



UNIVERSITY OF
KWAZULU-NATAL
INYUVESI
YAKWAZULU-NATALI

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Name: Amy Paula Dedekind
Student Number: 207 511 786
Supervisor: Mr Vishal Surbun

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Declaration: "I certify that the whole dissertation, unless specifically indicated to the contrary in the text, is my own work. It is submitted as the dissertation component in partial fulfilment of the requirements for the degree of Masters of Law in the Faculty of Law, University of KwaZulu-Natal," 2012.

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ABSTRACT

A review of measures to combat illicit drug trafficking and trade: a domestic maritime perspective

From a survey of media reports and other documentary sources, illicit drug trafficking and trade seems to be a prevalent problem in South Africa today. Drugs are being shipped undetected in containers, which poses a significant threat to maritime security. The drug trade is also having a negative impact upon one of South Africa's valuable resources, abalone. It appears that there is a substantial nexus between the poaching of abalone and the illicit drug trade in South Africa. Abalone is considered to be a delicacy in the East and research shows that a substantial amount of drugs in South Africa has originated from the illicit trade of abalone.

This dissertation will examine illicit drug trafficking and trade with particular reference to the maritime industry which facilitates this illicit trafficking and trade through ineffective security measures governing containerisation; and also through the abalone trade. A survey of media reports, articles, reviews, Institute for Security Studies papers, books and the World Drug Report 2012 set the scene of illicit drug trafficking and trade in South Africa as being prevalent and damaging to the country's security measures.

A review of South Africa's domestic legislation and the international conventions to which it is party is necessary to determine whether the law governing illicit drug trafficking and trade is adequate to address the issues highlighted above. The focus of this dissertation will then shift to wards the issues surrounding implementation and enforcement of these laws.

The enforcement and implementation of the law seems tainted by corruption, lack of skills and morale and inexperience and therefore these issues need to be addressed in order to fully combat illicit drug trafficking and trade in South Africa's maritime industry.

DECLARATION

I, Amy Paula Dedekind, declare that:

1. The research reported in this Dissertation, except where otherwise indicated, is my original research.
2. This Dissertation has not been submitted for any degree or examination at any other university.
3. This Dissertation does not contain other persons' data, pictures, graphs or other information, unless specifically acknowledged as being sourced from other persons.
4. This Dissertation does not contain other persons' writing, unless specifically acknowledged as being sourced from other researchers. Where other written sources have been quoted, then:
 - (a) Their words have been re-written but the general information attributed to them has been referenced.
 - (b) Where their exact words have been used, then their writing has been placed in italics and inside quotation marks, and referenced.
5. This Dissertation does not contain text, graphics or tables copied and pasted from the Internet, unless specifically acknowledged, and the source being detailed in the thesis and in the Reference sections.

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LIST OF CONVENTIONS, STATUTES AND CASES:

International Conventions:

Convention on Psychotropic Substances, 1971.

Single Convention on Narcotic Drugs, 1961.

United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988.

United Nations Convention against Transnational Organized Crime.

United Nations Convention on the Law of the Sea, 1982.

South African Domestic Legislation:

Customs and Excise Act 91 of 1964.

Drugs and Drug Trafficking Act 140 of 1992.

International Trade Administration Act 71 of 2002.

Marine Living Resources Act 18 of 1998.

Prevention of Organised Crime Act 121 of 1998.

Ship Registration Act 58 of 1998.

Protocols ratified by South Africa:

Protocol on Combating Illicit Drug Trafficking in the Southern African Region

Zambian Domestic Legislation:

Narcotic Drug and Psychotropic Substances Act, 1993.

Cases:

Keyser v State (634/11) [2012] ZASCA 70 (25 May 2012).

Sheryl Cwele & another v The State (671/11) [2012] ZASCA 155 (1 October 2012).

National Director of Public Prosecutions v Engels 2005 (3) SA 109 (C).

National Director of Public Prosecutions v Tam and others 2004 (2) SA 500 (W).

LIST OF ABBREVIATIONS

AMSSA	African Maritime Safety and Security Agency
CCSI	Container and Cargo Scanning Initiative
CITES	Conventions on International Trade in Endangered Species of Wild Fauna and Flora
CSI	Container Security Initiative
INCB	International Narcotics Control Board
ISS	Institute for Security Studies
MARINEs	Management Action for Resources of Inshore and Nearshore Environments
SARS	South African Revenue Services
SADC	Southern African Development Community
UNODC	United Nations Office on Drugs and Crime

I

INTRODUCTION

With civilisation's need for wealth, power, prosperity and luxuries, a world with effective and speedy transport is a necessity. Although there are many forms of transport, the shipping industry seems to have one of the longest histories¹ and is an effective way to transport large cargo from one country to another. With the growth of international trade and the corresponding prevalence of international crime, it is each country's responsibility to enhance their state security to protect their society and state structures. This places a spotlight on port security, especially with the rise in various goods being shipped from one part of the world to another and the rate at which these goods are shipped. Coastal states need to make sure that hazardous goods or materials are not being brought into the country without their knowledge or shipped from the country undetected. This brings maritime safety and security into question.

1.1 Maritime Safety and Security

For the purposes of this dissertation it is necessary to differentiate between maritime safety and maritime security. According to the African Maritime Safety and Security Agency (subsequently referred to as AMSSA), maritime safety promotes support systems set up to deal with unintentional damage or cases of pollution in the sea or the loss of life out at sea.² It also promotes the investigation of the above issues and the observation of the movements of vessels and the information they transmit.³ Search and Rescue teams, emergency strategies and Refuge Ports are also dealt with in terms of maritime safety.⁴

Maritime security according to AMSSA deals with intentional damage including "sabotage, subversion, or terrorism".⁵ This wide category extends to "transnational organised crimes" including human and drug trafficking, piracy and armed robberies,

¹ In around 3,100 BC in Egypt sailboats were said to have been invented and used, and in around 2,700 BC, the Egyptians started to use wooden boats to trade on the seas: Tim Lambert 'Timelines of Transport' available at <http://www.localhistories.org/transporttime.html>, accessed on 2 July 2012.

² AMSSA 'Risk Prevention and Maritime Security' available at <http://www.amssa.net/intelligence/risk-prevention-and-maritime-security.aspx>, accessed on 13 April 2012.

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

the security of resources and the environment, sovereignty and the maintenance of “international peace and security”.⁶

Although many transnational organised crimes seem to be prevalent in the 21st Century, this dissertation will focus on illicit drug trafficking and trade at sea and how South African ports have developed their security measures to monitor and prevent the illegal trafficking and trade of drugs, through containerisation on ships and illegal abalone trade.

1.2 Drug Trafficking

Drug trafficking according to the United Nations Office on Drugs and Crime (subsequently referred to as UNODC) is defined as “a global illicit trade involving the cultivation, manufacture, distribution and sale of substances which are subject to drug prohibition laws.”⁷ This definition does not only involve the sale of drugs as the umbrella concept ‘drug trafficking’ would suggest, but also involves the making, distribution, growing and trade of illicit drugs. The distribution of illicit drugs is facilitated through the use of containers in the maritime industry. Trade in this dissertation will specifically address the illegal trading of abalone for drugs by criminal syndicates. Abalone is a mollusc or sea snail⁸ that lives on the seabed in a number of coastal states.

Criminal syndicates in South Africa not only import drugs, but also export them and the UNODC has noted a high presence of cannabis and cocaine being brought into and exported out of South Africa.⁹ This is evidenced by the fact that near the close of 2010, seizures of about 2016 kilograms of cocaine took place at South African ports.¹⁰ To

⁶ *Ibid.*

⁷ UNODC ‘Drug Trafficking’ available at <http://www.unodc.org/unodc/en/drug-trafficking/index.html>, accessed on 2 August 2012.

⁸ UNODC ‘Transnational Organized Crime in the Fishing Industry’ 2011 at 98, available at http://www.unodc.org/documents/human_trafficking/Issue_Paper_-_TOC_in_the_Fishing_Industry.pdf, accessed on 14 August 2012.

⁹ United States Department of State ‘South Africa 2012 OSAC Crime and Safety Report’ available at <https://www.osac.gov/pages/ContentReportDetails.aspx?cid=12014>, accessed on 3 September 2012.

¹⁰ *Ibid.*

avoid the detection by authorities, drugs are hidden in containers.¹¹ Containerisation has made the transportation of goods much simpler since more goods can be transported at one time and packed neatly to ensure the maximum use of space. However, the laws regarding the goods that can be transported in these containers need to be clear to ensure that no illegal goods can enter or leave the country. Inspections of containers and other security measures are provided for in International Conventions and in South Africa's domestic legislation.

Reports have shown that Chinese and Balkan drug syndicates have taken an interest in importing drugs into South Africa.¹² Chinese organised crime syndicates have taken a special interest in South Africa because of its abalone resources. These Chinese syndicates import drugs into South Africa in exchange for abalone which is considered a delicacy by the Chinese.¹³ The trade of abalone for drugs in South Africa increases the amount of illicit drugs entering the country. The drug and abalone trade is regarded as a transnational organised crime and is governed by South African legislation, namely the Prevention of Organised Crime Act 121 of 1998 and also the United Nations Convention against Transnational Organized Crime which South Africa ratified on 20 February 2004.¹⁴ This Convention came into force on 29 September 2003 and has 147 signatories and 173 parties.¹⁵ South Africa has made one reservation in relation to this Convention in that it does not want to be made subject to the "compulsory jurisdiction of the International Court of Justice".¹⁶

The drug and abalone trade will be addressed in more detail in Chapter two.

¹¹ Richard Norton-Taylor 'Sea trafficking report reveal how ships move guns and drugs' *The Guardian* 30 January 2012, available at <http://www.guardian.co.uk/world/2012/jan/30/sea-trafficking-report-guns-drugs>, accessed 2 August 2012.

¹² United States Department of State, *op cit* note 9.

¹³ Brick et al 'Abalone poaching, methamphetamine use, criminal activity in South Africa and the associated implications for resource management' available at [http://www.commerce.uct.ac.za/economics/seminars/2009/Brick%20et%20al%20\(2009\).pdf](http://www.commerce.uct.ac.za/economics/seminars/2009/Brick%20et%20al%20(2009).pdf), accessed on 4 September 2012.

¹⁴ United Nations Treaty Collection, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en, accessed on 16 April 2012. The provisions of this Convention are closely related to the Prevention of Organised Crime Act 121 of 1998.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

1.2.1 International Conventions

The United Nations Conventions of which South Africa is a party to, relating to drug trafficking are:

- (a) The Single Convention on Narcotic Drugs, 1961;
- (b) The Convention on Psychotropic Substances, 1971; and
- (c) The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988.¹⁷

The Single Convention on Narcotic Drugs, 1961 came into force on 13 December 1964 and has to date, 61 signatories and 153 parties.¹⁸ South Africa acceded to this Convention on 16 November 1971 with a reservation: “Subject to a reservation in respect of article 48 of the Convention, as provided for in article 50, paragraph 2.”¹⁹ Article 48 deals with the manner in which disputes between two State Parties should be resolved.

The Convention on Psychotropic Substances, 1971 came into force on 16 August 1976 and has to date, 34 signatories and 183 parties.²⁰ South Africa acceded to this Convention on 27 January 1972 and a reservation regarding this Convention was made: “The Government of the Republic of South Africa deem it advisable to accede to the Convention on Psychotropic Substances, subject to reservations in respect of Article 19 paragraphs 1 and 2, Article 27 and Article 31 as provided for in Article 32 paragraph 2 of the Convention.”²¹

The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 came into force on 11 November 1990 and has to date,

¹⁷ P Vrancken *South Africa and the Law of the Sea* (2011) 150.

¹⁸ United Nations Treaty Collection, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-15&chapter=6&lang=en, accessed on 25 November 2012.

¹⁹ *Ibid.*

²⁰ United Nations Treaty Collection, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-16&chapter=6&lang=en, accessed on 25 November 2012.

²¹ *Ibid.*

87 signatories and 188 parties.²² South Africa acceded to this Convention on 14 December 1998 and made a declaration regarding this Convention: “In keeping with paragraph 4 of Article 32, the Republic of South Africa does not consider itself bound by the provisions of paragraphs 2 and 3 of Article 32 of the Convention.”²³

The United Nations Convention on the Law of the Sea, 1982 also plays a part in preventing illicit drug trafficking in that it provides for inter-State co-operation and assistance where it is believed illicit drug trafficking is taking place on the high seas.²⁴ This Convention also provides for coastal States to exercise criminal jurisdiction over foreign ships in that particular coastal State’s territorial waters where that foreign ship is illicitly trafficking in drugs.²⁵ South Africa ratified this Convention on 23 December 1997.²⁶

1.2.2 Accession and Ratification

Acceding to a Convention means that the State has accepted that Convention and that it intends for the provisions of such Convention to become legally binding upon it.²⁷ Acceding to a Convention is the same as ratifying it in terms of having a “legal effect” upon the State, yet no signature is required before accession.²⁸

Ratification is an action by States who intend to be considered “legally bound” by a particular Convention.²⁹ The process of ratification starts off with the State signing the particular Convention and thereafter adjusting or developing the domestic legislation to bring it in line with the particular Convention.³⁰ The State then decides to become a

²² United Nations Treaty Collection, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&lang=en, accessed on 25 November 2012.

²³ *Ibid.*

²⁴ Article 108.

²⁵ Article 27 paragraph 1(d).

²⁶ United Nations, available at

http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm, accessed on 30 November 2012.

²⁷ UNICEF’ Introduction to the Convention on the Rights of the Child: Definition of key terms’, available at <http://www.unicef.org/crc/files/Definitions.pdf>, accessed on 2 December 2012.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*

party to the Convention and sends an “instrument of ratification” to the United Nations.³¹

1.2.3 South Africa's Domestic Legislation

South Africa's domestic legislation regarding illicit drug trafficking is provided in the Drugs and Drug Trafficking Act 140 of 1992, which empowers officials to prevent the use, manufacture and dealing in drugs and also allows officials to conduct inspections for drugs and to seize drugs that have been trafficked and to seize the proceeds of drug trafficking. The Drugs and Drug Trafficking Act works in conjunction with the Medicines and Related Substances Act 101 of 1965 which regulates which medicinal drugs can be brought into the country or exported from the country.

1.3 Imports and Exports

For the sake of clarity, an ‘import’ means “any goods or service brought into one country from another country in a legitimate fashion, typically for use in trade.”³² An ‘export’ means “goods or services that domestic producers provide to foreign consumers.”³³

South Africa's import and export industry brings in billions of Rands in revenue each month.³⁴ In July 2012 alone goods imported into South Africa were valued at R70.2 billion and included mainly equipment, food, chemicals and petrol³⁵ and exports were valued at R63.5 billion and included mainly gold, platinum, diamonds and coal.³⁶

Both importing and exporting to and from South Africa respectively is controlled by the Department of Customs and Excise which places them in a very authoritative position concerning what types of goods enter and leave South Africa. The Customs and Excise Act 91 of 1964 and the International Trade Administration Act 71 of 2002 regulate the laws and regulations regarding imports and exports in South Africa. The aim of the

³¹ *Ibid.*

³² ‘South Africa Imports’ available at <http://www.tradingeconomics.com/south-africa/imports>, accessed on 18 September 2012.

³³ ‘South Africa Exports’ available at <http://www.tradingeconomics.com/south-africa/exports>, accessed on 18 September 2012.

³⁴ ‘South Africa Imports’, *op cit* note 32.

³⁵ *Ibid.*

³⁶ ‘South Africa Exports’, *op cit* note 33.

Customs and Excise Act, as set out in the long title of the Act is to prevent and regulate certain types of goods from being imported, exported, used or produced and any other issues relating to these matters. The International Trade Administration Act 71 of 2002 plays a role in the determination of import-export procedures and the role of investigating officers concerning the import and export of goods.

1.4 The Prevalence of Illicit Drug Trafficking and Trade

Scholarly articles and reports³⁷ suggest that illicit drug trafficking and trade is rife in South Africa with the need for the State to urgently address these issues. Laws have been put in place in South Africa,³⁸ yet the problem is still occurring in the maritime industry. This dissertation sets forth and provides a review of the applicable laws to combat illicit drug trafficking and trade in relation to containerisation and the illegal abalone trade.

1.5 The Aim of the Study

This study will seek to determine whether: (i) the law in South Africa is adequate to address the problems identified with illicit drug trafficking through containerisation and the abalone trade, and (ii) whether these laws are implemented and enforced effectively.

This analysis will be performed through the use of documentary sources including media articles, reports, reviews, practice and policy guides and statistical data. From these sources, a conclusion will be submitted that the legislation regulating the illicit drug trafficking in South Africa and the international conventions that South Africa is a party to seem generally adequate in that their provisions cover a wide spectrum of container and vessel inspection measures for the purpose of detecting illicit drug trafficking. The legislation and conventions also regulate the abalone trade in terms of acquiring a fishing permit before any fishing can take place and provides for penalties to be imposed on those who contravene the law. With the legislation and conventions proving to cover a wide range of security measures in the maritime industry, it will be submitted that the enforcement and implementation of these laws is deficient due to corruption, inefficiency, lack of morale and inexperience of officials. It will also be submitted that while the law may seem comprehensive, amendments could be made to

³⁷ Media reports in Chapter two and scholarly articles in Chapter four.

³⁸ Discussed in more detail in Chapter three.

possibly assist with the shortfalls in the implementation and enforcement of the law. To do this the law, for example, could provide for stricter liability amongst officials who must strive to perform their duties with due and reasonable care.

