234 联合王国，1990 年《刑事司法 ( 国际合作 ) 法》，第 5 章第 19 至 21 节。
的法规只能用于《1988年公约》的其他缔约国。不过，鉴于国际法允许任何船
旗国放弃它的专属管辖权并同意国际社会另一成员对它的船舶采取强制行动，考
虑一个不专门针对《1988年公约》的提法可能是有一定意义的。这将允许将
这种合作形式扩大到尚未成为这一重要国际文书的缔约国的国家。

4.28 第四条第三款第 11 款载有关于按国际海洋法执行沿海国管辖权的
不减损规定。因此，对于负责有效执行《1988年公约》的机构来说，审慎的
做法将是审查现行的法律对任何毗连区或关税区内有关的犯罪行使管辖权是否
适当，以及有关包括紧追权在内的其他独立的海洋法权利的国内法规则是否适
当。236 这样，1995年《欧洲委员会执行〈联合国禁止非法贩运麻醉
药品和精神药物公约〉第十七条关于海上非法贩运的协定》第 3 条第 3 款要求
每个参加国“采取可能必要的措施对在无国籍船舶上或依国际法类似于无国籍
的船舶上发生的有关犯罪确立其管辖权”。

4.29 还宜忆及，第十七条第 11 款载有关于按国际海洋法执行沿海国管辖权的
不减损规定。因此，对于负责有效执行《1988年公约》的机构来说，审慎的
做法将是审查现行的法律对任何毗连区或关税区内有关的犯罪行使管辖权是否
适当，以及有关包括紧追权在内的其他独立的海洋法权利的国内法规则是否适
当。237

4.30 有关确立第 1 款 (b) 项为之提供特定处理法的域外时效管辖权的最后一条
斟酌决定的理由是所谓的“效力”原则。238 这条原则在其他情况下一直是有一
定争议的，它的适用范围严格限于第三条第 1 款 (a) 项 (iv) 目所列举的犯罪，即
它发生在缔约国的领土以外，但是为了在该国领土内进行按第三条第 1 款确定
的犯罪。因此，虽然在被控告的行为与缔约国的领土之间存在着明显的联系，
但正如这一情况下表示的效力原则，其范围大于第 1 款 (a) 项 (i) 目所设想的属
地原则。这是因为在这种情况下犯罪发生在缔约国领土之外，而且在缔约国领
土内确实可能不存在公开行为。换言之，这项原则可以延伸至缔约国领土范
围内策划但尚未实现的效力。

4.31 对许多国家来说，充分利用本条规定创造的可能性，将要求采取立法行
动。239 尽管这样说，某些普遍法管辖区的司法部门近年来对现行的普通法规则扩

235 这是《美国海事法执行法令》采取的立场（见《美国法典》第四十六卷第1903条）。
236 见麻醉药品委员会第 8 (XXXVIII) 号决议提出的海事合作工作组第 13 号建议，(《经济及社
会理事会正式纪录》1995年, 补编第 9 号) (E/1995/25), 第七章, A 节 )。
237 紧追权也能用于某些“母船”毒品走私活动。某些国内法院裁定，这项权利也延伸至所谓的
“广泛推定存在活动”（例如，见 Re Pullos，国际法报告》第 77 卷，第 587 号（意大利）和《R
诉苏尼拉和索斐案》（1986年）《国内法律规则》，第 28 卷（第 4 版）第 450 条（加拿大）。
238 见第四条第 1 款 (b) 项 (iii) 目。
239 例如，见泰国，《打击麻醉药品罪犯措施法令》，第 5(2) 条，它的内容如下，“任何人进行
有关麻醉药品的犯罪，尽管犯罪发生在王国以外，也应在王国受到惩处，如果看来；……(2) 罪犯
为外国人并打算使用后果发生在王国境内或泰国政府是受害方人”。
大到这一范畴采取了支持的观点。在 1990 年良锡力帕拉塞特诉美国政府等 240 一案中，枢密院司法委员会裁定，“意欲在香港进行贩运毒品犯罪而进入泰国的同谋在香港是应受司法审判的，即使在香港未发生属于此同谋的公开行为”。241 在随后雷吉娜诉桑松等人 242 案—该案亦涉及域外麻醉品同谋——中，英格兰上诉院确认了上述普通法原则的观点，并将它扩大至解释法律规定。243

第 2 款 (a) 项

2. 各缔约国：

(a) 当被指控的罪犯在其领土内，并且基于下述理由不把他引渡到另一缔约国时，也应采取可能必要的措施，对其按第三条第 1 款确定的犯罪，确立本国的管辖权：

(i) 犯罪发生在其领土内或发生在犯罪时悬挂其国旗的船只或按其法律注册的飞行器上；或

(ii) 进行犯罪的人为本国国民；

评注

4.32 遵照处理国际关注犯罪的许多其他多边协定采取的一般办法，第四条第 2 款使用在不引渡即审判原则中体现的替代司法的概念。实质上，这一概念要求，当被指控的罪犯在缔约国领土上而且该缔约国不引渡有关个人，它应确立管辖权以便能够提起诉讼。

4.33 可将整个第 2 款的文本与《1961 年公约》第三十六条第二款 (a) 项 (iv) 目的文本作比较。在 1961 年文本中，与本规定不一样，它有一项保障条款，提及缔约国的宪法限制、它的法律制度和国内法。1973 年出版的《1961 年公约评注》载有这样的提示：“鉴于自 1961 年以来国际毒品形势恶化……，有关国家的政府目前可能发现，起诉在国外进行的非法贩运的严重犯罪所遭到的基于原则理由的反对，比起当年它们遭到的反对少多了”。244 这种预言性的提示在某种程度上得到了第 2 款文本的确认。

4.34 在基于 (a) 项 (i) 和 (ii) 目列举的两项理由之一拒绝引渡的情况下，缔约国可以采取行动确立其管辖权是强制性的。 (a) 项 (i) 目列出的理由取决于属地原则，将它扩大到包括船舶和飞机；在所有这些情况下，各缔约国都必定确立了属第 1 款 (a) 项的管辖权。

240[1990 年]《事件全录》，第 2 卷，第 866 页。
241 同上，第 878 页。
242[1991 年]《事件全录》，第 2 卷第 145 页。
243 同上，第 150 页。
244 也见《1961 年公约》第三十六条第 3 款，以及《1961 年公约评注》，关于第三十六条第 2 款 (a) 项 (iii) 目的评论。
4.35 (a) 项 (ii) 目覆盖的情况并不相同，在那种情况下，进行犯罪的人是缔约国的国民。此处的文本需要与第1款 (b) 项 (i) 目文本作比较，该目使缔约国能够但不要求它在某些案件中确立管辖权，其中包括犯罪的人为其国民的案件。本规定的作用在于，对国民所犯罪行的管辖权一般是任择的，但如以此为由拒绝引渡，就变成强制性的了。要指出的是，本规定未提及惯常居住在一缔约国领土内的个人所犯的罪行；以被指控的罪犯的惯常居住所为由所作的任何拒绝不属于本规定的范围。

第2款 (b) 项

(b) 当被控的罪犯在其领土内，并且不把他引渡到另一缔约国时，也可采取可能必要的措施，对其按第三条第1款确定的犯罪，确立本国的管辖权。

注

4.36 如果拒绝或曾拒绝引渡所依据的理由为 (a) 项规定以外的理由，被请求国没有义务确立它自己的管辖权。所以，例如，如果甲国谋求乙国引渡因在甲国犯罪而被指控的罪犯，该罪犯现在乙国但他或她不是乙国国民，而且乙国以可能的种族偏见为由拒绝引渡，246 罪犯极有可能逃避起诉，因为被请求国没有义务确立它自己的管辖权，而且实际上该案不属于有关确立管辖权的任择理由的第1款和第2款的规定的范围。此种任择管辖权已经确立而且不引渡被指控的罪犯，第六条第9款 (b) 项要求，将案件提交其“主管当局进行起诉，除非请求国为了维护它的合法管辖权而另提请求”。247

执行考虑：第2款

4.37 第四条第2款 (a) 项以强制性用语拟定，它要求缔约国在由于下述两个原因拒绝引渡时确立管辖权，即或者犯罪发生在它的领土上或它的船舶或飞机上，或者犯罪的人是其本国国民。248 在后一种情况下，由于宪法、法律或政策原因，通常大陆法系的管辖区不能引渡其本国公民，与采用英美法系传统的管辖区不一样。249 不过，如上文指出的，同一些大陆法系国家也倾向于非常广泛地利用国籍原则，因而通常有法律依据，可对被指控在国外犯罪的国民进行起诉。因此，凡打算成为《1988年公约》缔约国而面临引渡其国民障碍的国家必须确保它已援用了第1款 (b) 项 (i) 目规定的任选办法以履行其在此类情况下的义务。

246 为此目的，不理会按第三条第1款 (c) 项 (iv) 目确定的犯罪的可能的案件（见第四条第1款 (b) 项 (iii) 目和上文第 4.21 至第4.22段)。

247 见第六条第6款。

248 见下文关于第六条第9款 (b) 项的评论。

249 见下文关于第六条第9款 (a) 项的评论。
4.38 利用第四条第 2 款 (a) 项的任择规定还获得进一步的机会，可以消除按第三条第 1 款确定的犯罪的覆盖范围缺口，否则可能导致在外国犯有毒品贩运罪的个人逃避法律制裁。澳大利亚是利用此种机会的国家之一。在 1990 年《犯罪 (贩运麻醉药品和精神药物 ) 法》第 12 条中，对于日后来到澳大利亚的非澳大利亚人所犯的某些毒品罪确立了域外管辖权。设想了两种情况：第一，未收到犯罪发生在其境内的国家的引渡请求；和第二，要求引渡但遭到了拒绝。正如在联邦总检察官针对《解释性备忘录》所指出：“例如，可能发生这种现象的情况将是：总检察官裁定，由于请求国拒绝作出不判处或不执行死刑的令人满意的保证而不应交出该人”。

第 3 款

3. 本公约不排除任一缔约国行使按照其国内法确立的任何刑事管辖权。

注释

4.39 公约要求或鼓励各缔约国在某些类型的案件中确立管辖权。如果缔约国未按包括在第四条所述的依据中的某项依据确立管辖权，本公约的任何规定均不妨碍继续行使此种管辖权。

执行考虑：第 3 款

4.40 重要的是不应把第四条最后一款理解为各缔约国可以不受任何约束地以政策理由或实际理由确立可能为私人接受的任何种类的域外管辖权。域外时效管辖权问题受习惯际法规则支配，而且国际社会的成员对于不合适或过分地要求此种管辖权的做法历来很敏感。如果考虑使用第四条中未另作专门授权的管辖权依据，负责执行的机构以征求有关专家的意见为妥。

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250 1990 年第 97 号法。

251 1989 年《犯罪 (贩运麻醉药品和精神药物 ) 法案：解释性备忘录》 (堪培拉，澳大利亚联邦议会，众议院，1989 年)，第 7 页；也见泰国，(禁止麻醉药品罪犯措施法令)，1991 年，第 5(3) 条。
第十一条

控制下交付

一般评论

11.1 公约第十一条明确可于国际一级使用控制下交付的调查技术。在第一条 (g) 项中，控制下交付被定义为“一种技术，即在一国或多国的主管当局知情或监督下，允许货物中非法或可疑的麻醉药品、精神药物。本公约表一和表二所列物质或它们的替代物质运出、通过或运入其领土，以期查明涉及按本公约第三条第 1 款确定的犯罪的人”。

11.2 第十一条是第一个认可控制下交付做法的国际文本。例如《1961 年公约》反映的以前的传统是强调扣押麻醉品，即使不是正面要求扣押；从这个意义上讲，《1988 年公约》根本上不同于以前的做法。

11.3 这一执法策略的最明显的吸引力在于，这一技术有利于查明、逮捕和起诉所涉及的犯罪活动的主犯、组织者和出资人，而不是仅仅那些较低级别的有关人员。用 1987 年《控制麻醉药品和精神药物的综合学科纲要》的话来说，这一技术的主要目的是将“因中间人或携带者在被发现后立即被捕而可能没有被识破的涉及一批非法运送的受控药物的装运、运输、支付、隐藏或收发的个人、公司或其他组织”捉拿法办。

11.4 现在在国际范围内正越来越多地使用这一重要的办法，这种办法在国际范围内可用于各种情况。例如，当在分离托运行李、分离托运行李或在邮件中检测到非法麻醉品货物时，这一办法特别有用。同样，当非法麻醉品由一携带者随身携带，或者该人不知道非法当局已经事先知情和注意，或者这项行动需要该人的积极配合时，可以采用控制下交付。在后一种情况下，例如，可以劝说被拘押的携带者，也许以减少指控或答应给予较轻刑事判决作为交换，继续交付运交的货物，以便可以查明共谋者或逮捕更多的人。

11.5 具体国家也许必须考虑其他缔约国以不同形式积极参与这些行动的请求。这些请求包括请求准许已侦破的装运或交运货物从其管辖区出口或进口到或者通过其管辖区。第一条 (g) 项中“控制下交付”的定义提及运出、通过或运入一国的货物。
国或多国“领土”这包括陆地领土、领海和上空。它包括通过空中或海上越过陆地疆界的预定的运输。另外，从公海上监视的角度，海事合作工作组在其 1995 年的报告中指出“控制下交付技术常常比在海上干预产生更好的执法效果”，因此建议，在适当的情况下，比之依第十七条进行的拦截应优先选择这项技术。501

11.6 重点自然是控制非法麻醉药品和精神药物交运货物，第一条 (g) 项所载定义还扩展到《1988 年公约》所附表一和表二所列物质的装运货物。502 国际做法也证明在这种情况下这一技术是有价值的。503 为此，经济及社会理事会在其第 1995/20 号决议中，请各国政府“进行合作，在特殊情况下对有嫌疑的货运安排控制下交付只要能充分确保货运的安全，只要所涉化学物品的数量和性质主管当局能够并加以安全管理，及只要需要进行合作的所有国家包括过境国家同意实施控制下交付”。

第 1 款

1. 在其国内法律制度基本原则允许的情况下，缔约国应在可能的范围内采取必要措施，根据相互达成的协定或安排，在国际一级适当使用控制下交付，以便查明涉及按第三条第一款确定的犯罪的人，并对之采取法律行动。

评注

11.7 一些国家授予起诉当局较大的自由裁量权，而在其他国家，据认为最重要的是只要有足够理由相信罪行是在该国领土之内发生的，就可提起诉讼。在这些国家，不提起诉讼的自由裁量权被认为容易被滥用，因此是不可接受的。人们将会意识到，存在着强制性起诉制度的国家会发现不可能进行控制下交付，第 1 款的引言指明了这一问题。

11.8 在关于第十一的讨论中，墨西哥代表强调说，在国内立法规定可使用控制下交付，而又有使用控制下交付的技术手段的情况下，并不反对使用控制下交付；但是，如果没有必要的经验丰富的警察组织和系统，使用这种技术就可能产生适得其反的结果。504 墨西哥政府更希望案文不提及控制下付，议定的案文是妥协的结果，没有完全满足会议的所有与会者。505


502 见下文关于第 12 条的评论。

503 例如，见《化学品行动工作队：最后报告》(华盛顿特区，1991 年 6 月)，第 25 页。

504 《正式记录》，第二卷……，全体委员会会议简要记录，第二委员会第 6 次会议，第 18、19 和第 70 段。

505 例如，见加拿大和联合王国代表的发言（《正式记录》，第二卷……，全体委员会会议简要记录，第二委员会第 6 次会议，第 22 至 23 和第 36 段）。
11.9 对控制下交付的使用和好处有丰富经验的其他国家的代表强调这种技术在
追查指挥各携带者的头目或组织者方面所取得的成功。这些代表认为，控制下
交付在公约案文中有突出的位置是至关重要的，即使必须为有法律或实际困
难的缔约国制订保障条款。506

11.10 作为讨论的结果，产生了较早案文的改拟版本。决定列入旨在解决已查
明的法律和实际困难的两句话。第一句是开头的话“在其国内法律制度基本原则
允许的情况下……”。这句话不能解释为指控制下交付行动将要求订立一条按
国内法允许采取这些行动的明文规定，这一点已作为第二委员会的意见记下备
案。

11.11 第二个是增加“在可能的范围内”这句话。用这句话为了避免任何缔
约国承行进行控制下交付活动的义务，而该缔约国本身认为副例如其警察、
海关或其他部门的技术和组织情况，它无法进行控制下交付行动。

11.12 结果是对缔约国施加一项有限的义务，即采取必要措施以允许在国际
一级适当使用控制下交付。什么叫“必要”，以及何时使用这一技术“适当”则
是一个判断问题。因此，案文指明这种行动应以相互达成的协定或安排为基础。

11.13 这意味着有义务通知交运货物通过其领土的任何其他缔约国，并征得该
缔约国的同意，即使交运货物采取的路线可能会出人意外地改变。由于实际原
因或为了提供交运货物处于连续控制的可靠证明，每一个此种缔约国当局的合
作可能是必不可少的。但是，最新的电子记录追踪方法有说服力地提醒人们，
控制下交付这一概念中始终固有的困难，即它是否可以与简单监视区分开来，
以及是否可在未获得第11条要求的同意的情况下进行监视行动。

11.14 考虑到控制下交付每件事实具有非常具体的性质，很难对这些问题提供
明确的答案。设想发生这样的情况是可以的，例如监视一个被怀疑是携毒者的人
可能（至少最初）似乎不处于控制下交付定义的范畴。礼貌和实际考虑因素
都表明，在所有这些情况下都需要最大程度地向其他有关缔约国披露有关情报。
缔约国在遵守第九条第1款规定的保障措施的前提下有义务相互合作，对麻醉
药品、精神药物和表一和表二所列物质的转移情况进行调查，507 这将涉及控制
下交付概念边缘的案件。

11.15 会议审议了一项提案，该提案要求各缔约国应将有关控制下交付的职能
授予一个指定的国家主管部门，该国家主管部门可以与可能在行动中涉及的其他
缔约国的对应主管部门进行必要的讨论。该项提案反映了1987 年《控制麻醉品
滥用今后活动的综合性多科纲要》所包含的思路，该纲要建议：“为了确保在国
家一级和国际一级对控制下交付进行有效的协调，各国应酌情指定一个或几个
机构负责进行这种协调”。508 不过，为此规定一项条约义务将给不是集中基础

6)。第三卷第13 段，和《正式记录》，第二卷……，全体委员会会议摘要记录，第二委员会
第 8 次会议，第 1 至 20 段。

507 见第九条第 1 款 (b) 项 (iii) 目。

508 (麻醉品滥用和非法贩运问题国际会议的报告，维也纳，1987 年 6 月 17 日至 26 日)(联合国出版物，
出售品编号：E.90.XVII.3)，第一章，A 节，第 251 段。
组织其警察或海关部门的国家带来困难，该提案未坚持。509

11.16 根据第 1 款，控制下交付行动是为了“查明涉及按第三条第 1 款确定的犯罪的人，并对此采取法律行动”。除了这一最后条款，案文与第一条 (g) 项的定义相对应。该条款涉及逮捕非法贩运所涉及的人；第二委员会正式同意这一解释。510

第 2 款

2. 使用控制下交付的决定应在逐案基础上作出，并可在必要时考虑财务安排和关于由有关缔约国行使管辖权的谅解。

评注

11.17 第 2 款吸取了各国在策划控制下交付行动方面取得的经验。它强调需要给予每个案件以单独的考虑。虽然将成为第十条的第一稿提需要在逐案基础上使用控制下交付，但它还是较详细地阐明了各缔约国的义务和行使管辖权的结果。511 政府间专家组在 1987 年 10 月召开的第二届会议上认为这些条款太详细了，因此将它们省略了。512

11.18 不过，该案文确实特别指明可能需要关注的两个问题（除了明显的行动细节外）。其中第一个涉及到财务安排，这一短语可能包括各种问题。它们包括行动费用，同时不仅需要需要调配的资源而且需要各缔约国的需要（例如，需要特定形式的证据）。虽然在某些情况下控制下交付和相互法律援助之间存在着联系，但控制下交付的费用将不属为第七条第 19 款目的“一般费用”。“财务安排”还将涉及最终没收非法物质的后果（处置或销毁这些物质的措施），由于采取控制下交付的决定的结果，没收可能被推迟，从而在一个不同的国家进行。在一些国家，存在已久的“奖励”制度，根据这些制度，执法人员得到特殊奖金，有时依据与缉获交运货物的量挂钩，如果控制下交付有效防止了交运货物的缉获，对有关人员的经济后果也需要考虑在内。由于这些问题的复杂性，可取的做法是各缔约国在可能情况下应当有长期安排，因为在具体案件中可能没有时间进行详细的谈判。

11.19 第二个问题涉及管辖权的行使，在这种情况下，控制下交付行动的后果可能再次产生可据以行使管辖权的其他依据。例如，完成计划中的控制下交付可能导致在一个国家犯罪，而如非法贩运在早些时候被阻断，本来是不会在该国犯罪的。该国可以根据第四条第 1 款 (a) 项声称拥有管辖权。很明显，如果在对管辖权的任何相互冲突的要求出现之前就考虑到这种可能性（如果时间允许的话），将有助于提高清晰度。

509 同上，第 2 卷……，全体委员会会议简要记录，第一委员会第 6 次会议，各处，及第 8 次会议，第 48-第 51 段。
510 同上，第 8 次会议，第 17 和第 18 段。
511 同上，第 1 周……，E/CN.7/1987/2 号文件，第二节，第七条第 4 款。
512 同上，E/CN.7/1988/2 号文件（第二部分），第二节，第 162 段。
第 3 款

3. 在有关缔约国同意下，可以控制已同意对之实行控制下交付的非法交运货物，并允许将麻醉药品或精神药物原封不动地继续运送或在将其完全或部分取出或替代后继续运送。

评注

11.20 第 3 款是会议加上去的。它反映了海关合作理事会（现称世界海关组织）提倡的技术：在全部或部分取出麻醉药品或精神药物的情况下实施控制下交付，这样，如果行动失败，仍然使贩运者几乎得不到或根本得不到非法材料。513

11.21 当然，可能在有些情况下进行建议的替代是不切实际可行的。此外，关于这一议题如同许多其他议题一样，国家立法可能对可以采取的措施加以限制。例如，可能需要以麻醉药品或精神药物留在交运货物中，以便在交运货物到达预定目的地时提供它属非法性质的证据。取出一些交运货物可能使起诉困难，特别是在刑法中没有完善的共谋犯罪概念的国家，由于所有这些理由，文本允许使用各种技术，又没有使任何一种技术具有强制性。如果用其他材料替代麻醉药品或精神药物，文本没有就应使用的材料作出硬性规定。514

