Manufacture, marketing and manipulation; An insight into aspects of the international and domestic legal response to new synthetic drugs of abuse

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This thesis has been composed by me alone and the work is entirely my own.

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Candidate
From the middle of the 1980s, authorities in a number of countries began to be aware of the increasing misuse of a range of new synthetic or 'designer' drugs (NSDs) manufactured in clandestine laboratories specifically for the illicit market. At a domestic and international level existing drug controls have for the most part traditionally been structured to deal with an ascertainable number of plant-based narcotic drugs and a limited range of psychotropic substances. The spread of variable chemical compounds that can be manipulated only slightly in order to produce an unknown number of 'legal' recreational drugs has exposed serious limitations of the domestic and global control regimes.

Despite the significant amount of publicity devoted to the 'designer' drug scare and the increasing popularity of 'ecstasy' pills, very little has been written on the legal response to new synthetic drugs of abuse. This thesis aims to go some way towards filling an obvious gap in the debate on this area of drug control. In order to assist the reader to understand the new phenomenon, Part I offers a brief history of synthetic psychotropic drug use, before concentrating on the nature of the trend towards the production and consumption of 'designer' drugs. Part II outlines existing international controls, highlighting the shortcomings of the two relevant UN treaties. The third and final Part looks at recent legal initiatives, introduced at a national, international and European level, in order to address the ever expanding supply of and demand for new synthetic drugs.

This thesis does not purport to provide any easy solution, or indeed any 'solution' at all, to what is a significant law enforcement concern. It does, however, offer a balanced assessment of legal measures developed to deal with NSDs. It is submitted that further attention must be given to an evaluation of law and policy in order to determine which of the reforms thus far introduced have been most successful in minimising the harm related to these drugs. Only then will we be better positioned to deal with the next generation of synthetic compounds manufactured for the clandestine market.
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To my housemates, Maarty, Sarah, Sylvia and Julesy: 
_Hvala ti na glazbi. Na pjesmama pjevanim._
_Svim trenucma radosnim. Od Srca;

And to Jez and to Jen,

Thank you, thank you
List of Abbreviations

ACMD - Advisory Council on Misuse of Drugs (UK)
AFDL - Australian Forensic Drug Laboratory
ATS - Amphetamine-type stimulants
CICAD - Inter-American Drug Abuse Control Commission
COE - Council of Europe
CND - Commission on Narcotic Drugs
CRT - Criminal Review Tribunal (New South Wales)
DAL - Division of Analytical Laboratory (New South Wales)
DEA - Drug Enforcement Agency (United States)
EEC - European Economic Community
EMCDDA - European Monitoring Centre for Drugs and Drug Addiction
EMEA - European Agency for the Evaluation of Medicinal Products
INCB - International Narcotics Control Board
MCCOC - Model Criminal Code Officers Committee (Australia)
NSD - New synthetic drug
NSW - New South Wales
OAS - Organisation of American States
UNDCP - United Nations Drug Control Programme
USD - Unit Synthetische Drugs (Synthetic Drugs Unit) (The Netherlands)
WHO - World Health Organisation
Glossary of Terms

Amphetamine - A group of drugs closely related to adrenaline which act by stimulating the sympathetic nervous system, inducing a sense of well-being and confidence. Although it is thought that the first amphetamine was synthesised by a German chemist in 1887, the drug was not re-discovered until 1932 when it began to be marketed in significant quantities. Amphetamines were subsequently touted and sold as a cure for an enormous range of medical ills from sleep disorders to over-eating. While therapeutic use is now limited in recognition of their highly addictive and potentially dangerous properties, illicit use has continued to expand. Amphetamines are generally taken orally.

Amphetamine analogue - A synthetic substance that has not been marketed as an approved drug, manufactured by making slight structural modifications to the parent compound amphetamine.

Analogue - A compound that resembles another in structure but is not necessarily an isomer. It may be referred to as an homologue.

Barbiturates - A group of drugs based on the structure of barbituric acid. Substitutions or alterations within the basic structure produce drugs which reversibly depress the central nervous system by inhibiting the transmission of impulses between certain neurones. They therefore cause drowsiness or unconsciousness, depending on the dosage. Although until the mid-1970s barbiturates were widely used as sedatives and hypnotics, therapeutic use has now been overtaken by modern drugs with more suitable pharmacological properties.

Central nervous system - The part of the nervous system that involves the brain, the brain stem, and the spinal column. It is to this system that all senses connect (the afferent pathways) and it is from this system that all motor commands emanate (the efferent pathways).

Designer drugs - The term ‘designer drug’ was coined in 1982 by American pharmacologist Gary Henderson, in order to describe synthetic analogues of a controlled drug, deliberately manufactured in clandestine laboratories and designed to evade the US Controlled Substances Act. It has been adopted in other countries and by international and regional organisations and is now used to refer to new synthetic drugs manufactured by clandestine chemists in an attempt to avoid existing national or international controls.

Ecstasy - Ecstasy” is the popular name for the chemical compound 3,4-Methylenedioxy-N-methylamphetamine (or MDMA). The term was allegedly coined in the mid 1980s by a Los Angeles dealer who sold MDMA as a popular recreational stimulant. Although he though at the time that ‘empathy’ may be more appropriate, in reference to the feelings of affection and understanding that it promoted between users, ecstasy was chosen as a more exciting name that would be likely to attract consumers. By the end of the 1980s, ecstasy use had become associated with all night dance parties or ‘Raves’ and the ‘Acid House’ music scene. Drugs sold as ecstasy today are often not MDMA but related drugs known as ring-substituted amphetamines, including MDE, MDEA, MDA and MBDB. Tablets may contain a quantity of MDMA mixed with other chemically related substances such as those mentioned above, and/or cut with look-alike ingredients.

Essential chemical - A solvent, reagent or catalyst used in the manufacture of a controlled substance.

Ester - The compound formed by the elimination of water and the bonding of an alcohol and an organic acid.
Ether - 1. One of a class of organic compounds characterised by the structural feature of an oxygen linking two hydrocarbon groups (such as R-O-R). 2. A colourless liquid, slightly soluble in water; used as a reagent, intermediate, anesthetic, and solvent.

Homologue - See analogue.

Isomer - One of two or more chemical substances having the same elementary percentage composition and molecular weight but differing in structure, and therefore in properties.

New synthetic drug (NSD) - This term is used (particularly within Europe) to refer to the latest generation of synthetic psychotropic drugs of abuse, most commonly associated with MDMA and dance drugs. Some of the NSDs to appear on the market in recent years are 'designer' drugs, manufactured by clandestine operators in an effort to avoid existing drug controls.

