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REPORT

on the initiative of the Kingdom of Spain with a view to adopting a Council Act establishing, in accordance with Article 34 of the Treaty on European Union, the Convention on the suppression by customs administrations of illicit drug trafficking on the high seas
(5382/2002 – C5-0249/2003 – 2003/0816(CNS))

Committee on Citizens' Freedoms and Rights, Justice and Home Affairs

Rapporteur: Marjo Matikainen-Kallström

Symbols for procedures

- * Consultation procedure
majority of the votes cast
- **I Cooperation procedure (first reading)
majority of the votes cast
- **II Cooperation procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- *** Assent procedure
*majority of Parliament's component Members except in cases
covered by Articles 105, 107, 161 and 300 of the EC Treaty and
Article 7 of the EU Treaty*
- ***I Codecision procedure (first reading)
majority of the votes cast
- ***II Codecision procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- ***III Codecision procedure (third reading)
majority of the votes cast, to approve the joint text

(The type of procedure depends on the legal basis proposed by the Commission)

Amendments to a legislative text

In amendments by Parliament, amended text is highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). These suggested corrections are subject to the agreement of the departments concerned.

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PROCEDURAL PAGE

By letter of 2 June 2003 the Council consulted Parliament, pursuant to Article 39(1) of the EU Treaty, on the initiative of the Kingdom of Spain with a view to adopting a Council Act establishing, in accordance with Article 34 of the Treaty on European Union, the Convention on the suppression by customs administrations of illicit drug trafficking on the high seas (5382/2002 - 2003/0816(CNS)).

At the sitting of 5 June 2003 the President of Parliament announced that he had referred the initiative to the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs as the committee responsible and the Committee on Legal Affairs and the Internal Market for its opinion (C5-0249/2003).

The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs appointed Marjo Matikainen-Kallström rapporteur at its meeting of 9 July 2003.

At its meeting of 16 December 2003 the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs decided to request the opinion of the Committee on Legal Affairs and the Internal Market on the initiative's legal basis under Rule 63(2).

By letter of 22 January 2004 the Committee on Legal Affairs and the Internal Market notified the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs that it had decided to deliver an opinion on the legal basis of the initiative of the Kingdom of Spain under Rule 63(3).

The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs considered the initiative of the Kingdom of Spain and draft report at its meetings of 2 December 2003 and 9 and 19 February 2004.

At the last meeting it adopted the draft legislative resolution by 24 votes to 3, with 1 abstention.

The following were present for the vote: Jorge Salvador Hernández Mollar (chairman), Robert J.E. Evans (vice-chairman), Johanna L.A. Boogerd-Quaak (vice-chairwoman), Giacomo Santini (vice-chairman), Marjo Matikainen-Kallström (rapporteur), Mary Elizabeth Banotti, Michael Cashman, Carmen Cerdeira Morterero, Gérard M.J. Deprez, Koenraad Dillen, Adeline Hazan, Margot Keßler, Timothy Kirkhope, Eva Klamt, Lucio Manisco (for Giuseppe Di Lello Finuoli), Luís Marinho (for Martine Roure), Erik Meijer (for Ilka Schröder pursuant to Rule 153(2)), Elena Ornella Paciotti, Paolo Pastorelli (for Marcelino Oreja Arburúa), Hubert Pirker, Bernd Posselt, Gerhard Schmid, Olle Schmidt (for Baroness Ludford), Ole Sørensen (for Bill Newton Dunn), Patsy Sørensen, Joke Swiebel, Anna Terrón i Cusí, Maurizio Turco and Christian Ulrik von Boetticher.

The opinion of the Committee on Legal Affairs and the Internal Market on the legal basis is attached.

The report was tabled on 17 March 2004.

DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

on the initiative of the Kingdom of Spain with a view to adopting a Council Act establishing, in accordance with Article 34 of the Treaty on European Union, the Convention on the suppression by customs administrations of illicit drug trafficking on the high seas

(5382/2002 – C5-0249/2003 – 2003/0816(CNS))

(Consultation procedure)

The European Parliament,

- having regard to the initiative of the Kingdom of Spain (5382/2002)¹,
 - having regard to Articles 30(1)(a), 32 and 34(2)(d) of the EU Treaty,
 - having regard to Article 39(1) of the EU Treaty, pursuant to which the Council consulted Parliament (C5-0249/2003),
 - having regard to the opinion of the Committee on Legal Affairs and the Internal Market on the proposed legal basis,
 - having regard to Rules 106, 67 and 63 of its Rules of Procedure,
 - having regard to the report of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (A5-0100/2004),
1. Approves the initiative of the Kingdom of Spain as amended;
 2. Calls on the Council to amend the text accordingly;
 3. Calls on the Council to notify Parliament if it intends to depart from the text approved by Parliament;
 4. Calls on the Council to consult Parliament again if it intends to amend the initiative of the Kingdom of Spain substantially;
 5. Instructs its President to forward its position to the Council and Commission, and the government of the Kingdom of Spain.

¹ OJ C 45, 10.2.2003, p. 8.

Amendment 1
Council Act, title

Council Act establishing in accordance with Article 34 of the Treaty on European Union, the Convention on the **suppression by customs administrations of illicit drug** trafficking on the high seas

Council Act establishing in accordance with **Articles 30(1)(a), 32 and 34** of the Treaty on European Union, the Convention on **operational cooperation between the competent authorities of the Member States in relation to the prevention, detection, investigation and prosecution of criminal offences committed** on the high seas

Justification

The initiative of the Kingdom of Spain in fact has two legal bases (i.e. provisions assigning competence for adopting the legislative act), namely that referring to the legal form of the act in question, which is a convention (Article 34(2)(d) of the EU Treaty), and that referring to the substance (Articles 30 and 32 of the EU Treaty), which must also be specified.

The Committee on Legal Affairs has delivered an opinion on this matter in accordance with Rule 63(2), and this amendment is in keeping with that opinion.

Furthermore, Articles 30 and 32 of the TEU provide a relevant legal basis enabling the EU to extend the scope of this legislative proposal to cover other types of criminal offence in addition to illicit drug trafficking and to involve not just customs administrations but all competent administrations. Unless this is done, a large number of criminal offences will go unpunished, thus posing a serious threat to the health and security of EU citizens.

Amendment 2
Council Act, citation 1

Having regard to the Treaty on European Union, and in particular **Article 34(2)(d)** thereof,

Having regard to the Treaty on European Union, and in particular **Articles 30(1)(a), 32 and 34(2)(d)** thereof,

Justification

See justification for Amendment 1.

¹ OJ C 45, 10.2.2003, p. 8.

