

10 Law

**THE USA MARITIME ENFORCEMENT REGIME:
A MODEL FOR SOUTH AFRICA?**

**A dissertation presented to the Faculty of Law, University of Cape
Town, in partial fulfilment of the requirements of the degree of
Master of Laws**

NAME: GORDON WARDLEY
STUDENT NO: WRDGOR001
SUPERVISOR: PROF D.J. DEVINE
DATE: MAY 1998

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

DECLARATION

I declare that this dissertation is my own unaided work. It is submitted for the degree of Master of Laws at the University of Cape Town.

It has not been submitted before for any other degree or exam to any other university, nor has it been prepared under the aegis or with the assistance of any other body or person outside the University of Cape Town.

I N D E X

	Page No
REFERENCES	i
INTRODUCTION	1
THE UNITED STATES COAST GUARD	3
• Background	3
• Primary Duties	4
• Statutory Provisions	4
• General	4
• 14 USC 2	4
• Assistance Authority	5
• USCG Enforcement Authority	5
• 14 USC 89	5
• Interpretative Comments	7
• Practical Implementation and Institutionalisation	8
• Narcotics/Drug Law Enforcement	8
• Introduction	8
• National Effort	9
• Inter-Agency Memorandum of Understanding (MOU): USCG and USCS	9
• Interagency Agreement: USCG and the DEA	10
• Interagency Agreement/MOU with DoD	11
• International Effort	14
• Joint Integrated Agency Task Force	17
• Presidential Directive/NSC - 27	17
Conclusions	20
THE PRESENT SOUTH AFRICAN MARITIME INTERDICTION REGIME	
	21
Introduction	21
Primary Responsibility	21
Secondary Responsibility	23
Indirect Responsibility	26
The Role of the South African Navy (SAN) in the Enforcement Function	26
• Legal Restraints	28
• Other Restraints	29
Conclusion	31
Recommendations for future South African Maritime Law Enforcement	32

ANNEXURES:

- A: MOU between the USCG and the USCS 36
- B: Interagency Agreement between the USCG and the DEA 42
- C: Memorandum of Agreement between NORAD and the USCS 46
- D: Memorandum Understanding between the DoD and DoT
on the Use of the USCG capabilities and Resources in support
of the National Military Strategy 48
- E: Agreement between the Government of the USA and
concerning co-operation to Suppress Ilicit Traffic by Sea 53

BIBLIOGRAPHY 60

REFERENCES

TABLE OF TREATIES AND CONVENTIONS

United Nations law of the Sea Convention 1982

Global Moratorium on all large Scale Pelagic Driftnet Fishing on the High Seas
(UN GA 46/215)

Treaty Concerning Pacific Salmon 1985

Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean

Treaty on Fisheries between the Governments of certain Pacific Islands Nations
and the Government of the United States of America 1987

United Nations Convention Against Illicit Drugs and Pshycotropic Substances
(1988)

Convention for the Preservation of the Halibut Fishery of the North Pacific Ocean
and Bering Sea

Treaty on Pacific Coast Albacore Tuna Vessels and Port Privileges

Agreement on Fisheries Enforcement 1990

TABLE OF LEGISLATION

South African

The Constitution of the Republic of South Africa Act no 200 of 1993

The Consitution of the Republic of South Africa Act no 108 of 1996

Defence Act No 44 of 1957

Sea Fishery Act no 12 of 1988

Police Act no 7 of 1958

Customs and Excise Act no 91 of 1964

Abuse of Dependence-producing Substances and Rehabilitation Centres Act no 41 of 1971

Marine Traffic Act no 2 of 1981

National Parks Act no 57 of 1976

South African Maritime Safety Authority Act no 5 of 1998

United States

10 United States Code

14 United States Code

16 United States Code

18 United States Code

TABLE OF CASES

Namibian Cases

S v Pineiro and Others 1992(2) SA 683 (Nm)

United States case Law

United States v Conroy 1979, CA5 Fla, 100 S Ct 60

United States v Hensel 1983, CA1 Me, 104 S Ct 94

United States v Guillen-Linares 1981, CA5 Fla, 636 F2d 78

United States v Ceballos 1983, CA11 Fla, 706 F2d 1198

OFFICIAL PUBLICATIONS

Model Maritime Service Code, US Department of Transportation, United States Coast Guard, 1995

Maritime Law Enforcement Manual, COMDINSTR M16247.1A, 1 Feb 94 (as amended), issued by the Department of Transportation

Report of the Committee of Inquiry into a National Maritime Policy for the Sea, 31 Aug 1993 - The "Floor Commission"

SAMSA Guide, issued by SAMSA on 1 Apr 98

LIST OF ABBREVIATIONS

DEA	Drug Enforcement Agency
DoD	Department of Defence
EEZ	Exclusive Economic Zone
FCO	Fishery Control Officer
JIATF	Joint Integrated Agency Task Force
LEDET	Law Enforcement Detachment
MOA	Memorandum of Agreement
MOU	Memorandum of Understanding
NDF	National Defence Force
NORAD	North American Aerospace Defense Command
RFA	Royal Fleet Auxilliary
RN	Royal Navy
RSA	South Africa
SADC	Southern African Development Community
SAMSA	South African Maritime Safety Authority
SANDF	South African National Defence Force
SAN	South African Navy
SAPS	South African Police Services
UK	United Kingdom
US or USA	United States of America
USAAF	United States Air Force
USC	United States Code
USCG	United States Coast Guard
USCS	United States Customs Service
USN	United States Navy
WIGS	West Indian Guardships

INTRODUCTION

There has been much public debate within South Africa (RSA), especially since 1994, concerning the role of the South African National Defence Force (SANDF) now that peace is the order of the day. Coupled to this is the perennial issue of insufficient funds to pay for all the services the government is expected to provide, and at the level with which all are satisfied.

One of the hardest hit departments, from a budgetary point of view, is the Department of Defence (DoD), with funds been shifted to meet the ever-increasing demand for socio-economic upliftment at the expense of defence. At the base of any argument concerning the issue of defence versus socio-economic upliftment, is the question of whether massive expenditure for defence in a peacetime environment is justifiable, seen in the light that many South Africans still do not have secure homes, access to acceptable education, medical facilities and potable water.

The debate was highlighted by the Minister of Defence when he said "*There has been, as we well know, quite a sharp but healthy debate in our country since the 1994 elections about Defence expenditure. This is thrown into critical relief by the fact that we must focus on the socio-economic advancement of our people.*"¹

The counter argument is that sovereign countries are expected to be able to protect their freedom and independence. It is within this paradigm that the armed forces of a country have primary responsibility. However, armed forces, it is argued, have collateral utility in peacetime. This sentiment is supported by the Minister of Defence when he says "*Although the Navy is designed to fulfil its primary role of defending the nation, it is also capable of assisting in the maritime policing task, and should do so to help earn its keep.*"²

In the hydrosphere, the collateral utility of armed forces include issues amongst others, such as maritime safety, pollution response, search and rescue, protection of marine resources and interdiction of maritime offenders. It is with regard to the latter proposition, the collateral utility of armed forces in peacetime, is perhaps the most contentious question.

In order to provide a perspective of the issues involved, this paper attempts to make a comparative study between the approach adopted by the United States of America (USA) and the RSA and finally, to highlight possible solutions for a future RSA maritime regime. It is on one level undoubtedly odious to compare the USA with the RSA, firstly because the USA has access to vast resources, and secondly, because the USA has a well respected and separate Coast Guard organisation (the United States Coast Guard (USCG)), it will be contended that there are valuable lessons to be learnt from the USA on the level of philosophical

¹ Excerpt of the opening address by the Min of Defence, the Hon Mr J. Modise at a conference in Simon's Town titled: "The South African Navy and an African Renaissance", on 23 Oct 97

² *Ibid*

approaches to or doctrine on the question. This paper will therefore not attempt to compare the assets available, but it will rather only address the question of doctrine or philosophy.

It is also important at this juncture to realise that the USCG is probably the organisation which is most comparable with a Navy such as ours. This view is supported by the fact that the USA has chosen the USCG and not the US Navy (USN), to be the organ of state that is to forge relations with other smaller Navies of the world. This being so, it is interesting to note that the USCG has both a civil and military mission. The USCG is one of the five armed forces of the US military, and it is also the US's leading federal maritime law enforcement agency and maritime safety authority.³

This paper will therefore further limit itself primarily to a discussion of USCG doctrine and philosophy. Reference will, however, be made to the interface the USCG has with the USN and United States Airforce (USAAF).

Furthermore, inherent in such a comparative analysis are the questions of

- the rolls of various departments in addressing their individual responsibilities,
- the roll of the RSA in Southern Africa and its relations with neighbouring territories in respect of maritime issues,
- whether the SANDF is capable of having collateral utility, both from a practical and legal point of view, within the realm of maritime safety, pollution response, search and rescue, protection of marine resources and interdictions of maritime offenders, and
- the establishment of a "coast guard" either *de novo* as a new and separate maritime agency, or whether the maritime arm of the SANDF, the SA Navy (SAN) should transform itself into a coast guard in the fullest sense of the word, or merely adopt "coast guard" functions as part of its mission.

Much of what will be addressed in this paper has been gleaned from the personal experiences of the writer as a legal advisor in the SAN, personal interviews and discussions with knowledgeable persons on the topic, both in the RSA and the USA, official documents obtained from USCG and a recent visit to USCG headquarters, area commands and units. However, the conclusions that will be drawn and the comments made are purely those of the writer.

³ 14 United States Code (USC)2

THE UNITED STATES COAST GUARD

BACKGROUND

The USCG has served US maritime interests for more than two hundred years. Its origins are to be found in the Revenue Cutter Service which was established in 1790 to protect the emerging economy of the newly independent America.. On Aug 4 1790, an act of the US Congress authorised the first US President, George Washington, to have built and fitted out "*so many boats or cutters, not exceeding 10, as may be necessary for the protection of revenue.*"⁴ Appointees to these new vessels were commissioned as "officers of the customs", an appointment which still exists until today.

The Revenue Cutter service continued to operate under this name until 1915, when it became obvious that there existed a requirement for a maritime force that was charged with the execution of more than just customs functions. The USCG was therefore established on 28 Jan 1915. What is interesting is that the USCG was formed as "*a military service and a branch of the armed forces of the United States at all times*" and that "*the Coast Guard shall be service in the Department of Transportation, except when operating as a service in the Navy*".⁵

The dualistic nature of the USCG is therefore already apparent from the moment of its inception. The practical effect of this provision is that the USCG is a service of the armed forces (USN) in time of war, and a service of the Department of Transportation in peacetime. The "change of command" from Department of Transportation to DoD, occurs upon the "declaration of war or when the President directs"⁶. The latter part of this provision provides for a situation of a state of emergency during peacetime, where the President might direct the USCG to provide service to the USN.

Furthermore, as an armed force, USCG personnel are subject to the same disciplinary code as the members of the Army, Navy, Air Force and Marine Corps, and their cutters when under the command of a commissioned officer, are deemed to be warships under international law, independent from the department to which they are rendering a service.⁷ This is a necessary consequence of the fact that they are "*a military service and a branch of the armed forces of the United States at all times.*"⁸

⁴ Excerpt from a briefing given by Lieutenant Commander M.A. Hamel, USCG, on 2 Mar 98 at USCG Headquarters in Washington D.C. titled "The legal basis for Coast Guard Maritime Enforcement Operations." Lieutenant Commander Hamel is an officer in the Maritime and International Law Division of USCG Headquarters in Washington D.C.

⁵ 14 USC 1

⁶ 14 USC 3

⁷ *Op Cit* Hamel

⁸ 14 USC 1

PRIMARY DUTIES

STATUTORY PROVISIONS

GENERAL

14 USC 2

In terms of 14 USC 2, the USCG shall

“enforce or assist in the enforcement of all applicable federal laws on, under, and over the high seas and waters subject to the jurisdiction of the United States; shall engage in maritime air surveillance or interdiction to enforce or assist in the enforcement of the laws of the United States; shall administer the laws and promulgate and enforce regulations for the promotion of safety of life and property on or under the high seas and waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department; shall develop, establish, maintain and operate, with due regard to the requirements of national defense, aids to maritime navigation, icebreaking facilities, and rescue facilities for the promotion of safety on, under, and over the high seas and waters subject to the jurisdiction of the United States; shall pursuant to international agreements, develop, establish, maintain, and operate icebreaking facilities on, under, and over the high seas and waters subject to the jurisdiction of the United States; shall engage in oceanographic research on the high seas and in waters subject to the jurisdiction of the United States; shall maintain a state of readiness to function as a specialized service in the Navy in time of war, including the fulfilment of Maritime Defence Zone command responsibilities.”

The primary functions of the USCG can therefore be said to be:

- The enforcement or assistance in the enforcement of all federal laws in, under and over the high seas and waters subject to US jurisdiction.
- Maritime air surveillance or interdiction of offenders in, under and over the high seas and waters subject to US jurisdiction.
- Administration, promulgation and enforcement of regulations for the promotion of safety of life and property in, under and over the high seas and waters subject to US jurisdiction.

- The development, establishment, maintenance and operation of aids to maritime navigation, icebreaking facilities and rescue facilities for the promotion of safety in, under and over the high seas and waters subject to US jurisdiction.
- Oceanographic research in, under and over the high seas and waters subject to US jurisdiction.
- Maintenance of a state of readiness to function as a specialised service of the USN.

Assistance Authority

A very important aspect of the provisions in 14 USC 2, is the element of assistance. Under 14 USC 141, other federal, as well as state and local agencies/departments, can request the assistance of the USCG and the USCG can request their assistance. These requests can be made on an *ad hoc* basis, or on a continuous basis. Many of the assistance arrangements have been contained in memoranda of understanding and/or agreements between the USCG and other agencies/departments. Assistance might also involve foreign governments, who request the assistance of the USCG through the State Department. 14 USC 141 provides the following:

“(a) The Coast Guard may, when so requested by proper authority, utilise its personnel and facilities to assist any federal agency, State, Territory, possession, or political subdivision thereof, or the District of Columbia, to perform any activity for which such personnel and facilities are especially qualified.”

“(b) The Coast Guard, with the consent of the head of the agency concerned, may avail itself of such officers and employees, advice, information, and facilities of any Federal agency, State, Territory, possession or political subdivision thereof, or the District of Columbia as may be helpful in the performance of its duties. ...”