Pharmacological - Relating to pharmacology or the composition, properties, and actions of drugs. or 2. Sometimes used in physiology to denote a dose (of a chemical agent that is or mimics a hormone, neurotransmitter, or other naturally occurring agent) that is so much larger or more potent than would occur naturally that it might have qualitatively different effects.

Phenethylamine - 1. A naturally occurring compound found in both the animal and plant kingdoms. It is an endogenous component of the human brain. 2. Any of a series of compounds containing the phenethylamine skeleton, and modified by chemical constituents at appropriate positions in the molecule.

Precursor - A chemical used in the manufacture of a controlled substance and crucial to its creation, which becomes part of the controlled substance.

Psychotomimetic drugs - Drugs that produce acute hallucinations and psychotic reactions. Many are naturally occurring and have a long tradition of use for quasi medical, religious and social purposes. Some have a limited use in psychiatric medicine. Several of them have a widespread non-medical (and usually illegal) use. Alternative names for the class include hallucinogens, psychotogenics, psycholytics, psychodyseptics, psychedelics, psychotoxics, eidetics and phantastica. Three main groups of drugs belong to this general class: indolylalkylamines such as lysergide (LSD), phenylalkylamine derivatives such as mescaline and drugs with atropine-like actions such as phencyclidine (PCP, angel dust).

Psychotropic Drugs - Drugs used in the treatment of mental disturbances that produce acute reactions resembling those occurring in mental diseases. The term is derived from Greek words meaning ‘mind turning’. The subclasses of psychotropic drugs are lithium salts, tranquillisers and neuroleptic, thymoleptic, thymecletic, psychostimulant and psychotomimetic drugs.

Psychoactive drug or substance - A substance that, when ingested, affects mental processes, e.g. cognition or affect.

Salts - A combination of a base and an acid resulting in a mixture that ordinarily has a fixed ratio of components and is of increased water solubility. Most drugs as salts will produce a reaction that is different from that produced by the drug in a different form.

Stereoisomer - Compounds whose molecules have the same number and kind of atoms and the same atomic arrangement, but differ in their spatial relationship.

Synthetic Drugs - Psychoactive substances that have been manufactured in the laboratory...
rather than derived from natural plant-based substances. This category includes tranquillisers, methadone and amphetamine, recognised as having both a licit and illicit use, as well as ecstasy and LSD, manufactured almost solely for the illicit market.

Tryptamine - 1. A naturally occurring compound found in both the animal and plant kingdoms. It is an endogenous component of the human brain. 2. Any of a series of compounds containing the tryptamine skeleton, and modified by chemical constituents at appropriate positions in the molecule.
INTRODUCTION

I think the subject matter which we are talking about is one that could be one of the most dangerous things that could ever – or, we know it is already here, but it could be a scourge of our country. I think we are dealing with what is sort of a future drug, or future drugs, and we have all seen a lot of the science fiction movies of some of the problems that are created by some of the new technology that we have. This is in a way like one of those science fiction horror stories to me, the potential of what we are talking about here.

Senator Chiles, “Designer Drugs, 1985”, Hearing before the Sub-Committee on Children, Family, Drugs and Alcoholism, of the Committee on Labour and Human Resources, United States Senate, 99th Congress, First Session on Investigating Designer Drugs and Efforts To Stop Them, 25 July 1985

Before the summer of 1985, the phenomenon of ‘designer’ drugs, the dangers associated with ‘ecstasy’ and the threat of “future drugs” traded on the illicit market were barely recognised. It was around this time that authorities in several industrialised countries were made aware of the manufacture and distribution of a number of synthetic psychotropic drugs that had not, at least in most jurisdictions, been brought under the control of existing drug laws. In clandestine laboratories chemists were manufacturing a range of variable chemical compounds that were becoming increasingly popular with consumers.

It is now well over a decade since law enforcement authorities began to express their concern about the spread of designer drugs. Over the past fifteen years, they have been represented as a major social, health and law enforcement concern - a new “scourge” that must be treated as a priority by national governments and tackled at a global level. In response, national authorities have implemented a range of legislative measures aimed at reducing supply and discouraging demand. At a supra-national and international level, action has been taken in an effort to prevent cross-border traffic and to prompt States to play their role in addressing the problem. There is no doubt however, that despite the publicity generated over the dangers of recreational synthetic drug use and despite the considerable amount of funding and resources devoted to addressing what is perceived to be a serious problem, consumption, production and trafficking have steadily increased. New synthetic drugs have not only become popular in industrialised countries where they were initially manufactured, but have spread to less developed and newly independent States that are ill-equipped to deal with the social and legal

1 Twelve years later, the same prediction of a frightening future of illicit synthetic drug use was made by US authorities. “These synthetic drugs, which have been gaining popularity over the last half decade, are well on their way to becoming the drug control nightmare of the next century”. Department of State Bureau for International Narcotics and Law Enforcement Affairs, International Narcotics Control Strategy Report, March 1997, p 3.

2 In Chapter 5 there is a lengthy discussion of legislative changes made by Governments in order to capture ‘groups’ of new synthetic drugs.

3 A notable increase in the supply of and demand for illicit synthetic drugs has recently attracted and occupied the attention of key international organisations involved in illicit drug control. Organisations within the family of the United Nations (the World Health Organisation, International Narcotics Control Board, Commission on Narcotic Drugs, and United Nations Drug Control Programme) as well as central institutions of the European Union (the Commission, Council and Parliament) have drawn attention to the need for urgent action to address problems caused by an influx of synthetic drug abuse. See, for example, UNDCP, “Amphetamine-Type Stimulants: A Global Review, UNDCP Technical Series, No.3 (Vienna, UNDCP, 1996) and Communication from the Commission to the Council and the European Parliament on the Control of New Synthetic Drugs (Designer Drugs), 23.5.1997, COM (97) 249 Final, p 2.

4 UNDCP, Amphetamine-type Stimulants; A Global Review, ibid., pp 99-118.
issues involved.5

Terminology

It is important to clarify the terminology central to the discussion that follows. First, what substances are included within the category of 'psychotropic drugs'? Science provides us with a pharmacological or psychological definition of substances in terms of their effect on the natural organism. In scientific literature, psychotropic drugs have been defined as those which are "used in the treatment of mental disturbances, and that produce acute reactions resembling those occurring in mental diseases".6 Although there is no uniformly recognised legal definition of the terms psychotropic or narcotic, the types of drugs included in those categories can be determined by the schedules to the international Conventions which govern their control.7 The 1971 Convention on Psychotropic Substances8 covers amphetamine-type stimulants, sedative hypnotics, tranquillisers and hallucinogens; drugs that are chemically manufactured rather than agriculturally produced. By contrast, the 1961 Single Convention on Narcotic Drugs9 regulates the plant-based drugs; opium and its derivative morphine, cocaine produced from the coca bush and cannabis sativa. This thesis focuses on certain sub-categories of psychotropic drugs that have most recently appeared on the illicit market.