1.6 The Structure of the Study

After setting the scene regarding illicit drug trafficking in general and in the maritime industry specifically through containerisation and the abalone trade in Chapter two, this dissertation will analyse and apply South Africa's domestic laws and the International Conventions that South Africa is a party to regarding illicit drug trafficking in Chapter three. A determination will be made as to the adequacy of the law in combating illicit drug trafficking and trade in the maritime industry and problematic areas will be highlighted. A review of the implementation and enforcement of these laws will be discussed in Chapter four and a conclusion will be derived in Chapter five from the findings of the previous chapters.

II

DRUG TRAFFICKING

Containerisation and the abalone trade seem to facilitate illicit drug trafficking and trade in the maritime industry. Due to South Africa's geographical position on a busy sea route, it has been described as "an ideal channel for drugs" and as a "conduit in the transportation of drugs".³⁹ Port security and import-export measures therefore need to be in place to ensure that all transactions taking place at the ports and out at sea are legal. This chapter will firstly describe the operation of and response to illicit drug trafficking especially at ports and thereafter discuss how containerisation and the abalone trade facilitate illicit drug trafficking and trade.

2.1 Overview of Drug Trafficking and Port Security

The UNODC has named South Africa as a "hub" for drug trafficking whilst the United Kingdom has named South Africa as the country from which most of its cannabis was smuggled from.⁴⁰ In 2002, The United Nations Office for Drug Control and Crime Prevention teamed up with the South African Government, sending police officials, border patrol officials and South African Revenue Services (subsequently referred to as SARS) members on a course to suppress the illicit drug trafficking taking place in airports and seaports.⁴¹ This course also involved the identification and "profiling" of containers and vessels.⁴²

Illicit drug trafficking continued to be a major problem, however. For example, in 2008, newspaper reports labelled mandrax from China and cocaine from South America as the

³⁹ Dasen Thathiah and Bheki Mbanjwa 'SA ports ideal for drug trade: Entire region a conduit for export' *Daily News* 17 September 2009 at 3, available at <http://www.samedia.uovs.ac.za/cgi-bin/getpdf?year=2009&refno=14355&topic=15>, accessed on 7 September 2009.

⁴⁰ 'South Africa: UN study finds country is regional drug trafficking hub' *Health Systems Trust* 13 November 2002, available at <http://www.hst.org.za/print/news/south-africa-un-study-finds-country-regional-drug-trafficking-hub>, accessed 16 April 2012.

⁴¹ Zain Cook 'Group to fight drug trafficking' *Pretoria News* 5 February 2002 at 5, available at <http://www.samedia.uovs.ac.za/cgi-bin/getpdf?year=2002&refno=676&topic=10>, accessed on 7 September 2012.

⁴² Zain Cook 'Cops have new weapon in drugs war' *Cape Argus* 4 February 2002 at 4, available at <http://www.samedia.uovs.ac.za/cgi-bin/getpdf?year=2002&refno=1318&topic=15>, accessed on 7 September 2009.

most ‘popular’ drugs entering South Africa.⁴³ Ten kilograms of cocaine was found on a Russian ship in Table Bay harbour and seized by police in Cape Town, the value of such cocaine was estimated to be R5 million.⁴⁴ In another drug bust incident, a ship registered in Liberia was found to have two hundred kilograms of cocaine on board in one crew member’s room.⁴⁵ The ship was arrested and held in Durban Harbour pending investigations against the ship owners.⁴⁶

Dagga, heroin and cocaine became more popular in 2009 as suggested by newspaper reports.⁴⁷ This prompted Superintendent Devon Naicker, head of the Narcotics division of the Organised Crime Unit, to take drastic steps to curb illicit drug trafficking at a local and international level.⁴⁸ At a local level, ‘drug pushers’ and the persons organising the entry of drug consignments into the country were sought out.⁴⁹ The next targets were drug syndicates operating internationally and a successful drug bust took place with the seizure of a shipment of drugs on its way to the United Kingdom.⁵⁰ The drug syndicate conducting its ‘business’ in Durban and the United Kingdom was arrested.⁵¹ Thus the aim no longer seems to focus just on seizing the drugs to protect society, the aim has grown to infiltrating and arresting the “hierarchy of the syndicate”.⁵²

When *Servamus*, a community-based Safety and Security Magazine, visited the East London Port of Entry in 2009, the main function of the Water Wing / Border Police Unit in the Port of Entry was found to be the prevention of goods and persons moving

⁴³ Melanie Peters ‘Wave of drug smuggling has become a tsunami’ *Saturday Star* 11 October 2008 at 8, available at <http://www.samedia.uovs.ac.za/cgi-bin/getpdf?year=2008&refno=15718&topic=15>, accessed on 7 September 2012.

⁴⁴ *Ibid.*

⁴⁵ Bronwyn Gerretsen ‘Drug ship remains in port, for now’ *Independent on Saturday* 31 January 2009 at 2, available at <http://www.samedia.uovs.ac.za/cgi-bin/getpdf?year=2009&refno=1296&topic=15>, accessed on 7 September 2012.

⁴⁶ *Ibid.*

⁴⁷ ‘Police say drug imports through Durban’s harbour are rife, but narcotics teams are having success against big syndicates’ *Witness* 10 October 2009 at 7, available at <http://www.samedia.uovs.ac.za/cgi-bin/getpdf?year=2009&refno=6421&topic=10>, accessed on 7 September 2012.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

illegally into and out of the country.⁵³ This is carried out by searching vessels coming in from the high seas; and also through Customs and Immigration which surveys and searches containers.⁵⁴ The East London Dog Unit is also called out to inspect vessels for drugs and explosives.⁵⁵ Other important functions of the Water Wing / Border Patrol Unit are to research information about and take action against incidents relating to abalone, narcotics and containers.⁵⁶

In 2011, drug traffickers seemed focused on trading drugs for cars between South Africa and the United Kingdom.⁵⁷ These cars were stolen in the United Kingdom and shipped to South Africa where they were exchanged for drugs.⁵⁸ Stolen cars have been found in containers surrounded by tyres⁵⁹ in a possible attempt to evade the officials who may check the containers.

The most prevalent drugs in South Africa from 2010 that were used amongst the population from the ages of 15 to 64 seem to be (i) amphetamines, which more than one percent of this population uses; (ii) cannabis, where the user percentage is between 4.01 – 6.00; (iii) cocaine, which is used by between 0.51 – 1.00 percentage of the population; (iv) opiates (includes heroin and opium), where the user percentage is between 0.31 – 0.50; (v) opioids (includes heroin, opiates and opium), where the user percentage is between 0.31 – 0.50 and; (vi) ecstasy, where the user percentage is between 0.31 – 0.50.⁶⁰ From this it is clear that South Africans are one of the highest drug users and measures need to be put in place to stop drugs from entering and leaving the country. According to a media report, the UNODC has been named South Africa as third in the

⁵³ Kotie Geldenhuys 'Policing SA's only river port' *Servamus* 1 July 2009 at 34, available at <http://www.samedia.uovs.ac.za/cgi-bin/getpdf?year=2009&refno=13911&topic=15>, accessed on 7 September 2012.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ Gareth Wilson 'Drug kings score from porous ports' *The Times* 10 August 2011 at 5, available at <http://www.samedia.uovs.ac.za/cgi-bin/getpdf?year=2011&refno=8623&topic=15>, accessed on 7 September 2012.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ UNODC 'Prevalence Maps' available at http://www.unodc.org/unodc/secured/wdr/WDR12/_Prevalence_maps.pdf, accessed on 2 October 2012.

world for cannabis seizures.⁶¹ This is supported in a paper particularly focusing on cannabis in Africa.⁶²

2.2 Containerisation

In the beginning of 2012 the Stockholm International Peace Research Institute conducted a study on cargo containers and the cargo carried therein and concluded that whilst containers are necessary and have made the transportation of goods in the shipping industry much easier, they also facilitate in the trafficking of arms and drugs at sea due to their nature.⁶³ Drugs are hidden in amongst lawful cargo in containers that are sealed and carried by foreign-ship owners pursuing their usual business who are sometimes unaware of the illegal goods they are carrying.⁶⁴ The ships on which these drugs are placed are also chosen specifically for their “circuitous routes” so that there is little possibility of goods being traced.⁶⁵ This could be because where a vessel is destined to travel to various places in a round trip, the drugs could have been placed on board at any given port where the vessel may have stopped and therefore it would become difficult to determine at which point the drugs were placed on board. Only a small portion of containers are inspected at ports and this allows traffickers easy access to traffic their illegal goods without being detected.⁶⁶ At Durban Harbour alone the estimated percentage of containers that are inspected is less than 1 percent whilst in November 2007, it was found that only ten percent of drugs coming into the country had been found and seized leaving the other ninety percent to enter unnoticed.⁶⁷

⁶¹ Staff Reporter ‘Drug trafficking rife in SA – UN report’ *Cape Argus* 4 January 2012 at 5, available at <http://www.samedia.uovs.ac.za/cgi-bin/getpdf?year=2012&refno=192&topic=15>, accessed on 7 September 2012.

⁶² UNODC ‘Cannabis in Africa: An Overview’ November 2007, available at http://www.unodc.org/documents/data-and-analysis/Can_Afr_EN_09_11_07.pdf, accessed on 12 December 2012.

⁶³ Richard Norton-Taylor ‘Sea trafficking report reveal how ships move guns and drugs’ *The Guardian* 30 January 2012, available at <http://www.guardian.co.uk/world/2012/jan/30/sea-trafficking-report-guns-drugs>, accessed on 2 August 2012.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ Clayton Barnes ‘Drugs pour into South Africa via open ports’ *Saturday Weekend Argus* 19 April 2008, available at <http://www.samedia.uovs.ac.za/cgi-bin/getpdf?year=2008&refno=6790&topic=15>, accessed on 7 September 2012.

One reason for this lack of maritime security is that containers, whilst the most effective way to transport goods in bulk by sea, are not easily checked. They come in different structures⁶⁸ and carry a large quantity of goods. However they seem to remain the most effective way to transport goods in bulk by sea.

2.2.1 Non-intrusive Detection Methods

An x-ray scanner was installed in 1998 in the port of Durban and in three years alone (as reported in 2001) the scanner stopped R100 million worth of stolen, fake and illegal goods from being imported and exported.⁶⁹ It is submitted that whilst the scanner performed well during the time it was first introduced, a possible reason for 90 percent of drugs entering unnoticed could be that the criminal syndicates know after years of experience how to manipulate the port security measures.⁷⁰ The scanner's operators are the police and Customs and Excise officials⁷¹ which could be manipulated by these criminal syndicates to perform actions contrary to their official duties. This will be addressed in more detail in Chapter four. The scanner manager of the National Ports Authority at the time had stated that workers using the scanners did not need extensive training but needed to be able to identify any suspicious images appearing from scanned containers, for example mandrax tablets hidden in amongst a consignment of teddy bears.⁷²

Trading partners have had an influence on how security is managed in South Africa. After 11 September 2001, when the World Trade Centre in the United States (US) was attacked by terrorists, the need to fight terrorism in all forms became more urgent.⁷³ Customs in the US thereafter put in place a 'Container Security Initiative' (subsequently

⁶⁸ Mediterranean Shipping Company S.A available at http://www.msccva.ch/cont_specs_agencies.html, accessed on 4 September 2012.

⁶⁹ Nicola Jenvey 'Durban Port's X-ray scanner zaps smuggling' *Business Day* 24 October 2001 at 15, available at <http://www.samedia.uovs.ac.za/cgi-bin/getpdf?year=2001&refno=14144&topic=8>, accessed on 7 September 2012.

⁷⁰ This can be deduced from the interaction between corrupt officials and criminals offering bribes to these officials. This will be addressed in further detail in Chapter four.

⁷¹ Jani Meyer 'Drug dealers avoid strict Durban port' *Saturday Star* 26 October 2002 at 9, available at <http://www.samedia.uovs.ac.za/cgi-bin/getpdf?year=2002&refno=14125&topic=15>, accessed on 7 September 2012.

⁷² *Ibid.*

⁷³ SARS 'Container and Cargo Scanning Initiative' available at <http://www.sars.gov.za/home.asp?pid=3637>, accessed on 3 September 2012.

referred to as CSI) to ensure that cargo leaving and entering the US was secure.⁷⁴ In 2003, the South African Revenue Service introduced the ‘Container and Cargo Scanner Initiative’ (subsequently referred to as CCSI) to modify and update South Africa’s customs clearance processes and was also necessary because South Africa and the United States trade extensively with each other. The CCSI aims to:

implement the use of non-intrusive inspection technology to support customs enforcement at the borderline. This may come in many forms, like large scale cargo scanners; handheld trace detectors; radiation portals monitors; contraband detector busters.⁷⁵

Durban port was the first port where CSI was incorporated, as every month an estimated 3500 containers are transported by sea to the United States from Durban.⁷⁶ A United States CSI team is stationed in Durban where they evaluate whether there is a risk in sending certain containers to America and whether those containers should be inspected before they are loaded onto the vessel heading for America.⁷⁷ This team is primarily on the lookout for radioactive substances which is likely to be linked with terrorist activity and a process of detection using a “hand-held radiation detector” is used after which the container is tagged and sealed.⁷⁸

The positive side in the use of such non-intrusive measures has been described as aiding in the deterrence and detection of illegal conduct in maritime transportation; the scanning of goods upon entry and again upon exit will aid in the detection of any criminal activity; and the scanning of containers will be able to source goods that were hidden therein.⁷⁹ The introduction of scanning devices was to aid in anti-smuggling campaigns and to detect illegal goods and goods that were not declared.⁸⁰ Cargoes are to be declared before they enter or leave the ports of South Africa in order for customs, operating in terms of the Customs and Excise Act 91 of 1964, to “ensure integrity of

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ SARS ‘Container Security Initiative’ available at <http://www.sars.gov.za/home.asp?pid=3638>, accessed on 4 September 2012.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ SARS ‘Container and Cargo Scanning Initiative’, *op cit* note 73.

⁸⁰ *Ibid.*

trade, to achieve operational efficiency and effective utilization of scanning equipment.”⁸¹

The recognition and promotion of non-intrusive scanning methods provides for a more efficient and less costly exercise of checking goods as less unpacking of the entire cargo would aid in effective time management and reduction in costs and delays.⁸² Durban has been named the port with the most activity in Africa and therefore it is no surprise that its container terminal has been named the most effective port in terms of its equipment.⁸³ In 2001, an average of three thousand containers moved through the Port of Durban per day⁸⁴ and more recent statistics show that about sixty percent of the total containers passing through South Africa pass through the port of Durban.⁸⁵ In 2009, reports showed that about two million containers pass through the Port of Durban yearly⁸⁶ which works out to be an estimated five thousand four hundred and seventy-nine containers per day which is an evident rise from the figures stated in 2001.

Due to the fact that Durban port experiences this high volume of container movements and the import-export of goods, it is necessary for port security measures to be in place. The South African Police Service helps with the inspection of goods to ensure all goods entering and exiting the country are legal and the South African Revenue Service aids in the import and export of goods in order to find revenue in terms of duty fees.⁸⁷ The Department of Customs and Excise must ensure all documentation is in order before it signs goods off to be shipped or offloaded.⁸⁸ Documentation may include a description

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ Transnet ‘Transnet port terminals’ available at <http://www.transnet.co.za/Divisions/PortTerminals.aspx>, accessed on 3 September 2012.

⁸⁴ Jenvey, *op cit* note 69.

⁸⁵ KwaZulu-Natal Business ‘KwaZulu-Natal is in the unique position of having two of the largest and busiest harbours in Africa’ available at <http://www.kwazulunatalbusiness.co.za/special-features/241302.htm>, accessed on 27 November 2012.

⁸⁶ Thathiah and Mbanjwa, *op cit* note 39 at 3.

⁸⁷ A Minaar *Policing the Ports Reducing Illicit Trafficking in South Africa* (2003) 74, available at <http://www.issafrika.org/uploads/Mono84.pdf>, accessed on 4 October 2012.

⁸⁸ *Ibid.*

of the items to be shipped or offloaded, for example whether the goods may have certain restrictions placed upon them.⁸⁹

2.2.2 Physical/Manual Inspection

Even though South Africa experiences a large number of container shipments, only about 100-120 containers can be inspected per day⁹⁰ and therefore a selective process determines which containers should be inspected due to the possibility that they fall under a class that could contain possible threats.⁹¹ Containers therefore need to be checked to ensure no dangerous or illegal goods are present inside.⁹² This is done through various ways. Firstly, a container can be completely unpacked which is a long process involving a lot of manpower with possible complications for example, where goods are required to be refrigerated temporarily whilst the container is emptied.⁹³ This process is the best way of checking all goods in containers but would be too time consuming for it to be done to more containers other than just a suspicious few.⁹⁴ Secondly, once the container has been emptied a thorough inspection of the goods can be performed.⁹⁵ Thirdly, a container can be scanned using an x-ray machine. This works best with goods that are wrapped up, as to unwrap them would cause them not to fit properly back into the container.⁹⁶ If a suspicious object is detected during the scan, that container may be opened for an inspection to be performed.⁹⁷ Fourthly, a container can be checked through what is termed a ‘tailboard’ inspection which is where only the first few rows of goods in the containers are checked by officials.⁹⁸ In 2003, about three percent of all goods were actually “physically inspected” after a ‘tailboard’ inspection was performed.⁹⁹

⁸⁹ ‘South Africa – Customs Clearance Documents’, available at http://www.excess-baggage.com/documentation/export_docs/customs/SACustomsForms.pdf, accessed on 12 December 2012.

⁹⁰ This is because of limited manpower, minimal scanners and high costs due to delay.