Amendment 3
Council act, recital 1

Whereas, for the purposes of achieving the **objectives of the** European Union, Member States **regard customs cooperation as a matter of common interest for the cooperation established in Title VI of the Treaty,**

Whereas, for the purposes of achieving the European Union **objective of maintaining and developing the Union as an area of freedom, security and justice, it is essential to step up cooperation between Member States in relation to the prevention, detection, investigation and combating of criminal offences committed on the high seas and to the prosecution of the natural and legal persons responsible,**

Justification

One of the Union's main objectives is to provide its citizens with an area of freedom, security and justice which extends to the whole of its territory. However, this objective will not be achieved unless the Member States decide to make use of the legal opportunities provided in the Treaty on European Union for cooperation in preventing and combating crime.

The Member States should cooperate in order to increase the chances of bringing to justice the natural or legal persons responsible for crimes committed on the high seas, by allowing the authorities of any Member State to stop a vessel on the high seas where there is good reason to believe that an offence has been or is being committed on the vessel, irrespective of the Member State flag under which it sails.

As things currently stand, under Article 92 of the United Nations Convention on the Law of the Sea (signed in Montego Bay on 10 December 1982 and currently ratified by 145 countries), vessels on the high seas come under the exclusive jurisdiction of the State under whose flag they sail. Furthermore, under Article 97(1) of that convention, no criminal or disciplinary proceedings may be instituted against any person in the service of the vessel except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national. Under paragraph 3 of that article, the arrest or detention of a vessel on the high seas, even as a measure of investigation, may not be ordered by any authorities other than those of the flag State.

This means that many criminal offences may go unpunished owing to a lack of cooperation between Member States, and this situation has serious social and economic implications for European citizens.

Amendment 4
Convention, recital 1

ACKNOWLEDGING the need to

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strengthen the commitments made in the Convention on Mutual Assistance between Customs Administrations, signed in Rome on 7 September 1967, and in the Convention on Mutual Assistance and Cooperation between Customs Administrations, done at Brussels on 18 December 1997.

strengthen the commitments made in the Convention on Mutual Assistance between Customs Administrations, signed in Rome on 7 September 1967, and in the Convention on Mutual Assistance and Cooperation between Customs Administrations, done at Brussels on 18 December 1997, **and to establish operational cooperation between the competent law enforcement authorities of the Member States, including police, customs and other specialised services, aimed at combating crime committed on the high seas, on vessels sailing under the flag of a Member State or without nationality.**

Justification

All existing legal means must be used to combat crime committed on the high seas by vessels sailing under the flag of one of the Member States or without nationality.

Furthermore, the crimes committed should not be prosecuted solely as customs offences by the customs administration but also as part of the general fight against crime by all competent administrations.

Amendment 5 Convention, recital 2

TAKING INTO ACCOUNT the United Nations Convention on the Law of the Sea, signed in Montego Bay on 10 December 1982, which provides *inter alia* for the right of hot pursuit, and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done at Vienna on 20 December 1988.

TAKING INTO ACCOUNT the United Nations Convention on the Law of the Sea, signed in Montego Bay on 10 December 1982, **Article 111 of** which provides for the right of hot pursuit, and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done at Vienna on 20 December 1988, **with particular reference to Article 17 thereof.**

Justification

Clearer wording.

Amendment 6
Convention, recital 3

CONSIDERING that the customs administrations are responsible within the customs territory of the Community, including its territorial sea and air space and especially at its points of entry and exit, for the prevention, investigation and prosecution of breaches not only of the Community customs rules but also of national laws, and in particular for combating smuggling, including the smuggling of narcotic drugs and psychotropic substances. ***deleted***

Justification

This recital is redundant if all crimes committed on Union vessels on the high seas are to be combated by all the competent authorities, and not just customs offences by customs administrations.

Amendment 7
Convention, recital 4

CONSIDERING that occasionally in the fight against ***drug trafficking*** it is necessary and effective for the ***customs to take action outside Community customs territory, particularly*** on the high seas.

CONSIDERING that occasionally in the fight against ***crime*** it is ***essential***, necessary and effective for the ***competent authorities of the Member States to take action*** on the high seas.

Justification

In line with the amendment to recital 3.

Amendment 8
Convention, recital 5

CONSIDERING that the increase in ***trafficking in narcotic drugs and psychotropic substances at sea*** is a situation which seriously threatens the health and security of the citizens of the European Union.

CONSIDERING that the increase in ***criminal offences committed on the high seas on vessels sailing under the flag of a Member State of the European Union or without nationality*** is a situation which seriously threatens the health and security of the citizens of the European Union.

Justification

The increase in illicit drug trafficking is an open sore on the face of society, but so too are other no less serious crimes committed using vessels which all too frequently are able sail with impunity on the high seas under the flag of one of the Member States or without nationality.

Amendment 9 Convention, recital 6

CONSIDERING that under the special forms of cooperation which have been established between Member States of the European Union ***both within the Member States themselves and in their respective territorial waters***, officials of one Member State are empowered to take action in the territory of another Member State, without prior authorisation on occasion.

CONSIDERING that under the special forms of cooperation which have been established between Member States of the European Union ***and which are provided for in particular in the Convention implementing the Schengen Agreement of 14 June 1985, with reference to land borders, and the Convention on Mutual Assistance between Customs Administrations of 18 December 1997¹, with reference to all types of borders***, officials of one Member State are empowered to take action in the territory of another Member State, without prior authorisation on occasion.

Justification

Both Articles 40 and 41 of the Convention implementing the Schengen Agreement, which cover land borders, and Article 20 of the Convention on Mutual Assistance and Cooperation between Customs Administrations, which covers all land, sea and air borders, authorise officials of one Member State who are pursuing in their country an individual caught in the act of committing or of participating in an offence to continue pursuit in the territory of another Member State. They may do so without prior authorisation in cases where, given the particular urgency of the situation, prior notification is not possible or where the competent authorities of the other Member State are unable to reach the scene in time to take over the pursuit.

Amendment 10 Convention, recital 7

CONVINCED that it is necessary to strengthen cooperation between the ***customs administrations*** in combating

CONVINCED that it is necessary to strengthen cooperation between the ***competent authorities*** in combating ***crime***

¹ OJ C 24, 23.1.1998, p. 1.

drug trafficking by giving vessels of the competent authorities of a Member State greater scope to take immediate action without prior authorisation against vessels from another Member State in emergencies, where currently it is not possible to take action without prior authorisation outside territorial waters,

on the high seas by giving vessels of the competent authorities of a Member State greater scope to take immediate action without prior authorisation against vessels from another Member State in emergencies, where currently it is not possible to take action without prior authorisation outside territorial waters,

Justification

See justifications for the amendments to recitals 3, 4 and 5 of the Convention.