 Agencies within the European Union have reported on the increasing manufacture and use of 'new synthetic drugs' (NSDs),10 in reference to the latest generation of synthetic psychotropic drugs of abuse, most commonly associated with ecstasy and dance drugs. Although several types of synthetic narcotics have been synthesised, both for licit medical purposes (e.g. Morphin) and illicit recreational use (e.g. Fentanyl analogues),11 they are not the focus of this thesis and are not included within the concept of NSDs unless specifically referred to. The category of NSDs receiving the most attention from international bodies monitoring their increasing use are referred to as 'amphetamine-type stimulants' (or ATS).12 Subsumed within this classification are licit pharmaceutical drugs still prescribed in the treatment of certain behavioural and physical problems and amphetamines used instrumentally to stimulate performance, as well as NSDs in the form of ring-type amphetamine substitutes manufactured in the clandestine laboratory and consumed purely for

5 See, for example, Communication from the Commission to the Council and the European Parliament on the Control of New Synthetic Drugs (Designer Drugs), supra n.3, pp 6 and 16. This is discussed further in Chapter 7, infra pp 197-198 and 233-234.
6 The subclasses included within this broad grouping are lithium salts, tranquillisers and neuroleptic, thymoleptic, thymergic, psychostimulant and psychotomimetic drugs. See WC Bowman, Dictionary of Pharmacology (Oxford, Blackwell Scientific Publications, 1986), p 181.
10 Communication from the Commission to the Council and the European Parliament on the Control of New Synthetic Drugs (Designer Drugs), supra n.3, p 2.
recreational purposes (including MDMA and related compounds).\textsuperscript{13}

‘Ecstasy’ is the popular name for the chemical compound 3,4-Methylenedioxy-N-methylamphetamine (or MDMA). In recent years, the term has been used to refer to a wider family of drugs known as ring-substituted amphetamines, including MDE, MDEA, MDA and MBDB.\textsuperscript{14} Drugs sold as ecstasy are likely to contain a quantity of MDMA mixed with other chemically related substances, and/or cut with look-alike ingredients.\textsuperscript{15} Ecstasy is the synthetic drug most commonly associated with the ‘House’ music or ‘Rave’ dance scene that was born in the middle of the 1980s and blossomed into a youth sub-culture that has spread throughout countries in Europe, America and Australasia.\textsuperscript{16}

The term ‘designer drug’ is often used as a synonym for new synthetic drugs. It was coined in 1982 by American pharmacologist Gary Henderson, in order to describe synthetic analogues of a controlled drug, deliberately manufactured in clandestine laboratories and designed to evade the US Controlled Substances Act.\textsuperscript{17} Some commentators have made the point that since MDMA (ecstasy) was in circulation long before the US legislation had been enacted, it could not have been manufactured deliberately to avoid controls and is not strictly a ‘designer drug’.\textsuperscript{18} It is, however, often referred to as such both in and outside of the United States,\textsuperscript{19} and may fall within the legislative definition of a ‘designer drug’ in several countries. Furthermore, it was the popular consumption of MDMA in the mid-1980s that drew the attention of authorities around the world to legal loopholes allowing for the production of uncontrolled psychotropic analogues and the rediscovery of this chemical compound is crucial to an understanding of the ‘designer drugs’ phenomenon.

This thesis is divided into three distinct Parts. Part I briefly outlines the discovery of synthetic psychotropics and historical patterns of misuse, before discussing the latest generation of NSDs. Part II discusses the two relevant international drug control treaties and their suitability for the control of variable compounds traded on the illicit market. The third and final Part explores the legal response, at national, international and regional levels, to the ever-expanding supply of and demand for new synthetic drugs.

**Part I - Three generations of synthetic psychotropic drugs**

In order to understand the control regime governing consumption and trade in synthetic psychotropic drugs, it is necessary to review the history of the manufacture and marketing of those substances, the past patterns of licit and illicit use and the response of law enforcement agencies. It is useful to divide the one hundred odd years since synthetic psychotropics were first discovered into three distinct generations or patterns of use. The first generation covers

\textsuperscript{13} Although most of the phenethylamines covered in the *Index of Synthetic Psychotropic Drugs* attached to this thesis could be classified as ATS, those in the tryptamine family could not.

\textsuperscript{14} See “New Trends in Synthetic Drugs in the European Union”, *Insights* (Lisbon, EMCDDA, 1997), p 14. Each of these compounds is profiled in the *Index of Synthetic Psychotropic Drugs* at Appendix A.

\textsuperscript{15} Ibid.


\textsuperscript{17} R Seymour et al, *The New Drugs: Look-Alikes, Drugs of Deception and Designer Drugs* (USA, Hazelden Foundation, 1989), p 41.


\textsuperscript{19} See, for example, the US Congressional hearings conducted in 1985 which included MDMA as one of the designer drugs posing a serious threat to public safety. “Designer Drugs, 1985”, *Hearing Before the Subcommittee on Children, Family, Drugs and Alcoholism of the Committee on Labour and Human Resources*, United States Senate, 99th Congress, First Session on Investigating the Threat of Designer Drugs and Efforts to Stop Them, July 25, 1985, pp 78-79.
the early manufacture and marketing of amphetamines and their subsequent over-prescription and misuse. The second generation refers to the first recreational patterns of use involving amphetamines and a number of synthetic hallucinogens, most notably LSD. The third generation is the present phenomenon of clandestine manufacture and consumption of a range of new synthetic or 'designer' psychotropic drugs produced specifically for the illicit market. Chapter 1 deals with the first two generations while Chapter 2 covers the third. It is a significant theme of this thesis that a chronicle of the domestic and international regulation of synthetic drugs reveals an interesting mixture of political, economic and moral considerations that have determined whether and to what extent certain drugs have been socially sanctioned and are legally available, while others have become the subject of moral condemnation and criminal laws. By exploring the history of psychotropic drug control it is possible to gain an insight into the interests that lie at the heart of current law and policy regulating consumption and trade in NSDs.