USCG ENFORCEMENT AUTHORITY

14 USC 89

14 USC 89 is the main source of USCG enforcement authority. 14 USC 89 provides for USCG active duty and commissioned warrant and petty officers to enforce all federal law

- on waters subject to US jurisdiction,

- in international waters, and
- on all vessels subject to US jurisdiction.

It is important perhaps to quote the entire provision, as it is fundamental to a complete understanding of what makes the USCG such an effective organisation and furthermore, to give substance to an interpretative discussion of the provision.

“(a) The Coast Guard may make enquiries, examinations, inspections, searches, seizures, and arrests on the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time board any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship’s documents and papers, and examine, inspect, and search the vessel and use all the necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or part thereof, on board of, or brought in to the United States by, such vessel, liable to forfeiture, or as to render such vessel liable to a fine or penalty and if necessary to secure such fine or penalty, such vessel or such merchandise, or both, shall be seized.

(b) The officers of the Coast Guard insofar as they are engaged, pursuant to the authority contained in this section, in enforcing the law of the United States shall:

(1) be deemed to be acting as agents of the particular executive department or independent establishment charged with the administration of the particular law; and

(2) be subject to all the rules and regulations promulgated by such department or independent establishment with respect to the enforcement of that law.⁹

⁹ 14 USC 89. See also as cross references 14 USC 2 (Enforcement of law generally), 14 USC 142 (Enforcement of customs laws) and 14 USC 637 (Stopping of vessels and immunity of the USCG officer)

Interpretative Comments

On a plain reading of the article, one can clearly come to the following conclusions.

The USCG, as has been said earlier, is the primary maritime enforcement agency of the US. The USCG as an enforcement authority is a federal enforcement authority only. Federal maritime law is applicable, as a general rule, only in waters seaward of 3nm. Waters landward of 3nm falls under individual state jurisdiction, and as such, the responsibility for the enforcement of state law, falls under individual state jurisdiction. However, there is an understanding between many of the state law enforcement agencies and the USCG to assist each other if they are able to. One such arrangement is between the Florida Marine Patrol and the USCG. The Florida Marine Patrol includes the Everglades and sea areas around the Keys. This is also an important area for drug enforcement actions, which is essentially a federal function. Such co-operation agreements close potential lacunae which may develop if no co-operation exists between federal and state enforcement agencies.

The USCG has implicit powers to search all US vessels in foreign waters for compliance with federal law or other applicable law.¹⁰ Furthermore, US law does not permit any searches of vessels in contravention of international law.¹¹

The second important observation one needs to make is that this particular article clearly provides for inter-agency co-operation, and as such is reflective of and complementary to the provisions in 14 USC 141. This is clearly what is envisaged in sub art (b)(1) and (2). Although another agency or department may be “charged with the administration” of a piece of legislation, the USCG has concurrent and lead (in the maritime dimension) law enforcement responsibility with that other agency/department.¹² Two important provisions have been formulated in this regard. They are:

- USCG officers are deemed to be agents of that other agency/department when involved in enforcement action in terms of legislation administered by that other agency/department.
- USCG officers have to comply with all the rules and regulations promulgated by that other department/agency for the enforcement of a particular federal law.

This “deeming provision” is innovative for many reasons, mainly because it obviates the need for specific empowering provisions in individual pieces of legislation, and it simplifies the authority of a USCG officer vis-à-vis third parties.

¹⁰ United States v Conroy 1979, CA5 Fla, 100 S Ct 60

¹¹ United States v Hensel 1983, CA1 Me, 104 S Ct 94

¹² The nature of inter-agency co-operation, memoranda of understanding, etc. will be discussed later in this paper.

The question of whether a USCG officer is authorised to enforce any particular federal maritime law, does not require an intimate knowledge of the law on the part of laymen. The only complication which could and does arise in this regard is a determination of the capacity under which a USCG officer is acting. This is important from an evidentiary point of view (what rules and regulations have to be complied with) as different standards of evidence might be in existence in respect to different laws.

The US courts have, however, determined that the capacity of a USCG officer at the time of a search is not critical with respect to the lawfulness of the search *per se*, but that the determination of capacity is an evidentiary matter which can be determined by a District Court.¹³ What therefore seems to be important is that the USCG officer is aware in terms of what legislation he is acting, so that he is able to ensure that he complies with the legislation, rules or regulations that may have been promulgated in terms of that legislation by the responsible department/agency.

PRACTICAL IMPLEMENTATION AND INSTITUTIONALISATION

For the purposes of this paper, the USCG's involvement in narcotics interdiction, serves as the best example of the manner in which the US has implemented and institutionalised its maritime enforcement and interdiction "regime". This "regime" makes extensive use of combined utilisation of all available law enforcement resources within the US and internationally, and clearly demonstrates the practical effect of legislative provisions such as 14 USC 2 (Primary Duties), 14 USC 89 (Functions and Powers) and 14 USC 141 (Co-operation with other Agencies). It will serve little purpose to analyse all the other functions of the USCG in a similar manner, and as such, one should apply the principles of the narcotics "regime" *mutatis mutandis* to other USCG law enforcement functions.

NARCOTIC/DRUG LAW ENFORCEMENT

Introduction

The USCG is the lead agency for maritime surface interdiction, and shares with the US Customs Service (USCS)¹⁴, a co-lead agency role in maritime air interdiction, of narcotics. A further agency involved with the counter-narcotics

¹³ United States v Guillen-Linares 1981, CA5 Fla, 636 F2d 78, where the determination of the status of USCG official as either a USCG officer or customs officer, after the seizure of marijuana was a matter of evidence, since different standards might apply which might have constitutional implications. In United States v Ceballos 1983, CA11 Fla, 706 F2d 1198, a boarding by a USCG officer in the company of Customs officers did not alter/affect his status as a USCG officer, so as to make the subsequent search and seizure of marijuana illegal.

¹⁴ See Annexure A : Inter-agency Agreement between the USCG and the USCS

operations is the Drug Enforcement Administration (DEA)¹⁵, which is involved in counter-narcotic operations on shore, sea and air.¹⁶ These three agencies work on a day-to-day basis in counter-narcotics law enforcement. Furthermore, all these agencies receive elaborate and continual assistance from the DoD, especially in its Department of the Navy and Air Force. The extent of this assistance, in view of the Posse Comitatus Act which is applicable to the DoD, will be more fully discussed at a later stage.¹⁷ The primary federal statute in this regard is the Maritime Drug Law Enforcement Act, which has now been codified in 46 USC App. 1903.¹⁸

National Effort

On a national level, the US relies heavily on inter-agency agreements and/or memoranda to meet the challenges. Not only does this give effect to the provisions of 14 USC 141, but it also has many practical benefits. Such agreements/memoranda define the parameters of co-operation and streamline the effective utilisation of resources, avoiding the problem of inherent duplication of effort. All USCG working relationships with other responsible departments are therefore, aimed at integrated response and effort in dealing with a particular issue.

Inter-Agency Memorandum of Understanding (MOU): USCG AND USCS

Annexure A¹⁹ to this paper sets out a typical agreement or memorandum of understanding between the USCG and the USCS. The following aspects of the memorandum demonstrate the nature and parameters of such agreements:

- Art III : The promotion of co-operative effort between the agencies and the resolution of inter-agency differences with regard to interdiction methods/policy. This aspect can be seen as the basis of the entire memorandum of agreement.
- Art IV: Outlining of responsibility of the Agencies involved.
- Art V: An organigram which defines the relationship of the Agencies.

¹⁵ See Annexure B: Inter-agency Agreement between the USCG and the DEA

¹⁶ Model Maritime Service Code, US Department of Transportation, United States Coast Guard, 1995, Ch 6 p 49

¹⁷ Posse Comitatus Act, 18 USC 1385

¹⁸ Maritime Law Enforcement Manual, COMDINSTR M16247.1A, 1 Feb 94 (as amended), p5-1, issued by the Department of Transportation

¹⁹ Annexure A has been re-produced in this paper from a photocopied document obtained from the USCG. The memorandum was signed by the then Commandant of the USCG) and the Commissioner of Customs on May 11 1987

- A breakdown of responsibilities for interdiction generally, with specific reference to individual lead responsibility for land, air and maritime interdiction of narcotics, and finally a geographic command distribution of responsibility. This breakdown includes the assignment of lead responsibility for the provision of resources/assets for interdiction operations.
- It provides impetus for the agencies involved to seek further co-operation with other departments, such as DoD, and therefore recognises and underlines the principle of jointness of effort.

This memorandum is not couched in terms that limit or regulate enforcement actions by either of the agencies, but rather must be seen as extending the existing law enforcement abilities of each of the agencies involved. The value of this memorandum can be seen in the following provision:

"The USCS jurisdiction is clearly recognised in the 12 mile contiguous zone. The current USCS inventory of vessels is recognised as substantial assets to be used within the contiguous zone..... shall co-ordinate their operations with the Coast Guard Operations Centres to facilitate optimum co-ordination of surface operations and avoid mutual interference.

Enforcement activities on the high seas outside the contiguous zone is clearly recognised as a Coast Guard operation. This may be augmented by support assets such as Law Enforcement Detachments (LEDETs) on U.S. Navy vessels, co-operative arrangements with vessels of foreign nations and special arrangements to facilitate other agencies' support such as the current arrangement allowing USCS to patrol the high seas between Bimini and the Florida coast"²⁰

The USCS is able, by virtue of this agreement, to increase its maritime sphere of influence, whilst the USCG has obtained access to a number of vessels to increase its interdiction ability. The role of Law Enforcement Detachments (LEDETs) will be discussed separately under a different heading.

Interagency Agreement: USCG and the DEA²¹

The Agreement between the USCG and the DEA is fundamentally the same as that between the USCG and the USCS. Although the latter is termed a Memorandum of Understanding (MOU), and the former an Interagency Agreement, it is submitted that nothing turns on this difference in nomenclature. Both instruments have the same aim and are similarly phrased so as to suggest that they have one and the same purpose and goal.

²⁰ *Op Cit* Annexure A

²¹ *Op Cit* Annexure B

The agreement recognises the roles that the USCS and the USCG has, and seeks to interface the DEA with the legislative responsibilities of the other two agencies. Key aspects of this agreement are the following:

- Art IB: There is a repetition of the principle underlying the USCG/USCS MOU, which recognises the fact that narcotics law enforcement requires a joint response by federal, state, and local law authorities.
- Art III: There is a promotion of the policy of effective utilisation of personnel and facilities (operational and training) by establishing a co-operative relationship between the USCG and DEA. This includes the exchange of intelligence and information, so as to create conditions for effective planning, budgeting and evaluation.
- Art IV: A brief but comprehensive breakdown of areas of responsibilities, not only with regard to equipment, personnel and facilities, but also geographic demarcation of responsibility. This article clearly has as its intention the avoidance of duplication of effort, whilst ensuring the maximisation of assets available.
- Art V: It provides for local commanders of the USCG and the DEA to enter into local agreements and arrangements.

Interagency Agreement/MOU with DoD

An agreement or MOU between law enforcement agencies and the DoD is thwart with legal issues. Fundamental to the issue is the operation of the Posse Comitatus Act²², which applies to USN, USAAF, US Army and the Marines, but not to the USCG even although it is considered to be an arm of the US military.

In terms of the Posse Comitatus Act, unless specifically authorised by Congress, the US Army and USAAF are prohibited from assisting law enforcement authorities in keeping the peace and from arresting offenders. The USN and the Marines apply the contents of the Act as a matter of policy. In other words, they are prohibited from enforcing domestic law. The reasoning behind this is that the US military must never be put into a position where, by virtue of their activities on the domestic front, they run the risk of being feared by the civilian population. However, even within the US, the realisation has been made that the US military has an important collateral utility that must not be overlooked.

Recently there have been some congressional enactments that have ameliorated the operation of the Posse Comitatus Act²³. While the military is still forbidden

²² Posse Comitatus Act, 18 USC 1385. The Act is a federal criminal statute

²³ 10 USC 371-380

from being actively involved in search, seizure and arrest of offenders, there has been some clarification of the support role that the DoD can fulfil in operations such as counter-narcotic operations. In 1981, Congress specifically authorised the limited and defined use of DoD facilities, platforms and equipment to assist federal authorities in maritime drug interdiction. The biggest inroad into the prohibition was that Congress authorised the USCG personnel to be placed onboard USN vessels for the purpose of counter-narcotics interdiction. These USCG Law Enforcement Detachments (LEDETs) simply use the USN platform to carry out their mission. USN personnel are therefore never directly involved in the search, seizure and arrest of offenders.

In 1989, in another move to increase the collateral utility of the DoD, Congress enacted the DoD Reauthorisation Act²⁴ giving the DoD lead agency responsibility for the detection and monitoring of drug shipments into the US. As a result of this congressional concession, MOUs and agreements between the DoD and federal law enforcement agencies have been entered into, with much the same purpose as the other interagency MOUs and agreements. For purposes of demonstration, two such agreements have been included by way of example²⁵.

In the MOU between the North American Aerospace Defense Command (NORAD) and the USCS, the agreement serves to underline the lead agency role that the DoD has in monitoring and detection of drug traffic. Due to this role, the MOU stipulates the responsibilities of role players and determines the responsibility between NORAD to "co-ordinate and integrate the multiagency surveillance effort."²⁶ Although this is an agreement between the DoD and USCS, it refers specifically to the MOU between the USCS and the USCG²⁷ and must therefore be seen as an extension to the latter MOU. While the MOU is couched in general terms, it also specifically designates the procedures for obtaining the services of NORAD equipment, in this case AWAC E-3 aircraft (Advanced Warning Aircraft) and NORAD fighters for dedicated counter-narcotics missions.