Amendment 11
Article 1, point (a)

(a) "vessels" means any structure or floating craft operating on the high seas suitable for the carriage of goods and/or persons, including hovercraft, non-displacement craft and submersibles.

(a) "vessels" means any ***type of ship***, structure or floating craft operating on the high seas suitable for the carriage of goods and/or persons, including hovercraft, non-displacement craft and submersibles.

Justification

Clearer wording.

Amendment 12
Article 1, point (d)

(d) "***relevant*** offence" means ***the offences defined*** in Article 3.

(d) "offence" means ***deliberate conduct or acts classified as criminal offences in the domestic law of the Member States or in European Union law, as set out*** in Article 3.

Justification

Clearer wording.

Amendment 13
Article 1, point (e), first sentence

(e) "**customs** authorities" means **the authorities responsible for implementing the customs rules and also the other** authorities given the responsibility of implementing the provisions of this Convention.

(e) "**competent** authorities" means the authorities given the responsibility of implementing the provisions of this Convention, **including the police, customs and other specialised law enforcement services of the Member States.**

Justification

In line with the other amendments and given that the scope of the Convention should not be restricted to illicit drug trafficking seen solely as a customs offence but should extend to cover other serious offences committed on vessels on the high seas, it is only logical for all law enforcement authorities to be involved in combating them with all the means at their disposal.

Amendment 14
Article 2

The customs authorities of the Member States of the European Union shall cooperate to the fullest extent possible to suppress illicit trafficking in narcotic drugs and psychotropic substances by sea, in conformity with the International Law of the Sea.

The purpose of this Convention is to promote, facilitate and establish operational cooperation and mutual assistance between the competent law enforcement authorities of the Member States in relation to the prevention, detection, investigation and suppression of the criminal offences set out in Article 3, committed on the high seas on vessels sailing under the flag of a Member State or without nationality, in conformity with the International Law of the Sea and within the bounds of the powers assigned to them by national or international law.

Justification

The Convention's scope has been extended in order to prosecute and combat both illicit drug trafficking and the most serious criminal offences committed on the high seas by vessels sailing under the flag of a Member State or without nationality and to use all possible means of combating such crime, with the involvement of all the competent law enforcement authorities of the Member States, not just the customs administrations.

Amendment 15
Article 3

Each Member State shall adopt the measures necessary to classify as *an* offence in its national law, and penalise, offences on board vessels or by means of any other craft or floating medium not excluded from the scope of this Convention under Article 4 thereof, *involving the possession for distribution, transport, transshipment, storage, sale, manufacture or processing of narcotic drugs or psychotropic substances as defined in the relevant international instruments.*

Each Member State shall adopt the *legislative and other* measures necessary to classify as *a criminal* offence in its national law, and penalise, *deliberate* offences *committed on the high seas* on board vessels or by means of any other craft or floating medium not excluded from the scope of this Convention under Article 4 thereof, *sailing under the flag of any of the Member States or without nationality, as defined by the law of each Member State and if punishable in the State intending to prosecute the offence by a custodial sentence or a detention order for a maximum period of at least three years, as applicable to similar offences committed within the territory under its sovereignty, in respect of the following criminal offences:*

(a) illicit trafficking in narcotic drugs and psychotropic substances;

(b) illicit trafficking in substances listed in tables I and II of the United Nations Convention Against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances and intended for the illicit production of drugs (precursor substances);

(c) illicit trafficking in weapons, components thereof, munitions and explosives;

(d) trafficking in cultural goods, including antiques and works of art;

(e) illicit trafficking in hazardous and toxic waste;

(f) illicit trafficking in nuclear materials and materials and equipment intended for the production of nuclear, biological and chemical weapons;

(g) illicit cross-border trade in goods subject to taxation;

- (h) trafficking in human beings;**
- (i) illicit trafficking in immigrants;**
- (j) trafficking in stolen vehicles;**
- (k) illicit trafficking in human organs and tissue or hormonal substances;**
- (l) violation of industrial property rights and falsification of goods;**
- (m) kidnapping, illegal restraint of persons and vessels and hostage-taking.**

Justification

Under Article 92 of the United Nations Convention on the Law of the Sea of 1982, vessels sail under the flag of one State only and, save in exceptional cases, are subject to its exclusive jurisdiction on the high seas. Article 97(1) stipulates that, in the event of a collision or any other incident on the high seas, no penal or disciplinary proceedings may be instituted except before the judicial or administrative authorities either of the flag State or of the State of which the person concerned is a national. Article 97(3) states that no arrest or detention of the vessel, even as a measure of investigation, may be ordered by any authorities other than those of the flag State.

This however does not prevent the EU Member States, should they so desire, from agreeing to establish close cooperation arrangements for the purpose of combating crime on the high seas, defining a set of serious criminal offences (included in Article 2(2) of the Council Framework Decision of 13 June 2002 on the European arrest warrant¹) committed on the high seas and laying down by common accord relevant rules on competence and jurisdiction.

This would make it legally possible for an official vessel of a Member State to board another vessel sailing on the high seas under the flag of another Member State or without nationality and to inspect the vessel and take appropriate action where there are reasonable grounds for suspecting that one or more of the criminal offences set out in this article is being committed on board, either having requested the prior authorisation of the flag State or, in exceptional cases, without prior authorisation where this is absolutely necessary in view of the urgency of the situation.

Amendment 16
Article 3 a (new)

Article 3a

Liability of legal persons

1. All Member States shall take the necessary measures to ensure that legal

¹ OJ L 190, 18.7.2002, p. 1.

persons can be held liable for the criminal offences referred to in Article 3, where such offences are committed on the high seas on their behalf by any person acting either individually or as part of an organ of the legal person, based on:

(a) a power of representation of the legal person;

(b) an authority to take decisions on behalf of the legal person;

(c) an authority to exercise control within the legal person.

2. Without prejudice to the cases provided for in paragraph 1, all Member States shall take the necessary measures to ensure that legal persons can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made it possible for a person under its authority to commit a criminal offence within the meaning of Article 3 on behalf of a legal person.

3. Liability of a legal person under paragraphs 1 and 2 shall be without prejudice to criminal proceedings against natural persons who have perpetrated, instigated or been accessories to a criminal offence within the meaning of Article 3.

Justification

The various cases in which legal persons may be held liable for involvement in criminal offences should be spelled out.

Amendment 17 Article 4

Warships and official non-commercial public service *vessels* shall be excluded from the scope of this Convention.

Warships, *naval reserve vessels and other vessels owned or operated by a State and vessels currently being used solely for official non-commercial public service purposes, when on the high seas*, shall be

excluded from the scope of this Convention.

Justification

More comprehensive list of vessels excluded from the scope of the Convention.