11.22 文本使用了“在有关缔约国同意下”这句话，这反映了第 2 款强调的逐案办法。比利时代表指出，他把这句话理解为并不影响在国家领土上惩罚犯罪和维护公共秩序的独立措施。515

11.23 虽然第 3 款仅提及替代麻醉药品和精神药物，如果情况需要也可以按本款作出用其他材料替代前体的安排（见下文第 11.35 至 11.36 段）。根据第一条(g) 项，控制下交付的定义事实上指“货物中非法或可疑的麻醉药品、精神药物，……表一和表二所列物质或它们的替代物质”。

执行考虑：整个第十一条

11.24 第十一条第 1 款对《1988 年公约》缔约国施加限定的义务，允许在国际上适当使用控制下交付（见上文第 11.12 段）。考虑到若干管辖区在授权使用这类程序方面面临着重大宪法和其他法律困难，更坚定的作法被认为是不适当的。由于认识到这一事实，只有在“其国内法律制度基本原则允许”此行为的情况下，缔约国才有义务为使用这一技术提供方便。516

513《正式记录》，第二卷……，全体委员会会议的简要记录，第二委员会第 6 次会议，第 23 段。
514 在早先的草案中，使用了“无毒物质”几个字，但被认为不能令人满意，因为不同的法律制度可能对什么是“无毒”采取不同的观点。
515《正式记录》，第二卷……，全体委员会会议简要记录，第二委员会第 7 次会议，第 63 段。
516 第十一条第 1 款。
第二部分 附件七

11.25 在这方面采取有效行动的基本先决条件是确保国内法律制度适当批准控制下交付行动。在行使起诉职能方面通常使用合法性原则的国家，这将是一个紧迫的问题。正如一位评注者指出的那样，在某些这样的国家，使用控制下交付“可能实际违背当局不宽恕或容忍已知的非法行为的义务”。相对经常的做法是制订立明文授权主管当局在确有这一法律传统的国家间使用控制下交付。对比之下，传统上向其起诉当局提供相当程度的自由裁量权的国家要求通过关于控制下交付的具体立法的可能性较小。在后一类型中，新西兰是从一开始就选择使这一技术合法的国家的少有的例子。 519

11.26 然而，最近的经验表明，不应轻松地得出不需要授权立法的任何结论。例如，在现有法律无条件禁止输入麻醉药品和精神药物的国家，国内和国外执法官员、提供合作的被告和与实施控制下交付行动的其他人，可能会发现他们的某些行为可能被认为不合法。这种情况将有关人个人置于一种令人反感的地位，且在某些建制区还可能对成为行动对象的人受到定罪的可能性产生负面影响。 520 在国内法的立场不确定的情况下，稳健的做法将是，最好凭借立法使这一事情确定无疑。

11.27 这方面的国家立法做法在性质、范围和复杂性方面有很大不同。在某些情况下，如在新西兰，必不可少的权力被直接授予有关执法机构的成员。也许更常见的是，执法人员必须寻求指定的第三方的授权。例如，在马耳他，要求地方法官或检察官总长同意。 521 在某些情况下，据认为使授权服从特定条件是适当的；例如，在佛得角，法律规定检察官办公室只有在下列情况下才可以应目的地所在外国的要求向警察签发有关命令：“(a) 详细了解毒者的可能行径并充分查明他们；(b) 目的地所在国和过境国的主管当局可以保证物质安全，不被偷窃或转移用途；(c) 目的地所在国或过境国的主管当局承诺紧急提供这次行动的结果和犯罪者活动的全部详细情况，特别是上得角进行的行动和活动的详细情况”。 522 除了附加条件，其条件的性质将依据当地情况、传统和其他因素而定，可以考虑涉及其他事情，例如，当为了授权的控制下交付行动而犯下某些行为时，向执法人员提供免予刑事责任的适当豁免。 523

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517 例如，参见 E.Nadelmann.《越境警察 美国刑事执法的国际化》(宾夕法尼亚州立大学出版社，大学公园，宾夕法尼亚，1993 年)，第 237 至 238 页。
518 D.Stewart， “反毒品战争国际化：联合国禁止非法贩运麻醉药品和精神药物公约”，《丹麦国际法和政策杂志》1990 年第 18 期，第 400 页。
519 例如《滥用麻醉品修正法》，1978 年，第 12(l) 条。
520 例如，参见 1995 年 4 月 19 日里奇韦诉女皇号案中澳大利亚高等法院的判决。在写本报告时，克服此种情况下所论困难的新的立法正在积极考虑中（见 1995 年罪行修正 (控制下行动) 法案：解释性备忘录 (堪培拉，澳大利亚联邦议会，众议院，1995 年)）；关于普通法对这些事情的更典型一些的做法，又见雷吉娜诉拉蒂夫 (1996 年) 《事件全录》第一卷第 353 条。
521 例如，参见《1994 年危险药物法令 (修正) 法》，1994 年第六号，第 38(l) 条。
522 1993 年 7 月 12 日第 78/IV/93 号法律，第 33 条第 2 款。
523 见法国第 91.1264 号法律。
11.28 另一个非常重要的问题是这种立法应给予的范围。规定为本公约目的的控制下交付的定义的第一条 (g) 项重点放在涉及非法麻醉品交运货物和表一和表二所列物质的行动。不过，自缔结公约以来，很明显在参与 1988 年案文谈判的人没有想到的一些情况下，也可以使用控制下交付，例如调查按照第三条第 1 款 (b) 项规定的洗钱罪行时。524 一个专门政府间机构认为，“控制下交付已知或怀疑是犯罪所得的款项是获得情报和证据，特别是有关国际洗钱活动的情报和证据的一项适当而有效的执法技术”。525 例如，使用控制下交付可以帮助查明交易涉及的所有当事方；买卖的财产；对使用不义之财提供便利的公司和机构；及其他有关的交易。对控制下交付技术的这种应用和其他可能的应用，包括交付打算用于非法制造受管制物质的制片机和实验室玻璃器皿等设备，是负责确保在国内一级实施第十一条的机构考虑的恰当主题，并且也肯定符合整个公约的精神。

11.29 制定与本公约其他条款相关的国内法律规则时，应对控制下交付行动的需要敏感，这点也是重要的。例如，在根据第十二条第 9 款，制订实施有关经常用于非法制造麻醉药品或精神药物的物质方面国际合作义务的国内立法和行政安排时，对可疑的出口，除了缉获或中止交易的权力外，还应包括允许使用控制下交付的规定。在洗钱领域，类似的敏感性反映在 1991 年欧洲委员会关于防止利用金融系统进行洗钱的指令的第 7 条中，该条要求有关机构在提请有关当局注意之前不要进行可疑的交易。526 由这些当局就是否进行该笔交易发出指示。不过，如果“这一交易被怀疑进行洗钱，不以此种方式进行这一交易已不可能或者有可能破坏追查可疑洗钱行动受益人的努力，有关机构应随后立即通知当局”。从本条的起草过程明显可以看出，使本条具有如此灵活性的决定是直接针对执法部门预计需要的，包括为控制下洗钱行动提供便利。527

11.30 应当强调，第十一条第 1 款所列的义务是在适当情况下和“根据相互达成的协定或安排”为国际控制下交付行动中进行的合作作准备的。第十一条其余规定进一步强调了同意概念的中心地位。同样，在第一条 (g) 项中，控制下交付的一个定义特点是在有关缔约国的主管当局“知情或监督下”进行。没有取得这种同意将使行动越出第十一条的范围。如果在未同意国家的领土之内进行，将冒被称为违反公约第二条第 3 款的严重危险。528

524 见上文关于第三条第 1 款 (b) 项的评论。
526 委员会指令第 91/308/EEC 号。
527 见 W.Gilmore, 《不义之财：打击洗钱对策的发展》(欧洲委员会出版社，斯特拉斯堡，1995 年)，第 167 页。
528 见上文关于第二条第 3 款的评论。
11.31 在第 1 款中，预计将根据相互达成的协定或安排，寻求和获得这种同意。这一措辞旨在反映这一领域需要一定灵活性。如同在别处指出的那样：“安排表示未特定形式的相互配合，可以包括各缔约国主管当局在这种情况下相互采用的标准做法，其中有在不需要正式书面协定的情况下，警官在控制下交付方面进行合作。”

529 虽然制订自己对这些问题的政策是各缔约国的事，但应记住，进行控制下交付行动的机会可能在正常工作环境中意外地出现，没有时间履行正式手续，更别说谈判了。例如，当检测到飞机乘客的过境行李中有麻醉药品时，必须紧急作出决定，是扣押麻醉品并逮捕携毒者还是安排控制下交付行动，采取行动的时间非常少。530 确实，征得几个国家同意可能是必要的。有若干可能性可供考虑，包括使用行政安排，如谅解备忘录，缔结双边或多边协定，依靠根据国内立法权力作出的特别决定，或上述措施的某种结合。531 与《1988 年公约》的所有其他缔约国逐个缔结协定或安排可能是不现实的，但是与之很可能相当频繁地一起使用这种技术的国家逐个缔结协定或安排可能是有好处的。532

11.32 不管请求是在预先就有的协定或安排的框架内考虑，还是作为专案处理，必须建立起允许在逐案基础上迅速作出决定的政策结构，这是第 2 款所设想的。这可能包括需要满足如下各点：请求由一主管当局发出，请求符合要求的形式，建议的控制是适当的，行动目的证明建议的行动和类似的事情是正当的。这些决定还可以“考虑财务安排和关于由有关缔约国行使管辖权的谅解”。533 反过来，这一框架必须由适当的行政程序，其中包括指定的权力范围来加强。

11.33 提前具体规划如何确保顺利而有效地管理和控制正式批准的行动也是必要的。在这里，国内机构间合作的程序是至关重要的。例如，如果一个主管机构采取的控制下交付行动被不知道正在进行这项行动的另一个主管机构采取的行动无意中破坏，就会出现困难和极其尴尬的情况。实践证明，许多国家指定一个集权机构促进协调并避免混淆、对抗和风险是有效的。在这种解决办法不适合的管辖区，建立一个可能制度化的内部协调机制可能值得认真考虑。其执

529 “出席联合国关于通过一项禁止非法贩运麻醉药品和精神药物公约的会议的美国代表团的报告”，第 101 届国会，第 1 次会议，参议院，行政报告 101-15，第 75 页。

530 例如，见 P.D.Cutting，“控制下交付技术作为对付非法贩运麻醉药品和精神药物的武器”，《麻醉品公报》第 35 卷，第 4 期 (1983 年)，第 20 至 21 页。

531 关于批准缔结这种协定和安排的法律规定，见圣卢西亚，1993 年 (禁止滥用) 麻醉品法，1993 年第 8 号法，第 9 条。

532 伊朗伊斯兰共和国、巴基斯坦和土耳其在经济合作组织框架内，设立了一个非法贩运和麻醉品滥用问题委员会，它的职权范围包括利用控制下交付技术。

533 将费用问题与根据第五条第 5 款 (b) 项 (ii) 目，财产分享问题一起考虑，既是可能的又是可取的。关于行使管辖权的一个立法例子，见葡萄牙第 15/93 号法令第 61 条第 2 款 (c) 项；又见“洗钱问题财务行动工作队：报告”，巴黎，1990 年 2 月 7 日，第 39 号建议。
法机构以前在使用这种调查工具方面经验很少或没有经验的国家，应开展培训方案，这是第九条第 2 款 (h) 项所要求的。534

11.34 采用这种调查技术并非没有风险。例如，行动也许会遇到困难和交运货物也许有丢失的可能，这些是决定是否开展这种行动或在这种行动中是否给予合作要考虑的重要因素。即使行动正在进行之中，实际发展可能使得必须在早于原先预计的阶段终止。包括葡萄牙在内的一些国家，已在其授权的立法中考虑到这种可能性。葡萄牙第 15/93 号法令第 61(3) 条规定如下：“即使在给予上述授权之后，如果安全程度明显降低或者如果行程意外改变，或者发生可能危及将来缉获物质和逮捕罪犯的任何其他情况，刑事警察应当进行干预”。535

11.35 通常称为“干净的控制下交付”的这种技术的变通形式已大大降低了这些风险。根据这一程度，麻醉品被全部或部分取出，或使用无毒的物质替代。536 第 3 款所列这一选择方案应在有关国家同意下采用。其他因素也可能表明在特殊情况下采用这一办法是有用的。例如，为了举证或其他理由可能在始发国家实施扣押是必要的。不过，这种替代办法反过来又影响在交运货物的最后目的地所在国实施预定的起诉的可行性。因此，采用这一办法要求事先进行认真的考虑。537 不过，采用部分替代而不是全部替代引起法律困难可能少些。因此，在实践中人们似乎更喜欢这种方法。538 无论如何，负责实施第十一条的机构应审查现有的国内法律，以弄清就这一事情求助立法是否适当。539

11.36 为了提高全部或部分替代的机会，在最方便进行实际替代过程的地方，执法人员可得到替代材料是重要的。已经开发出颜色、质地、气味和体积与麻醉药品和精神药物类似的先进材料。在常常是麻醉品最终目的地的发达国家，可以毫不困难地得到这些材料。相比之下，麻醉品始发地和过境地如果可以更容易地实施替代的国家的有关当局，可能倒不太容易立即得到这种替代物质。在这种情况下，根据第九条进行合作显然是重要的。

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534 见上文关于第九条第 2 款 (h) 项的评论。可能需要本条第 3 款所设想的技术协助。也可以通过联合国系统和其他国际机构得到协助。例如，又见《联合国禁毒执法培训手册》，第五章。

535 1990年《申根公约》第 73 条第 3 款也保留领土国进行干预的权利。

536 例如，见《刑事司法（国际合作）法案：关于实施禁止非法贩运麻醉药品和精神药物维也纳公约的建议的解释性备忘录》(伦敦，内政部，1990 年)，第 30 页。虽然第十条第 3 款明确规定仅在与非法麻醉品有关的情况下使用这一程序，但它在其他正常行动环境下显然也可应用，除了其他之外，包括涉及表一和表二所列物质及大宗现金交运货物中的应用。

537 在某些情况下，预定目的地所在国根据共谋等概念提起替代指控也许是可能的。见上文关于第三条第 1 款 (c) 项 (iv) 目的评论。

538 例如，见 P.D.Cutting，前引书第 18 页。

539 关于葡萄牙采取的立场，见第 15/93 号法令第 61 条第 4 款。将这一问题与审查充分而有效地利用依照第七条条款规定的相互法律协助请求提供的协助所要求的存档规则和程序的修改结合考虑可能是有益的。
第十七条
海上非法贩运

一般评论

17.1 第十七条所载的执法规定很具创新性，其目的在于促进在拦截海上从事非法麻醉品贩运的船只方面的国际合作。本条与《1988年公约》其他几个关键规定密切相关。因此，虽然其重点在于便利获得对可疑船只的强制执行管辖权，但计划的全面有效性取决于各国拥有适当的时效管辖权。这是第四条的职能。707 而且，这方面的执法活动只是为打击和制止有关犯罪的警察和海关合作这一更广泛问题的一个方面。因此，应与其他条文，特别是第九条（其他形式的合作和培训）结合起来审查。708

17.2 尽管海上走私麻醉品很重要，但以前关于麻醉品贩运的公约并不包含关于这一题目的明文规定。709《1958年领海及毗连区公约》提及了这件事情。710 与之相比，《1958年公海公约》没有提及非法麻醉品贩运。711

17.3 适用范围超出领海的第一类实质性规定是1982年《联合国海洋公约》第108条的规定。712 题为“麻醉药品或精神调理物质的非法贩运”的该条内容如下：

“1. 所有国家应进行合作，以制止船上违反国际公约在海上从事非法贩运麻醉药品和精神调理物质。

“2. 任何国家如有合理根据认为一艘悬挂其旗帜的船只从事非法贩运麻醉药品或精神调理物质，可要求其他国家合作，制止这种贩运。”

根据同一公约第 58 条第 2 款，这一义务也适用于专属经济区以及公海。713

17.4 虽然最初的意见反对在《1961年公约》的任何修订中具体提及登上悬挂外国旗帜的船只的问题，714 但麻醉药品委员会反对，《1988年公约）的内容中应包括一项规定，并且在最早的草案中就列为了关于这一题目的一个条文。本文本比这些草案所包括的草文有了很大发展。

707 见上文关于第四条的评论。
708 见上文关于第九条的评论。
709 见 W.C.Gilmore, “海上非法贩运”,《海洋政策》，第 183 期，1991 年。
710 第 19 条第 1 款 (d) 项授权沿海国对经过其领海的外国船只行使刑事管辖权，如果这一行为“为获取非法贩运麻醉药品确有必要者”，该条第 2 款不影响沿海国对驶离内水通过领海外外国船只在船上的行使管辖权。
711 《1958年海洋法公约》授权只有在怀疑一外国商船从事海盗行为或贩卖奴隶时，或因为该船事上悬挂同一国籍旗但滥用外国国旗或拒不显示其国旗，可以登临外国商船 ( 第 22 条 )。
712 《海洋法：联合国海洋法公约》（联合国出版物，出售品编号：E.83.V.5）。
713 该款内容为：“第 88 至第 115 条和国际法的其他相关规则适用于专属经济区，只要它们不与本部分有抵触”，即该公约题为“专属经济区”的第五部分。
714 见研究麻醉品单一公约的作用、适性和改进问题的专家组的报告，1961年(E/CN.7/1983/2/Add.1)，第 4 段。
第 1 款

1. 缔约国应尽可能充分合作，依照国际海洋法禁止海上非法贩运。

评注

17.5 第 1 款的文本以《1982 年海洋法公约》第 108 条第 1 款为基础（见上文第 17.3 段）。它规定各缔约国在这件事上进行合作的义务，“尽可能”几个字强调了其重要性。提及国际海洋法 715 把《1988 年公约》与《1982 年海洋法公约》的有关条文联系起来，国际海洋法的有关规则在很大程度上反映在后一个公约中。

第 2 款

2. 缔约国如有正当理由怀疑悬挂其国旗或未挂旗或未示注册标志的船只在进行非法贩运，可请求其他缔约国协助，以制止将该船用于此种目的。

被请求的缔约国应尽其所能提供此种协助。

评注

17.6 第 2 款在缔约国可以请求协助制止使用悬挂其国旗的船只用于非法贩运方面发展了《1982 年海洋法公约》第 108 条第 2 款的文本（见上文第 17.3 段）。与第 108 条相比，本款的规定更适用于没有国籍的船只。716 第二段限定被请求国提供此种协助的义务，因为“尽其所能”一句话承认一些缔约国根据请求全面协助的能力可能有实际限制（见下文第 17.43 至第 17.46 段）。

第 3 款

3. 缔约国如有正当理由怀疑悬挂另一缔约国国旗或显示该国注册标志的船只虽按照国际法行使航行自由但仍在从事非法贩运，可将此事通知船旗国，请其确认注册情况，并可在注册情况获得确认后，请船旗国授权对该船采取适当措施。

评注

17.7 事实证明起草第 3 款时有很大争议。这倒不是对于原则有什么异议，而是由于对它适用的海洋区的说明有分歧。在提交会议审议的草案中，案文提及“任何国家领海外部界限之外的”船只。717 较早的案文曾使用“《联合国海洋法公约》第七部分定义的公海”第一表述。718

715 把这种提法包括在内的一个修正案最初被撤回了（见《正式记录》，第二卷……，全体委员会会议简要记录，第二委员会第 17 次会议，第 34 段），但作为非正式讨论的结果，随后这几个字又加上去了。

716《1982 年公约》在第 92 条（船船的地位）和第 110 条（登临权）中涉及无国籍船只。


718 同上，E/CN.7/1987/2 号文件，第二节（“第 12 条”）。
17.8 第3款提及“按照国际法行使航行自由”和第11款指出根据第十七条采取任何行为必须“适当考虑有必要或不干预或影响沿海国依国际海洋法具有的权利和义务及其管辖权的行使”是支持在领海外限之外行使执法权力的国家和声称其他无在沿海国的专属经济区内采取这种行为的国家之间难以妥协的结果。会议期间的讨论表明，普遍同意《1982年海洋法公约》的规定将构成第十七条的基础，第3款提及的“国际法”和第11款提及的“国际海洋法”是《1982年公约》中体现的法律。

17.9 根据《1982年海洋法公约》第87条第1款(a)项和第58条第1款，所有国家，不管是沿海国还是内陆国，都享有在公海和专属经济区上航行的自由。这一自由要受船旗国按照《1982年公约》和其他国际法准则行事、适当考虑其他国家在公海的利益并适当考虑沿海国在专属经济区的权利和义务的普遍责任的制约。《1982年公约》第56条规定了沿海国在专属经济区的权利和义务。

17.10 根据《1988年公约》第十七条第11款授予充分保障的，《1982年海洋法公约》规定的沿海国的权利和义务和行使管辖权，包括沿海国在其毗连区行使管辖权，以防止和惩罚对其海关和财政法规的违反，及行使紧追权的权利。

17.11 与前一项权利有关，国家做法表明这一假设，并且会议期间进行的讨论也普遍支持这一假设，即非法垄断麻醉药品和精神药物被认为构成对沿海国领土或领海内海关和财政法规的违反。《1982年海洋法公约》第33条允许沿海国建立一个毗连区，从测量领海宽度的基线起最多延长24海里，它可以在该区内行使防止违反其“海关、财政、移民或海事法规”所需的管辖。

17.12 若干代表在全体会议上就他们对谈判中达成的立场的理解作了发言。美国代表说，他认为，第11款指的是“沿海国在其领海外限之外拥有权利的少数几种情况。涉及在专属经济区和公海紧追的情况和行使毗连区管辖权的情况”。这一款并不意味着核准任何沿海国对在专属经济区进行非法贩运

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719 同上，E/CN.7/1987/2号文件，第二节（“第12条”）。
720 同上，E/CN.7/1987/2号文件，第二节（“第12条”）。
721 同上，E/CN.7/1987/2号文件，第二节（“第12条”）。
722 同上，第111条。
723 例如，见《正式记录》，第二卷……。全体委员会会议摘要，第二委员会第17次会议，第7至第52段、第20次会议，第1至第4段、第28次会议，第1段；和第29次会议，第1至第128段和附件。
拦截提出任何更广泛的要求。荷兰代表作了大意类似的发言，他的发言得到联合王国代表的支持。毛里塔尼亚代表说，公约将在“不影响沿海国的领海权，不影响国际海洋法规定的在毗连区和专属经济区的特权的情况下”适用。印度代表和乌克兰苏维埃社会主义共和国代表提交了大意相同的书面意见，供按照第二委员会通过的程序载入《正式会议》。276

17.13 在第3款，要求有正当理由怀疑有关船只从事非法贩运的缔约国与船旗国联系，首先确认船只的注册情况，其次获得采取适当措施的授权。对于提出请求的方式及请求的内容没有谈到；这与相互法律协助方面的第七条的详细规定形成鲜明对比。不过，仍有限文审议的第7款的程序性规定，而第4款涉及要采取的“适当措施”。