The extent of DoD co-operation in this regard can be gleaned from the numerous references made to other agreements between various other DoD and federal law enforcement agency MOUs/agreements²⁸, and the fact that the agreement refers to North America, including Canada and not merely the US²⁹. The whole agreement therefore, clearly demonstrates not only a national approach to the multiagency effort, but also an international approach.³⁰

²⁴ 10 USC 124

²⁵ See Annexure C: Memorandum of Understanding between HQ North American Aerospace Defense Command (NORAD) and the United States Customs Service (USCS); and Annexure D: Memorandum of Agreement between the Department of Defense and the Department of Transportation on the use of USCG Capabilities and Resources in support of the National Military Strategy

²⁶ Annexure C par 4.a

²⁷ Annexure A

²⁸ Annexure C par 1

²⁹ Annexure C par 2 and 4.a

³⁰ During a briefing at the HQ of the Joint Integrated Agency Task Force East (JIATF East) in Key West, Fla on 5 Mar 98, Colonel J. Gorman (USAAF), the Chief of Staff stated that the DoD

The second MOU³¹, which has been referred to, is one between the DoD and the USCG, but from another perspective. Here the collateral utility of the Department of Transportation (specifically the USCG) to the DoD is addressed. The MOU recognises the fact that, due to the operation of the Posse Comitatus Act, it is unable to perform certain functions, and as a result, defines the role of the USCG in assisting in national defence³². The driving force behind an agreement such as this one is encapsulated in the words "*[S]trategic, political, and fiscal imperatives are driving change in the size and composition of the armed forces. Aggressive use of inter-service teamwork and resource integration is essential to maintain combat effectiveness.*"³³

Key aspects of the agreement include the following:

- Joint review by the DoD and the Secretary of Transportation of available resources, including joint planning, training, operations and doctrine.³⁴
- Use of USCG resources for low threat operations such as maritime interception operations, including missions such as maritime law enforcement.³⁵
- The use of the USCG in environmental defence operations, which have an impact on defense operations, national economies and natural resources.³⁶
- The use of the USCG in Deployed Port Operations, Security and Defence.³⁷

With regard to DoD co-operation with federal enforcement agencies, the mere nature of the resources available to the DoD results in their role being of specific importance within the international arena. It is here that the federal law enforcement agencies own resources become a bit thinner on the ground. Yet with international globalisation and the growth of the global village, there is a recognition that many law enforcement actions need to be taken at source. By this is meant, and especially within the narcotics paradigm, effective action should be taken where the narcotics are produced, and as such, it becomes easier to

considered the narcotics issue as a national defence issue, and as such, it was natural for the DoD to become involved in the suppression of the drug trade. JIATF is an organisation that truly reflects the national and international multiagency approach that has been adopted in this regard. The nature and role of JIATF will be discussed under the international approach to law enforcement, an approach that has been actively promoted by the US, especially in the Caribbean.

³¹ Annexure D

³² See fn 31 and Annexure D par 3

³³ Annexure D par 4

³⁴ Annexure D par 6

³⁵ Annexure D annex A

³⁶ Annexure D annex B

³⁷ Annexure D annex C

contain the problem. This has prompted the US to seek the assistance of other governments in combating the problem.

International Effort

Again to demonstrate the issues involved, the US counter-narcotics operations in the Caribbean serves as a good example of how international joint action can and is being taken to combat a particular problem, in this case narcotics. There are about 37 independent countries in the Caribbean that all play a critical role in the narcotics trade. The concept of sovereignty is a potentially and particularly debilitating obstacle in the effort to curtail the narcotics trade into the US. This is especially so if one accepts that the best way to attack the problem is to stop the trade at source.

In an effort to overcome the problem of sovereignty, the US has entered into numerous agreements with littoral states, aimed at achieving international co-operation, jointness in effort and joint efforts. The agreements that have been entered have a similar aim and goal as the MOUs and agreements that have been entered into between federal departments on a national level. The contents of the agreements largely include the following aspects³⁸:

- Shipriders.
- Overflight.
- Access to territorial waters.
- Combined Operations.
- Flag State authorisations to board, search, and, if evidence of criminal conduct is found, seizures and arrests.

The agreements are generally tailored to meet the needs identified between each of the countries involved, and not all of the agreements result in complete access to each other's territory. Nevertheless, the agreements result, generally, in the veil of sovereignty being lifted to some extent. A typical example of the content of agreements of this nature has been attached.³⁹

There are also joint agreements between the armed forces of countries in the Caribbean. In this regard, the agreements between the US and the United Kingdom (UK) and the Netherlands are of particular importance. Both the UK and the Netherlands have a permanent armed force presence in the Caribbean.

³⁸ *Op Cit* Maritime Enforcement Manual p5-1

³⁹ Annexure E: Agreement between the Government of the United States and the Government of _____ concerning the co-operation to suppress illicit traffic by sea - a pro forma agreement.

The agreement between the US and the UK (a similar agreement exists with the Netherlands) serves as a good example of the type of co-operation that exists to ensure best possible utilisation of all assets in the area to both parties advantage.

In 1993, the Minister of State for the Armed Forces of the UK authorised the embarkation of USCG LEDETs on board Royal Navy (RN) West Indies Guardships (WIGs) in the Caribbean Sea for the purpose of assisting in the international fight against drug trafficking. In early 1996, this arrangement was broadened, with ministerial consent, to allow USCG LEDETs to operate from Royal Fleet Auxiliary (RFA) tankers which support the WIGs. The conditions and practical issues related to these authorisations were set out in diplomatic notes between the US and the UK. The practical effect of these agreements are, however, the following⁴⁰:

- Firstly, any activities with regard to a suspect vessel are the responsibility of, and carried out by, the LEDET. In particular, all boardings are carried out by the LEDET. In order to carry out these responsibilities, the LEDET may request that the captain of the RN or RFA vessel take certain navigational measures or allow the LEDETs to use the ship's communication systems to relay orders to the suspect vessel. However, the captain may decline such requests, as he remains responsible for the safety of the vessel and its crew at all times. Activities with regard to suspect vessels are only carried out seaward of the territorial sea of third countries unless prior agreement has been reached with such third countries concerning activities in the territorial sea.
- Any boat or helicopter used to transfer the LEDET to the suspect vessel is identified as operating under the authority of the USCG in addition to the UK flag. Once on board the suspect vessel the LEDET operates according to USCG regulations and orders, including those regarding the use of force. While on board RN or RFA vessels, the LEDET is bound at all times by UK regulations. The captain of the RN or RFA vessel may, however, take measures to safeguard life if the LEDET is suddenly faced with a threatening situation on board a suspect vessel. The use of force in self defense is always permitted. Any use of force, however, must be strictly proportional to the circumstances and the minimum necessary to safeguard own vessels and the lives of personnel embarked.
- As regards damages and liabilities, any claims for damages caused by LEDET personnel during law enforcement boardings will be dealt with by the USCG in accordance with their policies. In terms of third party damages, the USCG will hold the UK and its forces harmless with respect to any claim arising from a boarding.

⁴⁰ Summarised content of a briefing attended at the HQ of the Joint Integrated Agency Task Force East (JIATF East) in Key West, Fla on 5 Mar 98, by Colonel J. Gorman (USAAF), the Chief of Staff of JIATF East

The role of LEDETs is a particularly important one. Because the USCG is the principal enforcement agency of the federal government, the LEDETs are comprised as a general rule, only of USCG personnel. Other federal agencies might include some of their personnel members in these teams, depending on the type of operation, but it is the USCG that retains control of the activities of the LEDET. The LEDET-approach has the following advantages:

- Personnel making up the LEDET team can receive specialist training in search, gathering of evidence and arrest of offenders. They are usually well-trained in the area of law in which they operate.
- The ships' personnel, be it USCG, USN or foreign, need not get involved with issues other than driving the ship. They do not have to undergo any specialist training in the area of law enforcement, and more importantly, do not need to spend long periods ashore preparing case dockets, giving evidence and attending trials. The business of efficiently operating the ship is left unaffected by any process of law enforcement.
- LEDETs are not shipbound, in that they remain on a particular vessel on any long term basis. They are by their very nature very mobile and can be embarked on any ship anywhere at very short notice.

Although the preceding paragraphs have focused on the issue of counter-narcotics enforcement actions, it is worthwhile noting that similar agreements/treaties have been entered into in relation to the exploitation of natural resources and illegal immigration.

With regard to fishing, and as a result of the Law of the Sea Convention in this regard⁴¹, the need for regional agreements/conventions is clear. These agreements⁴² have largely taken the form of regional treaties, but they all include reciprocal enforcement authority within the geographical area of application of the treaty. Furthermore, they include, generally, the duty to

- abide by treaty obligations;
- co-operate in the conservation of marine mammals;

⁴¹ Law of the Sea Convention arts 63-67, 116-120

⁴² Some examples of regional agreements treaties are: Global Moratorium on all large-scale Pelagic Driftnet fishing on the High Seas (UN GA 46/215; Treaty concerning Pacific Salmon between the US and Canada (Pacific Salmon Treaty Act of 1985, 16 USC 3631-3644); Convention for the Conservation of Anadromus Stocks in the North Pacific Ocean between the US, Canada, Russia and Japan (16 USC 5001-5012); Treaty on Fisheries between the Governments of certain Pacific Island States and the Government of the United States of America 1987 between the US and certain Pacific island nations (16 USC 973 *et seq*); Convention for the Preservation of the Halibut Fishery of the North Pacific Ocean and Bering Sea between Canada and the US (16 USC 773-773k); Treaty on Pacific Coast Albacore Tuna Vessels and Port Privileges, between Canada and the US; Agreement on Fisheries Enforcement 1990 between the US and Canada

- co-operate in the conservation of highly migratory species (such as tuna, billfish and oceanic sharks); and to
- give due deference to certain coastal state interests with respect to continental shelf fishery resources, anadromous species (salmon), catadromous species and straddling stocks.

Joint Integrated Agency Task Force

Due to the realisation that the only way to effectively utilise all available resources in the most cost-efficient manner, by national federal law enforcement agencies, and as a result of the numerous international agreements/MOUs that have been entered into, the need for a joint command structure to bring all the interested parties around the same table was identified. Although dealing only with counter-narcotics interdiction⁴³, the US has formed an organisation called the Joint Integrated Agency Task Force (JIATF) to bring all the agencies together, thereby providing a joint command structure where implementation of the MOUs/agreements are given effect to.

JIATF includes representation from the DoD, all interested federal law enforcement agencies, and liaison officers of the RN and the Royal Netherlands Navy. The organisation is the nodal point for all these entities to plan and execute interdiction operations and to give effect to the contents and intent of the MOUs and agreements. This institutionalisation allows for speedy and effective decisions, wider access to resources both human and material, and avoids conflicts in interest and duplication of effort.

PRESIDENTIAL DIRECTIVE/NSC - 27

The mere fact that many of the MOUs and agreements involve many sovereign governments and potentially entities who are not party to any of the agreements, means that the risk and potential for international and diplomatic incidents within the present "international" system of US law enforcement is very real. In order to ensure that law enforcement actions do not compromise national interests, a procedure has been created where, under certain circumstances, federal law enforcement agencies are compelled to inform the Department of State of a situation where US foreign policy might be effected. There is a sophisticated matrix that has been issued⁴⁴ that details the conditions under which the State

⁴³ A similar institutionalisation of federal agencies dealing with Search and Rescue, Pollution response and disaster control has been established within the US, called the Incident Command System (ICS). This also stems from a realisation that there needs to be a combined effort to deal with certain exigencies and that no single agency is physically or legally able to deal with all eventualities in any given situation

⁴⁴ *Op Cit* Law Enforcement Manual Encl 3

Department must be informed. This procedure has been colloquially named the "PD-27 Requirement"⁴⁵. However, its aim can be said to

- ensure that the USCG has interagency concurrence for proposed law enforcement actions that may adversely impact on US foreign relations; and
- initiate the diplomatic process by which any authorisations are sought from governments to take specific law enforcement actions. Examples of such law enforcement actions include entry into foreign territorial waters for purposes of law enforcement, boarding, search and detention of foreign flag vessels in international waters or the arrest or detention of persons on board such vessels, and the use of deadly force (warning and/or disabling shots).

It is normally not a requirement to follow the PD-27 procedure

- if a multinational agreement between the parties involved exists;
- in the case of consensual boardings;⁴⁶
- in the case of non-consensual boardings on the high seas, but where the boarding is conducted in pursuance of a standing agreement with the Flag State; and
- as a result of the legitimate exercise of the right of hot pursuit or constructive presence.

The text⁴⁷ of the PD-27 directive reads as follows:

"The President has directed that uniform and clearly understood procedures be established within the United States Government for dealing with various types of non-military incidents which could have an adverse impact upon the conduct of our foreign relations.

⁴⁵ The Presidential Directive no 27 was issued by the White House on 19 Jan 1978 and signed by Zbigniew Brzezinski. It was titled "Procedures for dealing with Non-Military Incidents"

⁴⁶ Under customary international law, a master may allow his vessel to be boarded by non-flag state officials as Flag State authority is not required. However, consensual boardings can not be used as a basis for an assertion of law enforcement jurisdiction. Consensual boardings are completely subject to the control of the master as to whether they occur, their scope and duration. The consent must be voluntary, and if the master gives such consent, the boarding party may only examine those areas that the master consents to, and remain onboard only as long as the master allows. Furthermore, consent must be obtained from the person who controls any given space onboard the vessel. Simply requesting the master to look around the vessel in all probability does not constitute consent to search each and every space onboard

⁴⁷ This text has been reproduced from a photocopy of the original Directive that was issued. The copy of the Directive was obtained from USCG Legal Services in Miami

To assist the Special Co-ordination Committee in ensuring that the government's decisions are reached expeditiously and that the views of all concerned Departments and Agencies, as well as considerations of both domestic law and foreign policy, are brought together in reaching a decision, the Department of State will have primary responsibility to co-ordinate government planning and public statements for dealing with such incidents and will keep the White House fully informed throughout.

The following basic procedures shall be observed in dealing with such incidents:

- a. *All Departments and Agencies in receipt of this Directive are hereby charged to maintain a 24-hour watch supervised by a responsible officer, or such other comparable mechanism as will in the opinion of the Department/Agency and the Department of State be adequate to achieve the objectives of this Directive. It will be the responsibility of this watch to advise the Department of State Operations Centre of incidents that are developing in a way that could impact adversely upon the conduct of US foreign relations. Actions already taken or under way by law enforcement agencies will be reported to the Department of State Operations Centre, along with those agencies' recommendations for dealing further with the incidents.*
- b. *The Department of State Operations Centre will promptly inform appropriate officers of the Department of State and other Agencies concerned and the White House Situation Room of such incidents and will assure timely communication to the Situation Room of information concerning an incident and its development, proposed courses of action intended by the Departments and Agencies concerned, and actions already taken. In the event of interagency disagreement, the Department of State Operations Centre will brief the Watch Officers of interested Agencies on the interagency differences and the considerations on which they are based, and will afford these Agencies the opportunity for further comment. The Operations Centre will then refer to the White House for final decision the recommendations of interested Agencies. The Operations Centre will inform the White House of
 - i. *any major disagreement among the Agencies, or*
 - ii. *any known intention of a senior official of an interested Agency to express the views of that Agency directly to the White House.**
- c. *As responsibility for the co-ordination of Intelligence Community operations will continue to be that of the Director of Central*

Intelligence, the Operations Centre will ensure that the DCI is also promptly notified of such incidents.