Amendment 18
Article 4 a (new)

Article 4a

Competence

1. Each Member State shall take the necessary measures to establish its competence with regard to a criminal offence pursuant to Article 3 committed on the high seas, where the criminal offence has been committed:

(a) on board a vessel sailing under its flag;

(b) by one of its nationals or a person normally resident within its territory, or on behalf of a legal person established within its territory;

(c) on board a vessel without nationality or assimilated to a vessel without nationality;

(d) on board a vessel sailing under the flag of another Member State;

Such competence shall be exercised only where the intervening State has received the prior authorisation of the flag State or, in exceptional cases, without prior authorisation where the urgency of the situation makes this impossible, in which case the competent authorities shall be notified immediately.

2. Nothing in this Convention shall entitle a Member State to exercise within the territory of another State jurisdiction or functions that the national law of that State exclusively confers on its own

authorities.

Justification

Each Member State should establish its competence under criminal law with regard to offences committed on board vessels sailing on the high seas, both under its flag and under the flag of another Member State or without nationality.

Amendment 19
Article 5, paragraph 1

1. *Save as provided for in the Convention on mutual assistance and cooperation between customs administrations,*
Member States shall exercise sole jurisdiction in relation to offences committed in their territorial and national waters including situations where offences originated or are due to be completed in another Member State.

1. *Expect in the cases provided for in current national and international law,*
Member States shall exercise sole jurisdiction in relation to offences committed in their territorial and national waters including situations where offences originated or are due to be completed in another Member State.

Justification

In addition to the cases provided for in the Convention on mutual assistance and cooperation between customs administrations, other circumstances provided for in other pieces of legislation should be excluded from the sole jurisdiction provisions.

Amendment 20
Article 6, paragraph 1

1. Where there are good grounds to suspect that one of the offences referred to in Article 3 has been committed, each Member State shall allow the other Member States a right of representation, which shall give legitimacy to action taken by ships or aircraft belonging to their respective **customs** administrations against vessels from another Member State.

1. Where there are good grounds to suspect that one of the offences referred to in Article 3 has been committed, each Member State shall allow the other Member States a right of representation, which shall give legitimacy to action taken **on the high seas** by ships or aircraft belonging to their respective **competent** administrations against vessels from another Member State.

Justification

See justification for amendment 4 to recital 1.

Amendment 21
Article 6, paragraph 2

2. In exercising the right of representation referred to in paragraph 1, official ships or aircraft may give pursuit, stop and board the vessel, examine documents, identify and question the persons on board and inspect the vessel and, should their suspicions be confirmed, seize **the drugs**, detain the persons alleged to be responsible and escort the vessel to the nearest or most suitable port where it shall be detained prior to being returned, informing beforehand if possible or immediately afterwards the State whose flag was being flown by the vessel.

2. In exercising the right of representation referred to in paragraph 1, official ships or aircraft **of a Member State that are duly authorised to carry out such tasks** may give pursuit, stop and board the vessel, examine documents, identify and question the persons on board and inspect the vessel and **its cargo and**, should their suspicions be confirmed, seize the **corpus delicti and take and assemble evidence**, detain the persons alleged to be responsible and escort the vessel to the nearest or most suitable port where it shall be detained prior to being returned, informing beforehand if possible or immediately afterwards the State whose flag was being flown by the vessel, **to which they shall immediately forward a summary of the evidence of all the offences detected. The flag Member State shall immediately issue a receipt for such evidence.**

Justification

This amendment is in keeping with all the other amendments tabled in this connection, particularly amendment 15 relating to Article 3, which extends the Convention's scope to cover not only criminal offences relating to illicit drug trafficking but also other serious crimes which are defined under the EU 'acquis' and which have been included in the list of criminal offences which, without verification of double criminality, can give rise to the surrender of a person under a European arrest warrant, as provided for in the framework decision of 13 June 2002, which will enter into force in most Member States on 1 January 2004.

Amendment 22
Article 6, paragraph 3

3. This right shall be exercised in accordance with the general provisions of international law.

3. This right shall be exercised in accordance with the general provisions of international law, **European Union law in this area and the provisions of this Convention.**

Justification

The right of representation, which gives legitimacy to action taken by a vessel of one Member State against a vessel from another Member State should be exercised in accordance with all the provisions in force in this area.

Amendment 23
Article 7, paragraph 1

1. Where action has been taken pursuant to Article 6, due account ***shall be taken*** of the need not to endanger the safety of life at sea or the security of the vessel and cargo, or to prejudice the commercial and legal interests of the flag State or the commercial interests of third parties.

1. Where action has been taken pursuant to Article 6, ***in all relevant cases the intervening State shall take*** due account of the need not to endanger the safety of life at sea or the security of the vessel and cargo, or to prejudice the commercial and legal interests of the flag State or the commercial interests of third parties.

Justification

To make it clear who is taking the action.

Amendment 24
Article 7, paragraph 2

2. ***In any case, should*** the action ***have*** been taken ***without adequate grounds for carrying out the operation,*** the Member State which carried it out shall be held responsible for damage and losses incurred ***unless the action was taken at the request of the flag State.***

2. ***Where*** the action ***has*** been taken ***in a manner that cannot be justified under this Convention,*** the Member State which carried it out shall be held responsible for damage and losses incurred.

Justification

A Member State directly responsible for causing any unjustified damage should be responsible for making good that damage.

Amendment 25
Article 7, paragraph 2 a (new)

2a. The intervening State shall be required to make good any loss or damage incurred by the natural or legal persons as a result of negligence or mistakes

attributable to it during the course of the action taken.

Justification

In order clearly to establish the principle that the intervening Member State is to be held responsible.

Amendment 26
Article 7, paragraph 3

3. A vessel's period of detention shall be reduced to the absolute minimum and the vessel returned to the flag State or given the right to free passage as soon as possible.

3. A vessel's period of detention shall be reduced to the absolute minimum ***required in order to complete the investigations into the relevant offences***, and the vessel ***shall be*** returned to the flag State or given the right to free passage as soon as possible.

Justification

To specify why a vessel may be detained.

Amendment 27
Article 7, paragraph 4

4. Persons detained shall be guaranteed the same rights as those enjoyed by nationals, especially the right to ***have an interpreter and be assisted by a lawyer***.

4. Persons detained shall be guaranteed the same rights as those enjoyed by nationals ***of the State exercising its relevant jurisdiction***, especially the right to ***a fair trial within the meaning of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and Articles 47 and 48 of the Charter of Fundamental Rights of the European Union***.

Justification

Anyone detained under any circumstances must above all be guaranteed their fundamental rights.