⁹¹ Minaar, *op cit* note 87 at 75.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ *Ibid* at 76.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

However in 2004, the x-ray scanner was broken for a period of three months allowing some two hundred and seventy thousand containers to pass through the Durban port without being scanned leaving officials to perform only random manual checks.¹⁰⁰ It is plausible that many drugs could have easily been moved into South Africa undetected in these circumstances. This kind of dangerous situation allows criminal syndicates transporting these drugs to thrive and take advantage of port security. It is problematic that, although all media reports acknowledge that Durban is the busiest port in South Africa, only one scanner was installed to reduce the risk of illicit drug trafficking. With x-ray scanners costing around R43 million each¹⁰¹, only one has been installed in the port of Durban for now due to the costs involved.

A useful case study, which highlights the shortcomings of the process occurred in 2006. The SARS customs officials received a tip-off about a container that would enter Durban Harbour carrying R146 million worth of Mandrax tablets.¹⁰² This container was transported from the harbour to a warehouse in Johannesburg where the drug bust was made.¹⁰³ Whilst media reports praise these officials for their efforts in prohibiting these drugs from being sold to society in general, what is evident about this event is that the officials could only execute the drug bust once they had received a tip-off. Without the tip-off it is unlikely that these officials would have known anything about this substantial amount of R146 million worth of mandrax tablets hidden in the container. The fact that this entered the port with the true contents undetected raises serious concerns. It may be argued that the bust only took place in Johannesburg because key role players that may have been linked to the drugs could be arrested there, but questions could be raised as to what provisions were in place if the truck carrying this container had been intercepted and the drugs offloaded somewhere before it reached Johannesburg.

¹⁰⁰ Brett Horner 'Harbour's scanner faulty' *Sunday Times* 21 November 2004 at 2, available at <http://www.samedia.uovs.ac.za/cgi-bin/getpdf?year=2004&refno=5223&topic=42>, accessed on 7 September 2012.

¹⁰¹ Staff Reporter 'R43m scanner unveiled at Durban's harbour' *Mail & Guardian* 1 April 2008, available at <http://mg.co.za/article/2008-04-01-r43m-scanner-unveiled-at-durbans-harbour>, accessed on 12 December 2012.

¹⁰² 'Another drug bust' *Star* 12 May 2006 at 14, available at <http://www.samedia.uovs.ac.za/cgi-bin/getpdf?year=2006&refno=6304&topic=15>, accessed on 7 September 2012.

¹⁰³ *Ibid.*

2.3 Drug Trafficking in the Fishing Industry

2.3.1 Background

It is evident that drug trafficking has a huge impact and consequence on world trade and world health but it also has a significant impact on environmental resources as it has been linked to the depleting numbers of abalone which essentially shows that transnational organised crime is present in the fishing industry.¹⁰⁴ The target of such criminal activity is specifically the *Haliotis midae*, an abalone species commonly known as perlemoen, which is highly valuable.¹⁰⁵ Abalone is particularly popular in Asia where it is considered to be an “aphrodisiac”.¹⁰⁶

On 1 February 2008, South Africa prohibited the fishing of wild abalone due to it becoming the focus of criminal syndicates from Asia and South Africa and its trade for drugs.¹⁰⁷ This crime of abalone poaching is termed a ‘marine living resource crime’ and has been defined in a UNODC study on transnational organised crime in the fishing industry as: “criminal conduct that may cause harm to the marine living environment; typically offences committed on the basis of contraventions of marine living resource management and conservation regulations.”¹⁰⁸ The trade of abalone for drugs also falls under the category of “illicit trafficking in natural resources (natural resource crimes), whereby natural resources are harvested, transported, trafficked or traded in contravention of environmental protection laws or nature conservation or management regulations.”¹⁰⁹

The Minister of the Department of Environmental Affairs and Tourism remarked that:

¹⁰⁴ UNODC ‘Transnational Organized Crime in the Fishing Industry’ 2011 at 3, available at http://www.unodc.org/documents/human_trafficking/Issue_Paper_-_TOC_in_the_Fishing_Industry.pdf, accessed on 14 August 2012.

¹⁰⁵ Jonny Steinberg ‘The illicit abalone trade in South Africa’ 2005 at 1, available at <http://www.iss.co.za/pubs/papers/105/105.pdf>, accessed on 1 October 2012.

¹⁰⁶ UNODC ‘Transnational Organized Crime in the Fishing Industry’ *op cit* note 104 at 87.

¹⁰⁷ Brick et al ‘Abalone poaching, methamphetamine use, criminal activity in South Africa and the associated implications for resource management’ 2009 at 1, available at [http://www.commerce.uct.ac.za/economics/seminars/2009/Brick%20et%20al%20\(2009\).pdf](http://www.commerce.uct.ac.za/economics/seminars/2009/Brick%20et%20al%20(2009).pdf), accessed on 4 September 2012.

¹⁰⁸ UNODC ‘Transnational Organized Crime in the Fishing Industry’ *op cit* note 104 at 3.

¹⁰⁹ *Ibid* at 96.

Commercial harvesting of wild abalone can no longer be justified because the stock has declined to such an extent that the resource is threatened with commercial extinction... Studies [have] shown that unless decisive and immediate action is taken, the resource will collapse completely with little prospect of recovery. For the past few years the recommendations from our Department's managers and researchers have been that the fishery is in crisis and that closure could not be avoided.¹¹⁰

From this, it is clear how serious the consequences of the abalone trade are and how vital it is that solutions are found in order to prevent the complete extinction of these sea molluscs which may result in a major environmental imbalance. Yet despite the significance of this issue, the prohibition of fishing for wild abalone in South Africa was lifted in 2010.¹¹¹ It has been argued that this ban was lifted due to the governmental department governing this area failing to properly regulate Conventions on International Trade in Endangered Species of Wild Fauna and Flora (CITES) permits.¹¹²

2.3.2 Trends

Steinberg commented that four factors that contributed to the expedient growth rate of abalone trade in the 1990's: firstly due to the fact that the Rand in South Africa was on a steady decline in value against the US dollar, secondly Chinese criminal syndicates were already present in South Africa and various routes for abalone trade were therefore already cemented, thirdly the lack of border control security and measures in South Africa facilitated the trade in abalone and lastly, as South Africa was moving toward a democracy, a sense of 'socio-political' awareness was developed especially within the fishers from the coloured race.¹¹³ This shows that there were many contributory factors to the rise in abalone poaching and trade but these factors portray a government whose

¹¹⁰ S Raemaekers 'Review of the causes of the rise of the illegal South African abalone fishery and consequent closure of the rights-based fishery' (2011) 54 *Ocean and Coastal Management* 433, 436 available at <http://www.eeu.org.za/publications/peer-reviewed-publications/Review%20of%20the%20causes%20of%20the%20rise%20of%20the%20illegal%20abalone%20fishery.pdf>, accessed on 4 September 2012.

¹¹¹ Muchapondwa et al. 'Abalone Conservation in the Presence of Drug Use and Corruption in South Africa', available at <http://www.webmeets.com/files/papers/EAERE/2011/817/Abalone%20conservation%20in%20South%20Africa.pdf>, accessed on 14 August 2012.

¹¹² Suzaan Jansen *Linkage mapping in Haliotis midae using gene-linked markers* (published Masters of Science thesis, University of Stellenbosch, 2011) 3, available at <http://scholar.sun.ac.za>, accessed on 12 December 2012.

¹¹³ Steinberg, *op cit* note 105 at 2.

shortcomings above facilitated the depletion of abalone rather than curbing the trade itself. It is submitted that the increase in the rate of abalone poaching and trade possibly increased the amount of drugs being trafficked into South Africa.

The end of apartheid has also had an impact in the rise of drug trafficking,¹¹⁴ abalone poaching and trading due to the fact that South African borders became more accessible for international trade.¹¹⁵ In 1995, divers were paid \$50 per kilogram of abalone when sold on the illegal market, whilst commercial divers were only being paid about \$35 per kilogram in 1996.¹¹⁶ When these prices are considered in conjunction with the value of the Rand against the US dollar as pointed out by Steinberg above, the business of abalone poaching and trade seems very profitable.¹¹⁷ This raises a conflict between materiality and morals. Questions could be raised as to the obligation to catch abalone legitimately when poachers could do so illegitimately at a higher incentive, notwithstanding being aware of the risk of being caught for illegally harvesting abalone.

Through the opening of South Africa's borders for international trade, abalone is being transported mainly over borders on land or by aeroplane,¹¹⁸ however in some circumstances it is transported through the ports.¹¹⁹ Statistical evidence gathered in Hong Kong between 2002 and 2003 suggests that "200,000 kg of frozen, shucked perlemoen and over 100,000kg of dried perlemoen" was smuggled from South Africa into neighbouring countries and from there it was exported to Hong Kong.¹²⁰ Angus MacKenzie, a chief oceanographic technician, was interviewed by Steinberg in 2005¹²¹ and he stated that dried abalone is "one-tenth of its original size".¹²² This smaller size makes it easier to transport and does not necessarily affect the quality of the abalone in the sense that it can be "rehydrated".¹²³ The drying of the abalone is a very sensible and essential task on the part of the smugglers as it becomes harder to detect dried abalone

¹¹⁴ UNODC 'World Drug Report 2012' at 93, available at http://www.unodc.org/documents/data-and-analysis/WDR2012/WDR_2012_web_small.pdf, accessed on 1 October 2012.

¹¹⁵ Raemaekers, *op cit* note 110 at 438.

¹¹⁶ *Ibid.*

¹¹⁷ Steinberg, *op cit* note 105 at 2.

¹¹⁸ *Ibid* at 4.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ *Ibid* at 13.

¹²² *Ibid* at 4.

¹²³ *Ibid* at 5.

when compared to fresh or frozen abalone which still has a very distinct odour thus giving away what the true contents of a consignment is.¹²⁴ Officials who are untrained in the appearance of dried abalone also fail to detect it even when looking at it as they mistake it for other goods.¹²⁵ Abalone can be stored and preserved for long periods of time.¹²⁶ There are two ways to dry abalone for transportation: the first way is to use the sun as a drying tool which is a popular method in China but the disadvantage to smugglers is that the process can be as long as two months; the second way is to douse the abalone with a chemical which preserves it and then be left in a room with a temperature of 38°C in order for it to dry over three weeks.¹²⁷

Cook and Gordon, as cited in a study by the UNODC, state that between 2004 and 2007 the sale of illegally caught abalone had moved from eight hundred and fifty metric tonnes to two thousand metric tonnes.¹²⁸ The sale of abalone per kilogram is \$143 and the poacher takes \$36 of this amount.¹²⁹ The market for this meat is not large however, the abalone is shipped to Asia where its meat is considered a delicacy.¹³⁰ With the rise in cost of drugs to keep up with the rise of the economy, more money is needed by users to maintain their drug habit and this ultimately causes a rise in the numbers of abalone illegally being caught¹³¹ and sold in exchange for drugs. Between the year 2000 and 2007, amounts varying between two thousand one hundred and four thousand and sixty tonnes of abalone were imported into Asia each year. The illegal portion of these amounts adds up to \$70 million per year.¹³²

2.3.3 *Modus Operandi*

The procedure is as follows: Asian organised crime syndicates hire local South African criminal groups, who in turn hire fishers to poach the abalone in South Africa.¹³³ These fishers are often easily manipulated into illegal activity considering that overfishing has

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ UNODC 'Transnational Organized Crime in the Fishing Industry', *op cit* note 104 at 99.

¹²⁹ *Ibid* at 87.

¹³⁰ *Ibid.*

¹³¹ Brick et al, *op cit* note 107 at 11.

¹³² Raemaekers, *op cit* note 110 at 439.

¹³³ UNODC 'Transnational Organized Crime in the Fishing Industry', *op cit* note 104 at 87.

caused a depletion in many catchable and profitable fish.¹³⁴ These fishers are taken to specific areas where they dive down into the ocean and use various tools to pry the abalone from the seabed.¹³⁵ They are then placed in nets which are only identifiable by the vessels collecting them at night.¹³⁶ The abalone is then given to local organised crime syndicates (also called the middlemen¹³⁷) who then pass it on to the transnational organised crime syndicates.¹³⁸ In exchange the local organised crime syndicate acquires drugs from the Asian transnational organised crime syndicate,¹³⁹ namely, methamphetamine, cocaine and heroin.¹⁴⁰ The fishers on board the vessel aiding in the drug trafficking mimic a scene of lawful fishing as they exhibit skills of experienced fishers and know how to navigate through the ocean with ease.¹⁴¹ The middlemen trade the abalone to gain finance from the buyers, to have access to drugs for their own purposes and also to sell the drugs to others.¹⁴²

It seems that the Asian transnational organised crime syndicates are the ‘masterminds’ behind the trade of abalone for drugs but these groups can only be accessed through other local crime syndicates, therefore local officials seem to hold the fishers themselves responsible for their actions and cannot link them with the transnational criminal group.¹⁴³ This is a serious problem as the main culprits behind the depleting resources and illegal drug trade remain relatively free and untouchable. Whilst capturing the fishers does bring a small sense of justice in terms of the interruption of a major operation, the ultimate objective should be to bring the real “masterminds” to justice.

It has been suggested by the UNODC that fishing vessels themselves may aid in illicit drug trafficking and even that larger fishing vessels have drug laboratories on board that manufacture these drugs and disperse quantities to be sold on smaller vessels that proceed to various areas to sell or barter the drugs.¹⁴⁴ Fishing vessels seem to be the

¹³⁴ *Ibid.*

¹³⁵ *Ibid* at 100.

¹³⁶ *Ibid.*

¹³⁷ Brick et al, *op cit* note 107 at 6.

¹³⁸ UNODC ‘Transnational Organized Crime in the Fishing Industry’, *op cit* note 104 at 100.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid* at 87.

¹⁴¹ *Ibid* at 93.

¹⁴² Brick et al, *op cit* note 107 at 7.

¹⁴³ UNODC ‘Transnational Organized Crime in the Fishing Industry’, *op cit* note 104 at 129.

¹⁴⁴ *Ibid* at 87.

most effective vessels to carry out this role as they act as ‘mother ships’ which smaller and faster vessels use as a base to receive and deliver drug stocks.¹⁴⁵ These ‘mother ships’ supply fuel and other necessities to the smaller vessels in order for them to perform their task efficiently and the smaller vessels move quickly into and out of harbours trafficking drugs and then return to the ‘mother ship’, which is placed conveniently outside of the coastal state’s jurisdiction.¹⁴⁶ Quick entrances and exits in and out of harbours is also predicated on the fact that certain officials are on duty at specific times in order for the drug trafficking to take place – this emphasises the corruption of the port officials.¹⁴⁷ Such corruption was evident when the Maritime Coastal Management of the South African Department of Environmental Affairs and Tourism and the South African organised crime unit analysed a case in 2001 involving the illegal trade of rock lobster and Patagonian tooth fish where fourteen fisheries officials had been bribed to falsify documents relating to the amount that had been caught.¹⁴⁸

Another way in which fishing vessels aid drug trafficking is that they can be out at sea for an extended length of time and go across great distances and they often go about their business undetected or undisturbed.¹⁴⁹ This is due to the fact that there is no requirement for fishing vessels to have an Automatic Identification System transceiver or a Vessel Monitoring System, unlike merchant vessels where it is a requirement to have these systems.¹⁵⁰ A Vessel Monitoring System tracks the vessel’s location and is only present where the flag state of the vessel requires it, and the data gathered from this system is held within the knowledge of the flag state and other states cannot freely access this data.¹⁵¹ This highlights a serious problem in that fishing vessels may not necessarily be able to be traced when out at sea; this gives them a sense of free rein without authorities being able to find them to prevent their illegal activities or to prosecute them. The fact that it is more difficult to conduct inspections and to confiscate drug containers when the vessel is already out at sea, especially the high seas (because

¹⁴⁵ *Ibid* at 92.

¹⁴⁶ *Ibid*.

¹⁴⁷ *Ibid* at 93.

¹⁴⁸ *Ibid* at 114.

¹⁴⁹ *Ibid* at 92.

¹⁵⁰ *Ibid*.

¹⁵¹ *Ibid*.

jurisdiction is applicable), facilitates the shipment of drugs and these procedures require extensive manpower and skilful operations.¹⁵² The flag state of the vessel needs to consent to these procedures in accordance with Article 17(3) and (4) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988.¹⁵³

Another serious issue is transparency: it is needed in the fishing industry as it seems that these vessels can change their registry with ease, making it harder for officials and police to track down the criminals involved in drug trafficking in this manner.¹⁵⁴ The Ship Registration Act 58 of 1998 provides that fishing vessels are not necessarily required to be registered.¹⁵⁵ Thus it seems important that States should recognise that vessels registered under its flag may be held accountable for what is carried on board those vessels and that their vessels may develop a suspicious reputation which is detrimental in international trade. Notwithstanding the lack of registration requirements for fishing vessels, it would still not be advisable for fishing vessels to conduct illegal acts on board. It is submitted that more regulations should be created to govern fishing vessels in particular, due to the prevalence of these types of vessels being involved in criminal activities like abalone poaching and acting as a base to enable the manufacture and transportation of illicit drugs.

2.3.4 Counter Measures

Detection of drugs on board vessels can be difficult as the fishing industry facilitates this since fish are being used to mask the scent of drugs so that dogs cannot detect it in the cargo.¹⁵⁶ The fish would need to be thawed properly before a proper inspection could be carried out.¹⁵⁷ Because this creates the possibility of spoiling the cargo of fish, the officials are reluctant to have the responsibility to check cargo which would inevitably attract liability on their part if they did not base their actions on a reasonable suspicion.¹⁵⁸

¹⁵² *Ibid* at 93.