- d. The Operations Centre will also ensure that there are full consultations with interested law enforcement agencies at each step of a developing incident in order that those agencies may properly carry out their law enforcement responsibilities.*
- e. The Department of State Operations Centre is charged with the timely transmittal to the relevant Departments and Agencies of directives received from the White House.*
- f. Where it is decided to take an action or to refrain from an action based primarily on considerations of foreign policy, the Department of State will co-ordinate with other interested Departments and Agencies in developing public statements regarding the actions or inaction of the United States Government and in transmitting appropriate press guidance to Agencies requesting it. When requested by the relevant law enforcement authorities, every effort will be made by the Department of State to transmit to them appropriate press guidance on such incidents at the same time that a government decision is made.*

Each Department or Agency in receipt of this Directive shall co-operate fully with the Department of State in the discharge of its responsibilities under this Directive. The Department of State, for its part, will take appropriate steps to ensure that it carries out its responsibilities under this Directive as expeditiously as possible, particularly in meeting the concerns of those Agencies charged with law enforcement.

Nothing in this Directive is intended to alter or restrict the statutory or other existing authority of any Department or Agency for the enforcement of the laws of the United States.

NSDM 207 is hereby rescinded."

By all accounts this procedure has been perfected so as to make it a quick and very efficient manner of ensuring that international incidents are avoided, while giving the law enforcement agencies peace of mind that what they are doing is backed by a political decision and resolve.

CONCLUSIONS

The US federal law enforcement agencies rely heavily on interagency and multinational co-operation to ensure that their law enforcement effort is effective and does not result in duplication of effort. This amalgamation of expertise,

personnel, equipment, intelligence and joint access and utilisation of resources has obvious benefits, even to a nation that at this stage of its development has seemingly unlimited finances available to it to interdict maritime offenders.

THE PRESENT SOUTH AFRICAN MARITIME INTERDICTION REGIME

INTRODUCTION

On a national level, the South African maritime enforcement regime is extremely fragmented, with responsibility for law enforcement at sea being spread over numerous departments, depending largely on who carries responsibility for administering a particular piece of maritime legislation. Furthermore, with one or two exceptions, personnel and material resources are equally fragmented between the various departments. The only conclusion that can be made from the present *status quo* is that the RSA has not yet come to terms with the fact that it is maritime nation and also, that it has not yet realised the value of maritime resource management and the need for effective maritime interdiction of offenders.

On the international level very little co-operation is present between the littoral states, with the exception of an agreement between Namibia and South Africa concerning reciprocal enforcement measures for fishery infringements.⁴⁸ It is, however, true to say that regional initiatives have been taken to cement co-operation between the littoral states, these moves being particularly evident in the formation of Southern African Development Community (SADC), an organisation aimed at southern African regional development. Numerous requests have been received for assistance from countries such as Tanzania and Mozambique for assistance in maritime law enforcement. It is within this arena that co-operation and the pooling of resources is most lacking and where the RSA can play a vital role.

For purposes of completeness, it is important therefore to give a brief overview of departmental responsibility for maritime interdiction. This overview reflects only the present national situation, in the absence of any real international interdiction effort and co-operation agreements.

Primary Responsibility

⁴⁸ The Agreement was entered into between the RSA and Namibia on 22 Mar 91, but is nowhere near as complete as the bi-lateral agreements that have been entered into between the US and other states. The agreement also requires prior diplomatic approval before any enforcement action can take place in each others "fishing waters". The agreement does not represent a standing authority, and thus in reality, does not really amount to much in practical terms. See also Devine, D.J. "An Unusual Interdict" (1993/94) 19 South African Yearbook of International Law p157

The primary responsibility for enforcing domestic law generally, lies with the South African Police Services (SAPS). This responsibility flows from provisions in the Police Act⁴⁹.

The maritime capability of the SAPS to enforce maritime legislation is as follows:⁵⁰

- Seven 12 ton vessels with an endurance of 18 hours.
- Four 5 ton craft with an endurance of 20 hours.
- Nine boats of 4 meters length.

In view of the fact that the Republic has a mainland coastline of approximately 3000km, not to mention the coast line off the Prince Edward and Marion Island group some 1700nm south east of the Cape south coast, and an Exclusive Economic Zone (EEZ) of some 1,2 mil square km, it is not difficult to conclude that the SAPS would be hard pressed to meet domestic and international law obligations relating to the management of marine resources. Furthermore, very few, if any, police officers have any experience in working in the hydrosphere, as traditionally they have not played any significant roll in marine law enforcement at all.

However, according to statistics by the SAPS, some 98% of crime in the maritime zone is committed within 50nm of the coast. *"Further analysis has shown that of the 98%, 75% of the crime is committed on the seashore and within the white water to an extent of 1nm from the coast, 20% is committed within the territorial waters extending another 11nm, and the remaining 5% within 38nm from the outer boundary of the territorial waters of the RSA."*⁵¹

Although these statistics may be a true representation of the state of affairs, one is forced to ask the question whether in fact any governmental department is really able to state with any degree of certainty what is happening at the furthest reaches of the EEZ. Furthermore, these statistics do not

- justify an exception to international law obligations manage the entire EEZ (including enforcement);

⁴⁹ Act no 7 of 1958 sec 5

⁵⁰ Bennett, Chris, "Coast Guard Function in South and Southern Africa" African Defence Review, Issue no 18 Aug 94, p46. Rear Admiral Bennett was a former Chief of Naval Staff in the South African Navy and is now involved with the Institute for Defence Policy in the Cape region.

⁵¹ Report of the Committee of Inquiry into a National Maritime Policy for the Sea, p48. The Committee was appointed by the Minister of Transport and Posts and Telecommunications on 16 Jan 92 and completed its work on 31 Aug 93. The Report is colloquially known as the "Floor Report" after it's Chairman, Prof B.C. Floor.

- do not reflect the seriousness of even 1 factory ship and a few fishing vessels catching with gill nets in relation to a holiday maker taking a crayfish or two more than he is permitted to (the tragedy of the destruction of the Patagonian Toothfish resources in the Southern oceans around the Prince Edward and Marion islands is but one example of the RSAs inability to fully comprehend its responsibility);
- take into account the changing reality that South Africa, for example, is becoming a major staging point for the worldwide distribution of narcotics.

To this extent these statistics create an erroneous picture that all is well if we only manage the white water coastal zone.

In conclusion, the SAPS is of the opinion that they are the umbrella organisation for the enforcement of law, although they admit that the process of establishing whether or not an offence has taken place, may be the function of another governmental department.

Secondary Responsibility

The secondary responsibility for enforcing the provisions of

- the Marine Resources legislation, including pollution of the sea, lies essentially with the Minister of Environmental Affairs and Tourism;
- customs legislation with the Department of Customs and Excise; and
- shipping, prevention of marine pollution by ships and marine safety legislation and the promotion of the RSA's maritime interests, lie with the South African Maritime Safety Authority (SAMSA)⁵².
-

With regard to marine resources legislation, in terms of the provisions of the Sea Fishery Act, the Minister may appoint Fishery Control Officers (FCO) to enforce the provisions of the Act. Historically, the power to appoint FCOs was delegated to provincial administrators, namely the Cape and Natal Provincial Administrators. In terms of Schedule 4 to the Constitution⁵³, the protection of marine resources becomes a national competency, unlike previously where it was delegated down to provincial level. However, in the transitional period, the *status quo* has been maintained, and will probably be resolved by the passing of new legislation.

⁵² SAMSA is a statutory authority with juristic personality, with responsibility to the Minister of Transport. See secs 2 and 3 of Act 5 of 1988

⁵³ Constitution of the Republic of South Africa Act 108 of 1996

In effect therefore, the enforcement of marine resources legislation still seems to fall squarely within the domain of the Cape and Natal Provincial Administrations.⁵⁴

The Cape Provincial Administration had the following resources at its disposal:

- Seven large vessels of various tonnage
- Twenty Seven ski-boats

This fleet has severe limitations not only by the very nature of the vessels themselves, but also due to a severe lack of funds.⁵⁵ Of the 7 large vessels, only 1 (the Custos) has deep-sea capabilities and can patrol the entire 200nm EEZ. Four of the vessels are limited in that they can only operate 50nm from the coast and the remaining two are limited to 25nm from the coast.⁵⁶

The Natal Provincial Administration is similarly limited in its maritime capabilities:

- The Natal Sharks Board operate some 26 small craft (4 to 6,6 metres long) for the main purpose of shark control.
- The Natal Parks Board operates 5 ski-boats and 1 inflatable boat, all capable of operating 10nm from the coast.

The Natal Provincial Administration has therefore no deep sea capability at all.

In provincial administrations, there is also a severe lack of experience in operating in the deep sea. The FCOs have traditionally only operated in the coastal zone and their expertise is therefore limited to this area.

In terms of the National Parks Act,⁵⁷ the Minister of Environmental Affairs may also declare defined areas as national parks. In Schedule 1 to the Act, he has declared the Tsitsikama Forest and Coastal National Park, which extends to a distance of 0,8 km from the low water mark on a defined area on the coast, to sea.

The responsibility for enforcing the provisions of the Act in this maritime area is given to nature conservators, or any person appointed by the National Parks Board as a ranger.⁵⁸ The nature conservator is tasked with ensuring that the provisions of sec 21 are complied with. The powers of the conservator are described in sec 27 of the Act, and are in essence those of a peace officer.

It appears therefore that only nature conservators and police officers have enforcement jurisdiction in this marine national park. This is therefore an area

⁵⁴ In effect, the KwaZulu Natal and Western Cape Provincial Governments.

⁵⁵ *Op cit* Bennett p46

⁵⁶ *Ibid*

⁵⁷ Act 57 of 1976

⁵⁸ See definition of "official" in sec 1 of Act 57 of 1976

outside the jurisdiction of an FCO, who is appointed in terms of the Sea Fishery Act⁵⁹.

In terms of the Customs and Excise Act,⁶⁰ the Commissioner of Customs and Excise may appoint officers to carry out the provisions of the Act. In terms of sec 6, the powers of the officers are those of a police officer. These powers include the right to board and inspect vessels at sea to ensure compliance with the Act.⁶¹ In this regard reference should also be made to the Marine Traffic Act⁶² in relation to the possession of narcotics. This provision in relation to narcotics is the only provision where officers of the SANDF, along with the SAPS and other designated officers, have direct legislative responsibility to ensure that provisions of the Abuse of Dependence-producing Substances and Rehabilitation Centres Act⁶³ are being complied with. In this regard the Minister of Transport is the responsible Minister.

With regard to the position of SAMSA, their responsibility can be described as including the following:

- Flag State Inspection of Vessels.
- Port State Inspection of Vessels.
- Special cargo Inspections.
- Pleasure Craft Inspections.
- The determination of Standards in accordance with International Maritime Organisation Resolutions.
- Issue of Statutory Maritime Qualifications and Certificates.
- Establishment of Working Conditions for Crew on vessels.
- Compilations and Administration of a Shipping register.
- Maritime Safety Information.
- Search and rescue Co-ordination.
- Pollution Prevention and Combating.

⁵⁹ Act 12 of 1988

⁶⁰ Act no 91 of 1964

⁶¹ Act no 91 of 1964 sec 6(9)(a-d)

⁶² Act 2 of 1981 secs 1, 8(A) and 9

⁶³ Act 41 of 1971

- Prosecution of Offenders for contravention of Maritime Safety legislation, Pollution legislation, etc.⁶⁴

All these functions are functions were previously those of the Department of Transport in its Chief Directorate Shipping.

Indirect Responsibility

In the past the SANDF have conducted both air and surface patrols of the EEZ. However, it is most certainly imprecise to refer to a SANDF "responsibility to manage" marine resources or as a maritime interdiction agency. This is certainly a very controversial subject. The reasons for this proposition will become clearer later in the paper. However, the SANDF, specifically in its department of the SA Navy, has the following resources:

- Two Combat Support Vessels of 12 000t and 19 000t (helicopter carrying)
- One Hydrographic Research Vessel (helicopter carrying)
- Nine Missile-carrying Fast Attack Craft of around 500t.
- Eight Mine Countermeasures vessels of around 500t.
- Ten Harbour Patrol Vessels.
- Three Inshore Patrol Craft.
- Two Submarines.

The Air Force has a number of aircraft that are capable of doing maritime patrols, although there are no dedicated marine patrol aircraft. Furthermore, Parliament has given the approval for the purchase of four helicopter carrying Corvettes and a further four submarines. The SAN therefore, clearly has a blue water capability and will have for the foreseeable future.

THE ROLE OF THE SOUTH AFRICAN NAVY (SAN) IN THE ENFORCEMENT FUNCTION

It is and always has been the role of the SAN to protect and defend the Maritime sovereignty of the Republic⁶⁵. To this end the SAN conducts patrols throughout the maritime zones of the Republic, including the EEZ.

⁶⁴ SAMSA Guide, a document issued by SAMSA on 1 Apr 98 before promulgation of Act 5 of 1998
⁶⁵ Act 108 of 1996 reaffirms this fundamental role of the SANDF

The SANDF has also declared its willingness to provide support to other departments in the execution of their functions. This willingness is part of an attempt to reduce state expenditure through avoiding a duplication of activities and at the same time the SAN ensures that its readiness is maintained at a high level during peacetime.

In general the SAN envisages the following types of assistance.⁶⁶

- Fisheries Protection.
- Enforcement actions against Arms and Drug Smuggling.
- Protection against Piracy.
- Protection against Illegal Immigrants.
- Port Safety and Security.