Amendment 28
Article 7, paragraph 5

5. The period of detention shall be subject to supervision by the courts and to the time limits laid down by the law of the intervening Member State.

5. The period of detention shall be subject to supervision by the courts and to the time limits laid down by the law of the intervening Member State. ***Persons not suspected of having committed an offence shall be released immediately and items that may not be used as evidence shall be returned.***

Justification

In line with the previous amendment.

Amendment 29
Article 8, heading

SURRENDER OF JURISDICTION

PROVISIONS GOVERNING THE EXERCISE OF COMPETENCE

Justification

This article covers more ground than just situations in which flag States may surrender their preferential jurisdiction.

Amendment 30
Article 8, paragraph 1

1. Each Member State shall have preferential jurisdiction over ***its*** vessels but may surrender it in favour of the intervening State.

1. Each Member State shall have preferential jurisdiction over vessels ***sailing under its flag*** but may surrender it in favour of the intervening State.

Justification

Clearer wording.

Amendment 31
Article 8, paragraph 2

2. Before taking initial proceedings, the

2. Before taking initial proceedings, the

intervening State shall forward to the flag State by fax if possible or other means a summary of the evidence assembled pertaining to all the relevant offences committed, to which the flag State shall respond within one month stating whether it will exercise its jurisdiction or surrender it and possibly asking for further information should it deem it necessary.

intervening State shall forward to the flag State by fax if possible or other means a summary of the evidence assembled pertaining to all the relevant offences committed, to which the flag State shall respond within one month stating whether it will exercise its **preferential** jurisdiction or surrender it and possibly asking for further information should it deem it necessary.

Justification

Clearer wording.

Amendment 32
Article 8, paragraph 3

3. If the time limit referred to in paragraph 2 has lapsed without any decision being notified, the flag Member State shall be deemed to have surrendered its jurisdiction.

3. If the time limit referred to in paragraph 2 has lapsed without any decision being notified, the flag Member State shall be deemed to have surrendered its **preferential** jurisdiction.

Justification

Clearer wording.

Amendment 33
Article 8, paragraph 4

4. If the State whose flag is being flown by the vessel surrenders its preferential jurisdiction, it shall send the **other** Member State the information and documents in its possession. Should **it** decide to exercise its jurisdiction, the **other** State shall transfer to **the preferential State** the documents and evidence it has assembled, the corpus delicti and the persons detained.

4. If the State whose flag is being flown by the vessel surrenders its preferential jurisdiction, it shall send the **intervening** Member State the information and documents in its possession. Should **the flag State** decide to exercise its **preferential** jurisdiction, the **intervening** State shall transfer to **it** the documents and evidence it has assembled, the corpus delicti and the persons detained.

Justification

Clearer wording.

Amendment 34
Article 8, paragraph 6

6. Surrender of detained persons shall not be subject to formal extradition proceedings; an order for detention of the person concerned or an equivalent document shall suffice, provided that the fundamental principles of each Party's legal system are observed. The Intervening State shall certify the length of time spent in detention.

6. Surrender of detained persons shall not be subject to formal extradition proceedings; ***the original or a certified copy of an order for detention of the person concerned or an equivalent document issued by a judicial authority of the flag State, including in cases where such action is taken in accordance with the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States¹***, shall suffice, provided that the fundamental principles of each Party's legal system are observed. The Intervening State shall certify the length of time spent in detention.

Justification

The Council Framework Decision on the European arrest warrant and the surrender procedures between Member States comes into force on 1 January 2004. In cases where surrender is effected under a European arrest warrant, the provisions of that decision will apply.

Amendment 35
Article 8, paragraph 8

8. Without prejudice to the general powers of Member States' Ministries of Foreign Affairs, any communication provided for in this Convention shall, as a rule, pass through their Ministries of Justice.

8. Each Member State shall appoint a central authority, coming under the Ministry of Justice, which shall be responsible for sending, receiving and notifying any communication provided for in this Convention and which shall remain operational twenty-four hours a day throughout the year.

¹ OJ L 190, 18.7.2002, p. 1.

Justification

Each Member State should set up a central authority which remains operational twenty-four hours a day throughout the year, to receive and pass on communications.

Amendment 36
Article 9, paragraph 1

1. Member States agree to settle disputes between them on the interpretation or application of this Convention, including those concerning damages, by direct negotiation between the respective Ministries of Justice and Foreign Affairs. ***deleted***

Justification

Disputes between Member States should be settled in accordance with Article 35 of the TEU.

Amendment 37
Article 9, paragraph 2

2. Where agreement cannot be reached using the arrangement in paragraph 1, the Court of Justice of the European Communities shall have jurisdiction to rule on any dispute between Member States regarding the interpretation or the application of this Convention, whenever such dispute cannot be settled by the Council within six months of its being referred to the Council by one of its members.

2. The Court of Justice of the European Communities shall have jurisdiction to rule on any dispute between Member States regarding the interpretation or the application of this Convention, whenever such dispute cannot be settled by the Council within six months of its being referred to the Council by one of its members.

Justification

In line with previous amendment.

Amendment 38
Article 9, paragraph 2 a (new)

2a. The Court of Justice of the European Communities shall have jurisdiction to

rule on any dispute between Member States and the Commission regarding the interpretation or the application of this Convention.

Justification

Provision should also be made for possible disputes between Member States and the Commission.

In accordance with Article 35(7) of the TEU, such disputes should be settled by the Court of Justice.

Amendment 39
Article 9, paragraph 3

3. The Court of Justice of the European Communities shall have jurisdiction, subject to the conditions laid down in paragraphs 4 to 7, to give preliminary rulings on the interpretation of this Convention.

3. The Court of Justice of the European Communities shall have jurisdiction, subject to the conditions laid down in paragraphs 4 to 7, to give preliminary rulings on the interpretation of this Convention ***and on the validity and interpretation of the measures implementing it.***

Justification

For the Convention to be effective, implementing measures need to be adopted in order to lay down detailed provisions governing the various forms of cooperation between the competent authorities of the Member States. Article 35(1) of the TEU gives the Court of Justice of the European Communities jurisdiction to give preliminary rulings on the validity and interpretation of measures implementing the Convention.

Amendment 40
Article 10, paragraph 1

1. This Convention shall be ***subject to*** adoption by the Member States in accordance with their respective constitutional requirements.

1. This Convention shall be ***open for*** adoption by the Member States in accordance with their respective constitutional requirements.

Justification

The Convention is open for adoption by the Member States, will enter into force once it has been adopted by at least half of them and will apply only to those that have adopted it.

Amendment 41
Article 10, paragraph 2

2. Member States shall notify the **depository** of the completion of the constitutional procedures for the adoption of this Convention.

2. Member States shall notify the **Secretary-General of the Council** of the completion of the constitutional procedures for the adoption of this Convention.