¹⁵³ *Ibid*.

¹⁵⁴ *Ibid*.

¹⁵⁵ Section 16(b).

¹⁵⁶ UNODC 'Transnational Organized Crime in the Fishing Industry', *op cit* note 104 at 93.

¹⁵⁷ *Ibid*.

¹⁵⁸ *Ibid*.

Brick, Muchapondwa and Visser (2009) suggest that a way forward regarding the illegal poaching of abalone is to increase law enforcement, to prevent any poachers from catching the abalone and with the increase of patrols and checks, any wrongdoers are likely to be brought to justice. By placing a blanket ban on any abalone fishing, any person caught with any abalone in their possession will be known to be committing an offence as in the contravention of rules and regulations relating to conservation of the species.¹⁵⁹ Also the duty to protect and conserve one's environment should be extended to local communities¹⁶⁰ who will take a sense of pride in their resources and realise the value of their protection. It is envisaged that by being involved in a resource protection plan, it will be severely frowned upon by the community to poach abalone and the poachers, who have to ultimately return to the community where they live, may be shunned and feel a sense of moral remorse. With stricter regulations in place governing the poaching of abalone, the amount of drugs being brought into South Africa will decrease because criminal syndicates in South Africa would have lost their bargaining chip with Asian criminal syndicates.

Many coastal provinces have taken some sort of initiative to curb abalone poaching for example, in the southwest coast of South Africa, 'Operation Neptune' commenced whereby the South African Police Service joined forces with authorities in the fisheries industry to investigate and prevent black market sales involving criminal syndicates, the Eastern Cape set up an Abalone Task Team in 2002 where a wide variety of tools were used to monitor illegal fishing such as sniffer dogs, helicopters and vessels patrolling different areas, and in the Western Cape a programme termed the 'Management Action for Resources of Inshore and Nearshore Environments (MARINEs)' was established and their mandate included:

24 h (hour) visibility, patrols and rapid response, slipway control, follow-up of cases, awareness-raising, liaison with schools and communities and co-ordination with other departments and organisations.¹⁶¹

In 2003, South Africa's first environmental court was created in Hermanus and soon thereafter one was created in Port Elizabeth and these courts were specifically created to

¹⁵⁹ Brick et al, *op cit* note 107 at 10.

¹⁶⁰ *Ibid* at 13.

¹⁶¹ Raemaekers, *op cit* note 110 at 440.

mainly deal with illegal abalone poaching and trade.¹⁶² Another fairly helpful plan was for South Africa to place abalone in Appendix III of the Conventions on International Trade in Endangered Species of Wild Fauna and Flora (CITES) which means that a CITES permit must be present with legal exports of abalone; this allows abalone cargo from South Africa to be traced and Asian countries receiving these cargoes to be monitored.¹⁶³ This plan was however withdrawn on 25 May 2010 as the process had not been thought through with the depth it required.¹⁶⁴ It is submitted that abalone should have been kept in Appendix III of CITES to ensure that a system of checks and balances was in place to enable any abalone to be traced and any individuals contravening the law in regard to abalone could be punished. It is therefore evident that the ineffective implementation of CITES would cause a depleting resource to be removed from the protection that CITES would have afforded to it, placing it in greater danger of extinction. Specific procedures should be in place to address urgent issues and the administration of inter-governmental departments should be effective when attending to legal problems.

It is clear from the evidence discussed above that South African and Chinese criminal syndicates are the key role players in the drug and abalone trade and necessary actions need to be taken to prevent this trade as it is attracting many criminals who are trafficking drugs into our country and also facilitating the depletion of our natural resources.

¹⁶² *Ibid.*

¹⁶³ *Ibid* at 442.

¹⁶⁴ *Ibid.*

III

LEGAL FRAMEWORK

It is evident from the previous chapter that illicit drug trafficking through containerisation and the abalone trade is a prevalent problem in the maritime industry as set out by the various media reports and community-based safety and security magazines. Several general measures have been put in place to combat illicit drug trafficking and trade and this chapter will highlight the law governing these measures. There are various laws in place to regulate the import and export of goods and to prevent certain drugs from entering and exiting South Africa. A critical analysis of international conventions that South Africa is a party to and South Africa's domestic legislation will be necessary in order to determine whether the laws regarding illicit drug trafficking and trade are adequate or whether the implementation and enforcement of these laws is at issue. Relevant provisions of each of the conventions and domestic legislation will be discussed, with an analysis.

3.1 International Conventions regarding drug trafficking generally

The Conventions to be analysed regarding drug trafficking are (i) the Single Convention on Narcotic Drugs, 1961 as amended by the 1972 Protocol; (ii) the Convention on Psychotropic Substances, 1971 and (iii) the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988. These Conventions regulate search and seizure techniques, they promote anti-drug trafficking campaigns within each Party State and encourage Party States to co-operate to end illicit traffic by sea. The United Nations Convention on the Law of the Sea, 1982 also promotes Party State involvement in combating drug trafficking and inter-State cooperation in the punishment of drug trafficking. Various provisions of these Conventions will firstly be highlighted and secondly, an analysis will follow.

3.1.1 Single Convention on Narcotic Drugs, 1961 as amended by the 1972 Protocol (1961 Convention)

This Convention defines "illicit traffic" as the trafficking or growing of drugs in contravention of this Convention whilst drugs are described as those in Schedule I and

II.¹⁶⁵ Relevant Schedule I drugs include cannabis, cocaine, heroin and opium. The aim of this Convention is to “limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs.”¹⁶⁶

This Convention states that Party States (i) should implement legislation to prevent and subdue the illicit traffic of narcotic drugs;¹⁶⁷ (ii) should work together and work with international agencies to promote the illegality and seriousness of the illicit trafficking of narcotics;¹⁶⁸ (iii) should give any information relating to the occurrences of any illicit trafficking in drugs in their State, including information on the making or growing of drugs and their use;¹⁶⁹ and (iv) may ask for advice on how to combat the trafficking occurrences after submitting the relevant information.¹⁷⁰

The Convention also provides that Party States should have satisfactory punishment procedures in place to address the following intentional acts:

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.¹⁷¹

Containerisation is to be addressed under the concepts of dispatch, transport, importation and exportation above.

If the acts above are committed in two or more different States then they shall be treated as separate crimes,¹⁷² “conspiracy and attempts to commit” such crimes and financial assistance in these crimes is also a crime punishable by the State Party in accordance with their laws.¹⁷³ The relevant State Party shall prosecute crimes that take place in their area or the prosecution can be done by the State Party where the offender is found to be

¹⁶⁵ Article 1.

¹⁶⁶ Article 4 paragraph (c).

¹⁶⁷ Article 35 paragraph (a).

¹⁶⁸ Article 35 paragraph (c).

¹⁶⁹ Article 35 paragraph (f).

¹⁷⁰ Article 35 paragraph (g).

¹⁷¹ Article 36 paragraph 1(a).

¹⁷² Article 36 paragraph 2(a)(i).

¹⁷³ Article 36 paragraph 2(a)(ii).

if there is no possibility of extradition.¹⁷⁴ The crimes committed must be dealt with in terms of the law of the State Party concerned¹⁷⁵ and the criminal law of the State Party in question shall govern should an issue relating to jurisdiction arise.¹⁷⁶ This Convention also makes provision for the “seizure and confiscation” of drugs and materials used in relation to the crimes mentioned above.¹⁷⁷

3.1.2 Convention on Psychotropic Substances, 1971 (1971 Convention)

It is necessary to define what a psychotropic substance is in accordance with the Convention; it is “any substance, natural or synthetic, or any natural material in Schedule I, II, III or IV.”¹⁷⁸ A psychotropic substance is also known as a ‘psychoactive substance’ and it has an effect on a person’s mental and physical capabilities.¹⁷⁹ The Schedule II psychotropic substances relevant to this dissertation are amphetamine and methamphetamine. The illicit traffic in this Convention refers to the “manufacture of or trafficking in psychotropic substances contrary to the provisions of this Convention.”¹⁸⁰ Regarding the trade of these substances internationally an express authorization (based on the form provided by the Commission on Narcotic Drugs of the Economic and Social Council of the United Nations¹⁸¹) is necessary for the parties wanting to import or export Schedule I or II substances.¹⁸² This authorization must state where the substance is going, how much of the substance is to be imported or exported, the pharmaceutical form, the importer or exporter’s name and address and the amount of time the import or export process should take.¹⁸³ Before an export authorization can be acquired, the Party needs to firstly obtain an import authorization from the importing country so that when applying for the export authorization it can be shown that the importation of the substances was allowed.¹⁸⁴ This export authorization must travel with the cargo and a

¹⁷⁴Article 36 paragraph 2(a)(iv).

¹⁷⁵ Article 36 paragraph 4.

¹⁷⁶ Article 36 paragraph 3.

¹⁷⁷Article 37.

¹⁷⁸ Article 1 paragraph (e).

¹⁷⁹ ‘Psychoactive drug’, available at <http://medical-dictionary.thefreedictionary.com/Psychotropic+substances>, accessed on 12 December 2012.

¹⁸⁰ Article 1 paragraph (j).

¹⁸¹ Article 1 paragraph (b) and (a).

¹⁸² Article 12 paragraph 1(a).

¹⁸³ Article 12 paragraph 1(b).

¹⁸⁴ Article 12 paragraph 1(c).

copy must be sent to the importing country.¹⁸⁵ Once the substances arrive in the importing country, the export authorization must be sent back to the exporting country with an endorsement stating that the amount of goods received was correct.¹⁸⁶

Exported substances in Schedule II are not allowed to be stored in ‘bonded’ warehouses unless the Government of the country importing these substances verifies that the substances are to be stored in such a place.¹⁸⁷ Every time a consignment of these substances is removed from the warehouse, a permit must be issued by the relevant authorities governing the warehouse.¹⁸⁸ The export authorization will also state, in respect of substances stored in a bonded warehouse, that these substances have been authorized to be stored there by the Government of the importing State.¹⁸⁹ Consignments cannot be transported without the necessary export authorization.¹⁹⁰ Where a consignment of substances has been allowed to pass through a specific country, the relevant authorities of that country are permitted to take necessary action to stop the consignment from falling into the wrong hands or being transported to a place other than the place stated on the export authorization.¹⁹¹ Whilst substances are being transported, nothing must be done to alter the characteristics of the substances and all seals must be kept intact unless authorised otherwise by the relevant authorities.¹⁹² “Manufacturers, exporters, importers, and... distributors” of these psychotropic substances can be inspected at any time in regard to the place where they conduct these activities, their supply of these substances and the documentation relating to these substances.¹⁹³ These inspections also apply to “medical and scientific” organisations.¹⁹⁴

Should there be any illicit trafficking of psychotropic substances or a seizure of such substances being illicitly trafficked, a State Party must send a report to the Secretary-General of the United Nations regarding any new trafficking styles, the amount of drugs found to be involved, where the substances originated from and the manner in which

¹⁸⁵ Article 12 paragraph 1(d).

¹⁸⁶ Article 12 paragraph 1(e).

¹⁸⁷ Article 12 paragraph 3(c).

¹⁸⁸ Article 12 paragraph 3(c).

¹⁸⁹ Article 12 paragraph 3(c).

¹⁹⁰ Article 12 paragraph 3(d).

¹⁹¹ Article 12 paragraph 3(f).

¹⁹² Article 12 paragraph 3(g).

¹⁹³ Article 15.

¹⁹⁴ Article 15.

these substances were trafficked.¹⁹⁵ The International Narcotics Control Board (INCB) must be sent statistical documentation every year from each Party.¹⁹⁶ These reports must contain (i) the amount of Schedule I and II substances manufactured, the supply of such substances and information regarding the import and export of these substances; (ii) the amount of Schedule II and III substances used to make “exempt preparations”; and (iii) the amount of Schedule II, III and IV substances “used for industrial purposes”.¹⁹⁷ The State Parties have also been requested to co-operate with each other and international institutes to repress illicit drug trafficking.¹⁹⁸ The Convention also provides that State Parties should ensure that all crimes perpetrated in contravention of this Convention should be sufficiently punished.¹⁹⁹ When crimes are committed by persons addicted to psychotropic substances, State Parties may provide treatment for them in conjunction with their punishment or in place thereof.²⁰⁰ As in the 1961 Convention discussed previously, crimes committed in terms of the 1971 Convention in two or more distinct countries are considered as separate offences²⁰¹ and any intention to commit these crimes or an attempt to do so or aiding financially with any of these crimes is also punishable.²⁰² Also, as with the 1961 Convention, the State Party to prosecute such crimes is the Party where the crimes were committed or where the perpetrator is found and extradition is not possible.²⁰³ Psychotropic substances and materials used to execute any crimes contrary to this Convention may be seized and confiscated²⁰⁴ and all crimes shall be punished in accordance with the State Party’s “domestic law”.²⁰⁵

3.1.3 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 (1988 Convention)

This Convention covers both narcotic drugs and psychotropic substances within its ambit whilst the 1961 and 1971 Convention covered one or the other. The 1988

¹⁹⁵ Article 16 paragraph 3.

¹⁹⁶ Article 16 paragraph 4.

¹⁹⁷ Article 16 paragraph 4(a), (c) and (d).

¹⁹⁸ Article 21 paragraph (a), (b), (c), (d) and (e).

¹⁹⁹ Article 22 paragraph 1(a).

²⁰⁰ Article 22 paragraph 1(b).

²⁰¹ Article 22 paragraph 2(a)(i).

²⁰² Article 22 paragraph 2(a)(ii).

²⁰³ Article 22 paragraph 2(a)(iv).

²⁰⁴ Article 22 paragraph 3.

²⁰⁵ Article 22 paragraph 5.

Convention also creates a link between itself and the previous Conventions and it elaborates and expands on the previous Conventions. The 1988 Convention is therefore an all encompassing drug trafficking Convention.

“Illicit traffic” in terms of this Convention has been outlined as encompassing many intentional offences including:

The production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.²⁰⁶

Under this Convention, illicit trafficking also consists of: the growing of cannabis and opium poppy to make drugs in contravention of the 1961 Convention and amended 1961 Convention,²⁰⁷ having narcotic drugs or psychotropic substances in one’s possession or the buying of these to perform any of the intentional offences mentioned above;²⁰⁸ the transportation and making of substances knowingly to be used in the illicit manufacture of narcotic drugs and psychotropic substances,²⁰⁹ and the financing of the above offences all are criminal offences.²¹⁰

Hiding the “illicit origin” of property derived from any of the offences mentioned above²¹¹ and hiding the location of the property in attempt to conceal its “true origin” knowing that it is derived from an offence mentioned above are also criminal offences.²¹² It is also a criminal offence and considered illicit traffic to (i) receive property knowing it to have been involved in any offences mentioned above;²¹³ (ii) possess substances listed in the appended Tables to the Convention knowing they are to be used in the illegal manufacture of drugs;²¹⁴ (iii) incite others to use narcotics or psychotropic substances for illicit purposes or to commit any criminal offence

²⁰⁶ Article 3 paragraph 1(a)(i). Article 3 paragraphs 1 and 2 are read with Article 1 paragraph (m).

²⁰⁷ Article 3 paragraph 1(a)(ii).

²⁰⁸ Article 3 paragraph 1(a)(iii).

²⁰⁹ Article 3 paragraph 1(a)(iv).

²¹⁰ Article 3 paragraph 1(a)(v).

²¹¹ Article 3 paragraph 1(b)(i).

²¹² Article 3 paragraph 1(b)(ii).

²¹³ Article 3 paragraph 1(c)(i).

²¹⁴ Article 3 paragraph 1(c)(ii).

mentioned above;²¹⁵ and (iv) to attempt to help a person who has committed an offence in terms of this Convention or to attempt to commit or conspire to commit an offence in terms of this Convention.²¹⁶ Each Party exercises jurisdiction over the offences committed in their territory²¹⁷ or where the offence was committed on board a ship flying the flag of the Party State.²¹⁸ Each Party may also exercise jurisdiction where (i) a national from that Party State committed the offence or the person has their 'habitual residence' in that Party State;²¹⁹ (ii) that Party in particular has been requested to take action on a ship against illicit traffic by sea;²²⁰ and (iii) where conspiracy to commit an offence has occurred outside that Party's territory but that Party being the target destination for the commission of the crime.²²¹ Each Party may also exercise jurisdiction over offenders when they are in the Party's territory and that Party does not extradite the offender due to the fact that (i) the offence was committed within its territory or occurred on a vessel which was flying that Party's flag at the time;²²² or (ii) one of that Party's nationals committed the offence in question.²²³ Any proceeds from the offences mentioned above should be confiscated by the Party²²⁴ and any drugs seized or any objects intended to be used to commit the above crimes must be confiscated.²²⁵

Regarding the offences mentioned above, each Party has an obligation of mutual legal assistance with other Parties, this involves investigating offences, prosecuting offences and setting up trials.²²⁶ The rendering of mutual legal assistance could also involve (i) the noting down of statements and evidence;²²⁷ (ii) serving court documents;²²⁸ (iii) searching areas where the alleged offences were committed and seizing various

²¹⁵ Article 3 paragraph 1(c)(iii).

²¹⁶ Article 3 paragraph 1(c)(iv).

²¹⁷ Article 4 paragraph 1(a)(i).

²¹⁸ Article 4 paragraph 1(a)(ii).

²¹⁹ Article 4 paragraph 1(b)(i).

²²⁰ Article 4 paragraph 1(b)(ii).