17.14 在第3款及事实上在第4款，都提及船旗国的授权。措辞经过慎重选择，以强调船旗国在对其船只行使主权时作出的决定的肯定性质。本条中没有规定打算以任何方式影响船旗国对其船只的权利，船旗国没有义务提供所请求的授权；是否允许另一缔约国针对其船只采取行动完全由该国自行决定。277

17.15 在讨论第3款时，加拿大代表指出，在对本款所涉及的请求类别作出答复时，加拿大政府的做法不是给予许可，而是对所提的行动不表示反对。加拿大政府认为这种做法符合本公约的规定。278

第 4 款

4. 按照本条第3款，或按照请求国和船旗国之间有效的条约，或按照其互相达成的任何其他协议或安排，除其他事项外，船旗国还可以授权请求国：

(a) 登船；

(b) 搜查船只；

(c) 如查获涉及非法贩运的证据，对该船只、船上人员和货物采取适当行动。

评注

17.16 第4款说明可以采取的行动。就它规定根据该款可以授权的行动而言，它与第3款有关，但它还对按照有关缔约国之间有效的条约或按照其互相达成的任何其他协议或安排可以授权的做法作了编纂。

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274 同上，第81和第83段。
275 同上，第84段。
276 同上，全体委员会会议简要记录，第二委员会第29次会议，附件。
277 同上，第29次会议，第7段。
278 同上，第29次会议，附件。
第 5 款

5. 如依本条采取行动，有关缔约国应适当注意不得危害海上生命安全，船只和货物的安全，也不得损害该船旗国或任何其他有关国家的商业和法律利益。

评注

17.18 加进第 5 款是为了确保依第 3 和第 4 款采取的行动不危害有关船只，其海员或货物，或船旗国或任何其他有关国家的法律权利或合法商业权益。措辞是经过仔细选择的：缔约国应“应当注意”文本中所列的考虑因素；没有绝对的语言，例如承认如果阻止或耽搁船只前行动的话，对合法商业利益的某种损害是不可避免的。

第 6 款

6. 只要符合本条第 1 款所规定的义务，船旗国可使其授权服从它与请求国之间相互议定的条件，包括关于责任的条件。

评注

17.19 已经强调过（见上文第 17.14 段），任何缔约国不是必须授予第 3 和第 4 款提到的授权。还有人提出其他的观点，认为如果给予授权，授权可以服从条件；它不是一种“要么全有要么全无”的情况。虽然条件是相互议定的。但现实是船旗国可以规定它准备给予必要授权的条件（见下文第 17.35 至第 17.36 段）。

17.20 列入这一规定背后有其特殊关注，这反映在最后一句话中提及关于责任的条件。所谓的责任或赔偿责任指在登船或搜查船只或采取进一步的适当行动的过程中可能造成对船只或其货物或任何第三方的损害，或对海员的损伤。对于被请求国遭受的损害是否有责任是有关任何索赔的法律要处理的事情；它不是在本公约范围内处理的。在这种情况下，提及相互议定条件可能会更有意义，因为可以相互议定对任何索赔的管辖权和法律选择；不过，这将在两个缔约国拟订标准做法时而不是根据立即授权的请求加以适当考虑。

729 同上，第 29 次会议，第 8 段。
730 同上。
731 同下文关于第十七条第 6 款的评论。
732 为了照顾不同法律制度的需要，“责任”一词更好些。
第 7 款

7. 为本条第 3 和第 4 款的目的，缔约国应以有述的方式答复另一缔约国要求确定悬挂其国旗的船只是否有此权利的请求，并答复根据第 3 款规定提出的授权请求。各缔约国在成为本公约缔约国时，应指定一个机构，或必要时指定若干机构接受并答复这类请求。这类指定应在指定后一个月内通过秘书长通知其他所有缔约国。

评注

17.21 在第 7 款中，要求缔约国迅速答复按照第 3 和第 4 款提出的要求，并且作为保证这种迅速的一种方式，引进了指定机构对要求作出答复的概念。必要时”缔约国可指定不止一个机构。公约文本并不鼓励这一点（因为在实践中，如果请求一直发给一个不适当的机构，这样反而可能导致拖延），但法律和地理考虑因素可能使得就不同的领域指定不同的机构成为必不可少（见下文第 17.28 至第 17.31 段）。文本设想与指定机构直接联系而不是通过非直接办法，如通过外交渠道，鉴于这类请求的紧迫性，这种直接联系是十分可取的。

第 8 款

8. 已按照本条采取了任何行动的缔约国，应将行动的结果迅速通知有关船舶国旗国。

评注

17.22 第 8 款的规定强调船旗国对就其船只采取的行动的权力。从更实用方面讲，应迅速交换情报，这有助于有关当局之间保持良好关系。

第 9 款

9. 缔约国应考虑达成双边和区域协定或安排，以执行本条各项规定或增强其有效性。

评注

17.23 第 9 款是本公约的劝告性条款之一，除了考虑某些可能性之外，没有给缔约国施加任何义务。第 4 款明确谈到就按本款可能给予的授权缔约国之间达成协议或安排的可能性。本规定表明这类协议和安排对本条涉及的各类问题的效用。它们可以是双边的或区域性的，可以涉及本条条款的具体执行（例如，确保迅速处理请求的联系手段）或增强其有效性（例如，本着本公约第九条第 1 款的精神交换有关情报）。
第十款

10. 根据本条第4款采取的行动只能由军舰或军用飞机或具有执行公务的明显可识别标志并获得有关授权的船舶或飞机进行。

注

17.24 第10款的措辞以《1982年海洋法公约》第107条和第111条第5款的措辞为基础。这一款的目的是限制可以适当用于拦截行动的船舶和飞机的类型。

第十一款

11. 根据本条采取任何行动均应适当注意有必要干预或影响沿海国依国际海洋法具有的权利和义务及其实管辖权的行使。

注

17.25 第11款特别重要，已作为本条第3款草拟工作的长期讨论的决议的一部分列入，并在关于该款的注中对其进行审查 (见上文第17.8至第17.10段)。

执行考虑：整个第十七条

一般评论

17.27 在第十七条中，设想执法活动在领海外限之外，并以“依照国际海洋法”的方式进行 ( 见上文第 17.7 至第 17.9 段 )。对先存在的国际海洋法准则的这种关注的中心进一步反映在列入第 11 款这一非减损条款的决定中。“国际海洋法”体现在《1982 年海洋法公约》的规定中。因此，确保按照该公约执行第十七条是重要的。鉴于这一复杂的国际法分支的专业性，编写一个实用指导手册对于参与决策过程的人可能证明是有用的。

拦截悬挂外国旗帜的船只

17.28 在实际情况下，第十七条适用的最常见情况是在一国执法当局希望对悬挂《1988 年公约》另一缔约国旗帜的船只采取行动时。虽然并非所有国家都有在海域使用国家警力的技术能力，但所有国家都是其他国家根据第 3 和第 4 款提出情报或授权请求的潜在接受国。因此，在第 7 款中，要求各缔约国指定一个或几个机构接受并答复这类请求。738 反过来这类指定必须转达秘书长，秘书长将通知所有其他参与的国家。这种必不可少的联系情报，包括地址、电话和传真号码及工作时间，由联合国公布并定期更新。739

17.29 虽然指定的国家机构设在什么地方算适当以及授予它什么样的权力和职能要由各国确定，但它需要有能力有效和高效地答复接收请求一事却比其他国家合作领域的任何事情都还要重要。这是由于这一事实造成的，这类请求就是为了采取强制行动而提出的而且直接涉及开放海域所具有的常常是困难的行为环境。鉴于根据第 3 和第 4 款针对悬挂其他缔约国旗帜的船只的执法行动只能在船旗国事先授权的情况下进行这一事实，如果对这类请求拖延答复，就常常会失去采取有效措施的机会。

17.30 由于认识到这一事实，要求 1995 年《欧洲委员会协定》的缔约国“尽可能”确保它们的指定机构能在二十四小时不分昼夜一周七天设有周末随时对授权请求作出答复。740 而且，它们有义务“尽快，在可行的情况下在接到请求四小时之内传达作出的决定……”。741 海事合作工作组在其报告中也强调迅速作出决定和就此高效传达的重要性。742

17.31 为了确保按照第 7 款要求，指定机构能迅捷对另一缔约国的请求作出答复，十分需要规定有关国家当局 ( 如起草者所明显设想的那样 ) 之间的直接联系而不是使用麻烦得多的外交渠道。因此，提供适当的电话和传真联系应是一个高度优先的事项。在这种直接联系不可行的情况下，缔约国似宜考虑使用通过刑警组织或世界海关组织可利用的联系渠道。743

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738 这也包括授权船只悬挂其国旗的内陆国。
739 〈按照国际药物管制条约指定的国家主管当局〉，由联合国以 ST/NAR.3 的编号汇编出版。
740 1995 年《欧洲委员会协定》，第 17 条第 1 款。
741 同上，第 7 条。
743 例如，见 1995 年《欧洲委员会协定》，第 18 条第 2 款。
17.32 根据第十七条第 3 和第 4 款，指定机构将服从至少两类不同但明显相关的请求。第一类是确认一可疑船只的注册情况 (及国籍)，为此，各国保留一个载有受权悬挂其国旗的船只的信息的登记册，指定机构可以容易地查阅该登记册至关重要。\footnote{海事合作工作组会议的报告，1994 年 9 月 19 日至 23 日和 1995 年 2 月 20 日至 24 日在维也纳举行 (E/CN.7/1995/13)，建议 1。} 然而，人们普遍承认，某些国家在更新其这方面的国内系统时可能需要技术援助，以便确保掌握的信息能够迅速对请求作出答复。

17.33 这类措施除其他之外，可以包括登记和搜查船只，“查获涉及非法贩运的证据，”“对该船只、船上人员和货物采取适当行动”。\footnote{同上，第 4 款 (c) 项。} 任何这类决定完全由被请求国自行作出，但得服从某些条件。\footnote{见上文关于第十七条第 6 款的评论。} 为了能迅速而持续地对这类请求作出答复，需要向被请求国提供关于每个案件事实的充分的有关情报。还需要补定既定的政策框架，根据该政策框架可以决定是否对请求作出肯定答复，如果是的话，要服从哪些条件，如果有条件的话。


1. 请求缔约国名称，包括发出请求的当局和负责采取措施的机构
2. 船舶说明，包括注册的船名、船旗国以及与该船舶有关的任何其他信息
3. 已知的有关航程和船员的详情
4. 目测情况和天气报告
5. 提出请求的理由 (列明作为干预理由的种种情况)
6. 打算采取的行动
7. 任何有关资料
8. 干预国请求的行动 (包括确认船舶的注册和准许搜查船，如适用) 以及行动的时限。

当然，任何缔约国可以改变它在这方面的要求，以及在任何情况下要求提供其他信息。

17.35 如上所述，根据第十七条第 6 款，船旗国得使其授权服从它与请求国之间“相互议定的”条件。虽然具体提到了关于责任的条件，但很明显船旗国在
这方面的权利是没有限制的。然而，实际上，同样显而易见的是，如果要充分利用实现第十七条的潜力，必须谨慎和适度地使用这种保护被请求国利益的便利。如 1995 年《欧洲委员会协定》正式解释性报告所指出的那样：“如果船旗国提出干预国不能接受的条件，它将不予干预。因此，委员会同意各国应谨慎使用条件，只有在确实必要时才使用它们。”当船旗国提出条件，随后基于第十七条进行干预时，它们对干预国有约束力。因此，遵守这些条件可能引发国际责任和法律责任。

17.36 这方面的国家实践揭示出种种问题，事实证明这些问题对各个船旗国非常重要。除了由执法行动产生的对损失、损坏或伤害所受的赔偿责任外，还特别包括通常由干预国承担的费用。使用所获得情报或证据的限制。船旗国的国民待遇，在具体时限内保留对连续行使对船只或船上人员的管辖权的反对权利，及对把船只带到第三国管辖区的限制。不过，重要的是，应抵制为了重新安排第十七条的计划而施加条件的任何诱人的图谋。如果一缔约国由于宪法、法律和其他原因得出结论说需要进行这种彻底修订，则应当考虑根据第 9 款规定的授权谈判双边或区域协议或安排。如果例如想要规定一般提前授权登船和采取措施而有关大大简化《1988 年公约》的计划，也须采取这种办法。

17.37 由于给予请求国授权始终是斟酌决定的，应为有效和立即行使这种自由裁量权作出安排。为行使这一权力确定适当的框架将与指定的国家当局应设在政府系统内哪个部门这一问题有关。第十七条不要求在拒绝授权请求的情况下向请求国解释原因，但在适当情况下指出作决定的依据将符合公约的精神。确实，一些国家可能认为制定这样一项政策是适当的，即根据这一政策未经授权指定国家当局之间进行事先磋商不得拒绝请求。

17.38 鉴于这里所设想的那类授权行动背离了船旗国在公海上的专属管辖权，慎重的做法将是所有国家采取步骤减少悬挂其国旗的船舶的经营着和其他有关实

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270 1995 年《欧洲委员会协定解释性报告》，第 44 段。
271 见上文关于第十七条第 6 款的评论。
273 例如，见 1995 年《欧洲委员会协定》，第 23 和第 24 条。
274 1995 年《欧洲委员会协定》，第 2 条第 2 款。
275 例如，见 1981 年联合王国和美国之间的换文，第 4 和第 5 段。
276 例如，见 1995 年《欧洲委员会协定》解释性报告，第 44 段。
277 例如，可以论证，充分实行船旗国“优先管辖权”的概念所要求的复杂规定，可以通过求助于在海上非法贩运方面反映这一概念的双边或多边文书来很好满足（见 1990 年意大利和西班牙之间的条约和 1995 年《欧洲委员会协定》）。
278 1991 年联合王国和美国之间的换文使用的提前“放弃反对”制度适合这种情况。1991 年意大利和西班牙之间的条约在第 5 款中使用“机构”的概念以取得类似的结果。然而，应当指出，该条约是在船旗国优先管辖权的范围内做的。
279 与有关相互法律协助的第七条第 16 款采取的立场大不相同。
际利益的人对第十七条规定的安排的性质可能产生的误解。1995 年《欧洲委员会协定》第 22 条中明确强调了这一点, 该条内容为：

“各缔约国应采取必要的措施, 通知悬挂其国旗的船舶的船主和船长本协定的缔约国可被授权为本协定具体规定的在任何缔约国的领海之外登船, 并特别通知他们遵守行使这一权力的干預国的登船方发出的指令。”

这类倡议可能只是把那些从事海上运输的人联合起来共同努力打击海上非法贩运麻醉品的更广泛计划的一部分而已。760

17.39 第十七条也对请求国施加某些义务和限制。因此, 根据第 10 款并按照通常国际惯例, 执法行动只能由某些类别的公有船舶和飞机进行。而且, 第 8 款要求迅速向船东国报告采取的任何行动的结果。最后, 它必须“适当注意不得损害海上生命安全, 该船只和货物的安全, 也不得损害该船国或任何其他有关国家的商业和法律利益”。761

17.40 在履行其义务时, 干预国需要确保执法人员得到适当培训和指导, 制定保证遵守公认的国际准则的程序。例如, 至关重要的是应作出安排, 保证在阻止和登上船只时, 使用武装力量仅作为最后手段, 并以符合习惯国际法的方式进行。762 同样, 必须有切实可行的安排, 指定国家当局可据此迅速将旗船国可能施加的和他们必须遵守的任何条件和限制通知负责的执法当局。

17.41 如同在第四条的评论中强调的那样(见上文第 4.27 至第 4.29 段), 制定适当的执行立法对于第十七条规定的合作制度正确运作至关重要。特别有关的是据此对悬挂外国旗的船只的全面强制执行权的规定。例如, 1994 年《爱尔兰刑事司法法》附表一 763 除其他事情之外, 载有对搜查和获取情报的权力、逮捕和扣押的权力、使用合理的武力、出示权力的证据、有关罪行的规定和对有关官员提供适当的法律等具体处理的办法。各缔约国应考虑在这方面需要确保适当地实施。

17.42 潜在干预国提前考虑他们通常利用请求授权的便利条件也很重要。例如, 起草 1995 年《欧洲委员会协定》的专家委员会认为, 应考虑“对不利于预定定期客运服务船舶或从事商业贸易的较大船舶采取行动的理由。对于这类船舶, 常常可在下一个停靠的港口进行搜查, 特别是如果下一个停靠港口位于本协定或《日内瓦公约》缔约国的领土内的话。”764 而且, 在某些情况下, 可能需要使用替代合作执法战略。海事合作工作组认为, 如果行动环境允许, “应优先考虑对船进行监视, 更多地实行控制下交付, 以破获犯罪集团作为目标, 而不必

760 关于这类方案的性质和范围的进一步想法, 见《海事合作工作组的报告》(ECN.7/1995/13), 建议 23。
761 第十七条 5 款。
762 例如, 见 1995 年《欧洲委员会协定》, 第 2 条第 1 款 (d) 项及第 2 和第 3 款。
763 1994 年第 15 号法。
764 1995 年欧洲委员会协定解释性报告, 第 53 段。
登船检查作为目标。在此种情况下，应考虑采取措施，确保非法货物原封不动，并防止可能在船抵达预定目的地之前转移或转运非法货物。”

其他形式的合作

17.43 第十七条的主要重点是便利对涉及其他缔约国船舶海上非法贩运麻醉品采取执法行动，但又不仅仅与这件事有关。第2款的条款突出表明了这一事实，该款明确规定向制止将自己的船只或无国籍船只用于这种非法贩运目的船旗国提供协助。不过，文本都没有就进行这种合作活动的方式或限度提供进一步的指导。该项规定仅仅表明将由公约缔约国“尽其所能”提供此种协助。评估在每种情况下是否拥有有关的能力，则只有靠被请求国。

17.44 就向船旗国提供协助而言，可以预期请求通常要求采取第4款规定的一些或所有行动。不过，也可以为多种其他的求求协助，其中可能包括搜查可疑船只，防止它卸货或转运货物，便利船旗国执法官员登上追踪船等等。船旗国可使其协助请求服从它认为合适的条件和限制，这一点在步骤的性质上未讲明，而《欧洲委员会协定》第4条第2款中则是讲明的。同样，被请求国似宜阐明它准备作出肯定答复的条件。

17.45 有两个问题特别值得考虑，第一个与支付实施请求的费用有关，这笔费用可能很大。如上所述，在干预国主动要求对另一缔约国的船只采取行动的在正常情况下，费用一般由干预国支付。不过，在这里考虑的情况，还没有既定的国际惯例。海事工作组认为，在应船旗国的请求提供协助时，除非另有协议外，船旗国（而非干预国）应支付有关的费用。在欧洲委员会内规定了不同的解决办法。根据《1955年协定》第25条第1款，通常预期被请求国支付有关费用。不过，正如解释性报告指出的，“如果所涉费用巨大或涉及非常费用，可以设想……请请求协助的国家分担干预的费用……”。在这种情况下，有关缔约国必须寻求就分摊费用达成一项协议。如果达不成此种协议，可能就不会进行干预。”类似考虑同样适用于应另一缔约国的请求采取的对无国籍船只的行动。

17.46 考虑到国际惯例，可能值得一些国家特别注意的另一个方面与损害赔偿责任有关。这里出现的问题在于是否应采用向干预国分配责任的多数做法。起草《欧洲委员会协定》的专家委员会认为，需要一项特殊规则。该规则载于该协定第26条第3款，内容如下：“根据第4条[对船旗国的协助]采取的行动而产生的任何损害赔偿责任应由请求国承担，如果损害是由被请求国疏忽或其他可归咎于该国的过失造成的，请求国可以寻求被请求国补偿。”


767《1995年欧洲委员会协定的解释性报告》，第89段。
17.47 在第十七条第 2 款中，还考虑了制止在非法麻醉品贩卖活动中使用“未挂旗或示注册标志”的船只的协助请求。提及这些船只的决定，构成明确承认无国籍船只和根据国际法那些类似于无国籍船只的船只事实上被从事非法麻醉品贩卖的人利用的程度。不过，在这种情况下，与迄今为止考虑的其他合作情况相比有很大不同。特别是不受《1988 年公约》制约的各国，根据《1982 年海洋法公约》第 110 条拥有某些权利，即临检无国籍船只的权利，根据第 92 条第 2 款，无国籍船还包括依方便而悬挂两国国旗的船只。第 110 条指出，行使临检权涉及登船 (第 1 款) 和检查船只。因此，不应当承认请求国附加任何条件或限制的权利。只有被请求国可以决定什么行动是适当的。768 不过，被请求国的义务是应尽其所能提供协助，并且如上所述，它可以在作这种决定时适当考虑经济因素，包括进行任何有关执法活动的预期费用。在某些情况下，可能被认为适当的做法是，是否对一项请求作出肯定的答复取决于对分摊这种费用的协议。769

17.48 虽然第十七条仅专门涉及上文审查的三类协助，但“尽可能充分”合作的义务可以包括与制止海上非法贩运有关的任何其他形式的重要国际活动。海事合作工作组报告中特别强调的一个方面涉及便利和加强通过适当渠道，交换关于涉嫌参与国际麻醉品买卖和有关事项的船只的一般情报。770 工作组特别建议各国尽可能确定并及时直接向其他国家或通过刑警组织、世界海关组织、海事信息网771 或通过参与这一领域工作的其他组织或通信网络，向其他国家通报根据判断可能有助于查明已卷入或将卷入非法贩毒的船舶的那些征兆。772 在其他地方，人们已认识到自动交流情报的重要性。因此，负责实施第十七条的机构应考虑有些最适当的办法可在这方面作出积极贡献。

768 例如，见 1995 年《欧洲委员会协定》，第 5 条第 2 款。
769 例如，见欧洲委员会协定解释性报告，第 89 段。
771 海事信息网是一个国际情报交流系统，用于监测大西洋、波罗的海、北海和地中海的海上交通，由法国（南部海事信息网）和德国（北部海事信息网）的国家海关当局管理。海事信息网只包括商业船只，这些当局管理的对私人游艇或其他非商业船只的类似监视系统，称为游艇信息网。
附件八

1982年《联合国海洋法公约》*（摘录）

第九十一条

船舶的国籍

1. 每个国家应确定对船舶给予国籍。船舶在其领土内登记及船舶悬挂该国旗帜的权利的条件。船舶具有其有权悬挂的旗帜所属国家的国籍。国家和船舶之间必须有真正联系。

2. 每个国家应向其给予悬挂该国旗帜权利的船舶颁发给予该权利的文件。

第九十二条

船舶的地位

1. 船舶航行应仅悬挂一国的旗帜，而且除国际条约或本公约明文规定的例外情形外，在公海上应受该国的专属管辖。除所有权确实转移或变更登记的情形外，船舶在航程中或在停泊港内不得更换其旗帜。