Justification

The depository should be the Secretary-General of the Council of the European Union.

Amendment 42
Article 10, paragraph 3

3. This Convention shall enter into force ninety days after the notification referred to in paragraph 2 by the State, **Member** of the European Union **at the time of adoption by the Council of the Act drawing up this Convention, which is last to complete** that formality.

3. This Convention shall enter into force **for those Member States that have adopted it** ninety days after the **date of the** notification referred to in paragraph 2 by the **Member** State of the European Union **whose completion of** that formality **means that at least half of the Member States have adopted the Convention.**

Justification

In accordance with Article 34(2)(d), second subparagraph of the TEU, unless they provide otherwise, conventions shall, once adopted by at least half of the Member States, enter into force for those Member States that have ratified them and notified the Council. At present, half the Member States means eight Member States.

EXPLANATORY STATEMENT

I. INTRODUCTION: COOPERATION WITHIN THE EUROPEAN UNION IN PROSECUTING AND PUNISHING CUSTOMS OFFENCES

On 7 September 1967 in Rome the Member States of the European Economic Community signed a convention on mutual assistance between their customs authorities, commonly known within the Community as the 'Naples I Convention' or '1967 Naples Convention'.

The convention sought to ensure mutual cooperation between customs authorities with a view to enhancing the collection of customs duties and other taxes applying to exports and imports and to preventing, investigating and prosecuting customs law infringements more effectively.

Since the entry into force of the Maastricht Treaty signed on 7 February 1992, customs cooperation has become one of the European Union's priorities in accordance with Article K.1(8) of Title VI of the Treaty. Article K.1(9) of the Treaty provides for police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime, including if necessary certain aspects of customs cooperation.

Since then the legal basis for customs cooperation has been split between two of the three EU pillars:

- a) within the framework of the Treaty establishing the European Community, customs cooperation seeks to ensure the proper implementation of Community law on customs and agricultural matters;
- b) within the framework of Title VI of the Treaty on European Union, customs cooperation seeks to suppress customs offences. This involves detecting, investigating and prosecuting infringements of national customs law and prosecuting and punishing infringements of Community law, particularly by means of criminal proceedings.

It was thus necessary to draw up a new Convention on mutual assistance and cooperation between customs administrations in order to bring the 1967 Convention into line with the single market, the removal of customs controls at internal borders and the major efforts being made by customs authorities to combat organised crime, as recommended by the Council in its action plan to combat organised crime, which was endorsed by the Amsterdam European Council in June 1997¹.

The convention was adopted by the Council in Brussels on 18 December 1997² and is commonly known as the 'Naples II Convention'.

The Naples II Convention will enter into force ninety days after the notification of the completion of the constitutional procedures for its adoption by all the Member States of the European Union.

¹ OJ C 251, 15.8.1997, p. 1.

² OJ C 24, 23.1.1998, p. 1.

When it does enter into force, the Naples I Convention will be repealed.

To date, six years after its establishment, the Naples II Convention has been ratified by only 10 Member States (Denmark, France, Germany, Greece, Ireland, Luxembourg, the Netherlands, Spain, Sweden and the United Kingdom).

However, in accordance with Article 32, France, Germany, the Netherlands, Spain, Sweden and the United Kingdom have decided to start implementing the Convention before it enters into force, without waiting for the last Member State to complete its constitutional procedures.

This means that, within the limited sphere of the prosecution and punishment of customs offences and the limited scope provided by the conventions' legal form, some Member States are currently applying the Naples I Convention and others the Naples II Convention.

One can thus only regret the fact that, while the Amsterdam Treaty has laid the foundations enabling the European Union to build a large area without internal borders which has facilitated the free movement of, among other things, major financial and economic crime, the Union appears, paradoxically, incapable of coming up with instruments to ensure security within that area and of developing appropriate means and resources to combat large-scale organised crime.

II. INTERNATIONAL CONVENTIONS RELATING DIRECTLY OR INDIRECTLY TO THE FIGHT AGAINST ILLICIT DRUG TRAFFICKING ON THE HIGH SEAS

There are at present three international conventions providing for various measures to be applied by the states parties in combating illicit drug trafficking on the high seas, namely:

a) **The United Nations Convention on the Law of the Sea, signed in Montego Bay on 10 December 1982**

The convention, which one might call 'the constitution of the seas', is one of the most important legal instruments of the 20th Century, laying down the basic international law for the seas, and has been signed by 159 States and ratified by more than 138 states parties, including the European Union.

Under the convention, the sovereignty of each coastal State extends to an adjacent belt of sea, that may not exceed 12 nautical miles, described as the 'territorial sea'. Furthermore, within a zone contiguous to its territorial sea ('contiguous zone'), a coastal State may exercise the control necessary to prevent and punish infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured. Lastly, the 'exclusive economic zone' is an area beyond and adjacent to the territorial sea, within which the coastal State has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil. The exclusive economic zone may not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured

Given the limited rights conferred upon coastal states in their 'contiguous zones' and 'exclusive economic zones', no State can claim that any part of the high seas that does not form part of its 'territorial sea' comes under its sovereignty.

The high seas are open to all States, whether coastal or not, which have the right to see the vessels flying their flag sail freely on them, with each being subject to the exclusive jurisdiction of the State whose flag it is flying.

In connection with drug trafficking on the high seas, attention should be drawn to Article 108 of the convention, which provides for cooperation between States in suppressing such trafficking on the high seas, and Article 111, which provides for the right of hot pursuit of a foreign ship when the competent authorities of a coastal State have good reason to believe that the ship has violated the laws and regulations of that State. However, such pursuit must be commenced when the foreign ship or one of its boats is within 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

b) The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, adopted in Vienna on 19 December 1988

Article 17 of the convention lays down the cooperation arrangements to be established between the states parties with a view to suppressing illicit trafficking by sea. A state party may request authorisation from another state party to board a vessel flying its flag if it has reasonable grounds to suspect that it is engaged in illicit trafficking, to search the vessel and to take appropriate action if evidence of involvement in illicit trafficking is found. Furthermore, a state party which has reasonable grounds to suspect that a vessel flying its flag or not displaying a flag is engaged in illicit trafficking may request the assistance of another state party in suppressing its use for that purpose

Finally, Article 17(9) provides for the possibility of states parties entering into bilateral or regional agreements or arrangements to enhance the effectiveness of the article's provisions.

c) Council of Europe Agreement on Illicit Traffic by Sea, implementing article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

Article 17 of the 1998 Vienna Convention seeks to extend and clarify the overly vague scope of Article 108 of the 1982 Montego Bay Convention, with a view to laying sound foundations for practical cooperation between states parties aimed at putting an end to illicit drug trafficking by sea. On some matters, however, the Vienna Convention fails to provide sufficiently clear guidance to allow genuinely effective practical implementation. With a view to ensuring greater effectiveness, in accordance with Article 17(9) of the Vienna Convention, the Council of Europe therefore drew up the above agreement of 31 January 1995, which entered into force on 1 May 2000 and which lays down detailed provisions on matters such as legal relations between the intervening State and the flag State, authorisation procedures and scope. Only two of the 15 Member States (Austria and Germany) have as yet ratified it, however.