²²¹ Article 4 paragraph 1(b)(iii).

²²² Article 4 paragraph 2(a)(i).

²²³ Article 4 paragraph 2(a)(ii).

²²⁴ Article 5 paragraph 1(a).

²²⁵ Article 5 paragraph 1(b).

²²⁶ Article 7 paragraph 1.

²²⁷ Article 7 paragraph 2(a).

²²⁸ Article 7 paragraph 2(b).

items;²²⁹ (iv) the inspection of objects;²³⁰ (v) the giving of evidence and information;²³¹ (vi) the giving of various documents;²³² and (vii) to aid in the search for equipment and materials to be used as evidence.²³³

Parties shall also endeavour to make sure that the transport used by commercial carriers (persons involved in the transportation of goods and people²³⁴) is not being used to commit any of the above-mentioned offences.²³⁵ Commercial carriers are also requested to take “reasonable precautions” to ensure their transportation is not used for the purposes of committing the offences above.²³⁶ These “reasonable precautions” include (i) where the commercial carrier’s “principal place of business” is in the Party’s territory, the training of staff is needed so that they are able to point out and recognise suspicious consignments and also morals and integrity should be emphasised amongst staff;²³⁷ (ii) where the commercial carrier conducts business in the Party’s territory, cargo documents should be given in advance; containers should be sealed shut with tamper-proof seals and all suspicious activity possibly linked with the offences mentioned above should be reported to the relevant State authorities as soon as relatively possible.²³⁸ Customs officials, commercial carriers and members of the port authority are required to work together at entry and exit portals with a view to prevent any unauthorised tampering with cargo and transport and to ensure port security is enforced.²³⁹

Each State is also encouraged to deal with the “possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention” as criminal offences in accordance with their own domestic laws.²⁴⁰ The seriousness of the criminal offences in this Convention is determined by looking at (i)

²²⁹ Article 7 paragraph 2(c).

²³⁰ Article 7 paragraph 2(d).

²³¹ Article 7 paragraph 2(e).

²³² Article 7 paragraph 2(f).

²³³ Article 7 paragraph 2(g).

²³⁴ Article 1 paragraph (d).

²³⁵ Article 15 paragraph 1.

²³⁶ Article 15 paragraph 2.

²³⁷ Article 15 paragraph 2(a)(i) and (ii).

²³⁸ Article 15 paragraph 2(b)(i), (ii) and (iii).

²³⁹ Article 15 paragraph 3.

²⁴⁰ Article 3 paragraph 2.

whether the offender belongs to an organised criminal syndicate;²⁴¹ (ii) whether the offender is involved in international organised criminal syndicates;²⁴² (iii) whether the offence committed by the offender aggravates other crimes;²⁴³ (iv) whether the offender was violent or used weapons;²⁴⁴ (v) whether the offence is connected to a position the offender holds in public office;²⁴⁵ (vi) whether the offence involved the “victimization or use of minors”;²⁴⁶ (vii) whether the offence took place near areas where children participate in various activities;²⁴⁷ and (viii) whether the offender has any previous convictions.²⁴⁸

Regarding the substances listed in Table I and II appended to this Convention, each Party shall (i) monitor international trade and be vigilant for suspicious activities involving these substances;²⁴⁹ (ii) seize any of these substances where there is sufficient evidence that they will be used illicitly to make narcotic drugs and psychotropic substances;²⁵⁰ (iii) if it is evident that substances in the Tables are imported, exported or transported for illicit purposes to make narcotic drugs or psychotropic substances, notify the relevant Party’s authorities;²⁵¹ (iv) require documentation accompanying the Tabled substances to be named, the amounts of each substance provided and the name of the importer, exporter or consignee;²⁵² and (v) keep these documents available for two years for the purposes of inspection by the relevant authorities.²⁵³

The Parties must work together to prevent any deviation of consignments of materials that could be used in the illicit manufacture of narcotic drugs and psychotropic substances.²⁵⁴ Any legal exports of narcotic drugs and psychotropic substances should

²⁴¹ Article 3 paragraph 5(a).

²⁴² Article 3 paragraph 5(b).

²⁴³ Article 3 paragraph 5(c).

²⁴⁴ Article 3 paragraph 5(d).

²⁴⁵ Article 3 paragraph 5(e).

²⁴⁶ Article 3 paragraph 5(f).

²⁴⁷ Article 3 paragraph 5(g).

²⁴⁸ Article 3 paragraph 5(h).

²⁴⁹ Article 12 paragraph 9(a).

²⁵⁰ Article 12 paragraph 9(b).

²⁵¹ Article 12 paragraph 9(c).

²⁵² Article 12 paragraph 9(d).

²⁵³ Article 12 paragraph 9(e).

²⁵⁴ Article 13.

be labelled as such and the relevant documents should state this fact.²⁵⁵ All paperwork incidental to the transport of goods should state the name of the narcotic drugs and psychotropic substances as stated in the Schedules to the 1961 Convention, the revised 1961 Convention and 1971 Convention, the amount of the substances being exported, and the name and contact details of the exporter, importer or consignee.²⁵⁶ Parties should ensure that all narcotic drugs and psychotropic substance cargoes to be exported are labelled correctly.²⁵⁷

Illicit traffic of drugs by sea shall be monitored and prevented by the joint action of Parties fulfilling their obligations in terms of international law.²⁵⁸ Any vessel which reasonably appears to be involved in the illicit traffic of drugs, regardless of whether it's flying its flag or not, may be apprehended with the assistance of other Parties.²⁵⁹ Any Party, which reasonably suspects that a vessel is engaged in illicit traffic whilst enjoying navigation of its own free will, may take necessary steps after confirming the details of the vessel with the flag State.²⁶⁰ The flag State of the vessel may ask the State requesting information to board and search the vessel and where it is found that the vessel is involved in illicit traffic, the requesting State may take necessary measures regarding the persons, vessel and the cargo.²⁶¹ These measures must be taken by warships or government vessels marked as such.²⁶² The results of the measures taken by the requesting State must be reported to the flag State within good time.²⁶³ Parties are free to enter into agreements with one another to augment the prohibition on illicit traffic by sea.²⁶⁴

Regarding free trade zones or free ports, which are areas where goods are dealt with and not subjected to custom regulations,²⁶⁵ Parties are required to repress the illicit traffic of narcotic drugs and psychotropic substances and the Tabled Substances listed in this

²⁵⁵ Article 16 paragraph 1.

²⁵⁶ Article 16 paragraph 1.

²⁵⁷ Article 16 paragraph 2.

²⁵⁸ Article 17 paragraph 1.

²⁵⁹ Article 17 paragraph 2.

²⁶⁰ Article 17 paragraph 3.

²⁶¹ Article 17 paragraph 4(a) – (c).

²⁶² Article 17 paragraph 10.

²⁶³ Article 17 paragraph 8.

²⁶⁴ Article 17 paragraph 9.

²⁶⁵ 'Free-trade zone', available at <http://www.britannica.com/EBchecked/topic/218417/free-trade-zone>, accessed on 30 November 2012.

Convention in the same way as they would in other customs regulated areas in their territory.²⁶⁶ Goods and persons in free trade zones and free ports should be examined by Parties and all relevant authorities are allowed to search cargoes, vessels entering and leaving these ports, and members of the crew or even passengers on board these vessels as well as their luggage.²⁶⁷ In these zones, it is necessary for Parties to develop a system to identify which consignments of goods may in fact carry the Tabled substances listed in this Convention or narcotic drugs and psychotropic substances.²⁶⁸ Surveillance systems should also be put into place by Parties.²⁶⁹ A Party may take more stringent actions than provided for by this Convention if these actions are deemed necessary to stop the illicit trafficking of drugs.²⁷⁰

3.1.4 United Nations Convention on the Law of the Sea, 1982 (UNCLOS)

UNCLOS provides that States should work together to repress and put an end to any illicit trafficking in narcotic drugs and psychotropic substances occurring on the high seas in contravention of the various international conventions governing illicit trafficking.²⁷¹ A State may ask for co-operation from other States where a ship flying its State flag is reasonably believed to be involved in the illicit traffic of narcotic drugs and psychotropic substances.²⁷² As mentioned in Chapter one, a coastal State may also exercise criminal jurisdiction over a foreign ship where that ship is illicitly trafficking in drugs in that coastal State's territorial waters.²⁷³

3.2 General Application and Analysis of the 1961, 1971 and 1988 Conventions

Having set out the relevant articles of the Conventions above, this section will apply these provisions to South Africa and provide an analysis of their adequacy.

The INCB was created in 1968 with a "quasi-judicial" function to ensure compliance with the 1961 Convention and was still in operation with the coming into effect of the 1972 Protocol to the 1961 Convention, the 1971 Convention and the developmental

²⁶⁶ Article 18 paragraph 1.

²⁶⁷ Article 18 paragraph 2(a).

²⁶⁸ Article 18 paragraph 2(b).

²⁶⁹ Article 18 paragraph 2(c).

²⁷⁰ Article 24.

²⁷¹ Article 108 paragraph 1.

²⁷² Article 108 paragraph 2.

²⁷³ Article 27 paragraph 1(d).

stages of the 1988 Convention.²⁷⁴ Bewley-Taylor and Jelsma state that the purpose of these three conventions was to confine the “production, supply and use of narcotic and psychotropic drugs to medical and scientific purposes.”²⁷⁵

These Conventions seek to put in place two types of regulatory systems, the first system is to regulate the flow of narcotic drugs and psychotropic substances which are made, used and transported legally whilst the second system is to put penalties in place where narcotic drugs and psychotropic substances are used, made and transported illicitly.²⁷⁶ These systems, set up through the Conventions, attempt to stop illicit drug trafficking and trade but allow the legal movement and use of drugs.

Neil Boister, cited in Bewley-Taylor, argued that:

...while the substance of the drug control conventions is complex, their function is simple. They provide the legal structure for an international system of drug control by defining control measures to be maintained within each state party to these conventions and by prescribing rules to be obeyed by these Parties in their relations with each other.²⁷⁷

From the above statement it is evident that the 1961, 1971 and 1988 Conventions put a structural framework in place which State Parties are required to build their laws around and to test their laws against in order to allow for consistent application.

Usually with international conventions, States wishing to be Parties should allow for the provisions of the laws, set out in the conventions, to become applicable to their State, as seen in the definitions of accession and ratification in Chapter one. However, the 1961, 1971 and 1988 Conventions have been labelled as very broad²⁷⁸ due to the fact that

²⁷⁴ D Bewley-Taylor and M Jelsma ‘The Limits of Latitude’ Series on Legislative Reform of Drug Policies Nr. 18, March 2012 at 2, available at <http://www.undrugcontrol.info/images/stories/documents/dlr18.pdf>, accessed 25 November 2012.

²⁷⁵ *Ibid* at 2.

²⁷⁶ *Ibid*.

²⁷⁷ *Ibid*.

²⁷⁸ The Conventions could be considered ‘broad’ in that they have to cover a wide spectrum of State needs and whilst all domestic law may have its differences, international law requires there to be a consistent application to Party States because no State may be favoured above the other. The Conventions govern both legal and illegal use of drugs and therefore a State attempting to apply these Conventions needs to have an accurate knowledge of the context of each provision as these are couched in positive and negative terms.

these international law provisions need to cater for many States' approval yet States are encouraged to interpret these Conventions in light of their aims and objectives.²⁷⁹

The fact that the Conventions provide that State Parties must take into account their domestic criminal law to determine whether the offences in these Conventions will be regarded as offences under their domestic law opens the floodgates for possible problems.²⁸⁰ One problem is where a State may not criminalize the possession of drugs in terms of domestic law and therefore the provision for the possession of drugs as an offence will not be applicable to the State.²⁸¹ Furthermore, it has been argued in a paper dealing with Global Initiative for Drug Policy Reform that, due to the Conventions' inflexibility, some Party States feel stifled in the way they are required to deal with drug-related incidents.²⁸² The paper goes on to suggest that possible amendments could be made to the Conventions allowing Party States to decide whether the possession of drugs and the use of drugs for non-medical purposes should be allowed.²⁸³ These Conventions do however, provide that drug trafficking is taken to be a very serious offence and will not be dealt with lightly.²⁸⁴

South Africa has acceded to the 1961, 1971 and 1988 Conventions which means, as discussed in Chapter one, that South Africa has intended to be legally bound by the provisions of these Conventions. This emphasises the fact that all possession, trade, manufacture, sale and use of narcotic drugs and psychotropic substances is illegal unless it is proven to be for medical or scientific purposes. All containers carrying such substances in South Africa are therefore required to have proper documentation to show these drugs and substances are being carried for legitimate purposes. Premises and containers may be inspected by South African authorities to determine whether the drugs and substances being used, made, sold or stored are for licit purposes and where it is found to be for illicit purposes, to confiscate and seize such drugs and substances and all equipment used in the facilitation of this offence. There is an obligation upon South

²⁷⁹ Bewley-Taylor and Jelsma *op cit* note 274 at 3.

²⁸⁰ *Ibid* at 6.

²⁸¹ *Ibid*.

²⁸² Beckley Foundation 'The Global Initiative for Drug Policy Reform: Rewriting the UN Drug Conventions' (2011) available at <http://reformdrugpolicy.com/beckley-main-content/global-initiative/a-new-convention/>, accessed on 11 December 2012.

²⁸³ *Ibid*.

²⁸⁴ Bewley-Taylor and Jelsma, *op cit* note 274 at 6.

Africa to monitor the international trade systems it has in place to ensure all international trade is legal.

Thus it is submitted that South Africa should make an effort to ensure all consignments of narcotic drugs and psychotropic substances are not intercepted by persons who are not meant to have access to such consignments or criminal syndicates for illicit purposes. It is an offence to transport, sell, trade and make substances and drugs knowing that they are to be used for illicit purposes. In this way, South African customs officials, the National Port Authority and commercial carriers should ensure that all goods passing through South African ports in containers have been correctly declared and have the proper documentation. These officials should exercise their relevant powers to search such containers where they reasonably believe that drug trafficking is taking place and seize all illegal goods therein. They should also make sure any container seal has not been broken or any mark on the containers disturbed. South Africa should also provide reports to the United Nations concerning incidents of drug trafficking to allow such information to become available and all data and evidence to be processed. South Africa is also required to assist other Party States in stopping the illicit traffic of drugs and substances at sea and make drug trafficking a criminal offence in South Africa and to put in place domestic legislation to ensure the punishment of these offenders.

In general, it therefore appears that these Conventions give parties a wide range of actions to be taken where illicit drug trafficking is concerned and do provide a reasonable legal framework for States to work within to ensure they are doing all they can to stop the illicit trafficking of drugs. Whilst this legal framework may have a few shortfalls, it is still considered to be adequate in the sense that the Conventions cover a wide range of incidents relating to drug trafficking and when read closely, Party States are provided with a set of rules that should be carefully applied. South Africa, being a country which is not eager to legalise illegal drug possession, will not therefore have a conflict between the provisions in the Conventions and its domestic legislation. In the next section, South Africa's domestic legislation will be discussed to determine whether they are effective in conjunction with the Conventions.

3.3 Domestic legislation relating to drug trafficking, international trade and containerisation

The domestic statutes South Africa has in place to regulate drug trafficking, international trade regarding import and export procedures, and the search and seizure of drugs in containers include: (i) the Customs and Excise Act 91 of 1964; (ii) the International Trade Administration Act 71 of 2002; and (iii) the Drugs and Drug Trafficking Act 140 of 1992. Sections of these Acts will be discussed and thereafter analysed in light of how they affect drug trafficking particularly in relation to containers.

3.3.1 Customs and Excise Act 91 of 1964

This Act allows for a customs officer patrolling in the customs boat to stop any ship within South Africa's territorial sea and contiguous zone.²⁸⁵ The officer may also board that ship or any ship and is allowed to search the ship and any person found on board that ship²⁸⁶ in order to find goods that were not declared where they should have been and where no duty fee was paid for goods where there should have been.²⁸⁷ In order for this inspection to be made and for the ship to be searched, the customs officer must have "reasonable cause to believe" that this Act has been contravened in some way or that the laws regarding the import and export of goods have been breached.²⁸⁸ Provided the customs official acts "*bona fide*" in his activities, no payment will be made for loss or damage.²⁸⁹

Any container which is locked on board a ship may be opened by the customs officer "in any manner" should there be no key produced upon request.²⁹⁰ The customs officer shall be allowed free reign to check any part of the ship or the goods and can, after the inspection, seal, lock up and mark any goods.²⁹¹ If such seal or lock is "wilfully" broken or such mark has been "wilfully" removed or tampered without the customs official's

²⁸⁵ Section 4(9)(a)(i)(aa).

²⁸⁶ Section 4(9)(a)(i)(bb) and 9(a)(ii).

²⁸⁷ Section 4(9)(a)(ii)(aa) and (bb).

²⁸⁸ Section 4(9)(a)(ii)(cc).

²⁸⁹ Section 4(13).

²⁹⁰ Section 4(9)(b).