2. 悬挂两国或两国以上旗帜航行并视方便而换用旗帜的船舶，对任何其他国家不得主张其中的任一国籍，并可视同无国籍的船舶。

第九十三条

悬挂联合国、其专门机构和国际原子能机构旗帜的船舶

以上各条不影响用于为联合国、其专门机构或国际原子能机构正式服务并悬挂联合国旗帜的船舶的问题。

* 见《海洋法：1982年 12月 10日联合国海洋法公约正式约文以及附有第三次会议第147号文件第2条的文本》（联合国出版物，出版号：E.87.V.10）。
第九十四条

船旗国的义务

1. 每个国家应对悬挂该国旗帜的船舶有效地行使行政、技术及社会事项上的管辖和控制。

2. 每个国家特别应：

   (a) 保持一本船舶登记册，载列悬挂该国旗帜的船舶的名称和详细情况，但因体积过小而不应在一般接受的国际规章规定范围内的船舶除外；

   (b) 根据其国内法，就有关每艘悬挂该国旗帜的船舶的行政、技术和社会事项，对该船及其船长、高级船员和船员行使管辖权。

3. 每个国家对悬挂该国旗帜的船舶，除其他外，应就下列各项采取为保证海上安全所必要的措施：

   (a) 船舶的构造、装备和适航条件；

   (b) 船舶的人员配备、船员的劳动条件和训练，同时考虑到适用的国际文件；

   (c) 信号的使用、通信的维持和碰撞的防止。

4. 这种措施应包括为确保下列事项所必要的措施：

   (a) 每艘船舶，在登记前及其后适当的间隔期间，接受合格的船舶检验人的检查，并在船上备有船舶安全航行所需要的海图、航海出版物以及航行装备和仪器；

   (b) 每艘船舶都由具备适当资格、特别是具备航海术、航行、通信和海洋工程方面资格的船长和高级船员负责，而且船员的资格和人数与船舶种类、大小、机械和装备都是相称的；

   (c) 船长、高级船员和在适当范围内的船员，应充分熟悉并应遵守关于海上生命安全、防止碰撞、防止、减少和控制海洋污染和维持无线电通信所适用的国际规章。

5. 每一国家采取第3和第4款要求的措施时，须遵守一般接受的国际规章、程序和惯例，并采取为保证这些规章、程序和惯例得到遵行所必要的任何步骤。

6. 一个国家如有明确理由相信对某一船舶未行使适当的管辖和管制，可将这项事实通知船旗国。船旗国接收到该通知后，应对这一事项进行调查，并于适当时采取任何必要行动，以弥补这种情况。

7. 每一国家对于涉及悬挂该国旗帜的船舶在公海上因海难或航行事故对另一国国民造成死亡或严重伤害，或对另一国的船舶或设施，或海洋环境造成严重损害的每一事件，都应由适当的合格人士一人或数人或在一个这种人士在场的情况下进行调查。对于该另一国就任何这种海难或航行事故进行的任何调查，船旗国应与该另一国合作。
第一〇六条

无足够理由扣押的赔偿责任

如果扣押涉及有海盗行为嫌疑的船舶或飞机并无足够的理由，扣押国应向船舶或飞机所属的国家负担因扣押而造成的任何损失或损害的赔偿责任。

第一〇八条

麻醉药品或精神调理物质的非法贩运

1. 所有国家应进行合作，以制止船舶违反国际公约在海上从事非法贩运麻醉药品和精神调理物质。

2. 任何国家如有合理根据认为一艘悬挂其旗帜的船舶从事非法贩运麻醉药品或精神调理物质，可要求其他国家合作，制止这种贩运。

第一〇九条

登临权

1. 除条约授权的干涉行为外，军舰在公海上遇到按照第十九十五和第十九十六条享有完全豁免权的船舶以外的外国船舶，非有合理根据认为有下列嫌疑，不得登临该船：
   
   (a) 该船从事海盗行为；
   
   (b) 该船从事奴隶贩卖；
   
   (c) 该船从事未经许可的广播而且军舰的船旗国依据第一〇九条有管辖权；
   
   (d) 该船没有国籍；或
   
   (e) 该船虽悬挂外国旗帜或拒不展示其旗帜，而事实上却与该军舰属同国籍。

2. 在第 1 款规定的情形下，军舰可查核该船悬挂其旗帜的权利。为此目的，军舰可派一艘由一名军官指挥的小艇到该嫌疑船舶。如果检验船舶文件后仍有嫌疑，军舰可进一步在该船上进行检查，但检查须尽量审慎进行。

3. 如果嫌疑经证明为无根据，而且被登临的船舶并未从事嫌疑的任何行为，对该船舶可能遭受的任何损失或损害应予赔偿。

4. 这些规定亦适用于军用飞机。

5. 这些规定也适用于经正式授权并有清楚标志可以识别的为政府服务的任何其他船舶或飞机。
第一章

紧追权

1. 沿海国主管当局在发现一外国船只违反该国法律时，可对该外国船只进行紧追。此项紧追须在外国船只或其小艇之一在追逐国的水域，群岛水域、领域或毗连区内开始，而且只有在追逐未曾中断，才可在领海或毗连区外继续进行。当外国船只在领海或毗连区内接获驶离命令时，发出命令的船只并有必要也在领海或毗连区内。如外国船只是在第三十三条所规定的毗连区内，追逐只有在设立该区所保护的权利遭到侵犯的情形下才可进行。

2. 对于在专属经济区内或在大陆架上，包括大陆架上设施周围的安全地带内，违反沿海国按照本公约适用于专属经济区或大陆架包括这种安全地带的法律和规章的行为，应比照适用紧追权。

3. 紧追权在被追逐的船只进入其本国领海或第三国领海时立即终止。

4. 除非追逐的船只以可被的实际情况认定被追逐的船只或其小艇之一或作为一艘进行活动而以被追逐的船只为母船的其他船只是在领海范围内，或者，根据情况，在毗连区或专属经济区内或在大陆架上，紧追不得认为已经开始。追逐只有在外国船只视听所及的距离内发出视觉或听觉的停驶信号后，才可开始。

5. 紧追权只可由军舰、军用飞机或其他有清楚标志可以识别的为政府服务并经授权紧追的船只或飞机行使。

6. 在飞机进行紧追时：
   (a) 应照第条第 1 至第 4 款的规定；
   (b) 发出停驶命令的飞机，除非其本身能逮捕该船只，否则须其本身积极追逐船只直至其所召唤的沿海军船或另一飞机前来接替追逐为止。飞机仅发现船只犯法或有犯法嫌疑，如果该飞机本身或接着无间断地进行追逐的其他飞机或船只既未命令该船停驶也未进行追逐，则不足以构成在领海外逮捕的理由。

7. 在一国管辖范围内被逮捕并被押解到该国港口以便主管当局审问的船只，不得仅以其在航行中由于情况需要而曾被押解通过专属经济区的或公海的一部分为理由而要求释放。

8. 在无正当理由行使紧追权的情况下，在领海以外被命令停驶或被逮捕的船只，对于可能因此遭受的任何损失或损害应获赔偿。
附件九
海上缉毒执法培训指南（摘录）

第2章
使用武力和火器

导言

登船军官使用武力和火器主要受国内法以及若干国际文书管理。本节对有关使用武力的一些国际法的重要原则以及可适用的规范和标准作一归纳。不过，至关重要的是你们还应完全熟悉贵国有关这方面的国内法。（也见关于“控制船员”的第十二章和附件四“违禁品拦截查检技巧一览表”。）

你们应区分以下两种情况：
- 使用武力须向特别法律依据，例如在面临死亡或受到严重伤害威胁必须保护自己或他人的情况下，和
- 必须有使用武力的法律依据，例如，拦阻拒绝按指示方向行驶的船只。

使用武力应被理解为在所有情况下使用从最低到最高不等的水平均证明是正当的一个不可分割的统一行动。作为一项总的原则，即使非使用武力不可你也应尽量少用。

人的尊严

在履行职责时应始终尊重和维护人的尊严。

火器

使用火器的限度

你不对人使用火器，除非有以下情况以及只有在缺乏较不极端的手段时：
- 在国家法律授权使用火器时。
- 面临死亡或严重伤害威胁为保护自己或他人。

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1见《执法官员使用武力和火器的基本原则》，1990年12月18日第45/121号决议。
• 防止一起涉及严重威胁生命的特别严重的犯罪。

• 逮捕正对生命造成严重威胁和反抗制止此种威胁的适当行动的人员。

• 防止正对生命造成严重威胁的某人逃逸。

使用火器前应做些什么

如果你在上文所述情况下确实要对人使用火器，你必须:

• 认同自己是一名执法人员。

• 给予你打算使用火器的明确警告。

• 给足对方听从警告的时间，除非这样做将:
  
  (a) 对你产生严重危险;
  
  (b) 对他人产生死亡或严重伤害的严重危险;
  
  (c) 在此情况下显然不适合或没有效果。

指导使用火器的原则

每当不可避免要使用武力或火器时，你应:

• 行事克制并仅使用必要量的武力来实现正当的执法目的。

• 尊重人的生命并对人造成最低限度的伤害。

• 对财产造成最低限度的损害。

• 尽快帮助受伤的任何人并在需要时提供医疗援助。

• 尽快向上级官员报告。

逮捕

定义

逮捕可定义为“对被指控犯罪人员拘捕的行为”。

实施逮捕

你不得实施任何非法或不必要的逮捕。你应了解关于贵国国内法规定的逮捕和拘押的程序。

安全考虑

安全始终第一。要牢记由于跳弹,走火和地面不稳固击发武器可能产生危险。必须在不违反国内法的情况下接受安全使用武器的专门培训。
决策者的指导原则

国内法

政府和执法机构应通过和实施关于执法人员使用武力和火器的规则和规章。这些规则应具体规定授权执法人员携带和使用火器的具体情况并规定所允许的火器和弹药类型。应按照相对于要达到的正当目标的相称原则限制使用武力。

武器类型

海上和陆地上使用火器有不同的考虑。因此，应为培训军官海上使用武器制定不同的标准；如在登船培训期间不应使用装有弹药的武器。

执法人员应配备各种不同类型的武器，以便区别情况使用武力，其中包括使用非致命失能武器，减少使用致死或致伤武力。他们还应配备自卫和安全装备，如头盔和防弹背心等。

培训

政府和执法机构应确保所有执法人员均得到培训并按照使用武力的适当水平标准受到测试。要求携带武器的那些执法人员，只有完成了使用武器的专门培训之后才应授权携带武器。

国际文书

有些条约，如《公民及政治权利国际公约》对其缔约国施加了有法律约束力的义务。其他一些条约，如《日内瓦公约》具有习惯国际法的地位。相比之下，其他一些标准和规范，如《执法人员行为守则》提供已被接受的国际规范的范本作为各国的指南。

决策者应顾及可适用的国际文书，其中包括下文列举的这些文书：

- 《公民及政治权利国际公约》（1966 年 12 月 16 日联合国大会通过，从 1976 年 3 月 23 日起生效）。
- 《禁止酷刑和其他残忍、不人道或有辱人格的待遇或处罚公约》（1984 年 12 月 10 日大会通过，并从 1987 年 6 月 26 日起生效）。
- 《囚犯待遇最低限度标准规则》（1957 年 7 月 31 日经济及社会理事会第 663（XXIV 号决议）。
- 《保护所有遭受任何形式拘留或监禁的人的原则》（1988 年 12 月 9 日大会第 43/173 号决议）。
- 《执法人员行为守则》（1979 年 12 月 17 日大会第 34/169 号决议）。
- 《执法人员使用武力和火器的基本原则》（1990 年 12 月 18 日大会第 45/121 号决议）。
A. Agreement on Illicit Traffic by Sea, Implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

Council of Europe, European Treaty Series—No. 156, Strasbourg, 31 January 1995
Entry into force: 1 May 2002
States parties as at 28 August 2002: Austria, Cyprus, Germany, Hungary, Norway, Romania and Slovenia

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 cooperation on an international scale;

Desiring to increase their cooperation 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 hovercrafts and submersible crafts.

CHAPTER II. INTERNATIONAL COOPERATION

Section 1. General provisions

Article 2. General principles

1. The Parties shall cooperate 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 endeavour 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 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.
一、导言

本指南是根据麻醉药品委员会第 44/6 号决议起草的，目的在于为负责提出和（或）回答根据《1988 年联合国禁止非法贩运麻醉药品和精神药物公约》（下称《1988 年公约》）第 17 条提出的请求的国家主管当局提供协助。

指南载列了一系列附件，目的在于就实际执行、法律背景和参考材料提供一步步的指导。在这些附件中有指南提要（附件一）、示范格式（附件二、三和四）、词语汇编（附件五）以及《1988 年公约》相关摘录及《1988 年公约评注》摘录和 1982 年《联合国海洋法公约》的摘录（附件六、七和八）。此外还包括了作为参考材料的打击海上非法贩运药物双边和多边合作协定的一些例子（附件十），以及最近司法裁决方面的一些实例（附件十一）。附件十和十一没有翻译。


1 第一次以黑体字出现的词语在附件五的词语汇编中下了定义。
2 附件六为《1988 年公约》第 17 条的全文。
3 附件八为《海洋法公约》第 108 条的全文。
4 附件九为《海洋法公约》的参考章节，作为国家主管当局可资利用的一种资源，它们会发现这些参考章节是有用的。
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.

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) (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 subparagraph (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 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 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 cooperate 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 endeavours 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 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

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.

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 Cooperation Council.

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 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:

(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.

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 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 cooperation.

**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 insofar 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.

**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 nonmember 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 appendix 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.

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.

Appendix

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.

B. Agreement between the Government of the United States of America and the Government of the Republic of Costa Rica concerning Cooperation to Suppress Illicit Traffic and related exchange of correspondence

(Entry into force: 19 November 1999)

PREAMBLE

The Government of the United States of America and the Government of the Republic of Costa Rica (hereinafter the Parties);

Bearing in mind the complex nature of the problem of illicit traffic by sea;


Recalling that the 1988 Convention requires the Parties to consider entering into bilateral agreements to carry out, or to 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;
Conscious of the fact that, in order to combat drug-related activities effectively and efficiently, the active participation of all States affected is needed, that is, consumer and producer States, States whose territories are used as trans-shipment points for narcotic drugs, and States used to launder the proceeds of drug trafficking;

Taking into account that the Government of Costa Rica does not have sufficient technical and material resources to assume an active and forceful role in international counter-narcotics activities;

Recognizing that the United States Coast Guard is a law enforcement body within the United States Department of Transportation; and

Conscious of the fact that Costa Rica is experiencing increased use of its maritime zones in the Pacific Ocean and Caribbean Sea for the trans-shipment of drugs;

Have agreed as follows:

I. DEFINITIONS

In this Agreement, it shall be understood that:

1. Illicit traffic has the same meaning as in article 1 (m) of the 1988 Convention.

2. Costa Rican waters and airspace means the territorial sea and internal waters of Costa Rica, including Coco Island and the air space over Costa Rica.

3. Law enforcement vessels means 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 for the Government of the Republic of Costa Rica, the Ministry of Public Security, the Maritime Surveillance Service, the Air Surveillance Service, and the Drug Control Police, without prejudice to the powers of the appropriate judicial authorities, and, for the Government of the United States of America, the United States Coast Guard.


7. Ship-rider means one or more law enforcement officials, including boarding teams, of one Party authorized to embark on a law enforcement vessel of the other Party.

8. 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 involved in illicit traffic.

II. NATURE AND SCOPE OF AGREEMENT

1. The Parties shall cooperate in combating illicit traffic by sea to the fullest extent possible, consistent with available law enforcement resources and related priorities.

2. The Government of the United States of America shall continue to provide the Government of Costa Rica with available information collected by electronic, air and maritime surveillance means, on the presence of suspect vessels or aircraft in or over Costa Rican waters or airspace, so that the law enforcement authorities of Costa Rica may take appropriate control measures. The Parties undertake to agree on procedures for improving intelligence sharing.

III. OPERATIONS IN AND OVER NATIONAL WATERS

Operations to suppress illicit traffic in and over the waters of a Party are subject to the authority of that Party.
IV. PROGRAMME FOR LAW ENFORCEMENT OFFICIALS ABOARD THE OTHER PARTY’S VESSELS

1. The Parties shall establish a joint law enforcement ship-rider programme between their law enforcement authorities. Each Party may designate a coordinator to organize its programme activities and to notify the other Party of the types of vessels and officials involved in the programme.

2. The Government of Costa Rica may designate qualified law enforcement officials to act as law enforcement ship-riders. The Government of Costa Rica may assign boarding teams to conduct boardings, searches and detentions from United States law enforcement vessels under the flag of Costa Rica of suspect Costa Rican vessels and other suspect vessels located in Costa Rican waters in accordance with paragraph 5, subject to subparagraphs (b) and (c) of paragraph 6. Subject to Costa Rican law, these ship-riders may, in appropriate circumstances:

   (a) Embark on United States law enforcement vessels;
   (b) Authorize the pursuit, by the United States law enforcement vessels on which they are embarked, of suspect vessels and aircraft fleeing into Costa Rican waters;
   (c) Authorize the United States law enforcement vessels on which they are embarked to conduct patrols to suppress illicit traffic in Costa Rican waters; and
   (d) Enforce the laws of Costa Rica in Costa Rican waters, or seaward therefrom in the exercise of the right of hot pursuit or otherwise in accordance with international law.

3. The Government of the United States of America may designate qualified law enforcement officials to act as law enforcement ship-riders. Subject to United States law, these ship-riders may, in appropriate circumstances:

   (a) Embark on Costa Rican law enforcement vessels;
   (b) Advise Costa Rican law enforcement officials in the conduct of boardings of vessels to enforce the laws of Costa Rica;
   (c) Enforce, seaward of the territorial sea of Costa Rica, the laws of the United States where authorized to do so, in accordance with the principles of international law; and
   (d) Authorize the Costa Rican vessels on which they are embarked to assist in the enforcement of the laws of the United States seaward of the territorial sea of Costa Rica, in accordance with the principles of international law.

4. The Government of the United States of America shall, whenever feasible, assign as ship-riders persons fluent in Spanish, and to have liaison officials fluent in Spanish on board United States law enforcement vessels on which Costa Rican ship-riders are embarked.

5. When a ship-rider is embarked on the other Party’s vessel, and the enforcement action being carried out is pursuant to the ship-rider’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 ship-rider, except as follows:

   (a) Crewmembers of the other Party’s vessel may assist in any such action if expressly requested to do so by the ship-rider 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; and
   (b) Such crewmembers may use force in self-defence, in accordance with the applicable laws and policies.

6. The Government of the United States of America may only conduct operations to suppress illicit traffic in Costa Rican waters and airspace with the permission of the Government of the Republic of Costa Rica in any of the following circumstances:

   (a) An embarked Costa Rican ship-rider so authorizes;
   (b) In those exceptional occasions when a suspect vessel, detected seaward of Costa Rican waters, enters Costa Rican waters and no Costa Rican ship-rider is embarked in a United States law enforcement vessel, and no Costa Rican law enforcement vessel is immediately available to investigate, the United States law enforcement vessel may follow the suspect vessel into Costa Rican waters, in order to board the suspect vessel and secure
the scene, while awaiting expeditious instructions from Costa Rican law enforcement authorities and the arrival of Costa Rican law enforcement officials;

(c) In those equally exceptional occasions when a suspect vessel is detected within Costa Rican waters, and no Costa Rican ship-rider is embarked in a United States law enforcement vessel, and no Costa Rican law enforcement vessel is immediately available to investigate, the United States law enforcement vessel may enter Costa Rican waters, in order to board the suspect vessel and secure the scene, while awaiting expeditious instructions from Costa Rican law enforcement authorities and the arrival of Costa Rican law enforcement officials.

The United States shall provide prior notice to the Costa Rican law enforcement authority of action to be taken under subparagraphs (b) and (c) of this paragraph, unless not operationally feasible to do so. In any case, notice of the action shall be provided to the Costa Rican law enforcement authority without delay.

7. Law enforcement vessels of a Party operating with the authorization of the other Party pursuant to section IV of this Agreement shall, during such operations, fly, in the case of the United States of America, the Costa Rican flag, and in the case of Costa Rica, the United States Coast Guard ensign.

8. The Government of Costa Rica shall permit the mooring or stay of law enforcement vessels of the United States of America at national ports, after authorization by the Minister of Public Security, on the occasions and for the time necessary for the proper performance of the operations required under this Agreement.

9. The Government of the Republic of Costa Rica reserves the right to authorize, in accordance with the laws of Costa Rica, other operations to suppress illicit traffic not otherwise foreseen in this Agreement.

10. When aircraft of the Government of the United States of America (hereafter United States aircraft) are operating to suppress illicit traffic or supporting such operations, the Government of the Republic of Costa Rica shall permit those United States aircraft:

(a) To overfly its territory and waters with due regard for the laws and regulations of Costa Rica for the flight and manoeuvre of aircraft, subject to paragraph 11 of this section;

(b) To land and remain in national airports, after receiving authorization from the Minister of Public Security, on the occasions and for the time necessary for proper performance of the operations necessary under this Agreement; and

(c) To transmit orders from competent Costa Rican authorities to suspect aircraft to land in the territory of Costa Rica, subject to the laws of each Party.

11. The Government of the United States of America shall, in the interest of flight safety, observe the following procedures for facilitating flights within Costa Rican airspace by United States aircraft:

(a) In the event of planned law enforcement operations, the United States shall provide reasonable notice and communications frequencies to the appropriate Costa Rican aviation authorities responsible for air traffic control of planned flights by its aircraft over Costa Rican territory or waters;

(b) In the event of unplanned operations, which may include the pursuit of suspect aircraft into Costa Rican airspace pursuant to this Agreement, the Parties shall exchange information concerning the appropriate communications frequencies 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 Costa Rican aviation authorities, and with any written operating procedures developed for flight operations within its airspace under this Agreement.

V. OPERATIONS SEAWARD OF THE TERRITORIAL SEA

1. Whenever United States law enforcement officials encounter a suspect vessel flying the Costa Rican flag or claiming to be registered in Costa Rica, located seaward of any State's territorial sea, this Agreement constitutes the authorization of the Government
of the Republic of Costa Rica for the boarding and search of the suspect vessel and the persons found on board by such officials.

2. If evidence of illicit traffic is found, United States law enforcement officials may detain the vessel and persons on board pending expeditious disposition instructions from the Government of the Republic of Costa Rica.

3. Except as expressly provided herein, this Agreement does not apply to or limit boardings of vessels seaward of any State’s territorial sea, conducted by either Party in accordance with international law, 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.