III. INITIATIVE OF THE KINGDOM OF SPAIN CONCERNING THE ESTABLISHMENT OF THE CONVENTION ON THE SUPPRESSION BY

CUSTOMS ADMINISTRATIONS OF ILLICIT DRUG TRAFFICKING ON THE HIGH SEAS

The initiative of the Kingdom of Spain is subject to three limitations: firstly, it tackles the issue only from a customs perspective; secondly, it covers only the offence of illicit drug trafficking; and thirdly, it deals only with illicit drug trafficking on the high seas.

At present, under the current legislation, when an official vessel of a Member State detects and pursues on the high seas or from the high seas a vessel suspected of illicit drug trafficking which is flying the flag of another Member State, it cannot take any action against it without obtaining the prior authorisation of the flag Member State, in accordance with the vague provisions of Article 108 of the 1982 Montego Bay Convention, the more detailed provisions of Article 17 of the 1988 Vienna Convention and the excessively detailed provisions of the Council of Europe Agreement of 31 January 1995, which expands upon the aforementioned Article 17.

Given the need for prior authorisation and the time taken to obtain it, a fair number of anti-drug-trafficking operations end in failure on the high seas because the time spent waiting for authorisation is time lost in attempting to apprehend the vessel suspected of engaging in illicit activities. By the time authorisation to intervene is obtained, the suspect vessel has had time to get away or to destroy evidence of the crime, which means that the entire operation has to be aborted.

The basic aim of the Spanish initiative needs to be viewed against this background. That aim is nothing other than to step up cooperation between EU customs administrations in combating trafficking in drugs and psychotropic substances by making it possible, in particularly urgent circumstances, for an official vessel of a Member State to take action on the high seas against a vessel flying the flag of another Member State, where there is good reason to believe the vessel is being used for illegal drug trafficking, without having obtained prior authorisation from that Member State.

In order to be able to see this situation in its proper light, account needs to be taken of the fact that when an official vessel pursues in its territorial waters a vessel suspected of committing the offence of illicit drug trafficking, the official vessels may, in an emergency, continue the pursuit without prior authorisation:

- a) on the high seas, in accordance with Article 111 of the Montego Bay Convention;
- b) in the territorial sea of another Member State, when the Naples Convention enters into force.

When the Naples II Convention enters into force it will become possible, and even common, for an official vessel of a Member State engaged in hot pursuit within its territorial waters of a vessel flying the flag of another Member State, which is suspected of committing an offence, to continue the pursuit and board the vessel in the territorial waters of the other Member State, without having obtained the prior authorisation of that Member State, owing to the urgency of the situation.

Conversely, if the same vessels are on the high seas, hot pursuit will be possible only with the prior authorisation of the Member State whose flag the suspect vessel is flying. This will often result in the failure of the operation, owing to the need to intervene without delay.

The Member States should allow for exceptional circumstances under which an official vessel of a Member State may take action on the high seas against a vessel flying the flag of another Member State, including without prior authorisation if the urgency of the situation so warrants, where there are grounds for suspecting that an offence is being committed on board. In some situations, this is the only means of combating serious crime.

Furthermore, EU law contains provisions enabling officials of a Member State to take action in the territory of another Member State without its prior authorisation, under exceptional circumstances. These provisions include:

- a) Article 40 of the Convention implementing the Schengen Agreement provides for situations in which officers of a Member State keeping under surveillance in their country a person who is presumed to have participated in one of the criminal offences referred to in the same article, which include illicit trafficking in drugs and psychotropic substances, may cross the land border of another Member State without prior authorisation where, for urgent reasons, they need to continue their surveillance in that Member State's territory;
- b) Article 20 of the Naples II Convention stipulates that officials of the customs administration of one of the Member States pursuing in their country an individual observed in the act of committing one of the infringements referred to in Article 19 (which include illicit trafficking in drugs and psychotropic substances) may continue pursuit in the territory of another Member State without prior authorisation where, given the particular urgency of the situation, it was not possible to notify the competent authorities of the other Member State in advance, and may cross its land, sea or air borders.

IV. ASSESSMENT OF THE INITIATIVE AND JUSTIFICATIONS FOR AMENDMENTS

Given the above situation, the rapporteur feels it incumbent on her to make a favourable initial assessment of the initiative, since it does seek to combat crime, even though it focuses solely on the criminal offence of illicit drug trafficking seen from the point of view of customs administrations.

She considers this to be a bold and innovative legislative proposal as far as its basic substance is concerned, and one which, when implemented, could play a major role in combating cross-border crime and would help to protect the health and security of European citizens more effectively.

Nonetheless, the rapporteur totally disagrees with the legal form chosen by the Kingdom of Spain for its initiative, namely a convention, even though she understands the political reasons behind the choice.

A convention is clearly not the appropriate legal form, given the state of progress currently reached within the European Union as regards cooperation in police and criminal justice matters, which has gone far beyond the stage of mere intergovernmental cooperation.

It is essential for the Union to pursue its policies on the basis of legal forms and instruments of a unilateral, non-contractual nature.

The rapporteur therefore urges the government of the Kingdom of Spain to submit a new initiative in the form of a framework decision incorporating the contents of its original initiative, as amended by the European Parliament.

Since the entry into force of the Maastricht Treaty, 22 conventions or protocols thereto have been adopted, only six of which have been ratified by all the Member States, in some cases five or six years after their adoption by the Council.

How many years will it take for the proposed convention, once it has been adopted unanimously within the Council, to be ratified by the 25 Member States which the Union will comprise starting in May 2004? However long it takes, it will be too long for the purposes of security policy, the effective operation of which is becoming a matter of real and increasing public concern.