In the normal course of activities, the SAN maintains a comprehensive data base of all shipping around the Republic's coast. This information is obtained from various sources, including satellite, and is available for use by all state departments at no extra cost. The information that is kept includes all fishing activities in the Republic's maritime zones (including the Prince Edward and Marion Island group).

Furthermore, the SANDF has indicated that it is willing to make ships and aircraft available to perform policing functions at no expense to other departments, as long as these activities remain within the normal budget. This is achieved by duplicating the patrol function which the SAN and SA Airforce has, with that of a policing function.⁶⁷ What is clear though, is that the SANDF, up to now, did not want to be seen as assuming the responsibilities that other departments have in enforcing legislation, and such offer must be seen as simply an offer to provide assistance to other departments in the execution of their functions. To put it in another way, the SANDF has the means, and other departments have the responsibility.

This assistance to the Departments of Environmental Affairs and Tourism, the Directorate Sea Fisheries and the SAPS has been happening over the past few years on a regular basis and numerous law enforcement actions have taken place. During 1996, the SANDF conducted air patrols of the maritime zones totalling 1044.15 hours and 10 surface patrols. A normal surface patrol lasts anything up

⁶⁶ *Op Cit* Floor Report p49

⁶⁷ *Ibid*

to 2 or three weeks.⁶⁸ The SANDF has also conducted a successful operation in co-operation with the Namibian authorities.⁶⁹

There are however, certain legal restraints on the SANDF becoming directly involved in maritime law enforcement.

Legal Restraints

Sec 201(2) of the Constitution states that the SANDF may be employed "in co-operation with the police service, in defence of the Republic or in fulfilment of an international obligation, only on the authority of the President."⁷⁰ However, art 24(1) of Schedule 6 preserves the provisions in art 227 of the Interim Constitution⁷¹ until sub sec 2 of art 227 of the Interim Constitution is amended to read "(2) The National Defence Force shall exercise its powers and perform its functions solely in the national interest in terms of Chapter 11 of the Constitution of the Republic of South Africa, 1996"⁷² or any other amendment or any repeal of the relevant sections by an Act of Parliament passed in terms of sec 75 of the new Constitution.⁷³

This in effect means that the provisions in the Interim Constitution remain in force, being that the National Defence Force may be employed

- *"for service in the Defence of the Republic, for the protection of its sovereignty and territorial integrity;*
- *for service in compliance with international obligations of the Republic with regard to international bodies and other states;*
- *for service in the preservation of life, health or property;*
- *for service in the provision or maintenance of essential services;*
- *for service in the upholding of law and order in the Republic in co-operation with the South African Police Services under circumstances set out in law where the said Police Service is unable to maintain law and order on its own; and*

⁶⁸These figures were obtained during an informal interview with the senior Maritime Intelligence Officer at Silvermine on 9 Oct 97

⁶⁹ *Op Cit* Simpson-Anderson p17. See also *S v Pineiro and Others* 1992(2) SA 683 (Nm)

⁷⁰ Act 108 of 1996

⁷¹ Act 200 of 1993

⁷² Annexure D to Schedule 6 of Act 108 of 1996

⁷³ A reference to the "new" Constitution is a reference to Act 108 of 1996

- *for service in support of any department of state for the purpose of socio-economic upliftment.*⁷⁴

The present Defence Act⁷⁵ essentially reflects the provisions of the Interim Constitution.

Prof Devine has expressed the view that the provisions in Interim Constitution were far from satisfactory in providing a framework for the SANDF to be actively involved at law enforcement at sea. In referring to the new Constitution he states "*one finds that this topic has not been dealt with at all. The Constitution states that the primary objective of the NDF is to defend and protect the Republic. Perhaps one can infer from this that secondary objectives or tasks can be assigned to the NDF. Thus it would not be unconstitutional to use the NDF in law enforcement.*"⁷⁶

He states further that the only way he sees that the SANDF can be used entirely constitutionally for law enforcement at sea in terms of the new Constitution, is if the SANDF is used to fulfil international obligations in this regard. This could only occur if international conventions (which do not create obligations *per se*) are incorporated into domestic law, such as in Regulations to the SFA.⁷⁷

However, be that as it may, presently the provisions of the Interim Constitution and the Defence Act apply, and as such it is reasonably unproblematic to find justification for the SANDF to be used in law enforcement, with the proviso that any such action is in assistance to the SAPS or other delegated authority tasked with law enforcement, such as the Directorate Sea Fisheries. This opinion is expressed bearing the limited or even non-existent capability of those other departments to effectively manage and control the blue water marine resources.

In conclusion, it is suggested that by necessary implication and on a careful reading of the provisions of the interim and new Constitution (including reference to the provisions in the Defence Act), that the *posse comitatus* prohibition, in principle, is also applicable to the SANDF.⁷⁸

Other Restraints

There is a fundamental difference in mentality between soldiers and policemen. This should lead one to realise the inherent problem of expecting SANDF personnel to wear two hats. The problem is clearly stated in an editorial view as follows: "*For all the telling arguments of infrastructure, expertise, training facilities*

⁷⁴ sec 227(1) of Act 200 of 1993. See also Devine, D.J. "The National Defence Force: International operations, aggression, self-defence, use of force and conduct in hostilities under the Interim Constitution." (1995) 26 South African Yearbook of International Law p182

⁷⁵ sec 3(2) of Act 44 of 1957

⁷⁶ Devine, D.J. "The Maritime Sector: Constitutional Perspectives and Legislative Developments" : Paper delivered at the 5th Maritime Conference held at the Inter-Continental Cape Sun Hotel on 16 April 97

⁷⁷ *Ibid*

⁷⁸ Sec 227(1) of Act 200 of 1993, sec 201 of Act 108 of 1996 and sec 3(2) of Act 44 of 1957

and overall and compelling *chutzpa*, the navy, like the army, marches to a different drumbeat.”⁷⁹ . Some of the implications are as follows:

- The training and expertise required to successfully apprehend, prosecute and convict an offender is specialised. It also requires time. SANDF personnel are trained to operate at a different level, and training is premised on defending the territory of the Republic, guided only by the *ius ad bellum* , *ius in bello* and naval doctrine.
- There are political and financial implications. The fear has been expressed by other departments that if the SANDF was permitted to enforce civil law as a matter of rule in its own right, these departments would lose some of their authority, and subsequently their ability to motivate for funds. This is especially true of the SAPS and the Departments of Transport, Environmental Affairs and Tourism. This must also be seen in the light of the fact that the SAPS consider themselves to be the only authority for the enforcement of civil law.⁸⁰
- Many SANDF personnel, and especially in this regard the SAN, are of the opinion that these law enforcement duties are properly something which a Coastguard should do. They consider these Coastguard functions as boring and offering no challenge. Furthermore, they also hold the belief that such a function is below their dignity.⁸¹
- Concern has been expressed that if military personnel fulfil these tasks in assistance to other state departments, they run the risk of becoming “civilianised”, while at the same time personnel of these other departments run the risk of becoming “militarised”.⁸²
- The present Chief of the Navy, Vice Admiral R.C. Simpson-Anderson, (as well as previous Chiefs of the Navy) have adamantly expressed the view that the SAN will not assume primary responsibility for enforcement of civil law, and that such responsibility must remain that of the relevant departments.

Rear Admiral Bennett states that what is required to alleviate both the legal and other restraints and obtain clarity, is a policy decision. *“The main policy requirement is then to decide whether the SA Navy should become:*

- a primarily **military** organisation with a strong subsidiary coastguard role,

⁷⁹ Editor’s View contained in SA Commercial Marine Magazine, SA Commercial Fisherman, Mar-May 1994 p 3

⁸⁰ *Op Cit* Bennett p49

⁸¹ *Ibid*

⁸² *Ibid*

- a primarily **service** oriented organisation with a strong but subsidiary military role.⁸³

This question has plagued the policy and law makers for quite some time. The Floor Report⁸⁴ had as one of its tasks an investigation into precisely this question. Vice Admiral Simpson-Anderson has stated that the SA Navy has *“the ability to play an important peacetime role in support of the seaward functions of other state departments, notably the Department of Foreign Affairs, the Department of Environmental Affairs, the Department of Transport and the Department of Justice. This includes most of what could be termed seaward COAST GUARD functions. This ability has been repeatedly proved.....”*⁸⁵

CONCLUSION

The view taken by Bennett seems to have attained some political support in recent times. The Minister of Defence, J. Modise stated that *“[A]lthough the navy is designed to fulfil its primary role of defending the nation, it is also capable of assisting in the maritime policing task, and should do so to earn its keep. The central point to bear in mind is that South Africa, in fact, cannot afford both a navy and a coastguard, and it would be a downright waste of resources not to use the naval capability for peacetime purposes. The answer lies in mutual support of existing agencies.....”*⁸⁶

The RSA is now at the cross-roads in respect of law enforcement at sea. There appears to be political resolve to address the issue of economical utilisation of resources in maritime law enforcement at sea, driven by an austerity budget that is likely to continue well into the future. The question that now needs to be asked is not whether the SAN/SANDF should assume some responsibility for law enforcement at sea, but rather what the nature and extent of this responsibility should be, and how existing national resources can best be utilised to fulfil this function. Furthermore, both in terms of international law⁸⁷ and in terms of declared national policy, the RSA must formalise its assistance within the Southern African region in the area of maritime law enforcement. In both regards, the US law enforcement model can serve as a useful example.

⁸³ *Op Cit* Bennett p50

⁸⁴ *Op Cit* Floor Report

⁸⁵ *Op Cit* Simpson-Anderson p17

⁸⁶ *Op Cit* “The South African Navy and an African Renaissance”

⁸⁷ For example see the United Nations Convention on the Law of the Sea (1982) arts 63-67, 87, 108 and 116-120; and the UN Convention Against Illicit Traffic in Drugs and Psychotropic Substances (1988), art 17 regarding regional co-operation

RECOMMENDATIONS FOR FUTURE SOUTH AFRICAN MARITIME LAW ENFORCEMENT

It is clear that the fundamental principle that needs to underlie any future RSA maritime law enforcement regime, is the joint utilisation of available resources through inter-agency co-operation. This needs to be so both on a national and international level.

While it might be noble for the SAPS to cling to the belief that they are the premier law enforcement action, the simple reality is that they are incapable, both from a material and personnel point of view of conducting effective maritime interdiction operations. Even on the level of secondary responsibility, the Departments of Environmental Affairs and Tourism, the Commissioner of Customs and the Department of Transport, might arguably have the expertise, but not the material resources to effectively enforce their legislative responsibility. In the final analysis, it is only the DoD that has the present capability of rendering an effective maritime interdiction service.

Furthermore, bearing the present budgetary constraints in mind, it is highly unlikely that the SAPS and the other Departments will have a future capability to render an effective service. In any event, to provide these other departments with the means to conduct effective maritime interdiction operations, will inevitably result in duplication of effort, without necessarily increasing effectiveness. As has been said before, the RSA cannot afford a Coast Guard which enforces domestic legislation and a Navy which is maintained only to defend the RSA in times of conflict. The answer therefore, must lie in a redefinition of the role of the Navy, especially in time of peace.

One of the main arguments against the SAN's involvement in law enforcement at sea, is that the SAN will become "civilianised" and it would ultimately compromise its ability as a fighting force. From the US experience, it is quite clear that the Navy can be both a military force and a maritime interdiction force. Colonel Gorman stated in his briefing that the functions which the military perform in narcotics interdiction, is in essence up to 90% similar to purely military operations. He added that the US armed forces had not in any way compromised their fighting ability by becoming involved in maritime law enforcement.⁸⁸ From the USCG's point of view, the fact that they have been designated the lead agency in maritime law enforcement, has not weakened their military capability in any way. USCG officers constantly mention the effective role USCG forces played during Operation Desert Storm.

⁸⁸ Summarised content of a briefing attended at the HQ of the Joint Integrated Agency Task Force East (JIATF East) in Key West, Fla on 5 Mar 98, by Colonel J. Gorman (USAAF), the Chief of Staff of JIATF East

From a training point of view, it is true that the SAN, if it had to become involved in maritime law enforcement as one of its missions, would have to revise to the training curricula to meet the new challenge. While this might at first glance mean that the majority of naval personnel have to be retrained, it is contended that it might not be necessary. The LEDET concept might mean that only small numbers need to be trained initially. The SAN has a Military Police organisation already, who are already trained in the art of arrest, obtaining and preparing of evidence and investigating of crime. Their training could be expanded to include maritime law enforcement. LEDETs could be deployed on SA ships going on patrols, allowing the ship's company to get on with their tasks, without having to become involved with the actual law enforcement tasks.

Inter-agency/departmental involvement in law enforcement in the RSA's zones must be formalised in MOUs and MOAs, clearly defining the roles of each of the agencies/departments and describing the manner in which all available assets can be best utilised. These agreement should also include defined areas of lead responsibilities. By this it is meant for example, the SAPS is given lead responsibility for coastal zone law enforcement up to say 3 or 4 nm. The SAN is given lead responsibility for law enforcement in the remaining area. This demarcation of responsibility will result in efforts not being duplicated, and will allow for clarity in respect of budgetary issues and identification of priorities. This separation must of course be seen in conjunction with MOUs between other Departments who carry administrative responsibility to ensure that the law is complied with. There is arguably no need for all these departments to appoint "policemen" to enforce their legislation. This can be delegated to other agencies such as the SAPS and the DoD. By way of example, Greg Mills states that *"70% of drug seizures world-wide are made by customs services, again inter-departmental co-ordination and operations will be imperative."*⁸⁹ The attached annexures to this paper serve as good examples of how this can be achieved.

On an international level, the momentum already achieved by the formation of SADC, and the requests by some governments for RSA assistance in patrolling their waters, needs to be formalised by regional agreements. These agreements must be more comprehensive than the diplomatic exchange of intentions entered into between Namibia and the RSA, which is worth little more than the paper it is written on. They should also be standing agreements, not requiring diplomatic initiatives each and very time before action can be taken in accordance with the agreement. The RSA can also benefit from such international co-operation. Both the French and the English have a permanent presence in the southern oceans. There is no reason why co-operation in the form of bilateral agreements would not be successful in interdicting illegal fishing around the southern islands. Such co-operation on a regional and international level would certainly be in the spirit of SADC and international law.