VI. JURISDICTION OVER DETAINED VESSELS

1. In all cases arising in Costa Rican waters, or concerning Costa Rican flag vessels seaward of any State’s territorial sea, the Government of the Republic of Costa Rica shall have the primary right to exercise jurisdiction over a detained vessel, cargo and/or persons on board (including seizure, forfeiture, arrest, and prosecution), provided, however, that the Government of the Republic of Costa Rica 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, cargo and/or persons on board.

2. Instructions as to the exercise of jurisdiction pursuant to paragraph 1 shall be given without delay.

VII. IMPLEMENTATION

1. 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, and vessels assimilated to vessels without nationality.

2. 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.

3. 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 the applicable national laws and policies of that Party and with the applicable international law and accepted international practices.

4. Boardings and searches pursuant to this Agreement shall be carried out by law enforcement officials from law enforcement vessels or aircraft. The boarding and search teams may operate from such ships and aircraft of the Parties, and seaward of the territorial sea of any State, from such ships of other States as may be agreed upon by the Parties. The boarding and search team may carry standard law enforcement small arms.

5. 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.

6. All use of force pursuant to this Agreement shall be in strict accordance with the applicable laws and policies 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. Nothing in this Agreement shall impair the exercise of the inherent right of self-defense by law enforcement or other officials of either Party.

7. When carrying out operations pursuant to this Agreement, in accordance with the 1988 Convention, the Parties shall take due account of the possible advantage of conducting boarding and search operations in safer conditions at the closest Costa Rican port to minimize any prejudice to the legitimate commercial activities of the suspect vessel or aircraft, or its flag State or any other interested State; the need not to delay unduly the suspect aircraft or vessel; the need not to endanger the safety of life at sea without endangering the safety of the law enforcement officials or their vessels or aircraft; and the need not to endanger the security of the suspect vessel, aircraft or cargo.
8. To facilitate implementation of this Agreement, each Party shall ensure the other Party is fully informed of its respective applicable laws and policies, particularly those pertaining to the use of force. Each Party shall ensure that all of its law enforcement officials are knowledgeable concerning the applicable laws and policies of both Parties.

9. Assets seized in consequence of any operation undertaken in Costa Rican waters pursuant to this Agreement shall be disposed of in accordance with the laws of Costa Rica. Assets seized in consequence of any operation undertaken seaward of the territorial sea of Costa Rica 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. Each transfer generally will reflect the contribution of the other Party to facilitating or effecting the forfeiture of such assets or proceeds.

10. 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 in their boarding and investigation of suspect vessels located in the territory or waters of the first Party.

11. Any injury to or loss of life of a law enforcement official of a Party shall normally be remedied in accordance with the laws of that Party. Any other claim submitted for damage, injury, death or loss resulting from an operation carried out under this Agreement shall be processed, considered, and if merited, resolved in favour of the claimant by the Party whose officials conducted the operation, in accordance with the domestic law of that Party, and in a manner consistent with international law. If any loss, injury or death 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.

12. Disputes arising from the interpretation or implementation of this Agreement shall be settled by mutual agreement of the Parties.

13. The Parties agree to consult, on at least an annual basis, to evaluate the implementation of this Agreement and to consider enhancing its effectiveness, including the preparation of amendments to this Agreement that take into account increased operational capacity of the Costa Rican law enforcement authorities and officials. In case a difficulty arises concerning the operation of this Agreement, either Party may request consultations with the other Party to resolve the matter.

14. Nothing in this Agreement is intended to alter the rights and privileges due any individual in any legal proceeding.

15. Nothing in this Agreement shall prejudice the position of either Party with regard to the international law of the sea.

VIII. ENTRY INTO FORCE AND DURATION

1. This Agreement shall enter into force upon exchange of notes indicating that the necessary internal procedures of each Party have been completed.

2. In the case of Costa Rica, as stipulated in article 121 (5) of the Constitution, the Legislative Assembly and the actual act of approval shall grant permission for the operations described in section IV of this Agreement for a period of 10 years from the time of ratification. One month prior to the expiration of the initial authorization period set forth in the foregoing paragraph, the Legislative Assembly shall indicate, using the procedures set forth in its regulations, whether an extension is granted for a similar period. The same procedure shall apply to subsequent extensions.

3. This Agreement shall be registered with the Secretary-General of the United Nations for purposes of publication in accordance with article 102 of the Charter of the United Nations.

4. This Agreement may be terminated at any time by either Party upon written notification to the other Party through the diplomatic channel. Such termination shall take effect one year from the date of notification.
5. 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 during the time that it was in force.

In witness whereof, the undersigned, being duly authorized by their respective Governments, have signed this Agreement.

Done at San José, Costa Rica, this first day of December of 1998, in duplicate in the English and Spanish languages, each text being equally authentic.

For the Government of the
United States of America:
[Signed]
Thomas J. Dodd
Ambassador
Embassy of the
United States of America

For the Government of the
Republic of Costa Rica:
[Signed]
J. F. Lizano
Minister of Government,
Police and Public Security
Republic of Costa Rica

Signed in the presence of and witnessed by:

[Signed]
M. A. Rodriguez
Dr. Manuel Angel Rodriguez Echeverria
President of the Republic of Costa Rica

Protocol to the Agreement between the Government of the United States of America and the Government of the Republic of Costa Rica concerning Cooperation to Suppress Illicit Traffic

(Entry into force: 19 November 1999)

The Government of the United States of America and the Government of the Republic of Costa Rica, hereinafter the Parties;

Recalling the Agreement between the Government of the United States of America and the Government of the Republic of Costa Rica concerning Cooperation to Suppress Illicit Traffic, signed at San Jose, 1 December 1998, hereinafter the Agreement;

Noting the Decision No. 04156-99 of the Constitutional Chamber of the Supreme Court of Justice of Costa Rica, given at 2 June 1999, at 4:33 p.m., in which the Chamber concluded that paragraph 2 of section VIII of the Agreement was unconstitutional;

Desiring to modify the Agreement so as to rectify it in accordance with the Chamber’s decision;

Have agreed as follows:

Article I

The paragraph 2 of section VIII of the Agreement shall be amended to read in its entirety as follows:

“Whenever it may be required by article 121, subparagraph 5, of the Political Constitution of Costa Rica, the Government of Costa Rica shall seek and obtain from the Legislative Assembly its approval for activities described in paragraphs 8 and 10 (b) of section IV of this Agreement.”

Article II

This Protocol shall enter into force at the same time and in the same manner as the Agreement.

In witness whereof the undersigned, being duly authorized by their respective Governments, have signed this Protocol.
Done at San José, this second day of July 1999, in duplicate in the English and Spanish languages, each text being equally authentic.

For the Government of the
United States of America:
[Signed]
Thomas J. Dodd
Ambassador

For the Government of the
Republic of Costa Rica:
[Signed]
Roberto Rojas
Minister for Foreign Affairs

Signed in the presence of and witnessed by:
[Signed]
J. F. Lizano
Minister of Government, Police and Public Security
Republic of Costa Rica

Related correspondence

EMBASSY OF THE
UNITED STATES OF AMERICA

San Jose, 2 July 1999
Note No. 90
Excellency,

I have the honor to refer to the Agreement between our two Governments concerning Cooperation to Suppress Illicit Traffic, signed at San José on 1 December 1998 (the Agreement), and to the Decision No. 04156-99 of the Constitutional Chamber of the Supreme Court of Justice of Costa Rica, issued on 2 June 1999, at 4:33 p.m., in which the Chamber found sections IV (3), IV (10), and VII (11) of the Agreement are not unconstitutional provided they are interpreted as set forth in the whereas clauses of the Chamber's Decision.

My Government understands:

1. In reference to paragraph 3 of section IV of the Agreement, as well as provided in paragraph 1 of section VI of the Agreement, the Government of the Republic of Costa Rica, in accordance with its Political Constitution and laws, has the primary right to exercise jurisdiction over Costa Rican as well as foreign persons detained on board a vessel that is located within Costa Rican territorial sea and is suspected of being engaged in illicit traffic.

2. The aircraft of the Government of the United States of America to which paragraph 10 of section IV of the Agreement refers are law enforcement aircraft as defined in paragraph 4 of section I of the Agreement; and


I would appreciate confirmation by diplomatic note that the Government of the Republic of Costa Rica shares the afore-stated understandings.

Accept, Excellency, the renewed assurances of my highest consideration.

[Signed]
Thomas J. Dodd
Ambassador

His Excellency
Roberto Rojas
Minister for Foreign Affairs
of the Republic of Costa Rica

In reply, by Diplomatic note no. 821-99 ST-PE dated July 5, 1999, the Foreign Minister, after quoting the Embassy’s note no. 90, wrote:

With respect to the above, I have the honour to inform you that the Government of the Republic of Costa Rica shares the understandings enumerated in the note number 90 written above, which express the decision number 04156-99 of the Constitutional Chamber of 2 June, 1999.

[Signed]
Roberto Rojas
Minister for Foreign Affairs
C. Agreement of 20 February 1997 between the Government of the United States of America and the Government of the Republic of Colombia to Suppress Illicit Traffic by Sea

PREAMBLE

The Government of the United States of America and the Government of the Republic of Colombia (hereinafter “the Parties”);

Bearing in mind the complex nature of the problem of illicit traffic by sea;

Having regard to the urgent need for international cooperation in suppressing illicit traffic 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 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereinafter “the 1988 Convention”), and in international maritime law;

Recalling that the 1988 Convention requires the Parties to consider entering into bilateral agreements to carry out, or to 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;

Taking into account the recommendations of the report of the meetings of the Working Group on Maritime Cooperation, held at Vienna from 19 to 23 September 1994 and from 20 to 24 February 1995, and endorsed by the Commission on Narcotic Drugs at its thirty-eighth session, Vienna, 14 to 23 March 1995;

Recognizing the respect for sovereignty and principles of international law accepted by the Parties;

Reaffirming their commitment to fight effectively against illicit traffic by sea through continued mutual cooperation in technical, economic, and training and equipment matters;

Recognizing also the need to strengthen bilateral procedures involving boarding and search of vessels which are suspected of engaging in illicit traffic by sea;

Have agreed as follows:

DEFINITIONS

For the purposes of this Agreement, it shall be understood that:

(a) “Illicit traffic” has the same meaning as that term is defined in the 1988 Convention, and includes traffic by sea in narcotic drugs, psychotropic substances and precursor and essential chemicals;

(b) “Law enforcement officials” are: for the Government of the Republic of Colombia, uniformed members of the Colombian Navy; and for the Government of the United States of America, uniformed members of the United States Coast Guard;

(c) “Law enforcement vessels” are: warships and other ships of the Parties, clearly marked and identifiable as being on government service, including any boat and aircraft embarked on such ships, aboard which law enforcement officials are embarked.

OBJECT AND SCOPE OF THE AGREEMENT

1. The Parties shall cooperate in combating illicit traffic by sea to the fullest extent possible consistent with available resources and the priorities for the use of these resources, through the application of procedures for boarding and search of private or commercial vessels of the nationality of one of the Parties and which meet the conditions set forth in this Agreement.

2. As provided in article 2, paragraph 3 of the 1988 Convention, a Party shall not undertake in the territory of the other Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of the other Party by its domestic law.
OPERATIONS IN OR OVER NATIONAL WATERS

Operations to suppress illicit traffic in and over waters within which each Party exercises sovereignty in accordance with its domestic law are carried out by the authorities of that Party.

DETECTION AND MONITORING

1. Each Party recognizes the necessity that the detection and tracking of suspect vessels and aircraft located in its territorial waters and airspace be conducted and maintained by its authorities so that suspect vessels and aircraft can be brought by them under their control.

2. To this end, the Parties undertake to develop procedures and identify and employ technical equipment needed to improve timely communication between their operations centres and the sharing of tactical information, and to identify and employ other assets, so that detection and tracking of suspect vessels and aircraft, located in the territorial waters and airspace of each Party, is conducted and maintained by their authorities and that suspect vessels and aircraft can be brought by them under their control.

3. Each Party recognizes the necessity that the detection and tracking of suspect vessels and aircraft entering or exiting its territorial sea and airspace be conducted and maintained by its authorities so that suspect vessels and aircraft can be brought under their control.

4. To this end, the Parties undertake to develop procedures and identify and employ technical equipment needed to improve timely communication between their operations centers and the sharing of tactical information, and to identify and employ other assets, so that detection and tracking of suspect vessels and aircraft, entering or exiting the territorial sea and airspace of each Party, is conducted and maintained by their authorities and that suspect vessels and aircraft can be brought under their control.

SCOPE OF APPLICATION

This Agreement regulates the boarding and search of private or commercial vessels of the nationality or registry of one of the Parties, which are found seaward of the territorial sea of any State, and which either of the Parties has reasonable grounds to suspect are involved in illicit traffic.

IMPLEMENTATION

1. Whenever law enforcement officials of one Party find a vessel meeting the conditions under paragraph 6 claiming registration in the other Party, the 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.

2. The reply to the request for boarding and search shall be provided by the requested Party to the requesting Party at the earliest possible opportunity and, in each particular case, in conformity with the procedures referred to in paragraph 14. In replying, the requested Party may take into account whether it has a unit available to carry out the boarding and search in a timely and effective manner. If the requested Party has not responded to the request for authorization to board and search within three (3) hours of receipt of the request, it shall be understood that the authorization has been granted. In no case shall it be understood that the authorization refers to the conduct of boardings and searches of vessels of a flag other than of the requested State. If the vessel is not of the flag of the requested Party, the requesting Party may proceed in accordance with international law.

3. For application of the above provisions, the competent authority for Colombia shall be the Ministry of National Defense, through the Colombian Navy Operations Centre, and, for the United States of America, the appropriate United States Coast Guard Operations Center.
4. The boarding and search authorized by the flag State shall be conducted by law enforcement officials embarked in law enforcement vessels. Law enforcement officials of a Party may embark in and conduct boardings and searches from warships, or other ships clearly marked and identifiable as being on government service (including embarked boats and aircraft) of any other State to which the Parties mutually agree, provided that, when they conduct any actions permitted by this Agreement, such ships, boats and aircraft operate under the responsibility, authority and control of law enforcement officials of that Party.

5. Each Party shall ensure that its law enforcement officials, when conducting boardings and searches pursuant to this Agreement, act in accordance with international law, including this Agreement, with its domestic law, and with internationally accepted practices. When conducting a boarding and search, law enforcement officials shall take due account of the need not to endanger the safety of life at sea, the security of the suspect vessel and its cargo, or to prejudice the commercial and legal interests of the flag State or any other interested State. Such officials shall also bear in mind the need to observe norms of courtesy, respect, and consideration for the persons on board the suspect vessel.

6. When conducting boardings and searches in accordance with this Agreement, law enforcement officials shall avoid the use of force in any way, including the use of firearms, except in the exercise of the right of self-defence, and also in the following cases:

   (a) To compel the suspect vessel to stop when the vessel has ignored the respective Party’s standard warnings to stop;

   (b) To maintain order on board the suspect vessel during the boarding and search or while the vessel is preventively held, when the crew or persons on board resist, impede the boarding and search or try to destroy evidence of illicit traffic or the vessel, or when the vessel attempts to flee during the boarding and search or while the vessel is preventively held.

7. Law enforcement officials of the Party authorized to conduct the boarding and search may carry conventional small arms and will only discharge them when it is not possible to apply less extreme measures. In all cases where the discharge of firearms is required, it will be necessary to have the previous authorization of the flag State except when indirect warning shots are required as a signal for the vessel to stop, or in the exercise of the right of self-defence.

8. Whenever force is used, including the use of firearms, at all times it shall be the minimum reasonably necessary and proportional under the circumstances.

9. Once the operation has been concluded, regardless of the results, the Party which conducted the boarding and search shall immediately submit a detailed report to the other Party of what happened in accordance with the procedures referred to in paragraph 14. At the request of a Party, the other Party shall timely report, consistent with its laws, on the status of all investigations, prosecutions and judicial proceedings resulting from boardings and searches conducted in accordance with this Agreement where evidence of illicit traffic was found. The Parties shall provide each other the assistance provided for in article 7 of the 1988 Convention relating to investigations, prosecutions, and judicial proceedings which result from boardings and searches conducted in accordance with this Agreement where evidence of illicit traffic is found.

10. The authorities designated by each Party shall establish the necessary operational procedures for effective implementation of this Agreement. These procedures may be revised by the designated authorities. The procedures shall be consistent with the terms of this Agreement and may not modify or expand them.

11. Each Party shall, to the extent possible, inform the owners and masters of its private and commercial vessels of the circumstances under which officials may come aboard their vessels pursuant to this Agreement or otherwise in accordance with international law.

LAW ENFORCEMENT

1. In those cases where evidence of illicit traffic is found in Colombian flag vessels located outside the internal waters, territorial sea and exclusive economic zone of Colombia established in accordance with Colombian law, outside the maritime boundaries
of Colombia established in treaties signed by Colombia, and seaward of the territorial sea of any other State, the criminal law of the flag State shall apply, except when the domestic law of Colombia provides that the other Party has jurisdiction because it previously initiated criminal action for the same offense. This paragraph shall be implemented in accordance with the procedures referred to in paragraph 14 of this Agreement.

2. In those cases where evidence of illicit traffic is found in United States territory, waters, or airspace, or concerning United States flag vessels seaward of any nation’s territorial sea, the Government of the United States shall have the right to exercise jurisdiction over the preventively held vessel, the persons on board and cargo, provided however, that the Government of the United States may, subject to its constitution and laws, authorize the enforcement of Colombian law against the vessel, persons on board and cargo.

3. The Parties, to the extent permitted by their laws and regulations, and taking into consideration agreements in force between them, may share those forfeited assets which result from boardings and searches conducted in accordance with this Agreement where evidence of illicit traffic is found, or the proceeds of their sale.

FINAL PROVISIONS

1. Any claim submitted for damage, injury, or loss resulting from an operation carried out under this Agreement shall be processed, considered, and, if merited, resolved in favor of the claimant by the Party whose authorities conducted the operation, in accordance with the domestic law of that Party, and in a manner consistent with international law. Neither Party thereby waives any rights it may have under international law to raise a claim with the other through diplomatic channels.

2. The requested State shall always decide independently on any request for the authorization to board and search vessels of its flag or registry.

3. Situations not provided for by this Agreement will be determined in accordance with international law.

4. Nothing in this Agreement is intended to alter the rights and privileges in any legal proceeding under United States law, and the rights and guarantees in any legal proceeding under Colombian law, due any individual.

5. Nothing in this Agreement is intended to prejudice the position of either Party with regard to the international law of the sea.

6. For the purpose of verifying compliance with this Agreement, the Parties shall meet once a year, and either Party may request consultations when it deems necessary.

7. Disputes arising from the interpretation or implementation of this Agreement shall be settled by mutual agreement of the Parties.

8. This Agreement shall enter into force upon signature by both Parties and be of indefinite duration. However, this Agreement may be terminated by either Party upon written notification through diplomatic channels, such termination to take effect six (6) months from the date of notification. The termination of this Agreement shall not affect the application of the relevant provisions of this Agreement with respect to any administrative proceedings, investigations, prosecutions or judicial proceedings arising out of any boardings and searches conducted pursuant to this Agreement prior to such termination.

IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective Governments, have signed this Agreement.

Done at the city of Santafé de Bogotá, in duplicate, on the twentieth day of February 1997, in the English and Spanish languages, each text being equally authentic.

For the Government of the United States of America

For the Government of the Republic of Colombia
D. Treaty between the Kingdom of Spain and the Portuguese Republic for the Suppression of Illicit Drug Traffic by Sea

The Kingdom of Spain and the Portuguese Republic, Motivated by a common determination to combat illicit trafficking in narcotic drugs and psychotropic substances,

Conscious of the fact that one of the routes used for the distribution of such substances is illicit drug traffic by sea,

Desiring to suppress such traffic, while respecting the principle of freedom of navigation,


Have decided to conclude a bilateral Treaty in conformity with article 17, paragraph 9, of the Convention, and to this end

Have agreed as follows:

Article 1. Definitions

For the purposes of this Treaty:

(a) “Intervening State” means a State Party which has requested or proposes to request authorization to take measures foreseen in this Treaty in relation to a vessel flying the flag or displaying the marks of registry of another State Party;

(b) “Preferential jurisdiction” means that when two States Parties have concurrent jurisdiction over a relevant offence, the flag State shall have the right to exercise its jurisdiction to the exclusion of the exercise of the other State Party’s jurisdiction;

(c) “Relevant offence” means any of the offences described in article 3, paragraph 1, of the Convention;

(d) “Vessel” means a ship or any other type of seagoing craft, including hovercrafts and submersible crafts.

Article 2. Purpose

The Contracting Parties shall cooperate to the fullest extent possible in suppressing illicit traffic in narcotic drugs and psychotropic substances by sea, in conformity with the international law of the sea.

Article 3. Jurisdiction

1. Each Party shall exercise exclusive jurisdiction over acts committed in its territorial waters, free trade zones or free ports, including any acts initiated or intended to be completed in the other State.

2. In the case of acts committed outside the territorial waters of one of the two States, the flag State of the vessel on board which or by means of which the said acts were committed shall have preferential jurisdiction.

Article 4. Rights of the Parties

1. Where there are reasonable grounds to suspect the commission of any of the offences referred to in article 1, each Party shall recognize the other Party’s right of representation, whereby the latter’s warships, military aircraft and other ships and aircraft clearly marked and identifiable as being on government service or duly authorized to that effect, may
lawfully intervene in regard to vessels of the other State which are operating outside its territorial waters.

2. In exercising the right of representation referred to in paragraph 1, government ships or aircraft may pursue, stop and board a vessel, examine documents, question persons who are on board the vessel and search the vessel, and, if the suspicions are confirmed, proceed to seize the drug, arrest the persons presumed responsible and lead the vessel to the nearest port or the one most suitable for it to be laid up in case the return of the vessel proves necessary.

3. Nothing in this Treaty shall affect the immunity of warships and other government vessels operated for noncommercial purposes.

**Article 5. Intervention**

1. Where there are reasonable grounds to suspect that a vessel is engaged in illicit traffic, this fact shall be notified to the flag State, which shall respond as promptly as possible, in principle within four hours of receipt of the request, by transmitting all available information regarding the said vessel.

2. If these suspicions on the part of the intervening State are confirmed by this information, that State may intervene on board the vessel in order to take the measures foreseen in article 4.

3. Where intervention is not immediate, the intention to commence intervention shall be notified to the competent authority of the flag State, which shall respond by authorizing or denying that request, as far as possible within four hours of its receipt.

4. If circumstances prevent such prior authorization being obtained in a timely manner, the measures foreseen in article 4 may be taken, the master of the government ship or captain of the government aircraft being required to notify the competent authority of the flag State of his action without delay.

**Article 6. Operational safeguards**

1. All acts performed in application of this Treaty shall take due account of the need not to endanger the safety of persons or the security of the vessel and cargo, and not to prejudice the commercial interests of third parties.