**Part II - International Conventions Governing new synthetic psychotropic drugs**

Although there is no scope to fully explore the background, structure and functioning of international drug controls, it should be understood that international control over NSDs is managed within the scope of the pre-existing drug control regime and pre-existing international institutions. The programme of international cooperation for the control of drugs subject to abuse is less than a century old. Its roots can be traced back to 1909 when the first international conference on narcotic drugs was held in Shanghai, leading to the adoption in 1912 of the first drug control treaty, the International Opium Convention. Since then, a

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21 It is impossible to fully comprehend the problem of regulating new synthetic psychotropic drugs without placing it within the context of the much broader 'drug prohibition regime'. The concept of an 'international regime' has been defined as a system of rules that comes into existence when states and other relevant international actors, in order to avoid the costs of uncoordinated national action, agree (more or less explicitly) on normative or procedural constraints on their sovereign freedom of action in an issue-area - and (at least in part) conform their behaviour to these norms or procedures'. See J Donnelly, "The United Nations and the Global Drug Control Regime" in PH Smith, *Drug Policy in the Americas* (Oxford, Westview Press, 1991), p 282. In a discussion of the evolution of norms in international society, Nadelmann compares the 'drug prohibition regime' to other international prohibition regimes. He points out that acts such as piracy, slavery, counterfeiting national currencies, hijacking aircraft, trafficking in women and children and the illicit trade in certain psychoactive substances are all controlled by powerful global norms. See EA Nadelmann, "Global Prohibition Regimes: the evolution of norms in international society", *International Organisation*, Vol.44, 1990, p 479. In Nadelmann's view, criminal laws and international prohibition regimes are not successful in suppressing certain types of activities -- those which require limited and readily available resources and no particular expertise to execute, those which are easily concealed and unlikely to be reported to authorities, and those for which there is a consistent consumer demand. Thus, whereas the international community has been largely successful in prohibiting piracy and slave trading, it has not been able to cooperate to effectively reduce the supply and abuse of illicit drugs. See further, Nadelmann, *ibid.*, p 486.


23 Although the International Opium Commission did not have the authority to conclude a treaty when it met in Shanghai in 1909, its findings provided the foundation for the Hague Opium Conference of
further twelve multilateral drug control treaties have been concluded.24 Four of these are currently operative, namely, the 1961 Single Convention on Narcotic Drugs,25 the 1972 Protocol to the 1961 Single Convention on Narcotic Drugs,26 the 1971 Convention on Psychotropic Substances27 and the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.28

Part II provides a discussion of the two most recent international Conventions since it is these instruments that govern both licit and illicit trade in synthetic psychotropics and the precursors used in their manufacture. Chapter 3 looks at the 1971 Convention regulating end-products, i.e. licit pharmaceutical drugs and NSDs available solely on the illicit market. Chapter 4 covers the 1988 Convention, a treaty designed to strengthen control over the illicit trade in end-products and to extend coverage to a definable list of precursor chemicals used in their manufacture. In both chapters there is a discussion of the operation of important treaty provisions and certain ambiguities in their interpretation, so as to provide the reader with an understanding of the structure of international controls in place.29 This is supplemented by an insight into the history and politics that influenced decision making during the drafting process.30 The justification for doing so (aside from the fact that the history and politics of drug control often make for fascinating reading) is that it should then be possible to better understand weaknesses in the current control regime, further reforms that may be appropriate to strengthen international controls and the types of considerations at issue in determining whether and how control decisions are made.

Part III - Strengthening legal and policy responses to new synthetic drugs

At the time that the third generation of synthetic psychotropic drug use became apparent between the mid to late 1980s, neither domestic legislation nor the international Conventions were equipped to deal with variable chemical compounds traded on the illicit market. In the

December 1911 at which the Opium Convention of 1912 was drafted. See UNDCP, World Drug Report (Oxford, Oxford University Press, 1997), p 165.
24 See appendix B for a complete list of the thirteen international drug control treaties and the dates on which they were concluded.
25 See supra n.9.
27 See supra n.8.
29 The drug control treaties have been interpreted in accordance with the general rules governing the interpretation of treaties as set out in the 1969 Vienna Convention on the Law of Treaties. See, in particular, Article 31, providing that a “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. Article 32 of the 1969 Vienna Convention allows recourse to be had to “supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable”. This provides the justification for reference to be made here to the drafting history, particularly as presented in the Official Summary Records of conferences convened to draft the 1971 and 1988 Conventions. Use has also been made of the subsequent UN Commentaries written to aid interpretation and the relatively limited academic literature concerning the functioning of the 1971 and 1988 Conventions. For a further guide to the general interpretation of treaties, see P Reuter, Introduction to the Law of Treaties (London, Pinter Publishers, 1989) and I Sinclair, The Vienna Convention on the Law of Treaties, 2nd edn (Manchester, Manchester University Press, 1984), pp 114-154.
30 An understanding of the history and politics is drawn from the Official Summary records referred to above, subsequent UN Commentaries written on the Conventions and a small number of academic writings. See the references ibid.
great majority of countries and at an international level, the scheduling process had been designed to regulate stable compounds that could be brought under control some time (and usually a significant period of time) after they had been recognised as harmful. The emergence of a trend towards the popular consumption of NSDs and an increase in production to meet the new demand has prompted an interesting response from national governments, the international community and certain regional organisations, particularly the European Union. Chapters 5, 6 and 7 explore the peculiar legislative models of national governments, the proposals and concrete measures adopted by the international community under the auspices of the United Nations and the recent series of controls introduced by the EU. It is argued that at each level many of the reforms have merit. There are, however, a number of problems with certain of the controls implemented and proposed and there is still more action that can and should be taken in order to put in place the best possible mechanisms for minimising the harm caused by new synthetic drugs of abuse.

The emergence of a range of NSDs raises fascinating questions of a legal and socio-legal nature. How do authorities design national legislation that will allow for the effective control of certain dangerous substances, and yet not place excessively onerous restrictions on the legitimate use of synthetic drugs? Should national laws be harmonised in order to coordinate and strengthen controls? Can the trade in synthetic drugs and the precursor chemicals used in their manufacture be effectively regulated by existing international Conventions? In view of the political and economic interests involved in the production of licit pharmaceuticals and chemical preparations, have certain pressure groups hindered the implementation of effective reforms? To what extent are control decisions currently debated still influenced by the political and economic interests at stake? What policies should be adopted by national Governments, and fostered by international bodies, in order to reduce the demand for new synthetic drugs and/or minimise their harmful effects?