⁸⁹ Mills, Greg A Bridgehead into Africa ? A Maritime-Naval Strategy for Security Building in Southern Africa, a paper delivered at the SA Navy Annual Conference on 23 Oct 97

Mills states that “[A]s a comparatively benign instrument of state, maritime and naval co-operation could significantly enhance and improve regional confidence, and act in itself as a confidence-building measure.....Maritime co-operation will contribute to regional stability by easing tensions and reducing the risks of conflict while helping to promote a stable maritime regime in the region with the free and uninterrupted flow of seaborne trade, and nations able to pursue their maritime interests and manage their marine resources in an ecologically sustainable manner in accordance with the agreed principles of international law”⁹⁰

The only question that needs to be asked is whether the SAN should become involved in service or coastguard functions. From a political point of view, the question seems to have been answered by the Minister of Defence. From a military point of view, the expressed fears seem to be groundless. The SAN has collateral utility and must be utilised for the benefit of the state, especially in peacetime. There is simply no way that the Chief of the Navy can justify the SAN’s existence and cost, purely on the premise of defence.

The Floor Report recommended the following:

- “(a) That the responsibility of the Defence Force in terms of the Defence Act, 1957, be acknowledged in the declaration of a National Maritime Policy.
- (b) That the Defence Act, 1957, be amended or other legislation be adopted or amended to permit the use of the Defence Force in the provision of national or regional services.....

(e) That the SA Defence not assume responsibility for coast guard functions or the proposed SA Coastal Patrol Service, but afford assistance with patrolling and other Government maritime responsibilities, as described in paragraphs 4.2.15 - 4.2.18.”⁹¹

It is agreed that the RSA needs a national maritime policy, in that the policy can set the tone for future legislation to institutionalise the SAN’s role in maritime law enforcement. However, it cannot be agreed that the SANDF should not be given primary responsibility for law enforcement. To suggest this would leave the RSA in exactly the same position as it is now. Without assigned responsibility, the RSA’s maritime enforcement regime will continue to depend on SANDF assistance on an *ad hoc* basis, and will continue to present difficulty in respect of budget appropriations for maritime law enforcement. In a nutshell, those who cannot will continue to get the funds, whilst those who can will not get the funds to provide an effective service, even while they are expected to. Floor in this sense misses the point entirely. There is no reason why the SANDF (SAN) cannot be assigned lead responsibility.

⁹⁰ *Ibid*

⁹¹ *Op Cit* Floor Report, p134/135

Vice Admiral Simpson-Anderson acknowledges the SAN's collateral utility and supports the view that the SAN get responsibility for law enforcement⁹². Trevor Walker had the following to say : *"The South African Navy.....remains convinced that a South African Coast Guard should be established as a separate flotilla within the Navy. Chief of the Navy, vice-admiral Robert Simpson-Anderson, says it makes no sense to ignore or attempt to duplicate the infrastructure and expertise of the navy already in place."*⁹³

Whether or not the proposal that a separate flotilla be formed is the most cost-effective method of doing things, is a matter of debate. The LEDET concept and shiprider method might mean that the SAN has to do nothing other than send ships to sea, which it does anyway. The LEDET concept and a shiprider method is not incompatible with SAN lead agency responsibility in maritime law enforcement. These concepts will increase the capability of the SAN to embark law enforcement personnel on non-naval platforms and perhaps even on the law enforcement vessels of other states. The only aspect that will need addressing is the question of legislation, (as suggested by Floor) to give effect to this added responsibility. However, this will result in the SAN having the legislative means to render an effective service, and perhaps the budget to do it.

⁹² Simpson-Anderson, R.C., *The South African Navy as part of the African Renaissance - Setting the pace for the Future*, a paper delivered at the SA Navy Conference on 23 Oct 97

⁹³ Walker, Trevor, "SA Navy Begs to Differ...", *SA Commercial Fisherman*, March - May 94, p4

ANNEXURE A

DRUG INTERDICTION LEAD AGENCY ROLE

MEMORANDUM OF UNDERSTANDING

between the

US COAST GUARD

and

US CUSTOMS SERVICE

MAY 11, 1987

ARTICLE I - GENERAL INFORMATION

The United States Coast Guard (USCG) and the United States Customs Service (USCS) share much of the responsibility for the enforcement of Federal statutes related to the interdiction of contraband drugs. The prevention of the introduction of such drugs into the United States requires the joint efforts of both parties to this memorandum along with the co-operation of other federal, state and local law enforcement entities.

ARTICLE II - STIMULUS FOR AGREEMENT

The DoD Authorisation Act of 1987 requires in part, that the President submit to the Congress within 180 days of the enactment of the statute, a comprehensive program designed to interdict aircraft, vessels and vehicles carrying illegal drugs into the United States. This requirement has prompted a review of the existing roles of the federal agencies involved and is the stimulus for this agreement.

ARTICLE III - PURPOSE

The parties have entered into this Agreement to

- a. promote a co-operative effort to interdict drugs; and
- b. resolve differences related to the designation of lead agencies in various facets of interdiction.

ARTICLE IV - GENERAL RESPONSIBILITY OF AGENCIES

- a. The USCG and USCS will work closely with each other in the national interest. They will actively support each other, consistent with resource and jurisdictional limitations.

- b. It is anticipated that most actual planning and execution of operational efforts will be accomplished at the USCG Area or District and USCS Field Organisational levels.
- c. Nothing in this agreement is intended to restrict the authority of either agency to enforce federal laws.
- d. The Lead Agency in the Land, Air and Maritime Blocks respectively is the agency responsible for the development, implementation and co-ordination of these activities. This designation does not connote exclusive responsibility nor command and control of the resources of any other agency.

ARTICLE V - ORGANISATION

Figure (1) is an organisation chart depicting the lead agency assignments covered by this agreement.

INTERDICTION

The USCS will permanently chair the Interdiction Block for the NDPB with Coast Guard as a permanent Deputy. This program area covers all those actions taken to identify and prevent the illegal importation of restricted and prohibited drugs into the United States. The role of the Lead Entity for Interdiction is as follows:

- a. Review drug trafficking threat assessments.
- b. Make recommendations to the Policy Board Co-ordinating Group concerning the distribution of resource, concentration of interdiction efforts, and general conduct of Drug Interdiction.
- c. Develop interdiction strategies, and a general implementation plan for that strategy.
- d. Establish liaison with state and local enforcement agencies for the purpose of joint operations.
- e. Resolve issues between operational lead agencies.

No command or control is vested in this entity.

LAND

The USCS is the Lead agency to identify and prevent the illegal importation of restricted and prohibited drugs across a land border of the United States. The role of the Land Lead Agency is as follows:

- a. Develop National and Regional Plans for Ports of Entry and Land Borders consistent with the National Strategy.
- b. Acknowledge and encourage the contribution of other agencies to help meet the goals of the land plan.
- c. Acknowledge the authority of all other agencies to carry out routine operations consistent with the objectives of the land plan, and the legal jurisdiction of that agency.
- d. Co-ordinate the execution of the National and Regional plans through the field organisations of own and support agencies.
- e. Co-ordinate as necessary with the other lead agencies to meet the goals of the national strategy.
- f. Co-ordinate all multi-agency operations.
- g. Task the C3I Centres as necessary to provide adequate air interdiction support.

MARITIME

The USCG is the lead agency in the interdiction of illegal drugs in the Maritime Area from the shoreline seaward. The role of the Maritime Lead Agency is as follows:

1. Develop National and Regional maritime interdiction plans consistent with the national strategy.
2. Acknowledge and encourage the contribution of other agencies to help meet the goals of the maritime plan.
3. Acknowledge the authority of all other agencies to carry out routine operations in the maritime area, consistent with the objectives of the maritime plan, and the legal jurisdiction of that agency.
4. Co-ordinate the execution of the National and Regional Plans through the field organisations of own and support agencies.
5. Co-ordinate as necessary with the other lead agencies to meet the goals of the national strategy.
6. Co-ordinate all multi-agency operations in the Maritime areas.
7. Task the C3I centres as necessary to provide adequate air interdiction support.

The USCS jurisdiction is clearly recognised in the 12 mile contiguous zone. The current USCS inventory of vessels is recognised as substantial assets to be used within the contiguous zone. Blue Lightning Operations Centres (BLOCS) shall co-ordinate their operations with Coast Guard District Operation Centres to facilitate the optimum co-ordination of surface operations and avoid mutual interference.

Enforcement activities on the high seas outside the contiguous zone is clearly recognised as a Coast Guard operation. This may be augmented by support assets such as Law Enforcement Detachments (LEDETs) on US Navy vessels co-operative arrangements with vessels of foreign nations and special arrangements to facilitate other agencies support, such as the current arrangement allowing USCS to patrol the high seas between Bimini and the Florida coast.

AIR

The Air block is unique for many reasons resulting in a JOINT responsibility for leadership. Airspace not only exists over the land and sea with the consequent requirements for co-ordination of activities with both these lead agencies, it also is an interdiction environment of its own. The expertise of both agencies is required and the time and distance factors involved demand the centralised command and control centres (C3I (SW) and (SE). The Air Block on Figure (1) represents the Washington, DC headquarters influence and oversight of the two agencies. Their role is:

- a. Develop an air interdiction plan based on the national strategy.
- b. Seek the assistance of other support agencies, especially DoD.
- c. Distribute agency resources so as to optimise the air interdiction plan's potential for success.
- e. Remain aware of the air interdiction needs of both the Land and Maritime lead agencies as reflected in their National and Regional plans and blend those needs into the Air Interdiction Plan.

C3I CENTRES (BOTH)

The C3I Centres are the operational nerve centres for air interdiction. They control the routine daily business by utilising the resources provided from the Detection, Tracking and Apprehension blocks in such a manner as to optimally prosecute the cases at hand.

C3I CENTRE SOUTHWEST

Due to the concentration of land border with Mexico, in this area the C3I SW is a USCS operation. USCS shall be designated as lead agency for all aspects of Air operations in the SW and will provide resources to the C3I SW.

C3I CENTRE SOUTHEAST

This Agreement reaffirms the JOINT Command and Control of C3I Centre South East. In this most crucial high volume centre the joint manning, rotating command and the operational parameters listed in the 16 March Agreement are reaffirmed here.

- a. Customs will command the Southeast C3I Centre until 30 June 1989 with two year rotation thereafter. Deputy will be other Agency between Customs and USCG.
- b. The C3I Centre will have operational control of all assets chopped to the Centre, including other federal, state, and local assets.
- c. All C3I Centre operational staff will be provided on a 50-50 basis. Senior operational positions are to be evenly split between Customs and USCG.
- d. Surface operations Command Centres will remain under Agency control. Agency surface interdiction operations will be co-ordinated with the C3I Centre. For specific operations, surface units may be chopped to the C3I Centre.
- e. Each agency agrees to devote significant air and surface assets to be commanded from the C3I Centre.

The three blocks under the C3I Southeast are defined as the lead providers of air resources to the C3I Southeast. There is no command or control inherent in these blocks.

DETECTION

The USCG is designated the lead agency to provide detection assets to the C3I Centre Southeast. Inherent in this responsibility will be the co-ordination and utilisation of all surveillance assets capable of detecting airborne drug smugglers. These include the two E2C's on loan to the USCG from the USN, the aerostats at Georgetown, Cudjoe Key and Patrick AFB as well as all future detection assets deployed to the Southeast, including additional F/W AWACS platforms that become available from the USCS when no longer required to support the C3I Southwest. This should occur when the aerostats and the modified P3A's are in place along the Southwest border. The Coast Guard is willing to take over those assets at a time mutually agreeable to both agencies.

TRACKING

The USCS is designated the lead agency to provide tracking assets to the C3I Southeast. This adjusts the December 13, 1986 NDEPB decision because the

block designation has been changed to reflect a resource provision role, not an operational role.

Both agencies are committed to dedicating significant tracking assets to the C3I Centre Southeast. For the Coast Guard, this commitment is limited to eight (8) HU-25 Falcons for use as tracker/interceptors.

APPREHENSION

The USCS is designated the lead agency to provide apprehension assets to the C3I Centre Southeast.

ANNEXURE B**INTERAGENCY AGREEMENT**

between the

UNITED STATES COAST GUARD

and the

DRUG ENFORCEMENT ADMINISTRATION

ARTICLE 1 - GENERAL INFORMATION

1. The United States Coast Guard (USCG), and the Drug Enforcement Administration (DEA) both share responsibility for enforcement of Federal statutes related to the suppression of trafficking in narcotics and other dangerous drugs.

2. The prevention of the introduction of narcotics and other dangerous drugs into the United States requires the joint effort of such parties to this agreement along with the co-operation of other federal, state and local law enforcement agencies. The efforts include, but are not limited to the gathering and dissemination of intelligence, deterring potential violators, interdicting shipments of narcotics and other dangerous drugs, and the apprehension of violators.

ARTICLE II - REFERENCE AND AUTHORITY

Agreement between the USCG and DEA is entered into under the authority of 14 USC 141 and 21 USC 873, among others.

ARTICLE III - PURPOSE

The parties have entered into this Agreement to promote the effective utilisation of personnel and facilities through a co-operative effort and for the following specific purposes

- a. to define the nature and extent of the services, systems and facilities each agency may provide; and
- b. to provide for the timely interchange of information to permit proper planning, programming, budgeting and evaluation.

ARTICLE IV - RESPONSIBILITIES OF AGENCIES

1. In the national interest, the USCG and DEA will work in close co-operation and support each other with respect to the suppression of trafficking in narcotics and other dangerous drugs, by enforcing Federal laws related to that illegal trafficking.

2. It is anticipated that most of the planning and execution of operational enforcement and surveillance efforts will be accomplished at the USCG Area or District, and DEA Regional or District levels.