2. The vessel shall be laid up no longer than strictly necessary and shall be returned to the flag State as soon as its presence ceases to be required.

3. Any persons arrested shall be guaranteed the same rights as those enjoyed by national citizens, in particular the right to an interpreter and to legal counsel.

4. The conditions of custody shall be subject to judicial supervision and to the time limits established by the laws of the intervening State.

5. The master of a vessel which has been detained shall be entitled to communicate with his authorities from the same vessel that is the subject of the intervention and immediately after reaching port, and shall also be entitled to communicate with his Consul and receive a visit from the latter.

6. If the intervention was performed without it being confirmed that there were sufficient grounds for its performance, the intervening State may be liable for any damages suffered, unless it intervened at the request of the flag State.

**Article 7. Waiver of jurisdiction**

1. Each State shall have preferential jurisdiction over its vessels, but may waive such jurisdiction in favour of the intervening State.

2. After taking the first measures, the intervening State shall transmit to the flag State a summary of the evidence collected in regard to all relevant offences committed, providing advance notification, if possible, by facsimile; the flag State shall be required to respond within fourteen days as to whether it intends to exercise its jurisdiction or to waive it, and shall be entitled to request additional information if it deems it necessary.
3. If the period specified in the previous paragraph elapses without any decision having been communicated, it shall be presumed that the flag State waives the exercise of its jurisdiction.

4. If the flag State decides to exercise its preferential jurisdiction, the vessel, cargo and evidence shall be returned to that State without delay and the vessel escorted to the boundary of the territorial waters of the intervening State.

5. The surrender of the arrested persons shall not require any formal extradition procedure, a personalized judicial warrant of arrest or other equivalent order in conformity with the fundamental principles of the legal system of each Party being sufficient. The intervening State shall certify the period of detention undergone.

6. Instead of surrender, the flag State may request the immediate release of the arrested persons or of the vessel, in which event the intervening State shall order their release forthwith.

7. The period of custody undergone in one of the States Parties shall be deducted from the penalty imposed by the State which exercised its jurisdiction.

**Article 8. Competent authorities**

1. Without prejudice to the general areas of competence of the Ministries of Foreign Affairs of the two Parties, communications provided for under this Treaty should be channeled, as a general rule, through the respective Ministries of Justice.

2. In cases of particular urgency, the competent authorities of the intervening State may address themselves directly to the Ministry of Justice of the flag State or to the competent authorities designated by that Ministry.

3. The Parties shall designate, through an Exchange of Notes, liaison officers and competent authorities for the purposes of this Treaty.

**Article 9. Subsidiary application of treaty law**

Matters not expressly covered by this Treaty shall be subject to the subsidiary application of the principles set forth in the treaty instruments in effect between the Parties and to the principles set forth in the Agreement.

**Article 10. Settlement of disputes**

1. The Parties agree to settle their disputes as to the interpretation or application of this Treaty, including those relating to compensation for damages, through direct negotiation between their respective Ministries of Justice and of Foreign Affairs.

2. Where it is not possible to reach agreement by the means referred to in the previous paragraph, specific disputed matters of a legal nature shall be submitted to the European Committee on Crime Problems of the Council of Europe and the negotiations shall be resumed in the light of the opinion of that entity.

3. The Parties agree to exclude in their reciprocal relations, within the framework of this Treaty, the competence of the International Court of Justice.

**Article 11. Final provisions**

1. This Treaty is subject to ratification.

2. This Treaty shall enter into force thirty days following the date on which each of the Parties has communicated to the other that the necessary internal procedures for its entry into force have been completed.

3. This Treaty is concluded for an indefinite period and may be denounced at any time by either Party upon written notification through the diplomatic channel, such termination to take effect one hundred and eighty days from the date of receipt of the denunciation.
DONE at ________, in duplicate, this ____ day of ____, 1998 in the Spanish and Portuguese languages, both texts being equally authentic.

FOR THE KINGDOM OF SPAIN

FOR THE PORTUGUESE REPUBLIC

E. Treaty between the Kingdom of Spain and the Italian Republic to Combat Illicit Drug Trafficking at Sea

[Original: Spanish]

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

1. Solely for the purposes of this Treaty:

   (a) “Ship” means any seagoing craft or surface vessel that contains or transports goods and/or persons;

   (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;

2. 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 other 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 committed in its territorial waters, free zones or free ports, even if the said acts were initiated or terminated in the other State.

2. Should there be a discrepancy with regard to the extent of the 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.
3. 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 the offence was committed.

**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.

2. In exercising this authority, warships or military aircraft, 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 documents, question persons on board, and if reasonable suspicion remains, search the ship, seize 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.

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 its cargo, or to damage the commercial and legal interests of the flag State in question, or of any other interested State.

5. 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.

4. If it decides to exercise its jurisdiction, the other State shall transfer to it any documents obtained, items to be used in evidence, the persons arrested, and any other element relevant to the case.

5. The decision to exercise jurisdiction must be notified to the requesting Party within 60 days of the date of receipt of the request.

6. The necessary urgent legal measures which custom requires be carried out and the request to renounce the exercise of preferential jurisdiction shall be governed by the legal system of the intervening State.

7. If the deadline provided for in the present article expires without any decision having been notified, jurisdiction will be deemed to have been renounced.

8. 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 deducted 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 drugs or psychotropic substances.

Article 9. Final provisions

1. This Treaty shall be ratified and the instruments of ratification shall be exchanged as soon as possible at Madrid.

2. This Treaty shall come into force on the thirtieth day following the exchange of instruments of ratification and shall remain in force for an unlimited period, unless one of the Parties notifies the other Party through the diplomatic channels that it wishes to terminate the Treaty, in which case termination shall take effect six months after the date of receipt of notification.

3. When exchanging instruments of ratification, the Parties shall specify their central authorities as provided for in article 6, paragraph 4.

IN WITNESS WHEREOF, the undersigned, duly authorized by their Governments, have signed this Treaty.

Done at Madrid on 23 March 1990, in duplicate, in Spanish and Italian, both texts being equally authentic.

This Treaty shall enter into force on 7 May 1994, thirty days following the exchange of instruments of ratification, pursuant to article 9, paragraph 2.

The exchange of instruments took place at Madrid on 8 April 1994.

F. Agreement concerning Cooperation 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 drug traffic in the Caribbean area;

Desiring to increase their cooperation 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 cooperation 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;

Recalling that the nature of illicit traffic urgently requires the Parties to foster regional and subregional cooperation;

Desiring to promote greater cooperation 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 Coordination and Cooperation 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.

(l) “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 cooperate 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 subregional cooperation**

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 subregional institutional capabilities and the coordination and implementation of cooperation.
2. In order to meet the objectives of this Agreement, each Party is encouraged to cooperate closely with the other Parties, consistent with the relevant provisions of the 1988 Convention.
3. The Parties shall cooperate, directly or through competent international, regional or subregional 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 cooperation on suppression of illicit traffic. The Parties may undertake, directly or through competent international, regional or subregional 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 technical assistance from and to each other.

**Article 4. Facilitation of cooperation**

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 coordination 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 coordination 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 airspace 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 airspace 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 1 (a) or 1 (b), 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 1 (a).

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 4 (a) or 4 (b), 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 4 (a).

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 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:

   (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 airspace of that Party.

   (b) In the event of unplanned law enforcement operations, which may include the pursuit of suspect aircraft into another Party’s airspace, 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) authorisation 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 authorisation has been granted by the Party requesting assistance.

7. Parties shall elect either the procedure set forth in paragraph 6 (a) or 6 (b), 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 6 (a).

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 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 airspace 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 airspace, 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 on board; and
   (d) 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 cooperation and coordination Programmes for the Caribbean area**

1. The Parties shall establish regional and subregional maritime law enforcement cooperation and coordination programmes among their law enforcement authorities. Each Party shall designate a coordinator 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 subregional coordination centres 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 favourably 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-defence.
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-defence 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.

**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 per cent 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 subregional cooperation and coordination 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, on ____, 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:

   (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. 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.

3. 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.

**Article 39. Territorial application**

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 airspace 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, this ______ day of _________ 2003, in the English, French and Spanish languages, each text being duly authentic.
A. USE OF FORCE: THE M/V “SAIGA” (NO. 2) CASE (EXTRACTS)

The International Tribunal for the Law of the Sea

JUDGMENT

In the M/V “SAIGA” (No. 2) case
between
Saint Vincent and the Grenadines,
and
Guinea

The Tribunal, composed as above, after deliberation, delivers the following Judgment:

INTRODUCTION

1. On 13 January 1998, the agent of Saint Vincent and the Grenadines filed in the Registry of the Tribunal a request for the prescription of provisional measures in accordance with article 290, paragraph 5, of the United Nations Convention on the Law of the Sea (hereinafter “the Convention”) concerning the arrest and detention of the vessel M/V Saiga (hereinafter “the Saiga”). The request was accompanied by a copy of the notification submitted by Saint Vincent and the Grenadines to the Republic of Guinea on 22 December 1997 (hereinafter “the notification of 22 December 1997”) instituting arbitral proceedings in accordance with annex VII to the Convention in respect of a dispute relating to the Saiga. A certified copy of the request was sent on the same day by the Registrar of the Tribunal to the Minister for Foreign Affairs of Guinea in Conakry and also in care of the Ambassador of Guinea to Germany.

2. On 13 January 1998, the Registrar was notified of the appointment of Mr. Bozo Dabinovic, Commissioner for Maritime Affairs of Saint Vincent and the Grenadines, as agent of Saint Vincent and the Grenadines. On 20 January 1998, the appointment of Mr. Hartmut von Brevem, Attorney at Law, Hamburg, as agent of Guinea, was notified to the Registrar.

3. In accordance with article 24, paragraph 3, of the Statute of the Tribunal (hereinafter “the Statute”), States Parties to the Convention were notified of the request for the prescription of provisional measures by a note verbale from the Registrar dated 20 February 1998. Pursuant to the Agreement on Cooperation and Relationship between the United Nations and the Tribunal, the Registrar notified the Secretary-General of the United Nations of the request on 20 February 1998.

4. By a letter dated 20 February 1998, the agent of Guinea notified the Tribunal of the exchange of letters of the same date (hereinafter “the 1998 Agreement”) constituting an
agreement between Guinea and Saint Vincent and the Grenadines, both of which are parties to the Convention, to transfer the arbitration proceedings, instituted by Saint Vincent and the Grenadines by the notification of 22 December 1997, to the International Tribunal for the Law of the Sea.

FACTUAL BACKGROUND

31. The Saiga is an oil tanker. At the time of its arrest on 28 October 1997, it was owned by Tabona Shipping Company Ltd. of Nicosia, Cyprus, and managed by Seascot Ship Management Ltd. of Glasgow, Scotland. The ship was chartered to Lemania Shipping Group Ltd. of Geneva, Switzerland. The Saiga was provisionally registered in Saint Vincent and the Grenadines on 12 March 1997. The master and crew of the ship were all of Ukrainian nationality. There were also three Senegalese nationals who were employed as painters. The Saiga was engaged in selling gas oil as bunker and occasionally water to fishing and other vessels off the coast of West Africa. The owner of the cargo of gas oil on board was Addax BV of Geneva, Switzerland.

32. Under the command of Captain Orlov, the Saiga left Dakar, Senegal, on 24 October 1997 fully laden with approximately 5,400 metric tons of gas oil. On 27 October 1997, between 0400 and 1400 hours and at a point 10°25'03"N and 15°42'06"W, the Saiga supplied gas oil to three fishing vessels, the Giuseppe Primo and the Kriti, both flying the flag of Senegal, and the Eleni S, flying the flag of Greece. This point was approximately 22 nautical miles from Guinea's island of Alcatraz. All three fishing vessels were licensed by Guinea to fish in its exclusive economic zone. The Saiga then sailed in a southerly direction to supply gas oil to other fishing vessels at a pre-arranged place. Upon instructions from the owner of the cargo in Geneva, it later changed course and sailed towards another location beyond the southern border of the exclusive economic zone of Guinea.

33. At 0800 hours on 28 October 1997, the Saiga, according to its log book, was at a point 09°00'01"N and 14°58'58"W. It had been drifting since 0420 hours while awaiting the arrival of fishing vessels to which it was to supply gas oil. This point was south of the southern limit of the exclusive economic zone of Guinea. At about 0900 hours the Saiga was attacked by a Guinean patrol boat (P35). Officers from that boat and another Guinean patrol boat (P328) subsequently boarded the ship and arrested it. On the same day, the ship and its crew were brought to Conakry, Guinea, where its master was detained. The travel documents of the members of the crew were taken from them by the authorities of Guinea and armed guards were placed on board the ship. On 1 November 1997, two injured persons from the Saiga, Mr. Sergey Klyuyev and Mr. Djibril Niasse, were permitted to leave Conakry for Dakar for medical treatment. Between 10 and 12 November 1997, the cargo of gas oil on board the ship, amounting to 4,941.322 metric tons, was discharged on the orders of the Guinean authorities. Seven members of the crew and two painters left Conakry on 17 November 1997, one crew member left on 14 December 1997 and six on 12 January 1998. The master and six crew members remained in Conakry until the ship was released on 28 February 1998.

34. An account of the circumstances of the arrest of the Saiga was drawn up by Guinean customs authorities in a “Procès-Verbal” bearing the designation “PV29” (hereinafter “PV29”). PV29 contains a statement of the master obtained by interrogation by the Guinean authorities. A document, “Conclusions présentées au nom de l’Administration des Douanes par le Chef de la Brigade Mobile Nationale des Douanes” (Conclusions presented in the name of the Customs Administration by the Head of the National Mobile Customs Brigade), issued on 14 November 1997 under the signature of the Chief of the National Mobile Customs Brigade, set out the basis of the action against the master. The criminal charges against the master were specified in a schedule of summons (cédule de citation), issued on 10 December 1997 under the authority of the Public Prosecutor (Procureur de la République), which additionally named the State of Saint Vincent and the Grenadines as civilly responsible to be summoned (civillement responsable à citer). Criminal proceedings were subsequently instituted by the Guinean authorities against the master before the Tribunal of First Instance (tribunal de première instance) in Conakry.

35. On 13 November 1997, Saint Vincent and the Grenadines submitted to this Tribunal a request for the prompt release of the Saiga and its crew under article 292 of the Convention. On 4 December 1997, the Tribunal delivered its judgment on the request. The Judgment ordered that Guinea promptly release the Saiga and its crew upon the
posting of a reasonable bond or security by Saint Vincent and the Grenadines. The security consisted of the gas oil discharged from the Saiga by the authorities of Guinea plus an amount of $400,000 to be posted in the form of a letter of credit or bank guarantee or, if agreed by the parties, in any other form.

36. On 17 December 1997, judgment was rendered by the Tribunal of First Instance in Conakry against the master. The Tribunal of First Instance cited, as the basis of the charges against the master, articles 111 and 242 of the Convention, articles 361 and 363 of the Penal Code of Guinea (hereinafter “the Penal Code”), article 40 of the Merchant Marine Code of Guinea (hereinafter the “Merchant Marine Code”), articles 34, 316 and 317 of the Customs Code of Guinea (hereinafter “the Customs Code”) and articles 1 and 8 of Law L/94/007/CTRN of 15 March 1994 concerning the fight against fraud covering the import, purchase and sale of fuel in the Republic of Guinea (hereinafter “Law L/94/007”). The charge against the master was that he had “imported, without declaring it, merchandise that is taxable on entering national Guinean territory, in this case diesel oil, and that he refused to comply with injunctions by agents of the Guinean Navy, thus committing the crimes of contraband, fraud and tax evasion”.

37. The Tribunal of First Instance in Conakry found the master guilty as charged and imposed on him a fine of 15,354,024,040 Guinean francs. It also ordered the confiscation of the vessel and its cargo as a guarantee for payment of the penalty.

38. The master appealed to the Court of Appeal (cour d’appel) in Conakry against his conviction by the Tribunal of First Instance. On 3 February 1998, judgment was rendered by the Court of Appeal. The Court of Appeal found the master guilty of the offence of “illegal import, buying and selling of fuel in the Republic of Guinea” which it stated was punishable under Law L/94/007. The Court of Appeal imposed a suspended sentence of six months imprisonment on the master, a fine of 15,354,040,000 Guinean francs and ordered that all fees and expenses be at his expense. It also ordered the confiscation of the cargo and the seizure of the vessel as a guarantee for payment of the fine.

39. On 11 March 1998, the Tribunal delivered the order prescribing provisional measures, referred to in paragraph 8. Prior to the issue of its order, the Tribunal was informed, by a letter dated 4 March 1998 sent on behalf of the agent of Saint Vincent and the Grenadines, that the Saiga had been released from detention and had arrived safely in Dakar, Senegal. According to the deed of release signed by the Guinean authorities and the master, the release was in execution of the Judgment of the Tribunal of 4 December 1997.

HOT PURSUIT

139. Saint Vincent and the Grenadines contends that, in arresting the Saiga, Guinea did not lawfully exercise the right of hot pursuit under article 111 of the Convention. It argues that since the Saiga did not violate the laws and regulations of Guinea applicable in accordance with the Convention, there was no legal basis for the arrest. Consequently, the authorities of Guinea did not have “good reason” to believe that the Saiga had committed an offence that justified hot pursuit in accordance with the Convention.

140. Saint Vincent and the Grenadines asserts that, even if the Saiga violated the laws and regulations of Guinea as claimed, its arrest on 28 October 1997 did not satisfy the other conditions for hot pursuit under article 111 of the Convention. It notes that the alleged pursuit was commenced while the ship was well outside the contiguous zone of Guinea. The Saiga was first detected (by radar) in the morning of 28 October 1997 when the ship was either outside the exclusive economic zone of Guinea or about to leave that zone. The arrest took place after the ship had crossed the southern border of the exclusive economic zone of Guinea.

141. Saint Vincent and the Grenadines further asserts that, wherever and whenever the pursuit was commenced, it was interrupted. It also contends that no visual and auditory signals were given to the ship prior to the commencement of the pursuit, as required by article 111 of the Convention.

142. Guinea denies that the pursuit was vitiated by any irregularity and maintains that the officers engaged in the pursuit complied with all the requirements set out in article 111 of the Convention. In some of its assertions, Guinea contends that the pursuit was commenced on 27 October 1997 soon after the authorities of Guinea had information
that the Saiga had committed or was about to commit violations of the customs and contraband laws of Guinea and that the pursuit was continued throughout the period until the ship was spotted and arrested in the morning of 28 October 1997. In other assertions, Guinea contends that the pursuit commenced in the early morning of 28 October 1997 when the Saiga was still in the exclusive economic zone of Guinea. In its assertions, Guinea relies on article 111, paragraph 2, of the Convention.

143. Guinea states that at about 0400 hours on 28 October 1997 the large patrol boat P328 sent out radio messages to the Saiga ordering it to stop and that they were ignored. It also claims that the small patrol boat P35 gave auditory and visual signals to the Saiga when it came within sight and hearing of the ship. The Guinean officers who arrested the ship testified that the patrol boat sounded its siren and switched on its blue revolving light signals.

144. Guinea admits that the arrest took place outside the exclusive economic zone of Guinea. However, it points out that since the place of arrest was not in the territorial sea either of the ship's flag State or of another State, there was no breach of article 111 of the Convention.

145. The relevant provisions of article 111 of the Convention which have been invoked by the parties are as follows:

"Article 111. Right of hot pursuit"

"1. The hot pursuit of a foreign 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 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 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 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 ship."

146. The Tribunal notes that the conditions for the exercise of the right of hot pursuit under article 111 of the Convention are cumulative; each of them has to be satisfied for the pursuit to be legitimate under the Convention. In this case, the Tribunal finds that several of these conditions were not fulfilled.

147. With regard to the pursuit alleged to have commenced on 27 October 1997, the evidence before the Tribunal indicates that, at the time the order for the joint mission of the Customs and Navy of Guinea was issued, the authorities of Guinea, on the basis of information available to them, could have had no more than a suspicion that a tanker had violated the laws of Guinea in the exclusive economic zone. The Tribunal also notes that, in the circumstances, no visual or auditory signals to stop could have been given to the Saiga. Furthermore, the alleged pursuit was interrupted. According to the evidence
given by Guinea, the small patrol boat P35 that was sent out on 26 October 1997 on a northward course to search for the Saiga was recalled when information was received that the Saiga had changed course. This recall constituted a clear interruption of any pursuit, whatever legal basis might have existed for its commencement in the first place.

148. As far as the pursuit alleged to have commenced on 28 October 1998 is concerned, the evidence adduced by Guinea does not support its claim that the necessary auditory or visual signals to stop were given to the Saiga prior to the commencement of the alleged pursuit, as required by article 111, paragraph 4, of the Convention. Although Guinea claims that the small patrol boat (P35) sounded its siren and turned on its blue revolving light signals when it came within visual and hearing range of the Saiga, both the master who was on the bridge at the time and Mr. Niasse who was on the deck, categorically denied that any such signals were given. In any case, any signals given at the time claimed by Guinea cannot be said to have been given at the commencement of the alleged pursuit.

149. The Tribunal has already concluded that no laws or regulations of Guinea applicable in accordance with the Convention were violated by the Saiga. It follows that there was no legal basis for the exercise of the right of hot pursuit by Guinea in this case.

150. For these reasons, the Tribunal finds that Guinea stopped and arrested the Saiga on 28 October 1997 in circumstances which did not justify the exercise of the right of hot pursuit in accordance with the Convention.

151. The Tribunal notes that Guinea, in its pleadings and submissions, suggests that the actions against the Saiga could, at least in part, be justified on the ground that the Saiga supplied gas oil to the fishing vessels in the contiguous zone of the Guinean island of Alcatraz. However, in the course of the oral proceedings, Guinea stated:

“The bunkering operation of the ship in the Guinean contiguous zone is also of no relevance in this context, although it may be relevant to the application of the criminal law. The relevant area here is the customs radius. This is a functional zone established by Guinean customs law within the realm of the contiguous zone and a part of the Guinean exclusive economic zone. One can describe it as a limited customs protection zone based on the principles of customary international law which are included in the exclusive economic zone but which are not a part of the territory of Guinea.”

152. The Tribunal has not based its consideration of the question of the legality of the pursuit of the Saiga on the suggestion of Guinea that a violation of its customs laws occurred in the contiguous zone. The Tribunal would, however, note that its conclusion on this question would have been the same if Guinea had based its action against the Saiga solely on the ground of an infringement of its customs laws in the contiguous zone. For, even in that case, the conditions for the exercise of the right of hot pursuit, as required under article 111 of the Convention, would not have been satisfied for the reasons given in paragraphs 147 and 148.