²⁹¹ Section 4(9)(c).

consent, the master of the ship is liable for an offence unless the master could show that there was no way in which he could have prevented that act from being performed.²⁹²

Customs patrol boats, flying the SARS flag or displaying its emblem, may pursue a vessel that fails to stop once ordered to do so²⁹³ or where the customs officer has displayed his intention to board the vessel and the person in control of the vessel will not allow the officer to board.²⁹⁴ In this way the customs boat exercises, in terms of the United Nations Convention on the Law of the Sea, the right of hot pursuit²⁹⁵ and may also arrest persons on board the fleeing vessel and seize that vessel.²⁹⁶ The Commissioner for the South African Revenue Service may identify places where containers may be searched, detained and emptied and where they may be stored for the purposes of import and export procedures.²⁹⁷

All persons coming into South Africa or leaving South Africa must declare all goods which are “prohibited, restricted or controlled under any law” on their person at the time or which are in their possession.²⁹⁸ The Controller of Customs and Excise as appointed by the Commissioner can compel all persons to appear before a Magistrate in court where these persons have or are suspected of having goods shipped illegally or removed illegally.²⁹⁹ The Controller may also examine imported and exported goods without the presence of the importer or exporter of the goods provided all reasonable steps have been taken to find out where such importer or exporter is.³⁰⁰

3.3.1.1 Application and Analysis of the Customs and Excise Act

An examination of the relevant sections of the Custom and Excise Act above makes it evident that any suspicious ship or cargo can be inspected by a customs officer who also has the power to seize the ship and the goods and arrest persons not complying with this Act.³⁰¹ The Controller can designate certain areas for the inspection and unpacking of

²⁹² Section 4(9)(d).

²⁹³ Section 4C(2)(a)(i).

²⁹⁴ Section 4C(2)(a)(ii).

²⁹⁵ Section 4C(3)(a) read with Article 111 of UNCLOS.

²⁹⁶ Section 4C(3)(b).

²⁹⁷ Section 6(1)(hB).

²⁹⁸ Section 15(1)(a)(iii) and Section 15(1)(b)(iii).

²⁹⁹ Section 15(2).

³⁰⁰ Section 16.

³⁰¹ Section 4(9) and 4C.

containers and therefore provides for a thorough inspection of suspicious containers to be performed. However, a problem may arise here as it seems what is considered to be ‘suspicious’ is left for determination in the minds of the officials and, as this Act does not define what a ‘suspicious container’ may be, the officials may only determine such a suspicious status after a full inspection has been performed.

The Act also provides for prosecution where a seal that was placed on a container by a customs official has been intentionally broken. This shows that attempts are made to inspect containers and when a container is sealed on board a vessel, goods are not allowed to be removed by the carriers or other persons until a full inspection has been performed by a customs official at a place named by them. This method may seem fruitless in the sense that persons may try to remove goods from such containers once the official has left the vessel as an official cannot be expected to carry such goods with him or her. A full inspection will be easier when the ship has docked and facilities have been made available for the extraction of such goods or containers.

It is submitted that this Act does seem to be effective in that all possible situations revolving around the detection of illicit drug trafficking have been covered and in this way it is progressive. It also seems to incorporate certain inspection principles from the 1961, 1971 and 1988 Conventions which make it consistent with international standards. However it may be argued that this Act needs to be enforced better as there should be more extensive obligations or duties on customs officials provided in the Act to perform their functions properly.³⁰²

3.3.2 International Trade Administration Act 71 of 2002

The Minister responsible for trade and industry provides through a notice in the Government Gazette (subsequently referred to as the Minister’s notice) which goods are allowed or prohibited from entering or leaving the country.³⁰³ In terms of Chapter four of this Act, applications for import and export are provided for and such application may be made to the International Trade Administration Commission.³⁰⁴ Such applications can be for a permit regarding the control of import and export or any

³⁰² This could be done by rewarding officials when they perform effectively or placing more stringent liabilities upon them when they fail to perform their duties.

³⁰³ Section 6.

³⁰⁴ Section 26(1).

necessary alteration thereto.³⁰⁵ This application for import or export may either be refused or accepted wholly or partly.³⁰⁶ Where a permit has been issued it may state (i) the amount of goods to be imported or exported and their values;³⁰⁷ (ii) the import or export price at which the goods may be transported;³⁰⁸ (iii) when the goods may be imported or exported;³⁰⁹ (iv) the port where the goods can be imported or exported from or pass through;³¹⁰ (v) the country which the goods are coming from or going to;³¹¹ (vi) the way the goods are to be imported or exported;³¹² (vii) details regarding the owners of the imported goods or who shall take possession of these goods;³¹³ and (viii) any other details or conditions.³¹⁴ The Commission may also ask importers, exporters, manufacturers and traders of goods to provide information relating to these activities, storage and the supply of goods.³¹⁵

Investigating officers may be appointed by the Chief Commissioner;³¹⁶ these officers have many powers regarding import and export permits and the inspection of goods to see if they are complying with the Minister's notice.³¹⁷ These powers include (i) the entering and inspection of premises where possible goods mentioned in the Minister's notice are kept;³¹⁸ (ii) the requesting of information and documentation from the owner of the premises or person managing the premises or any person who has control over the access to this information and documentation;³¹⁹ (iii) the use of computers on these premises to search for and copy relevant data;³²⁰ (iv) the attachment of property relating to the investigation;³²¹ (v) ordering persons involved in the manufacture, storage, transportation or selling of the goods relevant to the Minister's notice to hand over such

³⁰⁵ Section 26(1)(a).

³⁰⁶ Section 27(1)(a)(i) and (ii).

³⁰⁷ Section 27(2)(a).

³⁰⁸ Section 27(2)(b).

³⁰⁹ Section 27(2)(c).

³¹⁰ Section 27(2)(d).

³¹¹ Section 27(2)(e).

³¹² Section 27(2)(f).

³¹³ Section 27(2)(g).

³¹⁴ Section 27(2)(h).

³¹⁵ Section 28.

³¹⁶ Section 38(1).

³¹⁷ Section 41.

³¹⁸ Section 41(1)(a).

³¹⁹ Section 41(1)(b).

³²⁰ Section 41(1)(c).

³²¹ Section 41(1)(d).

goods, documentation and information on these goods;³²² (vi) the inspection of such goods and documents and the copying thereof;³²³ (vii) the seizure of goods and documents to be used as evidence of an offence as provided for in this Act;³²⁴ and (viii) the sealing and marking of a container where goods, documents and information is found.³²⁵ These searches and inspections must be carried out with due regard for a person's right to dignity, privacy, freedom and security.³²⁶ All persons to be questioned in connection with any investigation and the search of the premises must be informed of their right to legal representation and must be allowed to exercise such right.³²⁷

3.3.2.1 Application and Analysis of the International Trade Administration Act

Goods to be used for illicit purposes cannot be brought into the country or allowed to leave the country and investigating officers in terms of this Act have the responsibility to ensure that these goods are seized. Investigating officers may search containers and place any relevant mark or seal on a container which has been inspected or is to be inspected and this mark or seal is not to be tampered with; this is similar to the process of customs officials in terms of the Customs and Excise Act. Various documents need to accompany the transportation of goods for international trade and this Act requires the compliance with these documents and importers and exporters are required to provide such information as requested so that officers can ensure goods are declared correctly and no illicit trafficking of drugs and substances can take place.

This Act seems to overlap slightly with the Customs and Excise Act which provides a wider platform for inspections to be performed on containers. However it has a different focus; it is concentrated more on documents accompanying containers and goods than the actual practical checking thereof. The Act should therefore place a higher standard of care on officials dealing with these documents to ensure a correlation between the documents accompanying the goods and the actual goods themselves exists. The Act in this regard should provide that officials will be held responsible where their documents

³²² Section 41(1)(e).

³²³ Section 41(1)(f).

³²⁴ Section 41(1)(g).

³²⁵ Section 41(1)(h).

³²⁶ Section 42(1).

³²⁷ Section 42(3).

are found not to correlate with consignments of goods. The issuing of permits should require a careful investigation of the applicant's business and credentials and should not be issued merely because the applicant applied for a permit and can pay for one. If this Act was developed further to incorporate this higher standard of care, it would move from just being adequate to being progressive.

3.3.3 Drugs and Drug Trafficking Act 140 of 1992

In terms of this Act, 'drug' means "any dependence-producing substance, any dangerous dependence-producing substance or any undesirable dependence-producing substance".³²⁸ Whilst 'dangerous dependence-producing substance' means "any substance or any plant from which a substance can be manufactured included in Part II of Schedule 2"; 'dependence-producing substance' means "any substance or any plant from which a substance can be manufactured included in Part I of Schedule 2" and 'undesirable dependence-producing substance' means "any substance or any plant from which a substance can be manufactured included in Part III of Schedule 2."³²⁹ Relevant substances applicable to the case study in this dissertation in Part III include amphetamine, cannabis, heroin and methamphetamine. This Act also works in conjunction with the Medicines and Related Substances Control Act 101 of 1965.³³⁰

This Act prohibits persons from supplying scheduled substances to another knowing or having suspicions that these substances are to be used in the illegal production of drugs.³³¹ Regarding the use and possession of drugs, no person is allowed to use any dependence-producing, dangerous dependence-producing or undesirable dependence-producing substances or have any of these in their possession.³³² The exceptions to this are where (i) the person has bought these substances from a medical practitioner, dentist³³³ or from a pharmacist³³⁴ and uses these substances in accordance with the medical indication given by these professionals;³³⁵ (ii) the person has bought these

³²⁸ Section 1(1).

³²⁹ Section 1(1).

³³⁰ Section 2.

³³¹ Section 3.

³³² Section 4(a) and (b).

³³³ Section 4(a)(i)(aa) and 4(b)(i)(aa).

³³⁴ Section 4(a)(i)(bb) and 4(b)(i)(bb).

³³⁵ Section 4(a)(i) and 4(b)(i).

substances from a medical practitioner, veterinarian, dentist³³⁶ or pharmacist³³⁷ in order to give these substances to a patient or a sick animal that is under the medical care of this medical practitioner, veterinarian or dentist;³³⁸ (iii) the person is the Director-General who has these substances in terms of the Medicines and Related Substances Control Act;³³⁹ (iv) the person is justified in having these substances in accordance with the Medicines and Related Substances Control Act;³⁴⁰ (v) the person is an employee of a pharmacist, importer, exporter or trader of these substances and their employment is in line with the Medicines and Related Substances Control Act;³⁴¹ and (vi) the person came into possession of these substances lawfully.³⁴² No person may deal in dependence-producing, dangerous dependence-producing or undesirable dependence-producing substances unless (i) it is bought for medical use from a medical practitioner, veterinarian, dentist or pharmacist;³⁴³ (ii) it is the Director-General who is buying or selling such substances;³⁴⁴ (iii) a medical practitioner, veterinarian, dentist or pharmacist, importer, exporter or producer of these substances buys, sells, imports, exports and makes any of these substances in accordance with the Medicines and Related Substances Control Act;³⁴⁵ and (iv) a person is an employee of any of the persons mentioned in (iii) and does so in accordance with the Medicines and Related Substances Control Act.³⁴⁶

The offences as stated in the Act relating to drugs and substances are where (i) a person places drugs on board a vessel of another so that the other person will be charged with committing an offence in terms of this Act;³⁴⁷ (ii) a person has manufactured a scheduled substance or has given a scheduled substance to another knowing or suspecting that it is to be used for unlawful purposes;³⁴⁸ (iii) a person has a dependence-

³³⁶ Section 4(a)(ii)(aa) and 4(b)(ii)(aa).

³³⁷ Section 4(a)(ii)(bb) and 4(b)(ii)(bb).

³³⁸ Section 4(a)(ii) and 4(b)(ii).

³³⁹ Section 4(a)(iii) and 4(b)(iii).

³⁴⁰ Section 4(a)(iv) and 4(b)(iv).

³⁴¹ Section 4(a)(v) and 4(b)(v).

³⁴² Section 4(a)(vi) and 4(b)(vi).

³⁴³ Section 5(a)(i) and 5(b)(i).

³⁴⁴ Section 5(a)(ii) and 5(b)(ii).

³⁴⁵ Section 5(a)(iii) and 5(b)(iii).

³⁴⁶ Section 5(a)(iv) and 5(b)(iv).

³⁴⁷ Section 13(a).

³⁴⁸ Section 13(b).

producing substance in their possession or is using this substance and does not fall within any of the exceptions stated previously relating to such a substance;³⁴⁹ (iv) a person has a dangerous or undesirable dependence-producing substance in their possession or is using such substance and does not fall within any of the exceptions mentioned above relating to such substances;³⁵⁰ (v) a person is dealing in a dependence-producing substance and does not fall within any of the exceptions stated previously relating to such substances;³⁵¹ and (vi) a person is dealing in a dangerous or undesirable dependence-producing substance and does not fall within any of the exceptions mentioned above relating to such substances.³⁵² Where a person commits offences (i) or (iii) above and is convicted of such, they are liable to a fine and/or imprisonment for not more than five years.³⁵³ If a person commits an offence in (v) above and is convicted as such, they are liable to a fine and/or imprisonment for not more than ten years³⁵⁴ and where an offence is committed relating to (ii) and (iv) and the person is convicted of such, they are liable to a fine and/or imprisonment for not more than fifteen years.³⁵⁵ Where a person commits an offence in (vi) above and is convicted of such, they are liable to a fine and/or imprisonment for not more than twenty-five years.³⁵⁶

With regard to investigations, where a police official has “reasonable grounds” to believe that an offence is about to take place or has already taken place relating to any scheduled substance, that police official may (i) board any vessel or enter any premise and search such places where any drugs or substances are suspected to be found;³⁵⁷ and (ii) search any container suspected of holding any drugs or substances.³⁵⁸ A police official may also search any person or their possessions where the official has ‘reasonable grounds’ to believe that the person has committed an offence relating to drugs and substances or was about to commit such an offence.³⁵⁹ A master or owner of a vessel may be summoned by a police official to stop or to enter a specific harbour

³⁴⁹ Section 13(c).

³⁵⁰ Section 13(d).

³⁵¹ Section 13(e).

³⁵² Section 13(f).

³⁵³ Section 17(b).

³⁵⁴ Section 17(c).

³⁵⁵ Section 17(d).

³⁵⁶ Section 17(e).

³⁵⁷ Section 11(1)(a)(i).

³⁵⁸ Section 11(1)(a)(ii).

³⁵⁹ Section 11(1)(b).

named by the police official.³⁶⁰ It is considered to be an offence under this Act where a person interferes with a police official;³⁶¹ does not comply with the requests of the police official;³⁶² does not answer adequately any questions asked by the police official;³⁶³ or gives false information to police officials deliberately to mislead these officials.³⁶⁴ Where a person commits any of these offences and is convicted of such they are liable to a fine and/or imprisonment for up to one year.³⁶⁵

3.3.3.1 Application and Analysis of the Drugs and Drug Trafficking Act

To summarise, this Act makes it an offence to possess, use, sell, deal and trade any narcotic drugs or psychotropic substances unless that person is involved in medicine or science and is entitled to do so by falling into one of the classes of exceptions. This is in line with the aims of the 1961, 1971 and 1988 Conventions to limit the possession and sale of drugs and substances to legitimate medicinal or scientific institutes. In this way, where drugs are found on a person not authorised to have them in accordance with this Statute, they are considered to be committing an offence and will be tried. Police officials may, in terms of this Act, search containers where the official believes an offence is taking place or will take place to determine whether drugs and substances are being transported therein are for legitimate purposes.

Whilst this Act may be considered comprehensive in that it addresses and provides for offences in terms of drug-related incidents, as the only Act focusing on drug trafficking as suggested by its title, it does not provide a definition of drug trafficking. In Zambia, the Narcotic Drugs and Psychotropic Substances Act, 1993 provides a definition of drug trafficking as:

(a) being involved directly or indirectly in the unlawful buying or selling of narcotic drugs of psychotropic substances and includes the commission of an offence under this Act in circumstances suggesting that the offence was being committed in connection with buying or selling; or

³⁶⁰ Section 11(2)(a) and (b).

³⁶¹ Section 16(a).

³⁶² Section 16(b).

³⁶³ Section 16(c).

³⁶⁴ Section 16(d).

³⁶⁵ Section 17(a).

(b) being found in possession of narcotic drugs or psychotropic substances in such amounts or quantities as the President may, by statutory instrument, declare to be trafficking for the purposes of this Act.³⁶⁶

It is evident that the word ‘trafficking’ is multi-faceted in that it incorporates many different ways of facilitating the distribution of drugs illicitly and therefore grounds for prosecution may become unclear due to the uncertainty as to whether the act committed is indeed trafficking. The South African Drugs and Drug Trafficking Act does provide for various offences using the categories of distribution of drugs however a definition of illicit trafficking of drugs would be useful to determine the threshold or ambit of the Act. The Drugs and Drug Trafficking Act could have had specific sections pertaining to the maritime industry as does the 1988 Convention. A greater focus should be placed on trafficking of illicit drugs in containers since media reports and reviews show that drugs often go undetected in containers.³⁶⁷

This Act should also provide for the establishment of a ‘Drug Enforcement Team’ at ports to perform the necessary checks that port officials may not perform, for example this team could specialise in the search and seizure of drugs. This team could be provided with their own system of rules that coincide with those of the police and port officials and to oversee the performance of these officials. In Zambia, a Drug Enforcement Commission was created and their functions included: “to control the importation, exportation, production, possession, sale, distribution and use of narcotic drugs and psychotropic substances.”³⁶⁸ This Commission addresses contraventions relating to the Narcotic Drugs and Psychotropic Substances Act, 1993; it also acts as an advisory body to Governmental departments and other institutions.³⁶⁹ Even though Zambia’s geographical position is not coastal, South Africa could still learn from this country in terms of its laws relating to illicit drug trafficking. South Africa could also develop a type of State-independent Drug Enforcement Commission to administer its Drugs and Drug Trafficking Act to ensure compliance with the provisions of this Act

³⁶⁶ Narcotic Drug and Psychotropic Substances Act, 1993 Section 2.

³⁶⁷ As evident from the reports in Chapter two.