3. In general, within the limits of its budgetary and personnel capabilities, the USCG to the extent practicable:

- a. Is generally responsible for at-sea enforcement which involves efforts outside the customs waters of the United States.
- b. Shares responsibility with the US Customs Service for at-sea enforcement within the customs waters of the United States.
- c. Will provide personnel and facilities, including aircraft and vessels, necessary for effective at-sea surveillance, intelligence gathering and enforcement.
- d. Will generally effect all arrests and seizures when a boarding is conducted for a Coast Guard unit.
- e. Will make every practicable effort to meet all DEA requests for cutter and aircraft assistance, including rapid response to urgent operational requirements. (Urgent Search and Rescue missions will take precedence).
- f. Will provide communications support for units involved in maritime operations, with the exception of special equipment that may be more properly provided by DEA.
- g. Will designate a contact point(s) at the Headquarters level to coordinate all law enforcement efforts which require co-ordination at that level.
- h. Will provide informal training in the operation and maintenance of small boats.
- i. Will be responsible for co-ordination with the Department of State for enforcement action taken against foreign vessels by or from a Coast Guard unit.
- j. Will provide maritime related enforcement information, as gathered, to DEA and other appropriate agencies.
- k. Will provide or permit the use of such other USCG personnel, facilities, or equipment as may be agreed upon from time to time.

- i. Will provide USCG personnel to assist with manning of the El Paso Intelligence Centre and will participate as member of the EPIC Advisory Board.

4. In general, within the limits of its budgetary and personnel capabilities, DEA to the extent practicable:

- a. is responsible for the gathering and dissemination of intelligence related to the trafficking in narcotics and other dangerous drugs.
- b. is responsible for non-maritime related enforcement of controlled substance laws, and investigation of possible violations of controlled substance laws for the purpose of prosecution.
- c. will provide personnel to USCG units assigned to patrols designed for the interdiction of narcotics and other dangerous drugs. The DEA personnel so assigned shall be available to advise the unit commander and to accompany, assist and advise boarding parties.
- d. will generally effect all arrests and seizures when a boarding is conducted from a DEA unit.
- e. will provide training in identification and testing of narcotics and other dangerous drugs.
- f. will provide enforcement information, as gathered, to USCG and other appropriate agencies.
- g. will provide or permit the use of such other DEA personnel, facilities or equipment as may be agreed upon from time to time.
- h. will designate a contact point(s) at the Washington level to co-ordinate all law enforcement efforts which require co-ordination at that level.
- i. will be responsible for co-ordination with the Department of State for enforcement action taken against foreign vessels by or from a DEA unit.

ARTICLE V - PLANNING

1. The USCG will plan effective facilities and equipment for at-sea enforcement.
2. The DEA will keep the USCG informed, on a continuing basis, as to both detailed and long range plans related to the joint effort or which may affect the Coast Guard's personnel and facility requirements.

3. The USCG will, in turn, keep DEA similarly informed as to additional requirements and the outlook for USCG facilities available for use in the joint effort.

ARTICLE VI - PUBLIC AFFAIRS

1. Each agency will keep the other advised of all public affairs matters, including news releases and major speeches that concern the other agency. News releases of national interest will be co-ordinated between the appropriate public affairs personnel in Washington, DC and released simultaneously whenever possible. Releases of local or regional interest will be co-ordinated and released jointly at the USCG Area or District level and the DEA Regional level, with copies sent to the Washington Public Affairs Offices. Each agency will exercise discretion in responding to inquiries with factual information concerning its own actions.

2. When the Attorney General or his representative determines that the release of information to the mass media would adversely affect the rights of defendants to a fair trial, or that release would compromise ongoing investigations, information will not be released.

ARTICLE VII - SUBSIDIARY AGREEMENTS

In context with the purpose and provisions of this Agreement, a local working agreement or memorandum of understanding (MOU) may be developed by and between USCG Area or District Commanders and DEA Regional or District Directors. No provision of any local agreement or MOU will contravene the spirit or letter of this Agreement. Copies of such working agreements will be forwarded to the Commandant, USCG, and the Administrator, Drug Enforcement Administration, for approval, and shall not become effective until so approved.

ARTICLE VIII - AMENDMENTS

This Agreement and any local Agreement pursuant to Article VII may be amended from time to time as may be mutually agreeable to the parties thereto.

ARTICLE IX - TERMINATION

This Agreement may be terminated by either party upon 60 days advance written notice thereof to the other party.

ANNEXURE C**MEMORANDUM OF UNDERSTANDING BETWEEN HQ NORTH AMERICAN AEROSPACE DEFENSE COMMAND (NORAD) AND THE UNITED STATES CUSTOMS SERVICE (USCS)****1. REFERENCES**

- a. MOU among DoD, US Coast Guard and US Customs Service (no date).
- b. MOU between USCINCLANT and CINCNORAD concerning Command Relationships with regards to Counternarcotics Surveillance Operations, 3 Jul 89.
- c. HQ NORAD/J3 message 081600Z Aug 89, Subj: Consolidated Guidance for NORAD Counternarcotics Ops.
- d. Letter of Agreement 1 Jul 88, HQ US Customs Service Aviation Operations Centre (West) and Southwest Air Defense Sector.
- e. HQ NORAD/J3 message 172315Z Aug 89, Subj: Standard Terminology for Counternarcotics Operations.

2. **PURPOSE.** This memorandum of understanding sets forth the relationships and delineates responsibilities of the signatory parties as to their involvement in the detection and monitoring of suspected aerial traffic of illegal drugs into North America.

3. **BACKGROUND.** The NORAD role is to conduct operations to detect and monitor suspected illicit aerial drug traffickers and to support the law enforcement interdiction process. The USCS is principally involved with interdiction, however, USCS aerial and ground based surveillance assets can be employed in support of the NORAD detection and monitoring role when available. The USCS role is to effect the arrest, apprehension and seizure of illicit drug traffickers, contraband and assets.

4. IT IS AGREED

- a. NORAD is the lead agency for the detection and monitoring of suspected aerial traffic of illegal drugs into the US and Canada. As such, NORAD has the responsibility to co-ordinate and integrate the multiagency surveillance effort.

- b. To facilitate the closest possible co-operation/liaison between USCS and NORAD, all policy, plans, exercises, intelligence and operational matters involving the USCS will be co-ordinated through a USCS liaison officer to NORAD (Terms of Reference attached).
- c. The concept of joint operations recognises the legal and practical division of responsibilities between the two parties. NORAD Region Operations Control Centres (ROCCs)/Sector Operations Control Centres (SOCCs) will conduct detection and monitoring operations and interface with the appropriate C31 Centres (East and West). The SOCC Senior Director (SD) will interface with his Customs counterpart, the Command Duty Officer, to ensure a positive hand-off of any suspected aircraft. The C31 Centre will co-ordinate the Law Enforcement Agencies (LEA) interdiction activity, review and compare operations logs as required to ensure compatibility and efficiency of operations. Relevant operational intelligence information will be exchanged as appropriate in a timely manner.
- d. The USCS through the Customs National Aviation Centre (CNAC) will provide Customs Service Detection System specialists for NORAD dedicated E-3 AWACS Counternarcotics Missions. CNAC will also participate in the periodic planning process for scheduling such missions. Unscheduled requests for NORAD E-3 services will be made directly to the Air Defense Operations Centre (ADOC) via C3IE, or CNAC. After initiating the request to the ADOC, the C3IE, C3IW or CNAC will co-ordinate information about the request and expected activity with the appropriate NORAD SOCC. The ADOC will forward the request to the NORAD Command Centre for action. The NORAD Command Director is responsible for the final assignment and commitment of all NORAD assigned assets.
- e. Normally USCS interceptors will effect intercept of suspected drug tracks. However, NORAD fighters may be launched by the SOCC, either upon USCS request or at the discretion of the SQCC SD with USCS notification/co-ordination, to effect interception. Close co-operation between SOCCs and C31 Centres, including timely exchange of aerial operations information and follow-up is essential for respective mission success.
- f. Secure communications are to be used to the maximum extent possible.
- g. This understanding is effective upon signature. It will be reviewed as required, but no later than biennially. Amendments to this MOU caused by administrative or organisational changes will not require renegotiation of the basic MOU. There are two originals of this agreement. One original is held by USCS, the other by CINCNORAD.

ANNEXURE D**MEMORANDUM OF AGREEMENT BETWEEN THE DEPARTMENT OF DEFENSE AND THE DEPARTMENT OF TRANSPORTATION ON THE USE OF US COAST GUARD CAPABILITIES AND RESOURCES IN SUPPORT OF THE NATIONAL MILITARY STRATEGY****PURPOSE**

1. To identify national defense capabilities of the Coast Guard.
2. To improve Coast Guard responsiveness as a force provider.

AUTHORITY AND BACKGROUND

3. The Coast guard is, by statute, "a military service and a branch of the armed forces of the United States at all times" (14 USC 1). It is required to "maintain a state of readiness to function as a specialised service in the Navy in time of war" (14 USC 2). It is also specifically authorised to assist the Department of Defense in performance of any activity for which the Coast Guard is especially qualified (14 USC 141).

4. Strategic, political, and fiscal imperatives are driving change in the size and composition of the Armed Forces. Aggressive use of inter-service teamwork and resource integration is essential to maintain overall combat effectiveness. Coast Guard military capabilities must be clearly identified and accounted for in the evolving national force structure. The Navy and the Coast Guard have undertaken a joint evaluation of Coast Guard roles, missions, and functions in national defense.

DISCUSSION

5. Coast Guard participation in Defense operations competes with other statutory missions. This competition invites case-by-case analysis of each request for assignment of Coast Guard resources to Department of Defense operations, with uncertain outcome. Including Coast Guard forces in deliberate plans reduces redundancy and sub-optimal use of military capabilities resident in the national inventory.

ACTION

6. The Secretary of Defense and the Secretary of Transportation agree to the following:

- a. The Chief of Naval Operations and the Commandant of the Coast Guard will jointly review Service capabilities to identify and document appropriate roles, missions, and functions of the Coast Guard in the support of the national military and naval strategies.
- b. Coast Guard national defense roles, missions, and functions shall be documented and updated as necessary in the annexes to this MOA. Each annex shall be individually approved and signed by the Chief of Naval Operations and the Commandant of the Coast Guard. The Service Chiefs shall keep their respective Secretaries apprised of the contents of these annexes.
- c. Annexes to this MOA shall become references for joint force assessments, joint maritime planning, training, and operations, and be incorporated into applicable joint and naval doctrine. As appropriate, they shall be provided as input to the periodic Report on the Roles, Missions and Functions of the Armed Forces required by Title 10, United States Code.
- d. This MOA constitutes inter-departmental recognition that the Coast Guard should be utilised for certain roles, missions, and functions designated in the MOA annexes; it does not, however, impose programming or budgeting obligations on either department. Assignment of Coast Guard forces for these missions shall be executed in accordance with current statutes.

EFFECTIVE DATE

7. This agreement is effective upon signature. It may be amended by mutual written agreement between the Secretary of Defense and the Secretary of Transportation. It terminates upon notification by any signatory of their intent to cease all obligations pursuant to this MOA. Annexes to this MOA may be amended and revised by mutual written agreement between the Chief of Naval Operations and the Commandant of the Coast Guard.

ANNEX A TO MEMORANDUM OF AGREEMENT BETWEEN THE DEPARTMENT OF DEFENSE AND DEPARTMENT OF TRANSPORTATION ON THE USE OF US COAST GUARD CAPABILITIES AND RESOURCES IN SUPPORT OF THE NATIONAL MILITARY STRATEGY

MARITIME INTERCEPTION OPERATIONS

DISCUSSION

A Maritime Interception Operation (MIO) is conducted to enforce the seaward portion of certain sanctions against another nation or group of nations. It may include stopping, boarding, searching, diverting or redirecting vessel traffic.

MIO is a resource-intensive, relatively low-threat operation that requires specialised training and a sustained presence in the area of operations. Vessels and aircraft involved in MIO engage primarily in surveillance and delivery of boarding teams to intercepted vessels. Dependent upon the overall threat environment, technology-intensive platforms may not be required for mission accomplishment.

The Coast Guard maintains many proficiencies and platforms directly applicable to MIO. In routine execution of peacetime missions such as maritime law enforcement, Coast Guard personnel, cutters and aircraft regularly conduct surveillance, interception and boarding activities. Use of trained Coast Guard personnel and Coast Guard platforms for MIO is an appropriate resource-to-mission match in certain threat environments.

Coast Guard participation in MIO can improve mission effectiveness through the employment of trained and practised Coast Guard forces. Enhanced combat effectiveness and overall efficiency can also be realised by redirecting naval combatants to higher-threat missions.

ACTION

The Navy and the Coast Guard agree that it is appropriate and desirable for the Coast Guard to participate in Maritime Interception Operations. To this end, both Services support fully the deployment of Coast Guard personnel and platforms for appropriate MIO missions. Commitment of forces will be co-ordinated between the CINCs, Services, and the Secretaries of the respective departments on a case-by-case basis

ANNEX B TO MEMORANDUM OF AGREEMENT BETWEEN THE DEPARTMENT OF DEFENSE AND DEPARTMENT OF TRANSPORTATION ON THE USE OF US COAST GUARD CAPABILITIES AND RESOURCES IN SUPPORT OF THE NATIONAL MILITARY STRATEGY

ENVIRONMENTAL DEFENSE OPERATIONS

DISCUSSION

Massive marine pollution incidents, such as the Iraqi-generated crude oil spill during Operation Desert Shield/Desert Storm, have the potential to disrupt defense operations, impact national economies, and do enormous damage to natural resources in the littoral zone. The Coast Guard and Navy have shared interests and complementary capabilities for protecting the marine environment through efforts to prevent and mitigate incidents of marine pollution.

As the lead Federal agency charged with preventing and responding to marine pollution incidents, the Coast Guard is organized and equipped to command, coordinate, and provide forces for the response to major spills or environmental disasters.

ACTION

The Navy and the Coast Guard agree that it is appropriate and desirable that the Coast Guard participate with the Navy in Environmental Defense Operations and pollution response activities and that the following action be taken:

The Coast Guard will actively participate in the joint operational planning process including anticipation of environmental exploitation during hostilities and the development of related intelligence to facilitate response and minimize operational interference and environmental damage. The Navy and Coast Guard will also establish procedures to co-ordinate response to pollution incidents in peacetime, overseas or in domestic waters, to maximise resources and capabilities.

ANNEX C TO MEMORANDUM OF AGREEMENT BETWEEN THE DEPARTMENT OF DEFENSE AND DEPARTMENT OF TRANSPORTATION ON THE USE OF US COAST GUARD CAPABILITIES AND RESOURCES IN SUPPORT OF THE NATIONAL MILITARY STRATEGY

DEPLOYED PORT OPERATIONS, SECURITY AND DEFENSE

DISCUSSION

Deployed Port Operations, Security and Defense (DPOSD) is conducted to ensure port and harbour areas are maintained free of hostile threats, terrorist actions and safety deficiencies which would be a threat to support and resupply operations. DPOSD also ensures the safe and efficient operation of all vessels and facilities within the port, harbour, and harbour approach environment.