USE OF FORCE

153. Saint Vincent and the Grenadines claims that Guinea used excessive and unreasonable force in stopping and arresting the Saiga. It notes that the Saiga was an unarmored tanker almost fully laden with gas oil, with a maximum speed of 10 knots. It also notes that the authorities of Guinea fired at the ship with live ammunition, using solid shots from large-caliber automatic guns.

154. Guinea denies that the force used in boarding, stopping and arresting the Saiga was either excessive or unreasonable. It contends that the arresting officers had no alternative but to use gunfire because the Saiga refused to stop after repeated radio messages to it to stop and in spite of visual and auditory signals from the patrol boat P35. Guinea maintains that gunfire was used as a last resort, and denies that large-caliber ammunition was used. Guinea places the responsibility for any damage resulting from the use of force on the master and crew of the ship.

155. In considering the force used by Guinea in the arrest of the Saiga, the Tribunal must take into account the circumstances of the arrest in the context of the applicable rules of international law. Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue
of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.

156. These principles have been followed over the years in law enforcement operations at sea. The normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop, using internationally recognized signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ship. It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force. Even then, appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered (S.S. “I’m Alone” case (Canada/United States, 1935), U.N.R.I.A.A., Vol. III, p. 1609; The Red Crusader case (Commission of Enquiry, Denmark—United Kingdom, 1962), I.L.R., Vol. 35, p. 485). The basic principle concerning the use of force in the arrest of a ship at sea has been reaffirmed by the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. Article 22, paragraph 1 (f), of the Agreement states:

1. The inspecting State shall ensure that its duly authorized inspectors:

   (f) avoid the use of force except when and to the degree necessary to ensure the safety of the inspectors and where the inspectors are obstructed in the execution of their duties. The degree of force used shall not exceed that reasonably required in the circumstances.

157. In the present case, the Tribunal notes that the Saiga was almost fully laden and was low in the water at the time it was approached by the patrol vessel. Its maximum speed was 10 knots. Therefore it could be boarded without much difficulty by the Guinean officers. At one stage in the proceedings Guinea sought to justify the use of gunfire with the claim that the Saiga had attempted to sink the patrol boat. During the hearing, the allegation was modified to the effect that the danger of sinking to the patrol boat was from the wake of the Saiga and not the result of a deliberate attempt by the ship. But whatever the circumstances, there is no excuse for the fact that the officers fired at the ship itself with live ammunition from a fast-moving patrol boat without issuing any of the signals and warnings required by international law and practice.

158. The Guinean officers also used excessive force on board the Saiga. Having boarded the ship without resistance, and although there is no evidence of the use or threat of force from the crew, they fired indiscriminately while on the deck and used gunfire to stop the engine of the ship. In using firearms in this way, the Guinean officers appeared to have attached little or no importance to the safety of the ship and the persons on board. In the process, considerable damage was done to the ship and to vital equipment in the engine and radio rooms. And, more seriously, the indiscriminate use of gunfire caused severe injuries to two of the persons on board.

159. For these reasons, the Tribunal finds that Guinea used excessive force and endangered human life before and after boarding the Saiga, and thereby violated the rights of Saint Vincent and the Grenadines under international law.

B. HOT PURSUIT AND CONSTRUCTIVE PRESENCE: REGINA v. RUMBAUT

(Excerpts)

Decision on voir dire held to determine admissibility of evidence seized on board the Cypriot vessel “M. V. Pacifico” on 22 February 1994.

New Brunswick Court of Queen’s Bench
Court File No. B/M/118/97
Judge: Deschenes J.
10 June 1998; 2 July 1998

Summary

At the accused’s trial for conspiracy to import cocaine, the Crown sought to introduce in evidence certain items found aboard a foreign vessel after it was arrested in international
waters and brought to Halifax by the Canadian authorities. The police observed a vessel, conceded by the accused to be empty of drugs when it departed, leaving the Canadian shore and meeting a foreign vessel, registered in Cyprus, just outside Canada's territorial waters. Upon the return of the Canadian vessel to the Nova Scotia shore, 170 bales of cocaine weighing over 5,000 kilograms were seized from it. A Canadian military vessel arrested the foreign vessel in international waters. While the vessel was being escorted to the Nova Scotia shore, Canadian authorities requested authorization from the Director of the Cypriot Department of Merchant Shipping pursuant to the relevant provisions of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, 28 I.L.M. 493, to board, search and take appropriate action if evidence of involvement in illicit traffic was found. After the Cypriot Government’s consent was given, arrest and search warrants were obtained from Canadian courts.

On a voir dire to determine the admissibility of evidence seized from the foreign vessel, held, the evidence was admissible.

Article 17 (3) of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances provides that a party which has reasonable grounds to suspect that a vessel 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. The accused argued that, pursuant to this provision, Canada had no right to order the foreign vessel to stop, nor to board it until it had obtained authorization from the Cypriot Government. Assuming that this provision represented the domestic law of Canada, it could not have any applicability under the circumstances, nor did the words of the provision allow the type of interpretation which the accused sought to place upon it. Prior to boarding the foreign vessel in international waters, the Canadian authorities did not know which flag the vessel was flying although they believed that the vessel had been engaged in illicit traffic. The Canadian authorities could not request confirmation of registry nor authorization from the flag State to take appropriate measures in regard to the intercepted vessel. The Convention in general and article 17 in particular do not and did not prevent Canadian authorities from entering into hot pursuit of the foreign vessel in accordance with the international law of the sea. In fact, article 17, paragraph 11 clearly recognized the continued applicability of the general rules relating to the exercise of criminal jurisdiction at sea under certain circumstances.

The accused also argued that the customary international law of the sea did not authorize any of the actions taken by the Canadian authorities. Neither the Geneva Convention on the High Seas, 1958, 450 U.N.T.S. 11 (Geneva Convention), nor the United Nations Convention on the Law of the Sea, 1982, 21 I.L.M. 1261 (Montego Bay Convention), have been ratified by the Canadian Parliament and are not, as such, part of Canadian domestic law. However, article 23 of the Geneva Convention and article 111 of the Montego Bay Convention as they relate to the issue of extended constructive presence are declaratory of existing customary international law which is part of the Canadian domestic law. Pursuant to the doctrine of constructive presence, a mother or hovering ship is deemed to be inside territorial waters when boats belonging to her are within territorial waters and if they are violating the laws of the State in whose water they are present, such that there is a right of hot pursuit against the mother ship. The doctrine of extended constructive presence arises when the pursued ship is working as a team with another ship which is itself within territorial waters. The pursuit, the arrest, the boarding and subsequent seizure of the items on board the foreign vessel were performed in accordance with the established law of the sea and Canada's domestic laws. Even assuming that the conduct of the Canadian authorities in arresting the foreign vessel in international waters was not authorized by customary international law, the admission in evidence of items seized from it would not constitute an abuse of the process of this court.

Judgment

Deschenes J.: The accused is a Spanish national being tried for conspiracy to import cocaine in Canada. The Crown has moved to introduce in evidence certain items found aboard the Pacifico after it was arrested some 100 nautical miles in international waters and brought to port in Halifax, Nova Scotia, on 2 February 1994. Before proceeding to
a recitation of the factual background, it is necessary to discuss briefly the position of the Attorney General of Canada with respect to certain Conventions and to explain the general position taken by the accused.

Firstly, the position of the Attorney General of Canada is that the two Conventions which are at the centre of the discussion herein namely, the Geneva Convention on the High Seas, 1958, 450 U.N.T.S. 11, and the United Nations Convention on the Law of the Sea, 1982, 21 I.L.M. 1261 (Montego Bay Convention), although not binding upon Cyprus and Canada, are nevertheless declaratory of customary international law and that the actions of the Canadian authorities in this case were fully justified under the rules of customary international law.

Secondly, the accused has taken no issue with many of the technical requirements of the rules relating to hot pursuit in international waters except to argue that, in this case, hot pursuit was simply not allowed by and was contrary to article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, 28 I.L.M. 493, and not justified under customary international law as the Pacifico, or one of its boats, never entered Canadian territorial waters.

Thirdly, for the purposes of this *voir dire*, it was agreed that Canada’s territorial waters extend 12 miles from its coast and that when the Pacifico met with the Lady Teri-Anne on 22 February 1994, both vessels were in fact outside Canada’s territorial waters.

### The contention of both parties and the legal issues with respect to “extended or extensive constructive presence”

The accused has also argued that the customary international law of the sea did not authorize any of the actions taken by Canadian authorities in this case and that such actions amounted to nothing less than “high-seas kidnapping”. He further contended that such unlawful arrest accompanied by threats of the use of force, was so reprehensible in terms of breach of international law that to allow the items seized as a result of such actions to be received as evidence against the accused would amount to an abuse of process. Hence, the accused maintains that the Court must use its supervisory jurisdiction and exclude the evidence sought to be adduced.

Bearing in mind the international conventions previously mentioned, the decisions of Mills, Kirchhoff and Sunila and the cases referred to in those decisions, along with the opinions of experts as derived from the available sources such as text books, I adopt the opinions expressed in Mills and Kirchhoff and find that the 1958 and 1982 Conventions are merely declaratory of the doctrine of extended or extensive constructive presence as part of customary international law of the sea and thus part of Canada’s domestic law.

Looking at article 23 and article 111’s requirements as they relate to this case, I would conclude that:

1. The hot pursuit was exercised by a military vessel or warship (Terra Nova) authorized to that effect. In fact, the accused did not take issue with that fact.

2. The hot pursuit was undertaken by the Terra Nova only after the Terra Nova had good reasons to believe, after the arrest and boarding of the Lady Teri-Anne at the Shelburne wharf by the Royal Canadian Mounted Police (RCMP), that the Pacifico had violated the laws of Canada by working as a team with the Lady Teri-Anne who was then in Canadian territorial waters with five tons of cocaine which had been unloaded from the Pacifico onto the Lady Teri-Anne, albeit outside of Canada’s territorial waters. Under such circumstances, the Pacifico had not only worked as a team with the Lady Teri-Anne but had also been used as a mother ship by the Lady Teri-Anne. On this point, I would adopt the views expressed by Poulantzas (at p. 250) that the wording covers “other crafts coming usually from the shore and not belonging to the ship” and would also find that the words used do encompass a single pre-arranged unloading of illicit drugs as took place in this case.

3. The pursuit of the Pacifico was never interrupted and at no time did the Pacifico enter the territorial sea of any other State. The accused did not take issue with such facts.

4. The arrest of the Pacifico was only effected after an auditory signal to stop had been given and had been heard by the Pacifico. The accused did not take issue with such facts.
The pursuit, the arrest, the boarding and subsequent seizure of the items on board the Pacifico was performed in accordance with the established law of the sea and Canada’s domestic laws. The allegations by the accused that the process of the Court is being abused by receiving the items seized on board the Pacifico are without merit.

I might also add that even if I were in error in my analysis of Canada’s obligations under international law, I would not use this Court’s supervisory jurisdiction to exclude the evidence on the basis of abuse of process. In the Court’s view, even assuming for the purposes of the argument that the conduct of the Canadian authorities in arresting the Pacifico in international waters was not authorized by customary international law, the admission in evidence of items seized on board the Pacifico would not, in my view, constitute an abuse of the process of this Court. On the contrary, my view is that the conduct of the Canadian authorities in this case was prompted by their belief that their actions were governed by customary international law and all of their actions were designed to avoid or minimize infringements of the freedoms of the high seas.

In my opinion, however, the Court’s jurisdiction could be exercised to exclude such evidence if I were of the view that it was appropriate “in order to prevent the Court’s process from being enlisted in a proceeding which would damage its integrity” (See R. v. Light (1993), 78 C.C.C. (3d) 221 (B.C.C.A.) at p. 245).

In Regina v. Dunphy (1996), 140 Nfld. & P.E.I.R. 8 (Nfld. S.C.), the Court refused to admit evidence obtained by Royal Canadian Mounted Police officers who had completed a hot pursuit onto the harbor at St-Pierre de Miquelon, a foreign jurisdiction, and had observed contraband tobacco on board the pursued vessel. The Court concluded that to admit the evidence would be to endorse behavior clearly in breach of international law and comity.

In this case, however, contrary to the facts in Dunphy, there is no evidence that even the Cypriot Government contested the arrest of the Pacifico, nor was the behavior of the Canadian authorities in clear violation or breach of international obligations.

I would apply the same principles which I applied in R. v. Rumbaut [1998] N.B.J. No. 153 (QL) (N.B.Q.B.), 4 May 1998 [reported 125 C.C.C. (3d) 368] and conclude that even assuming that the arrest of the Pacifico was in breach of the customary law of the sea, there is no evidence of improper motive or bad faith or of an act so wrong that it violates the conscience of the community such that it would genuinely be unfair and indecent to admit the evidence.

The items seized on the Pacifico shall be admitted in evidence. Judgment accordingly.

C. HOT PURSUIT AND CONSTRUCTIVE PRESENCE: REGINA v. SUNILA AND SOLAYMAN (EXTRACTS)

Nova Scotia Supreme Court, Appeal Division

Judges: Clarke C.J.N.S., Hart and Jones J.J.A.

2 January 1986

Summary

The accused were charged with conspiracy to import a narcotic, importing a narcotic and possession of a narcotic for the purpose of trafficking and sought to quash the charges as a result of their arrest on the high seas by the Royal Canadian Mounted Police (RCMP) with the aid of the Canadian Navy. The evidence indicated that the police had a Canadian vessel under surveillance and that it was observed to rendezvous with the accused’s ship in Canadian territorial waters at which time a quantity of narcotics was transferred from the accused’s ship to the Canadian vessel. The accused’s ship then returned to the high seas. The authorities were aware that the two ships were in communication with each other and therefore delayed arresting the accused’s ship until the Canadian vessel had reached port and imported narcotics. The accused’s ship was kept under continuous surveillance by military aircraft until she was intercepted by a Canadian naval vessel which had RCMP officers on board. Once the seizure of the Canadian vessel had been made, the accused’s ship was boarded and the accused arrested. An application by the accused to quash the
The seizure of the ship and the arrest of the accused was lawful in this case. In the circumstances there was authority under the Narcotic Control Act, R.S.C. 1970, c. N-1, for the seizure of the ship and the crew for having committed an offence within the territorial waters of Canada and under the principles of international law that seizure was properly made after pursuit of the accused's ship onto the high seas. International law has always recognized the right of a State to pursue and arrest a foreign ship on the high seas and to return that ship to its ports to answer charges committed by the ship and her crew within the State's territorial waters. The conduct of the authorities in this case complied with the international law relating to pursuit of ships onto the high seas as codified in the Geneva Convention on the High Seas, 1958. While Canada has not yet ratified that treaty, it does serve as international recognition of the principles affecting the law of the sea. In particular, the circumstances fell within article 23 of the convention in that the accused's ship was acting as a mother ship of the Canadian vessel and the Canadian vessel was within Canadian waters when the pursuit of the accused's ship took place by a naval vessel. While the accused's ship was many miles into the international sea when she was ordered to heave to by the naval vessel, under the circumstances it would have been unreasonable for any communication to have been made with the accused's ship before the destroyer was within range to effectively prevent her escape. The accused's ship had not entered the waters of any other State and the naval vessel had been pursuing her continuously from the time the offence of importation had actually been completed by the Canadian vessel. The arrest of the vessel and its crew was properly conducted and properly brought within the jurisdiction of the Canadian courts. Accordingly, in arresting the ship and the crew there was no breach of any provision of the Canadian Charter of Rights and Freedoms.

Appeal by the accused from a judgment of Glube C.J.T.D., dismissing an application to quash charges of conspiracy to import a narcotic and importing a narcotic and possession of a narcotic for the purposes of trafficking.

Judgment

Hart J. A.: This is an appeal from the decision of Glube C.J.T.D., dated 8 August 1985, in chambers, whereby she refused to grant a remedy under s. 24 of the Canadian Charter of Rights and Freedoms quashing the outstanding charges against the appellants under the Criminal Code and the Narcotic Control Act, R.S.C. 1970, c. N-1, because of an alleged breach of s. 8 (unreasonable search or seizure) and s. 9 (arbitrary imprisonment) of the Charter and further refused to grant bail to the appellants pending their preliminary hearing. At the time of her decision the preliminary hearing was already under way and subsequently resulted in the committal for trial of the appellants on three charges contrary to the Criminal Code and the Narcotic Control Act:

(a) Conspiracy to import a narcotic into Canada;
(b) Importing a narcotic into Canada; and
(c) Possession of a narcotic for the purpose of trafficking.

Their trial is scheduled to begin 20 January 1986, in the Supreme Court, Trial Division.

The appellants’ claim to the right to be released from all charges arose from the fact that they and their ship were arrested on the high seas by the RCMP with the aid of the Canadian Navy and brought back to the province to face the charges against them. They claim the arrest was illegal and the only suitable remedy was to quash the charges against them.

The Attorney General of Canada, on the other hand, claims that the police were justified in pursuing the appellants’ ship and making the arrests, since that ship acted as a mother ship which entered Canadian waters and unloaded substantial quantities of narcotics to a smaller vessel, which then proceeded into a port in Nova Scotia and completed the importation of its cargo into Canada.
Factual background

Normally one nation does not have the right to arrest the ships and citizens of another on the high seas, and a fairly extensive review of the factual situation is therefore necessary to determine whether the actions of the Canadian authorities in this situation were justified.

The RCMP were expecting an attempt to import a large quantity of narcotics into Canada as a result of information received from an informer and had been maintaining surveillance for some time on a motor vessel, the Lady Sharell, resting at Liverpool, Nova Scotia.

On 13 May 1985, the Lady Sharell left Liverpool with a crew of four members. She headed directly towards a position off Sable Island, Nova Scotia, where she remained under continuous surveillance by military aircraft for approximately 10 days.

While at sea the Lady Sharell held a rendezvous with only one vessel, later identified as the Ernestina. During this rendezvous 13.4 tons of cannabis resin were transferred from the Ernestina to the Lady Sharell and 15 $1,000 Canadian bills were transferred from the Lady Sharell to the Ernestina. The rendezvous occurred in the territorial sea of Canada off Sable Island under cover of darkness between 10.58 p.m. on 22 May 1985, and 12.15 a.m. on 23 May 1985, a period slightly in excess of one hour. In total the Ernestina spent only about five hours within the limits of the territorial sea of Canada.

When the transfer was completed the Ernestina headed back onto the high seas, but military aircraft maintained an active and continuous radar surveillance until she was later intercepted by Her Majesty's Canadian Ship (HMCS) Iroquois. In the meantime surveillance was maintained upon the Lady Sharell, which departed Sable Island after the rendezvous and sailed directly to Lockeport, Nova Scotia, arriving on 24 May 1985, at approximately 6.00 a.m., at which time the police boarded her and seized 13.4 tons of cannabis resin.

While the Lady Sharell was en route to Lockeport on 23 May 1985, and the Ernestina had re-entered the open seas, the RCMP obtained search warrants to search the Ernestina, the Lady Sharell and the organization’s communication base at Jordan Falls. Arrangements were also made at this time with Maritime Command for the assistance of a naval vessel, HMCS Iroquois, to pursue and intercept the Ernestina. Visual radar surveillance was continuously maintained but direct contact with either vessel by the police was not considered advisable until the Lady Sharell had arrived in port and completed the importation and her cargo had been seized.

On 24 May 1985, while at sea aboard HMCS Iroquois in pursuit of the Ernestina, Staff Sergeant L. Warren of the RCMP was advised of the seizure of the cannabis resin from the Lady Sharell in Lockeport Harbor. HMCS Iroquois then made contact with the Ernestina and requested her to stop for boarding. Shortly thereafter, at 11.45 a.m., Staff Sergeant L. Warren was the first to board the Ernestina.

The primary issue for decision by the chambers judge was whether or not the Canadian authorities were entitled under these circumstances to arrest the Ernestina and her crew and return them to Canada to stand trial on the charges alleged against them under the Criminal Code and the Narcotic Control Act. She decided that the police had reasonable and probable cause for believing that the crew members had, shortly before, committed an indictable offence in Canada and that they were justified in pursuing the ship into international waters for the purpose of their arrest. She held that under the international treaties, to which Canada was a party, the action of the police was justified and that there was no breach of the Canadian Charter in the conduct of the operation. The ship was lawfully searched and the appellants were lawfully arrested.

Glube C.J.T.D. went further and held that even if there had been a breach of international law in the arrest of the appellants that they were before Canadian courts and therefore subject to their jurisdiction. As authority for this proposition she referred to The Ship North v. The King (1906), 37 S.C.R. 385, and several other authorities. In the result she held that the appellants were validly held in custody in Canada and that the magistrate’s subsequent refusal to admit them to bail was justified and that they should therefore remain in custody pending their trial.
The appellants now appeal to this Court on the following grounds:

1. Royal Canadian Mounted Police.

2. That the learned Chambers Judge erred in holding that the Royal Canadian Mounted Police had lawful authority to stop M. V. Ernestina, to search it and its occupants, and seize various articles.

3. That the learned Chambers Judge erred in finding that the Appellants’ rights under section 8 of the Canadian Charter of Rights and Freedoms were not infringed or denied.

4. That the learned Chambers Judge erred in holding that the Appellants were lawfully arrested and were not unlawfully in detention.

5. That the learned Chambers Judge erred in holding that the Appellants’ rights under section 9 of the Canadian Charter of Rights and Freedoms were not infringed or denied.

The appellants argued that there was no authority to arrest them on the high seas unless the police could bring themselves within the concept of “hot pursuit” and that they had not done so. They said that they were in fact kidnapped by the Canadian authorities and forced against their will to return to a Canadian port to face the charges against them.

Today the international law relating to the pursuit of ships onto the high seas after an offence has been committed within the territorial waters of a State has been codified in an international treaty known as the Geneva Convention on the High Seas, 1958, 450 U.N.T.S. 11. Although Canada was a signatory to this Convention in 1958 and the Convention came into force in 1962, after the required number of countries had signed, Canada has not yet ratified the treaty. It does serve, however, as an international recognition of the principles affecting the law of the sea, and in its preamble states:

“...The States Parties to this Convention,

“Desiring to codify the rules of international law relating to the high seas,

“Recognizing that the United Nations Conference on the Law of the Sea, held at Geneva from 24 February to 27 April, 1958, adopted the following provisions as generally declaratory of established principles of international law,

“Have agreed as follows:”

By article 23 of the Convention, the right of hot pursuit on the high seas is stated as follows:

“1. The hot pursuit of a foreign 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 ship or one of its boats is within the internal waters or 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 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 ship is within a contiguous zone, as defined in article 24 of the Convention on the Territorial Sea and the Contiguous Zone, 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 ceases as soon as the ship pursued enters the territorial sea of its own country or of a third State.

“3. 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 are 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 ship.
4. The right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft on government service specially authorized to that effect.