Having made that general point and with reference to the scenario involving an official vessel of a Member State and a vessel flying the flag of another Member State, the rapporteur takes the view that the proposal's contents need improvement in many respects. She therefore proposes the following amendments:

- a) In the expectation that the Committee on Legal Affairs will deliver a favourable opinion on the matter, she has tabled amendments 1 and 2 with a view to establishing Articles 30 and 32 of the TEU as the appropriate legal basis to cover the substance of the initiative.
- b) Part of amendment 1 and amendments 4, 5, 7, 10, 13, 14 and 20 seek to extend the scope of the provisions relating to cooperation and the competent authorities. The arrangements for cooperation between authorities in combating crime should extend to all those involved in doing so, not just customs administrations.
- c) With a view to ensuring that the Union makes a little more progress towards building a genuine area of security for European citizens through action to combat crime, the rapporteur proposes that the act's scope be extended beyond the criminal offence of illicit drug trafficking to include many other types of criminal offence whose importance has been acknowledged in Article 2 of the Council Framework Decision on the European arrest warrant. Amendments 8, 12, 14, 15, 21 and 26 were tabled to this end.

The international conventions existing in this area must not prevent the Member States from coming together to coordinate their activities in combating criminal offences committed on their vessels on the high seas and to lay down their own implementing measures, with due respect for international law.

- d) In accordance with other legal instruments adopted by the Union with a view to combating various types of crime, it is important to provide for situations in which legal persons may be involved in committing criminal offences on vessels on the high seas. Amendment 16 was tabled to this end.
- e) Amendment 18 seeks to lay down a set of criteria for the assignment of competence, with a view to prosecution and the investigation of matters relating to offences.

- f) Amendments 24 and 25 seek clearly to establish the principle of liability for damage caused as a result of unjustified action or negligence on the part of the intervening Member State. Amendment 27 seeks to ensure strict respect for the human rights of persons detained. Amendments 29, 30, 31, 32 and 33 seek to improve the wording of the proposal. Amendments 36, 37, 38 and 39 seek to bring the provisions on possible disputes over interpretation of the Convention into line with Article 35 of the Treaty on European Union.

15 March 2004

MINORITY OPINION

pursuant to Rule 161(3) of the Rules of Procedure, by Maurizio Turco and Marco Cappato

The initiative of the Kingdom of Spain concerning the Convention on the suppression by customs administrations of illicit drug trafficking on the high seas stems from an obsessively prohibitionist drugs policy and the illusion that drug-related problems can be solved by increasing the powers of customs and police services. What is more, our committee has decided to accept the rapporteur's proposal seeking to extend the convention's scope to cover other crimes and at the same time to allow other law-enforcement agencies to intervene.

This initiative further strengthens the EU's prohibitionist arsenal (see the framework decision on drug trafficking). In practice, pursuing vessels on Europe's seas with a view to blocking the drugs traffic will have much the same effect as if one were to attempt to empty the sea with a teaspoon. We can only hope that in the not too distant future European governments will at last acknowledge that prohibition has been a resounding failure and will go ahead and legalise drugs, since this is the only alternative to the current disastrous situation in which the trade is controlled by organised crime, thus condemning drug addicts to death, perpetuating crime, destabilising public institutions and corrupting the body politic.

OPINION OF THE COMMITTEE ON LEGAL AFFAIRS AND THE INTERNAL MARKET ON THE LEGAL BASIS

The Chairman

Mr Jorge Salvador Hernández Mollar
Chairman
Committee on Citizens' Freedoms and Rights, Justice and Home Affairs
BRUSSELS

Subject: Legal basis of the initiative of the Kingdom of Spain with a view to adopting a Council Act establishing the Convention on the suppression by customs administrations of illicit drug trafficking on the high seas (C5-0249/2003 – 2003/0816(CNS))

Dear Mr Chairman,

By letter of 16 December 2003 you requested the Committee on Legal Affairs and the Internal Market to verify the legal basis of the initiative of the Kingdom of Spain with a view to adopting a Council Act establishing the Convention on the suppression by customs administrations of illicit drug trafficking on the high seas (C5-0249/2003 – 2003/0816(CNS)).

Pursuant to Article 63(2) of the Rules of Procedure, the Committee on Legal Affairs and the Internal Market is responsible for examining the validity and appropriateness of the legal basis of the above initiative of the Kingdom of Spain.

The initiative is based on Article 34(2)(d) of the Treaty on European Union. However, Mrs Marjo Matikainen-Kallström, the rapporteur of the committee responsible, considers that the initiative could be based on Article 30(1)(a) and Article 32 of the Treaty on European Union.

It is settled case-law that, in the context of the organisation of the powers of the Community the choice of the legal basis for a measure must be based on objective factors which are amenable to judicial review. Those factors include in particular the aim and the content of the measure¹.

The Spanish initiative is based on the need *'to strengthen cooperation between the customs administrations in combating drug trafficking by giving vessels of the competent authorities of a Member State greater scope to take immediate action without prior authorisation against vessels from another Member State in emergencies, where currently it is not possible to take action without prior authorisation outside territorial waters'*.

¹ See, in particular, the judgment of 23 February 1999, *Parliament v Council*, Case C-42/97, paragraph 36.

The recitals of the convention that the Spanish initiative seeks to establish refer to acts of international public law relating to mutual assistance between customs administrations and to the law of the sea (Recitals 1 and 2).

With regard to its substance, the objective of the Spanish initiative is for the Member States' customs administrations to cooperate *'to the fullest extent possible to suppress illicit trafficking in narcotic drugs and psychotropic substances by sea, in conformity with the International Law of the Sea'* (Article 2 of the convention).

Article 3 lays down the obligation, for each Member State, to adopt *'the measures necessary to classify as an offence in its national law, and penalise, offences on board vessels or by means of any other craft or floating medium (...) involving the possession for distribution, transport, transshipment, storage, sale, manufacture or processing of narcotic drugs or psychotropic substances as defined in the relevant international instruments'*.

Article 6 makes provision for a right of representation: *'Where there are good grounds to suspect that one of the offences referred to in Article 3 has been committed, each Member State shall allow the other Member States a right of representation, which shall give legitimacy to action taken by ships or aircraft belonging to their respective customs administrations against vessels from another Member State'* (Article 6(1) of the convention).

Article 7 lays down safeguards for action, in particular *'the need not to endanger the safety of life at sea or the security of the vessel and cargo, or to prejudice the commercial and legal interests of the flag State or the commercial interests of third parties'*.

In the light of the considerations set out above, and acting on a proposal from Mr François Zimeray, the rapporteur on the legal basis, the Committee on Legal Affairs and the Internal Market decided unanimously¹ at its meeting of 27 January 2004 that the appropriate legal basis is Article 30(1)(a), Article 32 and Article 34(2)(b) of the Treaty on European Union.

Yours sincerely,

Giuseppe Gargani

¹ The following were present for the vote: Giuseppe Gargani (chairman), Ioannis Koukiadis (vice-chairman), Lord Inglewood, Kurt Lechner, Manuel Medina Ortega, François Zimeray, Diana Wallis, Uma Aaltonen, Sir Neil MacCormick and Roy Perry.