It is submitted that there is a pressing need to evaluate law and policy in order to determine what reforms are necessary to control the illicit flow of NSDs and to minimise the risk taken by consumers. However, regulation and law enforcement must not be blindly expanded in the vacuum of a prohibition regime that was not designed to deal with them. Legal reform, accompanied by considered policy reform, should be specifically attuned to deal with new problems posed by the increasing popularity and ever expanding supply of synthetic psychotropic drugs. It is hoped that this thesis contributes in some way to an understanding of the problems faced and the options available.31

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31 This thesis seeks to reflect the law and practice in respect of NSDs up until March 2000.
PART 1: THREE GENERATIONS OF SYNTHETIC PSYCHOTROPIC DRUG USE

CHAPTER 1

THE HISTORY OF PSYCHOTROPIC DRUG CONTROL; THE FIRST TWO GENERATIONS

Drug law may be one of those on which a page of history (or sociology) is worth more than a volume of logic.

JB Bakalar and L Grinspoon, Drug Control in a Free Society

The first generation of synthetic psychotropic drug use

Discovering amphetamines

The first generation of synthetic psychotropic drug use came several decades after the discovery of amphetamine in the late years of the nineteenth Century. Although amphetamine was allegedly first synthesised by a German chemist in 1887, it was not re-discovered until 1932 when the American pharmaceutical company Smith, Kleine and French became the first to market a nasal inhalant containing the drug. In the decade that followed, the medical profession and the pharmaceutical industry promoted its clinical use for a diverse range of maladies, including addiction to morphine and codeine, tobacco smoking, radiation sickness, heart block, head injuries, low blood pressure, hyper-activity in children, narcolepsy, nasal congestion and excessive hiccuping. In all major industrialised countries manufacturers sold the drug under a multiple array of brand names. For the purpose of brevity, the following chapter focuses primarily on the marketing and control of amphetamines in the United Kingdom.

It was not long after the drug was released on to the market that reports appeared warning of its potentially adverse affects. The British Pharmaceutical Journal of 20 June 1936 made the first reference to the harmful effects of an amphetamine sulphate then known as Benzedrine, citing evidence that it produced hypertension. In the years that followed, many more reports appeared in journals and in daily newspapers warning of the potential side effects of Benzedrine and highlighting escalating problems with misuse of amphetamine in the United States. Although at that time the law permitted its free sale, some pharmacists took the precaution of supplying the drug only on prescription.

Amphetamine was first regulated by the British Government in 1939. Benzedrine was placed in Part 1 of the Poisons List, and in Schedule 1 and paragraph (1) of Schedule 7 of the

3 Ibid., p 16.
6 Ibid.
Poissons Rules. The drug could thenceforth be sold only under the supervision of a registered pharmacist, and only to a member of the public known by that pharmacist to be a person who might properly be supplied.

Those early regulations were not successful in curbing demand. The first outbreak of large-scale abuse was prompted, at least in part, by the prescription of amphetamine to military forces during the second world war. Millions of tablets and pills were supplied to American, British, Japanese and German forces in an effort to stimulate performance and fight fatigue. By the time they returned home, many soldiers had developed a physical or psychological addiction to amphetamine that led them to continue to use it long after hostilities had ceased. In post-war UK, pharmaceuticals such as Drinamyl (a mixture of amphetamine and barbiturate manufactured in a heart-shaped purple tablet) and Dexedrin (dexamphetamine sulphate) were liberally prescribed and the sale of non-prescription synthetics expanded throughout the 1950s. With the promotion of these tablets as a simple, risk-free solution to physical illness and mental strain, clinical use became extremely popular in the stressful years of post-conflict recovery.

By 1954, pharmacists were embarrassed by evidence of the increasing number of users heavily addicted and the British Pharmaceutical Society urged the Government to introduce further controls. In January 1956, amphetamine and its salts were placed in Schedule 4 of the Poisons Rules, thereby restricting sales to persons holding a prescription. Supply other than by sale was not an offence and authorities bore the onus of proving that a cash transaction had taken place before an action could be brought.

It has been widely acknowledged that even after the introduction of further controls, the practices of certain members of the medical profession contributed to the soaring number of amphetamine users and the spread of new and more dangerous patterns of abuse. In Britain between 1967 and 1968, two medical practitioners were largely responsible for the widespread misuse of injectable methylamphetamine. In the space of a month, one of those doctors prescribed 24,000 ampoules of 30mg methylamphetamine to 100 patients. A similar situation existed in the US where the National Health Service released figures to show that in 1969 practitioners had dispensed 3.3 million prescriptions for amphetamine and related compounds. In their estimation, up to 58% of patients prescribed amphetamines would become psychologically or physiologically dependent upon the drug.

The pharmaceutical companies of several industrialised countries, particularly Britain and the US, must be held partly responsible for the proliferation of licit and illicit use. Kramer and Pinco suggest that “most of the manufacturers” can be criticised for exploiting the highly questionable use of amphetamine in the treatment of obesity, mild depression and fatigue. Many sold products containing amphetamines mixed with vitamins, hormones or other medications. Although some who sold a vitamin/drug combination may have been motivated by a wish to provide dieters with a dose of vitamins, others marketed their product primarily as a nutritional supplement and added amphetamine in order to fool the patient that the sense

7 Ibid., pp 7-8.
8 Ibid., p 8.
9 See L Grinspoon and P Hedbloom, The Speed Culture, Amphetamine use and abuse in America (Cambridge, Harvard University Press, 1975), pp 18-20. Seventy-two million standard dose amphetamine tablets were distributed to the British Army alone.
10 H Klee, supra n.4, p 20.
11 Report by the Advisory Committee on Drug Dependence, supra n.5, p 8.
12 Ibid.
13 Ibid., p 18.
of invigoration or well-being they got from the pill was due to the dietary supplement rather than the drug. In some instances, the advice given by manufacturers trying to maximise their profit margins may have caused patients serious physical harm. In the one year, three US manufacturers recommended maximum doses of amphetamines at a level capable of inducing psychotic states. Other misleading and dangerous practices included claims that there was no risk of addiction, advertising amphetamines as a treatment for alcoholics and recommending morning and evening use of a drug prescribed as a stimulant.

As a direct result of the massive volume of amphetamines manufactured by industrialised countries, the market for licit use was completely saturated and bulk quantities were available for diversion into illicit channels. It has been estimated that until the early 1970s, one half to two thirds of the 100,000 pounds of amphetamine produced annually for clinical purposes in the US was diverted for illicit use. A number of operators were anxious to dump supplies and a black market developed whereby certain pharmaceutical companies, wholesalers, pharmacists and physicians, would allow drugs in their possession to be diverted to illicit traders. The production of excessive quantities encouraged the re-direction of synthetic drugs from the licit to the illicit market in order to satisfy an increasing demand for amphetamines by those dependent upon them.