5. Where hot pursuit is effected by an aircraft:

(a) The provisions of paragraph 1 to 3 of the present article shall apply mutatis mutandis;

(b) The aircraft giving the order to stop must itself actively pursue the ship until a ship or aircraft of the coastal State, summoned by the aircraft, arrives to take over the pursuit, unless the aircraft is itself able to arrest the ship. It does not suffice to justify an arrest on the high seas that the ship 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 ships which continue the pursuit without interruption.

6. The release of a ship arrested within the jurisdiction of a State and escorted to a port of that State for the purposes of an inquiry before the competent authorities, may not be claimed solely on the ground that the ship, in the course of its voyage, was escorted across a portion of the high seas, if the circumstances rendered this necessary.

7. Where a ship has been stopped or arrested on the high seas in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained.

I am satisfied that the Ernestina was a mother ship of the Lady Sharell and that the Lady Sharell was within Canadian waters when the pursuit of the Ernestina took place by HMCS Iroquois. It is true that the Ernestina was many miles into the international sea when she was ordered to heave to by the Iroquois, but under the circumstances it would have been unreasonable for any communication to be made with the Ernestina before the destroyer was within range to effectively prevent her escape. The Ernestina had not entered the waters of any other State and the Iroquois had been pursuing her continuously from the time the offence of importation had been actually completed by the Lady Sharell. Under the doctrine of necessity and reasonableness enunciated in The Ship North by the Supreme Court of Canada, the arrest of the Ernestina was properly conducted and she and her crew were properly brought within the jurisdiction of the courts of this province. I would hold therefore, as did the Chambers Judge, Chief Justice Glube, that in arresting the Ernestina and her crew there was no breach of any provision of the Canadian Charter of Rights and Freedoms, since an offence had been committed within the territorial waters of Canada and the ship was properly pursued under the principles of international law. It is therefore unnecessary to deal with any of the other issues raised on this appeal.

I should point out that Canada is also a party to the Single Convention on Narcotic Drugs, 1961, 570 U.N.T.S. 557, adopted by a conference of the United Nations, which came into force in 1975 and was accepted by this country in 1976. Honduras is also a party to this Convention. In the Convention by article 35 (c) the parties agree to:

(c) Co-operate closely with each other and with the competent international organizations of which they are members with a view to maintaining a coordinated campaign against the illicit traffic;

Other provisions of the convention which relate to the matter before the court are found in article 36:

1. Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties or deprivation of liberty.

2. Subject to the constitutional limitations of a Party, its legal systems and domestic law,
“(iv) Serious offences heretofore referred to committed either by nationals or by foreigners shall be prosecuted by the Party in whose territory the offence was committed, or by the Party in whose territory the offender is found if extradition is not acceptable in conformity with the law of the Party to which application is made, and if such offender has not already been prosecuted and judgment given.

“3. The provisions of this article shall be subject to the provisions of the criminal law of the Party concerned on questions of jurisdiction.

“4. Nothing contained in this article shall affect the principle that the offences to which it refers shall be defined, prosecuted and punished in conformity with the domestic law of a Party.”

International approval to the seizure of ships is contained in article 37, which states:

“37. Any drugs, substances and equipment used in or intended for the commission of any of the offences, referred to in article 36, shall be liable to seizure and confiscation.”

Under international law the only party having the right to complain about the seizure of the Ernestina was the Government of Honduras, and the fact that that Government is a party to the Single Convention on Narcotic Drugs, 1961, may very well be the reason why no protest was made to Canada over this incident.

For all of these reasons I would dismiss the appeal.
Appeal dismissed.

D. HOT PURSUIT: REGINA v. MILLS AND OTHERS

Ruling on jurisdiction and abuse of process issues

Summary

Six defendants, Seggerman, Jannsen, Charlin, Artesan, Baric and Grbac apply to stay these proceedings on the grounds of abuse of process. They are all foreign nationals and were arrested at sea in international waters on the MV Poseidon. I have first to decide whether I have jurisdiction to hear and determine this application; the Crown has argued that no domestic court in the United Kingdom has authority to hear the application or, if that be wrong, the application should have been made to the High Court which has exclusive jurisdiction. I have, however, been invited, whatever my decision on those submissions, to deal with the substantive arguments on the application to stay and to rule on both matters.

The substantive application by these defendants is to stay the proceedings because they were wrongly arrested on the high seas in breach of international law. They argue that, applying the principles contained in the decision of the House of Lords in Regina v. Horsey Road Magistrates Court ex-parte Bennet L1994J 1AC 42, the court should intervene and refuse to countenance behaviour by the executive that threatened either basic human rights or the rule of law, even though the matters complained of would not prevent the defendants having a fair trial.

Judgment

I have heard evidence over a period of five days, interrupted by the need for me to review decisions made on ex-parte applications by the Crown to withhold disclosure of documents on the grounds of public interest. I start by setting out the facts relating to the issue of abuse of process as they were agreed or as I find them to be.

The fourteen defendants on the indictment are charged with conspiracy to import cannabis into the United Kingdom. The quantities are considerable, over 6 tons with a street value in excess of £24 million. Those drugs were imported by sea from Morocco in a well-organized operation. They were shipped in MV Poseidon, a diving support vessel registered in St. Vincent. The Poseidon is a 200-foot long diving support vessel of 953 registered tons.
Factual background

Phase one

On 5 November the defendant Maezele, who has pleaded guilty, inspected the Delvan, a British registered fishing trawler of 50 tons, which was lying in Cork Harbour in the Republic of Ireland. It was crewed by undercover customs and police officers. He had been introduced to the Delvan by contacts made by the defendant Mills, who has also pleaded guilty, with another undercover police officer. The Delvan was deemed suitable and set sail from Cork at 1404 on 9 November with a crew of five undercover officers and with Maezele.

A naval task force commanded by Commander Durston, who was one of the witnesses giving evidence before me was deployed in support of the operation being mounted by the Customs and Excise. This force consisted of Her Majesty’s Ship (HMS) Avenger, a frigate, and Royal Fleet Auxiliary (RFA) Olma ....

At 2311 on 9 November HMS Avenger established radar contact with the Poseidon which was then at 49º16’N 010º08’W in international waters ....

By 1025 on 10 November the Poseidon and the Delvan had rendezvoused at 50º 00’N 009º 00’W, a position some 100 miles west of the Scillies and 100 miles south of Ireland in international waters. The rendezvous was monitored on radar by HMS Avenger and lasted from 1025 to 1440 when the Delvan opened from the Poseidon. During the rendezvous some 3 tons of cannabis were transferred to the Delvan. The whole cargo could not be transferred because of the weather. At all times during the operation both vessels remained in international waters.

At 1440 Delvan adopted a course of 110º in the general direction of the south coast of the United Kingdom. From 0130 on 11 November the Delvan was monitored by the Customs cutter Seeker which had sailed from Plymouth on 10 November under orders to search for and maintain surveillance on the Delvan. At that time radar contact was made and a few minutes later the Delvan entered United Kingdom territorial waters in which she remained until entering port .... The Delvan entered Littlehampton Harbour and moored at 2100. She unloaded her cargo of drugs and Maezele disembarked. The Delvan left Littlehampton at 2110.

Phase two: arrest of mothership is authorized

That order was received by the task force at 2315.

The Poseidon had proceeded on a course of 210º roughly south west back into the Atlantic from the rendezvous. It was under the continued surveillance of the Avenger which remained some 25 miles astern again out of range of Poseidon .... The course sailed and observations of the position of the Poseidon which are shown on the chart produced to me were not disputed by the defendants, indeed were confirmed by the courses marked on the chart seized from the Poseidon when she was arrested. At the time when the authority to arrest the Poseidon was received she was in international waters and had never entered the territorial waters of any State. I am satisfied that at no time after the transfer operation did the Poseidon have any contact with any other vessel which would have enabled it to trans-ship any cargo or person ....

I heard evidence from both Commander Durston and Mr. Hector about the advance preparations made for the arrest of the Poseidon in anticipation of authority being given. I also heard evidence about the weather conditions. Commander Durston told me that the relative size and construction of the ships in the Naval task force and the Poseidon precluded a boarding direct from one vessel to another. This evidence I unreservedly accept. The risks of damage would have been great in the prevailing weather conditions, the Delvan had herself suffered damage whilst alongside the Poseidon.

Commander Durston told me that he had considered a transfer of the boarding party by boat and he conducted a trial to see if this was feasible. He concluded that it was not and chose the alternative of landing the boarding party from helicopters.

Three helicopters were used for boarding. Commander Durston first attempted to call the Poseidon by name by very high frequency (VHF) radio on channel 16 on two separate occasions commencing at 0733, but received no reply.
I received evidence from Mr. Montalto about the radio equipment carried by Poseidon. VHF radio sets were positioned on either side of the bridge adjacent to the bridge deck doors. They were in working order; they were used by the naval prize party on the voyage back to the United Kingdom after the vessels arrest. No evidence was given by any of the defendants and I conclude that messages sent on VHF radio could have been heard on the bridge of the Poseidon.

... I find that no boarding took place until after an order to stop had been given. That is wholly consistent with the sequence of five messages sent by the Lynx helicopter to the Poseidon. It was not disputed that all the crew were arrested and later trans-shipped to the Avenger.

I heard considerable evidence about the negotiations between the Customs and Excise and the Ministry of Defence about the provision of naval assistance in the arrest of the Poseidon. I was also told about the discussion between the lawyers in the two departments about the legal position. I understand that this is the first occasion on which an operation of this nature had been mounted in international waters. I have seen the written advice given by Ms. Bolt of the Customs and Excise solicitors office to Mr. Delahunty. I am satisfied that having received that advice he endeavoured to act within it. He was quite frank in his evidence, he told me that his priority was to let the Delvan land its cargo at a United Kingdom port so that he could seize the drugs and arrest the United Kingdom shore party. It was clear to me that the arrest of the Poseidon was secondary to that aim. That is supported by the reference in the message from the Ministry of Defence sent at 2313 to Phase two. Delahunty believed that the delay between the entry of the Delvan into United Kingdom territorial waters and the order to arrest the Poseidon given at 2313 on 12 November was justified both operationally and in law. It was not argued that he acted in bad faith in delaying the arrest.

Soon after the defendants had first been brought before the magistrates the Crown gave notice to them by letter dated 8 December 1993 that they had been arrested in international waters in exercise of the right of “hot pursuit” contained in international law which is to be found in the Geneva Convention on the High Seas of 1958

**Hot pursuit**

Bearing those considerations in mind, I have been referred to numerous decisions in foreign jurisdictions and to the writings of a number of authors on the topic of hot pursuit.

One description of “hot pursuit” is to be found in “The International Law of the Sea” by O’Connell:

“Hot pursuit may be defined as the legitimate chase of a foreign vessel on the high seas following a violation of the law of the pursuing State committed by the vessel within the pursuing State’s jurisdiction, provided that the chase commences immediately and the vessel evades visit and search within the jurisdiction, and provided that the chase is carried on without interruption onto the high seas.”

It is clear that the right has existed for many years and was well established in the nineteenth century. O’Connell suggests that it had a jurisdictional basis stemming from the territorial concept of “fresh pursuit”, the right of the sheriff to pursue an offender fleeing out of his county into the jurisdiction of another, with the attendant fiction that, for jurisdictional reasons, an arrest made after pursuit was made at the place where the pursuit commenced.

The Geneva Convention on the High Seas of 1958 codified the right in article 23 in the following terms:

“1. The hot pursuit of a foreign 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 ship or one of its boats is within the internal waters or 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 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 ship is within a contiguous zone, as defined in article 24 of the Convention on the Territorial Sea and the Contiguous Zone, 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 ceases as soon as the ship pursued enters the territorial sea of its own country or of a third State.

“3. 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 are 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 ship.

“4. The right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft on government service specially authorized to that effect.”

It is convenient to deal with hot pursuit in the terms set out in the Convention. Article 23 imposes a number of qualifications upon the exercise of the right and I will deal with each separately.

*Offence in territorial waters*

The first precondition to the exercise of the right of hot pursuit is a reasonable belief by the United Kingdom authorities that a violation of the law of the United Kingdom had taken place within its territorial waters. There was clear and, for the purpose of this application, undisputed evidence that the Poseidon had been involved in the trans-shipment on the high seas to the Delvan of a considerable quantity of drugs and that those drugs had been taken by the Delvan to and unloaded at Littlehampton.

In its original form the right of hot pursuit could be exercised only if the offence itself had taken place in territorial waters. An example of such a situation is to be found in the Canadian decision of The Ship North v. the King 1906 37 Canadian SCR in which case the North had been observed fishing within Canadian territorial waters, was chased out into the high sea and there arrested. The arrest was upheld. This is reflected in article 23 (1) that provides that the hot pursuit must commence when the foreign ship or one of its boats is present within territorial waters.

*The doctrine of constructive presence*

The era of prohibition in the United States was fruitful for smugglers and for arrests at sea. A practice of boats hovering just outside the three-mile limit grew up, goods being smuggled ashore in the boats of the hovering vessel. The mother or hovering ship is deemed to be inside territorial waters because boats belonging to her are within territorial waters and if they are violating the laws of the State in whose waters they are present there is a right of hot pursuit against the mother ship.

The doctrine was upheld in the 1922 decision of the Massachusetts District Court, The Grace and Ruby 283, Federal Reporter 283. In that case goods were smuggled ashore in a boat taken ashore with the assistance of the crew of the foreign vessel. The court held that the act of unloading the contraband was not complete until the goods had been unloaded ashore and the fact the ship remained outside the three-mile limit did not make the seizure illegal.

*The doctrine of extended constructive presence*

This arises when the pursued ship is working as a team with another ship—not being one of its boats—which is itself within territorial waters. It is described in article 23 (3) of the Convention in the following words:

“... the ship pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship ....”

This doctrine was first recognized in the 1923 decision of the Federal Circuit Court of Appeals, The Henry L. Marshall 292, Federal Reporter 486. The Henry Marshall unloaded its cargo of alcohol outside the three-mile limit into small boats, not part of its equipment, which had come out from the shore and was arrested. The seizure was upheld. The ship was a British vessel and the United Kingdom Government disputed the seizure, but the
position was ultimately regularized by a treaty by which the United Kingdom agreed not to object to searches and seizures carried out within defined situations within the American jurisdiction.

After the ratification of the Geneva Convention in 1962 the doctrine was considered in the Italian Courts in The Pubs 1977 International Year Book of International Law at page 587. In that case there had been trans-shipment in international waters of cigarettes to a daughter ship which had come from Italian territorial waters. The daughter ship was pursued to and arrested in territorial waters. It was held that the right of hot pursuit which began immediately on the arrest of the daughter ship was extendible to the mother ship.

The doctrine was further upheld by the Nova Scotia Supreme Court in Regina v. Sunila and Solayman. In that case a trans-shipment of 13.4 tons of cannabis resin had taken place within territorial waters and the mother ship had returned to the high seas. She was arrested in international waters after the daughter ship had arrived in port and completed her importation.

All the cases to which I have referred above were cases in which the daughter ship had come from the shore of the pursuing State and returned to those shores. The defendants submit these circumstances were not present in this instant case. The Delvan, ship to which the goods were trans-shipped by the Poseidon, had departed from Cork in the Irish Republic before the rendezvous in international waters. It then made passage to British territorial waters before landing its cargo at Littlehampton. O’Connell at page 1093 in his commentary on the doctrine says:

“This paragraph [paragraph 3 of article 23] is not, like paragraph 1, operative to establish the rule, but circumstantial as to its application; and it makes pursuit conditional on team work and use of the vessel as a mother ship, which are not conditions unusual in trans-shipment.”

The defendants contend that the unity of control which O’Connell has identified as an essential feature of the doctrine is absent when the daughter ship departs from a port in a different jurisdiction to its port of destination and therefore it cannot be said that the Poseidon and the Delvan were acting together as a team.

The essential element in all the cases to which I have been referred is the transfer of the drugs or other contraband into territorial waters from the mother ship by the daughter ship as part of a pre-arranged plan. I must remind myself that the charges against the defendants are based on conspiracy. That offence will be made out only if the jury accepts that the defendants were part of that conspiracy. In my judgement the location of the port of departure of the mother ship is irrelevant. It is clear to me that the policy consideration behind doctrine is the prevention of the commission of crimes in the territorial waters of the State which exercises the right to hot pursuit. That consideration would be defeated if the point of departure was relevant, mother ships hovering outside territorial waters could never be arrested if the daughter ship departed from a different jurisdiction to her ultimate destination.

**Immediacy**

The defendants submitted that hot pursuit should have commenced immediately the Delvan entered United Kingdom territorial waters at 0130 on 11 November. Article 23 in the Convention is silent on the time at which the pursuit must commence.

Poulantzas in “The Right of Hot Pursuit in International Law” published in 1969 said:

“The right of hot pursuit represents a traditional limitation to the freedom of the high seas and should only be used for exceptional and urgent circumstances which necessitate very quick action on the part of the coastal State. If the period of time between committing an infringement by a foreign vessel and the commencement of the pursuit is not short, then the right of hot pursuit cannot any longer be justified under international law. However, the element of immediacy should not be interpreted stricto sensu, but in a broader sense.”

Another commentator, Craig Allen, writing in 1989, in “Doctrine of Hot Pursuit” dealt with immediacy in the following terms:
“The term ‘hot pursuit’ suggests that any pursuit must follow closely upon a violation. Immediate commencement of hot pursuit is not an inflexible requirement. Pursuit need not be commenced the moment a violation is detected; however, an unreasonable delay between detection of the violation and commencement of the pursuit will cast doubt on the pursuit’s legitimacy.

Initiation of pursuit may justifiably be delayed for violations involving vessels constructively present within coastal state waters. In constructive presence cases, the violation is complete only when the contact vessel consummates its violation of coastal state law. This may require that the pursuit be delayed a day or more. As long as the contact vessel remains within the coastal state’s waters, however, pursuit of the mother ship may be delayed until the contact vessel’s violation is complete.”

It is necessary to consider also the historic justification for both immediacy and continuity of pursuit. Before the installation in ships of modern tracking devices it was essential that the pursuing vessel maintained contact with the offending ship to be able to demonstrate that it had not arrested an innocent vessel exercising its right to navigate freely on the high seas. Similar considerations applied historically to the exercise on land of the right of “fresh pursuit”, the sheriff’s officers needed to be able to prove that they had arrested the true offender. Those practical considerations do not apply today when modern and accurate tracking devices are available at sea. The undisputed evidence shows that the identity and position of the Poseidon was known at all times to HMS Avenger.

In 1986 the Nova Scotia Supreme court held in Regina v. Sunila and Solayman that delay in commencing hot pursuit until after the daughter ship was justified. Hart J. A. said:

“Visual radar surveillance was continuously maintained but direct contact with either vessel by the police was not considered advisable until the Lady Sharrel [the daughter ship] had arrived in port and the offence of importation had been completed.”

After considering the terms of article 23 he went on to say:

“It is true that the Ernestina [the mother ship] was many miles into the international sea when she was ordered to heave to by the Iroquois [the pursuing warship] but under the circumstances it would have been unreasonable for any communication to be made with the Ernestina before the destroyer was in range to effectively prevent her escape.”

The arrest was upheld.

In this instant case the delay in commencing the pursuit of the Poseidon until after the arrival of the Delvan in Littlehampton and the completion of the importation does not, in my judgement, mean that the right of hot pursuit was lost. The decision to delay was made for justifiable reasons and, as the Poseidon had been under effective surveillance since the time of the trans-shipment there was no risk of the arrest of an innocent vessel. The offence in this case is conspiracy to evade the ban on the importation of drugs or to supply drugs. In Regina v. Wall 1974 2 All ER 245 it was held that, although in general acts committed abroad could not be the subject of criminal proceedings in England, steps taken abroad were for purpose of the fraudulent evasion and it followed that the defendant in that case was knowingly concerned in the fraudulent evasion of the ban. Similarly the offence of conspiracy was not necessarily complete until the drugs landed in Littlehampton. It was therefore arguable that the right to hot pursuit had not arisen until that time. In my judgement Mr. Delahunty was entitled to delay the issue of order for arrest of the Poseidon until the drugs had been landed in the United Kingdom at 2130.

There followed a delay until first light on 13 November. For the reasons which I have given earlier I am satisfied the commander of the Naval Forces was justified, having regard to all the ambient conditions, sea state and light, to delay the commencement of the hot pursuit until then because the purpose of the pursuit, boarding and arrest was not capable of fulfilment at the earlier time and in those circumstances.

Article 23 (3) provides that there are two conditions precedent to the commencement of hot pursuit:

(a) The presence of the ship pursued or the daughter ship within territorial waters; and
(b) The giving of a visual or auditory signal to stop at a distance which enables it to be seen or heard.

The signal to stop ensures that the offending ship is aware that it has been detected, identified and is being ordered to heave to for boarding. The pursuing vessel is entitled to open fire if its order is not complied with (see United States v. Striefel 1982, American Maritime Cases 1155). A signal will go some way to prevent unnecessary damage or injury. Having accepted that the delay in commencing the pursuit was justified the delay in sending the signal to stop was also justified.

The defendants argue that a signal sent by radio did not comply with the condition precedent in article 23 (3). The position has not been considered in any decided case and the commentators are divided.

It is clear from Poulantzas at page 204 that both the Hague Codification Conference of 1930 and the Geneva Conference of 1958 accepted that signals by radio should not be regarded as lawful for the commencement of the pursuit. It was thought that this exclusion was justified to prevent abuse from radio signals sent from a considerable distance. He accepted that wireless could be used by the pursuing ship in order to be assured that the auditory or visual signals had been understood.

McDougal and Burke (The Public Order of the Oceans, 1987) were of the opinion that the kind of signal given to a suspect directing it to stop and submit to a search seemed unimportant as long as it was followed in good time by the actual appearance of the arresting vessel. They went on to add that what was to be avoided was the imposition of delay, because the signal is given by a craft which is unable within a reasonable period to impose effective control over the violator.

This view was followed by Craig Allen in 1989, he said:

“Most modern publicists agree that enforcing craft should be permitted to give the initial signal by radio, even before the pursuing vessel comes within sight. Where it is clear by the offending vessel’s acknowledgement or otherwise that the vessel received and understood a signal to stop given by radio, such a signal meets the underlying policy goal of providing adequate notice to the vessel.”

The presence of three helicopters hovering close to the Poseidon would only have added emphasis to the radio signals sent by the Lynx helicopter.

Modern technology has moved on since 1958 and the law must take account of those changes. Mr. Montalto told me that VHF radio is now the standard method of communication between vessels at sea, which are required by international radio regulations to keep a watch on channel 16. I hold that the messages sent by this medium comply with the preconditions of the Convention to the exercise of the right of hot pursuit.

I hold that the Poseidon was properly arrested in international waters under the terms of the Geneva Convention and in accordance with the provisions of the international law of the sea.

For these reasons I disallowed the defendants’ application to stay the indictment on the grounds of abuse of process.