DPOSD is a resource-intensive operation which requires special training and a continued, sustained presence within the area of operations and includes: port safety and security, marine environmental protection, waterways management, and search and rescue.

The Coast Guard maintains both the proficiency and platforms directly applicable to DPOSD and maintains currency of experience through routine, peacetime operations. Use of trained Coast Guard personnel and Coast Guard platforms for DPOSD is an appropriate resource-to-mission match.

Coast Guard participation in DPOSD during contingency operations will improve mission effectiveness through the employment of trained and experienced Coast Guard forces. Enhanced combat effectiveness and overall efficiency will also be realised by enabling the redirection of naval forces from DPOSD to higher-threat missions.

ACTION

The Navy and Coast Guard agree that it is appropriate and desirable for the Coast Guard to participate in Deployed Port Operations, Security and Defense. To this end, both Services support fully the deployment of Coast Guard personnel and platforms for DPOSD.

The Navy and the Coast Guard will consult and closely co-ordinate their force allocations to DPOSD in order to provide an effective force package to supported CINCs while ensuring that national objectives and competing demands on force employment are met.

ANNEXURE E

**AGREEMENT BETWEEN
THE GOVERNMENT OF THE UNITED STATES OF AMERICA
AND
THE GOVERNMENT OF _____
CONCERNING CO-OPERATION TO SUPPRESS ILLICIT TRAFFIC BY SEA**

PREAMBLE

The Government of the United States of America and the Government of _____ (hereafter, the "parties");

Bearing in mind the special nature of the problem of illicit maritime drug traffic;

Having regard to the urgent need for international co-operation in suppressing illicit maritime drug traffic which is recognised in the 1961 Single Convention on Narcotic Drugs and its 1972 Protocol in the 1971 Convention on Psychotropic substances, and in the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereinafter, the "1988 Convention"), and in the 1982 United Nations Convention on the Law of the Sea;

Recalling that paragraph 9 of Article 17 of the 1988 Convention requires the Parties to consider entering into bilateral agreements to carry out, or enhance the effectiveness of, its provisions;

Desiring to promote greater co-operation between the parties, and thereby enhance their effectiveness in combating illicit traffic by sea;

Have agreed as follows:

NATURE AND SCOPE OF AGREEMENT

1. The parties shall co-operate in combating illicit maritime drug traffic to the fullest extent possible, consistent with available law enforcement resources and related priorities.

DEFINITIONS

2. In this agreement, unless the context otherwise requires:

- a. "illicit traffic" has the same meaning as that term is defined in the 1988 Convention.

- b. "_____ territory" means the land (and islands) under the sovereignty of _____.
- c. "_____ waters" means the territorial sea (insert archipelagic waters, if applicable) and internal waters of _____.
- d. "_____ airspace" means the airspace over _____ territory and waters.
- e. "law enforcement vessels" means warships and other ships, of the Parties or of third States, aboard which law enforcement officials are embarked, clearly marked and identifiable as being on government service and authorised to that effect, including any embarked boat or aircraft.
- f. "law enforcement authority" means: for the Government of the United States of America, the United States Coast Guard; and for the Government of ____, the _____.
- g. "law enforcement officials" means: for the Government of the United States of America, uniformed members of the United States Coast Guard; and for the Government of _____, uniformed members of _____.

SHIPRIDER PROGRAM AND ENFORCEMENT IN AND OVER _____ WATERS

- 3. Maritime counter-drug operations in _____ waters are the responsibility of, and subject to the authority of, the Government of _____.
- 4. The parties shall establish a joint law enforcement shiprider program between their respective law enforcement authorities. Each Party may designate a co-ordinator to organise its program activities and to identify the vessels and officials involved in the program to the other Party.
- 5. The Government of _____ may designate qualified law enforcement officials to act as law enforcement shipriders. Subject to _____ law, these shipriders may in appropriate circumstances:
 - a. embark on US law enforcement vessels;
 - b. authorise the pursuit, by the US law enforcement vessels on which they are embarked, of suspect vessels and aircraft fleeing into _____ waters;
 - c. authorise the US law enforcement vessels on which they are embarked to conduct counter-drug patrols in _____ waters.

- d. enforce the laws of _____ in _____ waters or seaward therefrom in the exercise of the right of hot pursuit or otherwise in accordance with international law; and
- e. authorise the US law enforcement officials to assist in the enforcement of the laws of _____.

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

- a. embark on _____ law enforcement vessels;
- b. advise and assist _____ law enforcement officials in the conduct of boardings of vessels to enforce the laws of _____;
- c. enforce, seaward of the territorial sea of _____, the laws of the United State where authorised to do so; and
- d. authorise the _____ law enforcement vessels on which they are embarked to assist in the enforcement of the laws of the United States seaward of the territorial sea of _____.

7. When a shiprider is embarked on the other Party's vessel, and the enforcement action being carried out is pursuant to the shiprider's authority, any search or seizure of property, and detention of a person, and any use of force pursuant to this agreement whether or not involving weapons, shall be carried out by the shiprider except as follows:

- a. crew members of the other Party's vessel may assist in any such action if expressly requested to do so by the shiprider and only to the extent and in the manner requested. Such request may only be made, agreed to and acted upon in accordance with the applicable laws and policies of both parties; and
- b. such crew members may use force in self-defense in accordance with the applicable laws and policies of their government.

8. The Government of the United States of America shall not conduct maritime counter-drug operations in _____ waters without the permission of the Government of _____, granted by this agreement or otherwise. This agreement constitutes permission by the Government of _____ for United States maritime counter-drug operations in any of the following circumstances:

- a. an embarked _____ shiprider so authorises;

- b. a suspect vessel or aircraft, detected seaward of the territorial sea of _____ enters _____ waters or airspace and no _____ shiprider is embarked on a US law enforcement vessel in the vicinity, and no _____ law enforcement vessel is immediately available to investigate, the US law enforcement vessel may follow the suspect vessel or aircraft into _____ waters in order to investigate, and board and search the vessel, and, if the evidence warrants, detain the vessel and the persons on board pending expeditious disposition instructions from _____ authorities; and
- c. no _____ shiprider is embarked on a US law enforcement vessel in the vicinity, and no _____ law enforcement vessel is immediately available to investigate, in which case the US law enforcement vessel may enter _____ waters in order to investigate a suspect vessel or aircraft located therein, and board and search the suspect vessel. If the evidence warrants, US law enforcement officials may detain the suspect vessel and persons on board pending disposition instructions from _____ authorities.

9. Nothing in this agreement precludes the Government of _____ from otherwise expressly authorising United States maritime counter-drug operations in _____ waters or involving _____ flag vessels suspected of illicit traffic.

10. The Government of _____ shall permit aircraft of the Government of the United States of America (hereafter, "US aircraft") when engaged in law enforcement operations or operations in support of law enforcement agencies to:

- a. overfly the territory and waters of _____ subject to Article 10 and with due regard for the laws and regulations for its laws and regulations for the flight and manoeuvre of aircraft; and
- b. relay, subject to the laws of each Party, orders from the competent authorities to aircraft suspected of trafficking in illegal drugs to land in _____.

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

- a. In the event of planned bilateral or multilateral law enforcement operations, the US shall provide reasonable notice and communications channels to the appropriate _____ aviation authorities of planned flights by its aircraft over _____ territory or waters.

- b. In the event of unplanned operations, which may include the pursuit of suspect aircraft into _____ airspace pursuant to this Agreement, the law enforcement and appropriate aviation authorities of the Parties may exchange information concerning the appropriate communications channels and other information pertinent to flight safety.
- c. Any aircraft engaged in law enforcement operations or operations in support of law enforcement activities in accordance with this Agreement shall comply with such air navigation and flight safety directions as may be required by the _____ aviation authorities, and with any written operating procedures developed by _____ for flight operations within its airspace under this Agreement.

OPERATIONS SEAWARD OF THE TERRITORIAL SEA

12. Whenever US law enforcement officials encounter a vessel flying the _____ flag or claiming to be registered in _____, located seaward of any nation's territorial sea and have reasonable grounds to suspect that the vessel is engaged in illicit traffic, this Agreement constitutes the authorisation of the Government of _____ for the boarding and search of the suspect vessel and the persons found on board by such officials. If evidence of illicit traffic is found, United States law enforcement officials may detain the vessel, persons on board, evidence and cargo pending expeditious disposition instructions from the Government of _____.

13. Except as expressly provided herein, this agreement does not apply to or limit boarding of vessels conducted by either Party in accordance with international law, seaward of any nation's territorial sea, whether based, inter alia, on the right of visit, the rendering of assistance to persons, vessels and property in distress or peril, the consent of the vessel master, or an authorisation from the flag state to take law enforcement action.

JURISDICTION OVER DETAINED VESSELS

14. In all cases arising in _____ waters or concerning _____ flag vessels seaward of any nation's territorial sea the Government of _____ shall have the primary right to exercise jurisdiction over a detained vessel and/or persons on board (including seizure, forfeiture, arrest and prosecution), provided, however, that the Government of _____ may, subject to its constitution and laws waive its primary right to exercise jurisdiction and authorise the enforcement of United States law against the vessel and/or persons on board.

IMPLEMENTATION

15. Counter-drug operations pursuant to this agreement shall be carried out only against vessels and aircraft used for commercial or private purposes and which

either of the Parties has reasonable grounds suspect are involved in illicit traffic, including vessels and aircraft without nationality.

16. A Party conducting a boarding and search pursuant to this agreement shall promptly notify the other Party of the results thereof. The relevant Party shall timely report to the other Party, consistent with its laws, on the status of all investigations, prosecutions and judicial proceedings resulting from enforcement action taken pursuant to this agreement where evidence of illicit traffic was found

17. Each Party shall ensure that its law enforcement officials, when conducting boardings and searches pursuant to this agreement act in accordance with the applicable national laws and policies of that Party and with international law and accepted international practices.

18. Boardings and searches pursuant to this agreement shall be carried out by law enforcement officials from law enforcement vessels. The boarding and search team may carry standard law enforcement small arms.

19. All use of force by a Party pursuant to this agreement shall be in strict accordance with applicable laws and policies of the respective Party and shall in all cases be the minimum reasonably necessary under the circumstances. Nothing in this agreement shall impair the exercise of the inherent right of self-defense by law enforcement or other officials of either Party.

20. To facilitate implementation of this agreement, each Party shall ensure the other Party is fully informed concerning its applicable laws and policies, particularly those pertaining to the use of force. Each Party has the corresponding responsibility to ensure that all of its officials engaging in law enforcement operations pursuant to this agreement are knowledgeable concerning the applicable laws and policies of both parties.

21. Unless their status is specifically provided for in another agreement, all law enforcement and other officials of the Government of the United States of America present in _____ waters or territory or on _____ vessels in connection with this agreement shall be accorded the privileges and immunities equivalent to those of the administrative and technical staff of a diplomatic mission under the 1961 Vienna Convention on diplomatic relations.

22. Assets seized in consequence of any operation undertaken in _____ waters pursuant to this agreement shall be disposed of in accordance with the laws of _____. Assets seized in consequence of any operation undertaken seaward of the territorial sea of _____ pursuant to this agreement shall be disposed of in accordance with the laws of the seizing Party. To the extent permitted by its laws and upon such terms as it deems appropriate, a Party may, in any case, transfer forfeited assets or proceeds of their sale to the other Party.

23. In case a question arises in connection with implementation of this agreement, either Party may request consultations to resolve the matter. If any

loss or injury is suffered as a result of any action taken by the law enforcement or other officials of one Party in contravention of this agreement or any improper or unreasonable action is taken by a Party pursuant thereto, the parties shall, without prejudice to any other legal rights which may be available, consult at the request of either Party to resolve the matter and decide any questions relating to compensation.

24. Except as provided in paragraph 21, nothing in this agreement is intended to alter the rights and privileges due any individual in any legal proceeding.

25. Situations not provided for by this agreement will be determined in accordance with international law.

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

ENTRY INTO FORCE AND DURATION

27. This agreement shall enter into force upon signature by both parties.

28. This agreement may be terminated at any time by either Party upon written notification to the other Party through the diplomatic channel, such termination to take effect one year from the date of notification.

29. This agreement shall continue to apply after termination with respect to any administrative or judicial proceedings arising out of actions taken pursuant to this agreement.

In witness whereof, the undersigned, being duly authorised by their respective governments, have signed this agreement.

BIBLIOGRAPHY

Briefings and Addresses

Devine D.J., "The Maritime Sector : Constitutional Perspectives and Legislative Developments" excerpts of a paper delivered at the 5th Maritime Conference at the Cape Sun Hotel on 16 Apr 97

Gorman J., briefing on the workings of the "Joint Intergrated Task Force", given in Key West, Florida on 5 Mar 98

Hamel M.A., "The Legal Basis for Coast Guard Maritime Enforcement Operations", excerpts of a briefing given at USCG HQ in Washington D.C. on 2 Mar 98

Mills G, "A Bridgehead into Africa? A Maritime-naval strategy for Security Building in Southern Africa", excerpts of a paper delivered at the SA Navy Conference at Simon's Town on 23 Oct 97

Modise J., "The South African Navy and an African Renaissance" excerpts from a paper delivered at the SA Navy Conference in Simon's Town on 23 Oct 97

Simpson-Anderson R.C., "The South African Navy as part of the African Renaissance - Setting the Pace for the Future" excerpts of a paper delivered given at the SA Navy Conference at Simon's Town on 23 Oct 97

Publications

Bennett C., "Coast Guard Function in South and Southern Africa" African Defence Review, Issue no 18 , Aug 94

Devine D.J., "The National Defence Force: International operations, aggression, self-defence, use of force and conduct of hostilities under the Interim Constitution" (1995) 26 South African Yearbook of International Law

Devine D.J., "An Unusual Interdict" (1993/1994) 19 South African Yearbook of International Law

Walker T., "SA Navy Begs to Differ.....", SA Commercial Fisherman, Mar - May 1994

International Documents

Presidential Directive No 27 issued by the White House and signed by Z. Brzezinski