³⁶⁸ K Mwenda ‘The institutional and legal framework for combating drug trafficking in Zambia’ (2007) 22 *SA Publiekreg Public Law* 104, 108 available at <http://reference.sabinet.co.za/document/EJC97929>, accessed on 14 December 2012 citing the Narcotic Drugs and Psychotropic Substances Act, 1993.

³⁶⁹ *Ibid* at 109.

and advise governmental institutions on matters relating to drug trafficking. This Commission could also oversee governmental efforts to reduce illicit drug trafficking and therefore facilitating a system of checks and balances.

Courts play a prosecutorial role relating to drug trafficking related offences. In a recent judgment by Mpati P, in *Sheryl Cwele & another v The State*,³⁷⁰ section 5(b) of this Act had been contravened in that the accused were caught dealing in dangerous dependence-producing drugs³⁷¹ and each accused was convicted of twenty years imprisonment each.³⁷² In another judgement of *Keyser v State*,³⁷³ Heher J also had to pronounce on an offence regarding the dealing in six and a half kilograms of cocaine which had been hidden amongst the accused's clothing in a suitcase.³⁷⁴ The judge found that twenty years imprisonment was an appropriate sentence.³⁷⁵ These cases emphasize that the Act can provide for harsh punishments and this will hopefully have a deterrent effect. In South Africa the standard of proof in criminal matters is 'beyond a reasonable doubt'. This is the same as in Zambia, yet Mwenda argues that the standard of proof should be lessened to 'a balance of probabilities' to ensure a greater chance of success in prosecution.³⁷⁶

3.4 Southern African Development Community (SADC)

South Africa is a member of the Southern African Development Community (SADC) and acceded to the Treaty governing this organisation on 29 August 1994.³⁷⁷ This organisation established a Protocol, which is already in force, on Combating Illicit Drug Trafficking in the Southern African region, which South Africa has ratified.³⁷⁸ This Protocol encourages members of SADC to accede to the 1961, 1971 and 1988 Conventions³⁷⁹ and to develop their domestic laws in line with these Conventions.³⁸⁰

³⁷⁰ (671/11) [2012] ZASCA 155 (1 October 2012).

³⁷¹ *Ibid* at 2.

³⁷² *Ibid* at 20.

³⁷³ (634/11) [2012] ZASCA 70 (25 May 2012).

³⁷⁴ *Ibid* at 4.

³⁷⁵ *Ibid* at 12.

³⁷⁶ Mwenda, *op cit* note 368 at 107.

³⁷⁷ Department of International Relations and Cooperation 'South African Development Community' available at <http://www.dfa.gov.za/foreign/Multilateral/africa/sadc.htm>, accessed on 14 December 2012.

³⁷⁸ *Ibid*.

³⁷⁹ Protocol on Combating Illicit Drug Trafficking in the Southern African Region, Article 3.

³⁸⁰ *Ibid* at Article 4.

The Protocol instils within member States an effective enforcement system to combat illicit drug trafficking and trade and this system includes the establishment of a specialised body to regulate the campaign to stop illicit trafficking in drugs.³⁸¹ It also provides for the training of officials to properly ensure they are qualified to perform their law enforcement roles.³⁸² A major issue which is dealt with in this Protocol that is not dealt with by the 1961, 1971 and 1988 Conventions is corruption. The Protocol requests member States to ensure their law enforcement groups co-operate with each other to stop corruption linked to the illicit trafficking of drugs.³⁸³ The appointment of highly qualified independent and reliable persons should be done in order to ensure the enforcement of anti-corruption campaigns.³⁸⁴ Domestic criminal laws of each member State should be developed to deal with corruption in a stricter way³⁸⁵ and administration systems should be set up to regulate the occurrences of corruption.³⁸⁶

3.5 National Drug Master Plan (2006-2011)

The National Drug Master Plan is one that focuses on measures to be implemented to lessen the prevalence of the use and supply of drugs in South Africa.³⁸⁷ This Plan also highlights the Department of Foreign Affairs' role in reducing "illicit trafficking in drugs and transnational organised crime" by promoting co-operation between regions in South Africa and co-operation between South Africa and other States.³⁸⁸ The Protection and Security Service, one of the programmes established under South African Police Services, has the task of searching for and seizing drugs at ports,³⁸⁹ yet their supposed presence has not seemed to deter criminals from transporting drugs in containers. This Plan should bring about the suggestion of an independent Drug Enforcement Commission to oversee the Protection and Security Service's functions.

³⁸¹ *Ibid* at Article 6 paragraph 1(c).

³⁸² *Ibid* at Article 6 paragraph 1(d).

³⁸³ *Ibid* at Article 8 paragraph 1.

³⁸⁴ *Ibid* at Article 8 paragraph 2(a).

³⁸⁵ *Ibid* at Article 8 paragraph 2(c).

³⁸⁶ *Ibid* at Article 8 paragraph 2(b).

³⁸⁷ Department of Social Development 'National Drug Master Plan 2006-2011' 1, available at [http://www.westerncape.gov.za/other/2009/5/national_drug_master_plan_\(2006-2011\)_a.pdf](http://www.westerncape.gov.za/other/2009/5/national_drug_master_plan_(2006-2011)_a.pdf), accessed on 18 December 2012.

³⁸⁸ *Ibid* at 30.

³⁸⁹ *Ibid* at 33.

3.6 International Convention relating to the abalone trade

As stated in Chapter two, the trade of abalone and drugs is considered to be a transnational organised crime in the sense that it involves organised criminal syndicates trading abalone in South Africa for drugs from China.

3.6.1 United Nations Convention against Transnational Organized Crime

In terms of this Convention, the term ‘organized criminal group’ means:

A structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.³⁹⁰

Each State Party is encouraged to develop their domestic legislation to criminalize the following offences when intentionally committed: (i) having an agreement between one or more persons to commit a crime that is financially beneficial or to gain some other material benefit and, where may also be required by domestic law, an act performed by one of those persons to further that agreement or the involvement of an organised criminal group;³⁹¹ (ii) a person actively participates in the criminal activities of the organised criminal group, knowing the aims and activities of the group and knowing that his or her actions will fulfil that aim.³⁹² It is also an offence to help an organised criminal group in their criminal activities.³⁹³

This Convention also criminalizes corruption by making the following acts an offence: (i) where a public official has been given an “undue advantage” in order to stop them from properly fulfilling their duties;³⁹⁴ and (ii) a public official accepts the “undue advantage” presented to them in order for them not to properly fulfil their duties.³⁹⁵

All criminal proceeds accruing to the commission of offences in terms of this Convention or property totalling the value of the proceeds should be confiscated within

³⁹⁰ Article 2 paragraph (a).

³⁹¹ Article 5 paragraph 1(a)(i).

³⁹² Article 5 paragraph 1(a)(ii).

³⁹³ Article 5 paragraph 2.

³⁹⁴ Article 8 paragraph 1(a).

³⁹⁵ Article 8 paragraph 1(b).

Party States³⁹⁶ and any materials or equipment to be used or that were used to commit an offence in terms of this Convention should also be confiscated.³⁹⁷ State Parties have been requested to put systems in place to enhance and allow the “identification, tracing, freezing or seizure of any item” used to commit an offence or which was gained from committing an offence.³⁹⁸ All State Parties are required to work together with other State Parties for the purposes of confiscation³⁹⁹ and for the providing of legal assistance to one another in connection with the investigation of offences, the prosecution of offences and with court proceedings.⁴⁰⁰

3.6.1.1 Application and Analysis of the United Nations Convention against Transnational Organized Crime

It is evident from the discussion in Chapter two that organised criminal syndicates are involved in drug trafficking for the purposes of the abalone trade. Asian criminal syndicates are considered to be in control of this trade operation and recruit South African fishers to fetch the abalone from the seabed; the abalone is then transported to Asia for consumption whilst drugs are flooded into South Africa in return.

South Africa has ratified the United Nations Convention against Transnational Organized Crime which means it intends to incorporate the provisions of this Convention into its domestic law. This trade is considered to be a transnational organised crime in that it fits the description in the above Convention. More than three people are involved in the commission of offences relating to the illicit trafficking of drugs and also the offence of fishing for abalone without a permit. These offences are committed for the purposes of gaining a material or financial benefit. South Africa should therefore ensure all proceeds gained from this organised crime should be seized and confiscated.

This Convention is effective in the sense that it allows for the seizure of the proceeds of crime and where the exact proceeds cannot be found, other property may be attached. In this way, it is submitted that it takes away any incentive to be a part of an organised

³⁹⁶ Article 12 paragraph 1(a).

³⁹⁷ Article 12 paragraph 1(b).

³⁹⁸ Article 12 paragraph 2.

³⁹⁹ Article 13.

⁴⁰⁰ Article 18.

criminal syndicate. This Convention does not only cover the acts of a person in a criminal syndicate and the syndicate itself, it also covers persons aiding these syndicates and in this way provides for a wider range of offences allowing prosecution. In relation to the previous point, this Convention covers corruption in that officials will be punished where they do not perform their duties in order to gain some advantage from the organised criminal syndicate. This is especially relevant in South Africa and will be addressed more specifically in Chapter four.

3.7 Domestic Legislation relating to the abalone trade

The domestic legislation enacted by South Africa covers the drug and abalone trade as a transnational organised crime and also makes illegal abalone fishing without a permit an offence.

3.7.1 Prevention of Organised Crime Act 121 of 1998

The Act provides that any person in a criminal gang as a member or who engages in activities with this gang shall be guilty of committing an offence where they (i) assist the gang in their criminal activities;⁴⁰¹ (ii) threaten to commit a violent act to be done by a gang or with the help of the gang;⁴⁰² or (iii) threaten a person in response to an act of violence as a sign of revenge.⁴⁰³ Other offences include (i) committing an act which promotes criminal gang activities;⁴⁰⁴ (ii) inciting a person to commit an act which is considered a gang activity;⁴⁰⁵ or (iii) encouraging another person to join a criminal gang.⁴⁰⁶

Where a person assists a gang or encourages criminal gang related activities and is convicted of such they will be liable to a fine or imprisonment for not more than six years.⁴⁰⁷ Where a person incites another to perform a gang related criminal activity or

⁴⁰¹ Section 9(1)(a).

⁴⁰² Section 9(1)(b).

⁴⁰³ Section 9(1)(c).

⁴⁰⁴ Section 9(2)(a).

⁴⁰⁵ Section 9(2)(b).

⁴⁰⁶ Section 9(2)(c).

⁴⁰⁷ Section 10(1)(a) applies where a person was convicted of an offence in terms of sections 9(1)(a) and 9(2)(a).

encourages a person to join a criminal gang and is convicted of such offences, they are liable to a fine or imprisonment for not more than three years.⁴⁰⁸

3.7.1.1 Application and Analysis of the Prevention of Organised Crime Act

This Act was enacted in accordance with the provision of the United Nations Convention against Transnational Organized Crime. It provides for punishment in terms of either a fine or imprisonment for offences relating to organised crime. Where a South African fisher is encouraged by Asian organised criminal syndicates to illicitly harvest abalone and the fisher commits this act, it will be considered an offence as the aim of the offence was to enhance the accomplishment of an organised criminal gang's activities. The drug traffickers involved with these criminal syndicates and who provide drugs in exchange for the abalone will also be guilty of organised crime as they are facilitating gang activities. This Act provides for reasonable punishments depending upon the gravity of the offence and is therefore effective in this sense. By providing for criminal offences for a wider ambit than just the actual criminal gang acts it increases the likelihood that people involved with and aiding these gangs will be caught and punished in the same way as had they been part of the gang itself. Criminal gangs caught illegally harvesting abalone and trading these for drugs would be committing an offence under this Act and the abalone and drugs would be confiscated as proceeds of organised crime.

3.7.2 Marine Living Resources Act 18 of 1998

A fishing permit is a necessity in South Africa before any fishing can take place.⁴⁰⁹ A person who fishes without a permit is guilty of an offence and is liable to a fine not greater than R2 million or imprisonment for not more than five years.⁴¹⁰ This Act allows a fishery control officer to board a vessel or enter premises without a warrant where he or she believes fish that were illegally fished are being stowed if the person in control of the vessel has consented to such entry; or where the fishery control officer believes a warrant would be issued should he or she apply but the delay of receiving the warrant

⁴⁰⁸ Section 10(1)(b) applies where a person was convicted of an offence in terms of sections 9(2)(b) and 9(2)(c).

⁴⁰⁹ Section 13.

⁴¹⁰ Section 58(1)(a)(i).

would defeat the aim of the search or entry.⁴¹¹ Where the fishery control officer believes an offence in terms of this Act has or will be committed, he or she may instruct the master of such vessel to enter a port in the territorial waters of South Africa in order for a search and inspection to take place.⁴¹² Such an officer may also seize any fish which is reasonably believed to have been taken in the commission of an offence in terms of this Act.⁴¹³ The term ‘fish’ includes any mollusc⁴¹⁴ and therefore abalone.

3.7.2.1 Application and Analysis of the Marine Living Resources Act

As evident from Chapter two, abalone is allowed to be caught where the persons involved have obtained permission legally to do so. This would involve the acquisition of a fishing permit allowing the catch of abalone. This Act allows a fishery control officer to board any vessel or inspect any premises or containers where he or she believes that fish, that have been illegally caught, are being stored and may seize these fish. One may argue that where abalone that has been illegally caught is seized by such officials, the incentive to perform the drug trafficking into South Africa would fall away as the bargaining tool would have been seized and the persons involved would be guilty of a criminal offence. Whilst it seems that fishers may be easily replaced, the seizure of the abalone and the convictions of the persons involved would slow down the process of the trade immensely making it possible for officials to become aware of the criminal syndicates’ presence and take immediate preventative action. It is submitted that this Act is effective generally in that it imposes fines and imprisonment for contravention of the Act, however it needs to be amended in order to provide for prevention of the illegal harvesting of abalone rather than just prosecution. The following cases will illustrate how this Act works closely with the Prevention of Organised Crime Act.

In the case of *National Director of Public Prosecutions v Engels*⁴¹⁵ it was held that a boat, vehicle and trailer that were used directly in the illegal harvesting and illegal transportation of abalone in contravention of the Marine Living Resources Act were liable to be seized in terms of a forfeiture order in terms of section 48 of the Prevention

⁴¹¹ Section 51(3)(a)(i) and (3)(a)(ii).

⁴¹² Section 51(2)(j).

⁴¹³ Section 51(3)(c)(iii).

⁴¹⁴ Section 1(xiii).

⁴¹⁵ 2005 (3) SA 109 (C).

of Organised Crime Act.⁴¹⁶ In the case of *National Director of Public Prosecutions v Tam and others*,⁴¹⁷ the respondent was found to be in the process of exporting frozen abalone at Johannesburg National Airport without a permit to do so.⁴¹⁸ The frozen abalone cargoes were seized by officials⁴¹⁹ and an application was made to the courts for a confiscation order in terms of section 18 of the Prevention of Organised Crime Act.⁴²⁰ It is evident from these cases that where abalone is illegally caught or transported, measures are taken in terms of the Marine Living Resources Act and the Prevention of Organised Crime Act which work together to combat illegal activities relating to abalone.

3.8 Conclusion

All relevant international conventions and domestic legislation relating to South Africa have been discussed and analysed. It seems that South Africa does have in general adequate laws in place to regulate drug trafficking and the abalone trade which is increasing the traffic of drugs into South Africa. These instruments set out offences and the punishment of such offences and also provide for processes whereby officials can gain access to vessels, persons and containers to fulfil their duties which involves them making sure legitimate trade is taking place and only legal goods are being transported. However, the discussion and analysis have shown that two areas where the law could be amended to increase its effectiveness. Firstly certain provisions need to be altered to address certain issues relating to illicit drug trafficking and trade more clearly and secondly, provisions could be added to assist in the implementation and enforcement of the detailed requirements set out in these instruments.

⁴¹⁶ *Ibid* at 110.

⁴¹⁷ 2004 (2) SA 500 (W).

⁴¹⁸ *Ibid* at 500.

⁴¹⁹ *Ibid*.

⁴²⁰ *Ibid* at 502.

IV

ADEQUACY OF THE LAW, IMPLEMENTATION AND ENFORCEMENT

In any State there is more often than not a division or at the very least a transition between the law as it appears on paper and its practical application to the public, commercial entities and persons involved in transnational trade. It is clear that the discrepancies are in large part due to the fact that when legislation is drafted it cannot anticipate every nuance of reality and can only take into account what is prevalent in terms of issues apparent to the legislators.

Further, once legislation has been promulgated, there is often a period of time during which regulations are composed which allow the legislation concerned to actually come into effect. This can, in some cases, take a considerable amount of time. Moreover, where the legislation and regulations have been properly promulgated there is often practical issues which need to be addressed. In the South African context, one of the biggest stumbling blocks is that of available resources; which includes equipment, manpower, skills and expertise.

4.1 Adequacy of the Law

In the discussion and analysis of the relevant international conventions and domestic legislation relating to South Africa in Chapter three, it is noticeable that these laws cover a wide range of powers to be exercised by officials in the detection of illicit drug trafficking and trade and a wide range of offences and punishments relating to the commission of drug trafficking and trade in the maritime industry. The scope of these laws seems to cover many legal bases for the inspection of vessels and containers, the seizure and confiscation of illegal goods and the prosecution of offences relating to drug trafficking and trade. These instruments all work together to create this wide platform on which criminals can be apprehended. There are also many overlapping provisions to ensure the widest possible coverage of the commission of serious offences. The law as it stands seems to address the major issues relating to drug trafficking and trade. However, it is evident from Chapter two that drug trafficking and trade is still prevalent in South Africa, therefore the critical issue is whether there are shortcomings in the implementation and enforcement of these laws. It can also be seen from the previous

chapter that there are certain shortcomings in the law itself relating to drug trafficking and trade and there is a lack of provisions in the law ensuring proper enforcement and implementation which enhances the deficiency in the law's practical application to the public.