The second generation of synthetic drugs

Recreational amphetamine use

The early years of the 1960s ushered in a second generation of synthetic psychotropic drug use, a generation of young recreational users whose consumption of illicit drugs was viewed as an important part of the hedonistic, liberal subcultures that emerged. In both America and Britain, amphetamines came to be the drugs of choice for sub-groups of young people including fashionable 'mods' and 'rockers' who used the pills at weekend dance venues. Some commentators considered that the new pattern of drug use was at least partly responsible for the increasingly liberal and irresponsible attitude of young people and what was perceived to be a loss of values and morality that threatened the broader community.

Within a short period of time, the new generation of drug takers had become increasingly obvious, attracting the attention of the media and law enforcement authorities. Police reported that amphetamines were sold cheaply and in large quantities to young people in jazz clubs and coffee bars. The increase in this pattern of highly visible amphetamine use was reflected in questions in Parliament presented at the time, with representatives on both sides of the political spectrum expressing their concern. In the early 1960s, a series of articles written by Anne Sharpley in the London Evening Standard drew attention to the trend of increasing amphetamine use among teenagers in Soho. Other journalists who wrote about the rapid spread of new drug sub-cultures played a role in generating alarm over expanding recreational drug use among the younger generation.

In 1964, the British Government was prompted to sponsor the passage of the Drugs

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12 Ibid.
13 Ibid.
14 Ibid.
15 H Klee (ed.), *supra* n.4, p 20.
17 *Report by the Advisory Committee on Drug Dependence, supra* n.3, p 8.
19 P Bean, *supra* n.21, p 86.
(Prevention of Misuse) Act, in order to impose criminal penalties on certain activities involving amphetamine. Earlier regulations discussed above had prohibited the unauthorised sale of amphetamine, but did not create an offence in respect of other methods of supply or possession. For the first time the 1964 Act prohibited the importation of amphetamine without a license and established an offence of unauthorised possession. Section 5 gave the Secretary of State the power to schedule new drugs after consulting with the Poisons Board. The legislation provided for the imposition of reasonably harsh penalties. While on a summary conviction offenders were punishable by a maximum fine of £200 or a term of imprisonment not exceeding six months, or both, on indictment, the accused could be subject to an unlimited fine or a term of imprisonment not exceeding two years, or both.

The enactment of the 1964 Act meant that for the first time in the history of British drug laws, legislation had been introduced at a domestic level to control a category of substances that were not yet subject to international control. From 1923 to 1964, all of the UK’s Dangerous Drugs Acts had been implemented in order to fulfil obligations that arose under UN conventions relating to narcotic drugs and an amendment of domestic schedules was restricted to the scope of the international instrument. During the debate following the second reading of the Misuse of Drugs Bill it was pointed out that since there was not yet a Convention regulating psychotropic substances, a different domestic regime had to be designed in order to bring amphetamines under effective control. The new law was not prompted by international pressure, but was enacted by the British Government in response to a perceived domestic problem involving increasingly visible illicit use.

The passage of the Drugs (Prevention of Misuse) Act in 1964 also marks an interesting change in the terminology used in drug legislation. Although certain drugs had long been over-used or abused by a considerable number of persons who had developed a dependence upon them, previous British Acts regulating narcotics drugs were referred to as ‘Dangerous Drugs Acts’. The term ‘misuse’ was used for the first time in the 1964 legislation enacted to criminalise the use of amphetamines. On the one hand, the change in terminology may have been introduced to show that some of the synthetic substances scheduled had a licit as well as an illicit use; i.e. they could be ‘used’ for clinical purposes and ‘misused’ for illegitimate recreational needs. However, the new wording also seems to cast a certain value judgement upon the users themselves. Whereas the ‘Dangerous Drugs Act’ suggests that the purpose of the legislation is to protect persons from substances which may cause harm, the ‘Prevention of Misuse’ Act suggests that there is a need to prevent and punish persons who insist on using the drugs for an illicit purpose. Dangerous drugs are the subject of previous Acts, but dangerous users are the focus of the 1964 legislation. The change in terminology appears to reflect a change in the attitude towards drug users during the 1960s. During the 1940s and 1950s, drug addiction was regarded as the manifestation of a disease rather than a form of indulgence and drug addicts were viewed as sick and in need of treatment. By contrast, the 1960s generation of young hedonists using popular drugs for recreational purposes were soon

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25 Public General Statutes, 31 July 1964, CH 64.
29 Phillip Bean makes the point that the 1964 Act was a "radical departure" from previous legislation since it was the first time that legislation had been passed to control drugs in the absence of an international obligation to do so. P Bean, supra n.21, p 87. See Appendix B for a list of international Conventions relating to drug control adopted between 1912 and 1988.
31 P Bean, supra n.21, p 62.
labelled as deviants deserving of punishment.\textsuperscript{32}

Up until the early 1970s, the bulk of amphetamines consumed illegally were diverted from licit channels and distributed through a clandestine network of suppliers. Amphetamines were commonly obtained by altering or forging prescriptions, stealing from surgeries, hospitals and manufacturers or buying the drugs from chemists who did not require a prescription.\textsuperscript{33} In some instances, they were collected by persons who pretended to represent a company and sent forged orders to manufacturers who were not careful to check the \textit{bona fides} of their customers. Surplus quantities were made available because of the practice of over-prescribing discussed above that persisted among some of the more careless members of the medical profession.\textsuperscript{34} Since the drugs were easily obtainable by diverting licit domestic sources, they were usually transferred informally through casual networks of friends or acquaintances\textsuperscript{35} and at that time very little organised crime or international trafficking was involved.

\textbf{Synthetic hallucinogens}

Synthetic hallucinogens, most notably \textit{Lysergic Acid Diethylamide} (LSD), make up the other important class of substances relevant to the second generation of synthetic psychotropic drug use. LSD was first synthesised in 1938 by Swiss chemist, Dr Albert Hoffman, who experimented with it unsuccessfully while attempting to find a new treatment for headache.\textsuperscript{36} Hoffman re-discovered LSD on 16 April 1943, when he accidentally ingested a minute quantity during further testing.\textsuperscript{37} In a now infamous account the chemist wrote a highly detailed description of the psychedelic reaction he experienced, provoking much excitement among the scientific and pharmaceutical communities.