4.2 Implementation and Enforcement of the Law

This section aims to examine a culmination of events and shortfalls in the maritime industry to determine why illicit drug trafficking and trade is still prevalent in this industry, notwithstanding a reasonably comprehensive legal framework.

4.2.1 Corruption

It was found by the Institute for Security Studies that corruption in the ports makes South Africa a target for criminal syndicates who take advantage of our system.⁴²¹ With a closer look at the officials⁴²² involved, who are key role players in the trade industry, it would seem that corruption has infiltrated this area of inter-state interaction in the same way that it affects other aspects of the country. Corrupt immigration officials and foreigners themselves have been linked to the bringing in of drugs into South Africa.⁴²³

There are many different officials working daily which opens the floodgates for discrepancies in controlled standards, for example one official may turn a blind eye where customs documentation is not fully furnished in the correct manner and whereas other officials may be stricter. In this way, drug traffickers may learn which lenient officials work on which days and exploit the system in this manner. This is contrary to the submission made by Minaar; who submits that the variety of personnel involved in the control of port trade results in an inherent system of checks and balances whereby drug traffickers would not be able to anticipate the particular person checking their cargo.⁴²⁴

⁴²¹ Gareth Wilson 'Drug kings score from porous ports' *The Times* 10 August 2011 at 5, available at <http://www.samedia.uovs.ac.za/cgi-bin/getpdf?year=2011&refno=8623&topic=15>, accessed on 7 September 2012.

⁴²² These officials include port officials, customs officials, immigration officials and police officials.

⁴²³ 'Another Drug Bust' *Star* 12 May 2006 at 14, available at <http://www.samedia.uovs.ac.za/cgi-bin/getpdf?year=2006&refno=6304&topic=15>, accessed on 7 September 2012.

⁴²⁴ A Minaar *Policing the Ports Reducing Illicit Trafficking in South Africa* (2003) 76, available at <http://www.issafrika.org/uploads/Mono84.pdf>, accessed on 4 October 2012.

Haefele, suggested that corruption involving drug trafficking had made its way through the governmental hierarchy:

According to a news reporter (from *Pretoria News*), police corruption in the South African Narcotics Bureau (SANAB) has taken on major proportions and has stymied the success of some of their investigations. The reporter further suggests that drug dealers have already infiltrated the SAPS ranks and government institutions, and are assisting drug trafficking cartels by providing legal documents and permits.⁴²⁵

This type of corruption usually involves officials receiving compensation in the form of a bribe for their assistance. Such compensation could entail either monetary rewards in cash, drugs itself, property or other favours. The United Nations Convention against Transnational Organized Crime specifically states that corruption of officials receiving an “undue advantage” is an offence. Therefore any acceptance of some type of reward by the officials for not performing their duties is construed as corruption and therefore an offence. Court officials may also have been influenced to become corrupt in the sense that charge sheets and supporting documentation have been reported to be removed from the clerks’ office.⁴²⁶ This is done without any consent.

However, sometimes there are officials who do not engage in corrupt activities but drug trafficking syndicates target officials and intimidate them and these traffickers are well-equipped to do so having “the financial resources and firearms to corrupt and terrorise even the best-intentioned officials.”⁴²⁷

In 2001, it was reported that business-related corruption in South Africa was at 11 percent as opposed to 1 percent in Australia and 1,8 percent in the United Kingdom and in Africa, there was a 14,5 percent rate of bribery involving customs officials.⁴²⁸

⁴²⁵ Benjamin Haefele ‘Drug Trafficking in South Africa: Does the State Have the Capacity to Counter this Potential Security Threat?’ 2000 *Acta Criminologica* 109, available at http://reference.sabinet.co.za/webx/access/electronic_journals/crim/crim_13_3_13.pdf, accessed on 6 September 2012.

⁴²⁶ *Ibid* at 111.

⁴²⁷ *Ibid* at 109.

⁴²⁸ J Prinsloo and B Naude ‘Corruption in Southern Africa’ (2001) 14 *Acta Criminologica* 40, 48, available at <http://reference.sabinet.co.za/document/EJC28670>, accessed on 13 December 2012.

South Africa is not the only country with corruption, by the early 20th Century corruption in Cuba was incorporated in the economic and political sphere and businesses could only thrive if they played a part in the bribery of officials:

Low-level officials often appointed as political patronage, depended on petty corruption to supplement meagre salaries or accumulate savings, given their lack of job security in a highly politicized civil service.⁴²⁹

Between 1925 and 1933, President Gerardo Machado managed to reduce the level of corruption in Cuba through an anti-corruption campaign which entailed a re-organisation of state sectors.⁴³⁰ Cuba's history of drug trafficking is long-standing and it has been closely linked to corruption.⁴³¹ The port of Havana in Cuba has been seen as less stringent and thus enables smugglers to transport drugs without being detected.⁴³² This problem was evident as far back as 1998 when 7.2 tonnes of cocaine was found and seized in containers on their way to Cuba from Columbia.⁴³³ Corruption was also evident in this port regarding a tender contract where it had been found that the officials who had been bribed were shareholders of the company to which the tender was awarded.⁴³⁴ Honduras, a country also experiencing a high rate of corruption, has implemented a Transparency and Anti-Corruption plan and a Honduran drug task force was established to address drug and corruption related issues in this regard.⁴³⁵ South Africa could establish a similar plan to ensure all government departments and officials are monitored by an independent body like the Drug Enforcement Commission mentioned in the previous chapter to ensure all activities carried out in these sectors are legal.

⁴²⁹ S Diaz-Briquets and J Perez-Lopez *Corruption in Cuba* (2006) 71.

⁴³⁰ *Ibid* 71-72.

⁴³¹ E Rovner *The Cuban Connection: Drug Trafficking, Smuggling, and Gambling in Cuba from the 1920s to the Revolution* (2008) 6.

⁴³² *Ibid* 59.

⁴³³ Tim Johnson 'Drug trafficking through Cuba on the rise, investigators say' *The Miami Herald* 29 January 1999, available at <http://www.latinamericanstudies.org/drugs/rise.htm>, accessed on 18 December 2012.

⁴³⁴ Diaz-Briquets and Perez-Lopez, *op cit* note 429 at 65.

⁴³⁵ Bureau of International Narcotics and Law Enforcement Affairs '2012 International Narcotics Control Strategy Report (INCSR)', available at <http://www.state.gov/j/inl/rls/nrcrpt/2012/vol1/184100.htm>, accessed on 13 December 2012.

4.2.2 Containers, Scanners and Officials in the Maritime Industry

Containers are built in various forms as noted previously and their structure makes it difficult to determine the entire contents of these containers when performing an inspection. In this sense, x-ray scanners are used to penetrate the walls of the containers using non-intrusive methods to determine the content of any container. However, the lack of scanners at every seaport in South Africa has been a real crisis and in 2008, the port of Durban was the only port with a container scanner.⁴³⁶ Senior Superintendent Deven Naicker had highlighted the fact that there are insufficient security staff and officials available to perform the checks and due to the incredibly high numbers of containers entering the ports, these officials are unable to search each one.⁴³⁷ Herbie Kostens, who was the Harbour master at the port in Knysna in 2008, stated that the only boats and ships that would be searched are those that they had received a tip-off about.⁴³⁸

From the above, it may be noted that the ratio between the number of containers entering and exiting South African ports and the number of officials working at these ports is not nearly equal and whilst expecting them to be equal would be unrealistic, something should be done to ensure more containers are checked. Having one scanner at a port that sees 60 percent of South Africa's total container movement is not nearly sufficient and a situation where there are no scanners at a port at all is almost unimaginable. Increasing the amount of officials at ports may also be an idea to ensure that corruption is not running rampant and to ensure that more checks are performed more regularly and on a wider range of containers. The legislation could also be amended to address the system of checks and balances more closely and provide incentives for officials to exercise care in their duties.

These checks and balances could include: the creation of an independent regulatory body (for example the Drug Enforcement Commission mentioned previously) to monitor port officials but without a vested interest in the running of the ports, increase port security with regard to cameras and the keeping of records; to create incentives for

⁴³⁶ Clayton Barnes 'Drugs pour into South Africa via open ports' *Saturday Weekend Argus* 19 April 2008, available at <http://www.samedia.uovs.ac.za/cgi-bin/getpdf?year=2008&refno=6790&topic=15>, accessed on 7 September 2012.

⁴³⁷ *Ibid.*

⁴³⁸ *Ibid.*

those who ensure the running of the port is performed in an upstanding manner and to enhance accountability on the part of port officials and management. The legislation could enhance the reporting mechanisms between officials so that there is constant communication between the hierarchy of officials. Again it must be mentioned that, from a purely practical viewpoint, morale should be boosted amongst officials so that a sense of pride and integrity is instilled within them so they can perform their duties. Haefele is in agreement with this submission where he states: "Corruption, declining morale, lack of skills and resources are the main obstacles to proper border-control and need urgent attention."⁴³⁹

Another shortfall relating to containers is that seals placed on containers may easily be opened or broken by criminals attempting to get access to the goods in a specific container:

The plastic seal can be broken and resealed using superglue to fix the break. The bolt-type seal can be sawed through then two holes are drilled into both sides with a pin inserted in the holes and the bolt glued together with superglue. Containers can also be opened without breaking a seal merely by taking out the whole bolt leaving the seal.⁴⁴⁰

Therefore whilst the law in Chapter three provided that no person may break the seal that a customs official had placed on a container, criminals are doing so anyway and are also deceptively trying to make it look like the seal is still intact. It is suggested that customs officials should use a more tamper-proof method of sealing containers to ensure that illegal goods are not removed before a thorough inspection can be performed and so that offenders may be apprehended in the process and not evade these officials.

Some successful drug busts have involved the use of the x-ray scanner whilst others have involved officials being 'tipped-off' that drugs consignments were to enter a port. Although 'tip-offs' are encouraged to ensure drug traffickers are caught and the drugs and substances are seized before reaching the South African public, there needs to be a reliance on more effective measures to detect drug consignments as 'tip-offs' are not necessarily meant to be a regular occurrence.

⁴³⁹ Haefele, *op cit* note 425 at 114.

⁴⁴⁰ Minaar, *op cit* note 424 at 78.

4.2.3 Investigations

Haefele has also attributed the increase in drug trafficking to an inadequacy in South Africa's investigative stage process:

In most drug-related cases, inadequate investigation by the police and poor co-ordination with prosecutors result in a few cases making it to the court. And when they do, a large proportion are withdrawn due to the workload and inexperience of many prosecutors who usually have little time to prepare evidence which can secure a conviction.⁴⁴¹

From the international conventions and domestic legislation discussed earlier, it can be submitted that the investigation stages of any officials in the relevant States are explained in detail, allowing for the seizure and confiscation of specific items so that these can be admitted into evidence and allowing for State co-operation to assist in the taking of any relevant statements from offenders. This provision in the law is however, left in the hands of these officials to carry out in accordance with the law of their State and where this is done inefficiently, the entire case may be dismissed from court for the reason of evidence being inadmissible or for the lack of evidence. Drug traffickers may witness the inability of law enforcement to secure a conviction against offenders and may therefore not be perturbed by the potential risks of illicitly trafficking or trading drugs in the maritime industry.

4.2.4 Implementation and Enforcement of Laws relating to Abalone

It was submitted previously in this dissertation that where the illegally caught abalone resource was seized or where the protection of the abalone species was greater, drug trafficking in South Africa may decrease in the sense that Asian criminal syndicates would not have the incentive to provide drugs because the abalone it would trade or exchange it for would be more difficult to obtain or it would be seized by police officials performing regular inspections.

The shortfalls in the industry relating to this trade are: (i) that the public is oblivious to the dangers affecting the environment,⁴⁴² abalone is depleting due to its connection with

⁴⁴¹ Haefele, *op cit* note 425 at 111.

⁴⁴² M Kidd *Environmental Law* 2 ed (2011) 273.

the drug trade; (ii) some officials are not adequately trained to investigate environmental matters and are not familiar with court processes and what information or evidence is required,⁴⁴³ this therefore affects the prosecutions and convictions⁴⁴⁴ of marine living resource crimes; and (iii) there may be a difference in the punishment imposed by legislation and the punishment that the court decides upon.⁴⁴⁵ This can be linked to a lack of checks and balances provided for in the applicable Statutes.

4.3 Conclusion

Corruption, inefficiency, lack of skills and resources, and lack of integrity all facilitate drug trafficking and trade in the maritime industry. The legislation in place has not been enforced and implemented effectively. It is therefore concluded that whilst the law is generally comprehensive in addressing issues relating to illicit drug trafficking and trade in the maritime industry, the enforcement and implementation of such laws seems to be lacking. It is possible that the enforcement issues could be addressed through an adaptation of the applicable legislation to provide for checks and balances which would ensure that the law as it stands and the practical implementation of the law correlate.

The Acts discussed above could incorporate provisions that allow 'spot checks' to be performed to ensure officials are performing their official duties at all times, the law should specifically define what each position occupied by these officials requires so that these duties can be properly monitored and stricter penalties should be in place for those who succumb to corruption. It would also be possible to assign an independent body or organisation to monitor officials dealing with illicit drug trafficking and trade to ensure they are performing their duties as specifically provided for by the legislation. This creation of an independent body could be done through an amendment to the existing statutes or it could be created by government through the promulgation of a new statute created specifically to govern the functions of this body in relation to the laws required to be upheld.

⁴⁴³ *Ibid.*

⁴⁴⁴ *Ibid.*

⁴⁴⁵ *Ibid.*

V

CONCLUSION

This dissertation sought to set the scene regarding illicit drug trafficking and trade through a survey of media reports and other documentary sources specifically reviewing the legal framework in place and to address shortfalls in the implementation of illicit drug trafficking legislation, particularly security measures relating to containerisation and the abalone trade. It is evident that South Africa has large quantities of drugs entering and exiting the country illegally. The international conventions that South Africa is a party to and South Africa's domestic legislation are in place to regulate the occurrences of illicit drug trafficking by sea. The relevant provisions of these instruments were set out in Chapter three and thereafter analysed in terms of their applicability to the checking and inspection of containers and the drug and abalone trade in South Africa.

Although South African legislation does have a number of checks and balances, the system is nevertheless flawed. This results from insufficient resources or some technical issues regarding the day-to-day implementation of the law. While, as in any modern States, there may be room for improvement to the legal provisions, a careful analysis of the legal provisions indicates that they are generally comprehensive in the combating of the illicit trafficking and trade of drugs at sea.

Even though the law appears to be comprehensive in addressing the issues relating to illicit drug trafficking and trade, these crimes are still prevalent in South Africa's maritime industry. There is clearly a loophole allowing these offences to occur. The implementation and enforcement of the law is left in the hands of officials who have specific powers and tasks to perform. These include the inspection of vessels and containers to determine whether any drugs are being trafficked illicitly, ensuring that all documentation accompanying consignments evidences the legal transportation of goods, confiscation of any goods transported illegally including illicit drugs and substances and the apprehension of offenders to ensure that they are punished. However, in this regard corruption, inefficiency of personnel, inexperience, lack of skills, insufficiency of resources, greed and a low sense of morale create an obstacle to the effective

implementation and enforcement of the laws prohibiting the illicit traffic and trade of drugs.

Port security measures involving the use of an x-ray scanner play a role in the detection of illicit drug cargoes yet with the high number of containers entering and exiting South African ports, most of these containers are not scanned or checked which opens the floodgates for drug traffickers to transport their illegal cargoes with ease. Certain suspicious containers are inspected by officials but this process requires a large amount of officials. Despite the large number of officials being appointed, their numbers are still, however, insufficient to inspect the large volume of containers.

It is evident from the finding of this study that certain amendments to the existing legal framework should be effected, particularly to (i) increase the provisions specifically relating to illicit drug trafficking in the maritime industry in the existing statutes; (ii) provide a comprehensive definition of drug trafficking; (iii) provide for a greater system of checks and balances to combat corruption; (iv) develop the law to facilitate in the practical procedures involving enforcement and implementation of the law and (v) provide for an independent body to regulate and oversee procedures relating to illicit drug trafficking and trade and corruption.

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16 January 2013

Ms Amy Paula Dedekind
School of Law
Howard College Campus

Dear Ms Dedekind

Protocol reference number: HSS/1274/012M

New project title: A review of measures to combat illicit drug trafficking and trade: A domestic maritime perspective

Approval and change of dissertation title

I wish to confirm that ethical clearance has been granted full approval for the above mentioned project:

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach/Methods must be reviewed and approved through an amendment /modification prior to its implementation. In case you have further queries, please quote the above reference number. Please note: Research data should be securely stored in the school/department for a period of 5 years.

Best wishes for the successful completion of your research protocol.

Yours faithfully

Professor Steven Collings (Chair)

cc Supervisor: Mr V Surbun
cc Academic leader: Professor M Carnelley
cc School Admin. Mr Pradeep Ramsewak

Professor S Collings (Chair)
Humanities & Social Sc Research Ethics Committee
Westville Campus, Govan Mbeki Building

Postal Address: Private Bag X54001, Durban, 4000, South Africa

Telephone: +27 (0)31 260 3587/8350 Facsimile: +27 (0)31 260 4609 Email: ximbap@ukzn.ac.za / snymanm@ukzn.ac.za

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