Throughout the 1950s, 60s and 70s, a large number of highly suspect experiments were conducted in the search for a therapeutic use for LSD. There were at that time few restrictions on the use of humans as tools for research and scientists tested the effects of the compound on persons deemed to be deviant, including drug addicts, prostitutes, schizophrenics, criminals and homosexuals.\textsuperscript{38} Relying on Hoffmann’s account of the depersonalising effects of the drug, it was hoped that LSD would allow persons with various ‘psychiatric disorders’ to ‘step outside’ themselves in order to view their problem objectively. The trials carried out were a miserable failure and many patients ended up extremely traumatised as a result.\textsuperscript{39} Some of the most alarming experiments were commissioned by the American Central Intelligence Agency (CIA) which, along with military agencies, was interested in potent psychoactive drugs as agents for mind control.\textsuperscript{40} The CIA envisaged the possibility of manipulating the beliefs of people it considered to be dangerous, notably political dissidents, prisoners and communists.\textsuperscript{41}

\textsuperscript{32} Ibid., p 173.
\textsuperscript{33} Report by the Advisory Committee on Drug Dependence, supra n.5, pp 9 and 15-16.
\textsuperscript{34} Ibid., p 18.
\textsuperscript{35} Ibid., p 15. Amphetamines were initially distributed by friends or acquaintances for a very small profit. Less frequently, the drug takers were organised into groups by a more enterprising individual, and would pool their supplies.
\textsuperscript{36} Report of the Advisory Committee on Drug Dependence, supra n.5, p 29.
\textsuperscript{37} Ibid.
\textsuperscript{39} Ibid.
\textsuperscript{40} Ibid., p 8. During one CIA experiment involving young army officers, one of the group who had been fed LSD without being informed he was taking the drug committed suicide by jumping from the window of his hotel. Although the tragic result of the test prompted much publicity over LSD and an apology from President Ford, it did not prevent American agencies from continuing their research for several years after the young man’s death.
\textsuperscript{41} Ibid., p 8.
Early in the next decade much publicity was generated over the increasing recreational use of LSD by young people riding the wave of 1960s popular counter-culture. More than any other personality, Dr Timothy Leary, then a lecturer in psychology at Harvard University, was largely responsible for promoting psychedelics (and particularly LSD) to this new class of young consumers. Drawing on his own experiences with LSD and on experiments conducted with inmates at a Massachusetts prison, Leary publicised the drug as a risk-free hallucinogen capable of allowing users to expand their consciousness. In 1962, he joined with Harvard colleague, Dr Richard Alpert, to found the International Foundation for Internal Freedom (IFIF), and in the following year set up an institute in Mexico for the philosophical and religious study of psychedelic drugs. The Institute was flooded with applications to attend and, amidst a storm of publicity for Leary and LSD, was closed down by authorities one month later. When fired from Harvard in 1963, Drs Leary and Alpert toured America promoting the virtues of various mind altering drugs and urging college students to “turn on, tune in and drop out”. Major newspapers, television networks and magazines featured stories, many of them inaccurate or sensational, on the phenomenal spread of LSD use, its virtuous properties or its potential to corrupt and destroy the minds of young consumers. It was hardly surprising that this level of publicity generated great interest in the drug and contributed to expanding use among large numbers of young people.

In response to an increasing sense of alarm over the popularity of LSD, domestic legislation was enacted to criminalise supply and possession. In the UK, the Drugs (Prevention of Misuse) Act 1964 Modification Order, 1966 was passed in order to bring LSD and several other hallucinogenic substances under tight control.

Throughout the ‘second generation’ of synthetic drug use, LSD was produced in small underground laboratories and distributed informally. Although there is no reliable data to give an accurate estimate of the quantity manufactured in clandestine laboratories in Britain or imported from other countries, evidence suggests that the illegal market was supplied entirely by illicit manufacture rather than by diversion of the limited licit supplies then available. Like amphetamines, LSD was available cheaply through networks of friends and acquaintances. At least initially there was no large scale organised criminal network involved in distribution and the drug was most often passed on to friends at parties and rock festivals. There is some evidence that more organised distribution networks had developed by the end of the 1960s. During parliamentary debate on the 1970 Misuse of Drugs Bill, the UK Secretary of State commented that LSD had recently been imported from America where it was manufactured in clandestine laboratories and financed by criminal interests. With greater attention being focused on the drug and the profits to be made through illicit sales, some operators may have been encouraged to expand their business overseas in order to satisfy new markets.

The pressure to tighten controls and criminalise the use of certain psychotropic drugs was motivated in part by a perceived increase in the number of young drug users and the variety of

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43 Ibid., p 9. Although anecdotal evidence of the massive increase in recreational use of LSD in the mid-1960s is enough to show that significant numbers of young people were involved, no reliable statistical data on the extent of drug taking is available. See N Malleson, “Guide to Drugs; The hallucinogens”, Drugs and Society, No.2, Vol.1, November 1971, p 19.


47 Report by the Advisory Committee on Drug Dependence, supra n.5., pp 38 and 41.

drugs subject to abuse.⁴⁹ Yet a growth in the number of users is not sufficient to explain the moral panic that arose over the popularity of certain synthetics or the agitation for criminal laws that would punish those who became involved. It has been pointed out that the number of persons taking a particular drug has never been the sole criteria for determining appropriate control.⁵⁰ Although from the early 1950s authorities were presented with evidence of the widespread over-prescription and over-use of barbiturates and the severe physiological effects that could result, that class of substances was abused by an older ‘hidden’ population and was not therefore included in the 1964 or 1971 Misuse of Drugs Acts. Furthermore, despite evidence that amphetamines had been over-used by a significant percentage of the population for many years, laws were specifically enacted to criminalise consumption of synthetic drugs only towards the middle of the 1960s, immediately after they became popular among highly visible youth subcultures existing at that time. Bean argues that “perceptions of the drug takers changed when they ceased to be predominantly middle-aged and middle class, but became younger or less secretive about their drug taking behaviour”.⁵¹ That is, use was labelled ‘abuse’ and users labelled as ‘deviant’ only when a certain type of user and certain patterns of use emerged. Writing in 1971, socio-legal theorist Jock Young suggested that the image of groups of hedonistic young people using synthetic drugs to pursue recreational or spiritual needs clashed with the ethos of industrialised countries that valued hard work and productivity.⁵² Although what is referred to here as the first generation of synthetic drug use involved a large number of persons using and abusing certain synthetic drugs in quantities that posed a significant health risk, users themselves were not perceived as a threat to the social order. The second generation of recreational use, during which people used drugs in the pursuit of pleasure, was associated with the increasing liberalty of the 1960s and a hedonism that did not accord with the values of political and economic elites.

The fact that certain users attracted the attention of authorities and were perceived as more

⁴⁹ In its 1970 Report, *Amphetamines, Barbiturates, LSD and Cannabis: Their Use and Misuse*, the Department of Health and Social Security acknowledged that at that time very little information was available on the actual extent of illicit amphetamine abuse in the community. There was, however, sufficient evidence to show a rise in the use of amphetamines and LSD among certain subcultures consisting predominantly of teenagers and young adults. Home Office Department of Health and Social Security, "Amphetamines, Barbiturates, LSD and Cannabis; their Use and Misuse", *Reports on Public Health and Medical Subjects*, No.124 (London, Her Majesty’s Stationery Office, 1970), pp 8 and 19-30. See also *Report by the Advisory Committee on Drug Dependence*, supra n.5.

⁵⁰ P Bean, supra n.21, p 118.

⁵¹ *Ibid.*, p 5. In a similar vein, Professor Blum has posed the question, “when one looks at the components of classification schemes and their functional enforcement, might it not be types of human behaviour rather than types of drugs which actually are the object of such control endeavours?” See RH Blum, “The International View of Drug Abuse”, *Society’s Response*, 16 April 1973, p 23 at 25. There is clear evidence of the attitude towards the younger generation of drug users visible in the 1960s in parliamentary debate over the Misuse of Drugs Bill 1970. See the comments of JT Price MP who suggests that drug taking is “one of the more disturbing manifestations of what is called the permissive society”. Thus, the House “was not only concerned with the technical outfall, as it were, of drug taking, but also of the moral consequences which lie behind it”. See HC Deb. Vol. 798, col. 1517, (25 March 1970). That moral overtone is reflected in some of the academic literature published at the time. Writing in 1971, Louria stated, "now let us look at drug abuse in connection with the quality of today’s present standards. Over the last two decades we have become increasingly pleasure oriented ... society was becoming more permissive ... but did not set new standards. One example is the use of nudity and sex in film and theatre ... Drug use will flourish in a mileu that has at its core an anything goes ethos where standards are abandoned". See D B Louria, *Overcoming Drugs: A Program for Action* (New York, McGraw-Hill Book Co., 1971), p 204.

⁵² Jock Young writes that, “[t]he social reaction against drug use, the aim of which is perceived to be purely hedonistic and detrimental to the individual’s productive capacity, is an example of moral indignation involving a condemnation of those who opt out of the notions of deferred gratification, hard work and responsibility implicit in the basic normative rules of Western society”. See J Young, *supra* n.21, p 99.
dangerous than others is reflected in the pattern of convictions under the 1964 Drugs (Prevention of Misuse) Act. Statistics collected for 1968 show that 78% of those arrested for possession of amphetamines were at or below the age of 25.\textsuperscript{53} In the same year, out of 72 convictions for possession of LSD, 52 of the accused were under the age of 25. In its Report on Amphetamines and LSD, the Home Office Advisory Committee wisely pointed out that these figures should not be taken as an accurate reflection of the pattern of amphetamine misuse in the broader population.\textsuperscript{54} Rather, they show that the young synthetic drug user was far more likely to be apprehended by police when buying their illicit supplies or using them at a recreational event, whereas the middle-aged user who continued to abuse substances obtained on medical prescription did not attract the attention of law enforcement agencies.

By 1970, the variety of new drugs that had come on to the market and the fragmentary nature of laws that had been enacted to control the trend led authorities to draft new legislation that would consolidate and strengthen drug laws. The Misuse of Drugs Act 1971\textsuperscript{55} replaced all previous Acts regulating both narcotic and psychotropic substances and is still in force today.\textsuperscript{56} In introducing the Bill to Parliament, the Home Secretary explained the rationale for this new and comprehensive legislation.\textsuperscript{57} First, it would distinguish for the first time between unlawful possession on the one hand, and unlawful trafficking on the other, a heavier penalty being imposed for the latter offence. Secondly, the Government would be given the power to act quickly to bring other dangerous drugs under control without having to consult international bodies.\textsuperscript{58} Thirdly, the Home Secretary would be given new powers to address over-prescribing by demanding information relating to the supply of any controlled drug from pharmacists or practitioners. Finally, the Act would provide for the establishment of an Advisory Council and Expert Committee on the misuse of drugs designed to assist the Government to develop effective law and policy.

The Misuse of Drugs Act had the effect of increasing penalties for psychotropic drugs, while at the same time decreasing them for offences relating to some narcotic substances. Drugs are divided under the Act into classes A, B or C, with the severity of the penalty that attaches to possession or trafficking determined on a sliding scale. Class A contains drugs that are judged to be the most dangerous and includes all but six of the substances controlled under the 1961 UN Single Convention on Narcotic Drugs,\textsuperscript{59} as well as LSD. Cannabis and cannabis resin are classified as Class B, along with many of the more potent amphetamines. Class C includes the less potent of the central nervous system stimulants. The new legislation had the effect of increasing the maximum penalties for possession of LSD from two to seven years imprisonment, while the maximum for possessing certain Class B amphetamines increased from two to five years. At the same time, penalties for the possession of heroin decreased from a maximum of ten to a maximum of seven years, and for possession of cannabis, from a maximum of ten to a maximum of five years.\textsuperscript{60} The change in penalty structure reflects an increasing concern over psychotropic drug use and the reliance placed by the Government on a criminal justice response to the expanding recreational use of amphetamines and LSD.

\textsuperscript{53} Report of the Advisory Committee on Drug Dependence, supra n.5, p 13.
\textsuperscript{54} Ibid., pp 13-14.
\textsuperscript{55} Misuse of Drugs Act, 1971, 27 May 1971, Chapter 38. This should be read in conjunction with the Misuse of Drugs Regulations 1973, S.I. 1973/797.
\textsuperscript{56} See Chapter 5 for a discussion of the regulation of new synthetic drugs under the UK Misuse of Drugs Act 1971.
\textsuperscript{58} It was explained that under the new Act, the Home Secretary need not wait until a substance was added to the Schedules of international conventions as was required under previous legislation, but could, by an Order in Council, bring any new substances under control and make any regulations that he considered appropriate.
\textsuperscript{59} The nature of the international drug control regime and the Conventions that dictate international controls are discussed in Part II of this thesis.
\textsuperscript{60} See Misuse of Drugs Act 1971, Section 35 and Schedule 4 (Prosecution and punishment of offences).
It is important to understand the role played by the media, subcultures and personalities in promoting certain patterns of psychotropic drug use and thereby stimulating controls. Recreational use of both amphetamines and LSD attracted the attention of a media hungry for further examples of the new tide of 1960s counter-culture. On the one hand, positive publicity was generated. Stories featured fashionable young adults alleged to rely on amphetamine ‘poppers’ or ‘purple hearts’ to entertain themselves at weekend dance parties and magazines devoted much space to personalities who shared their glowing experiences with mind altering psychedelic trips. On the other hand, articles published in both scientific journals and the popular press exaggerated the horror of these synthetic drugs, the evil of drug traders and the inevitable corruption of young people who succumbed to peer group pressure to experiment.

Much misinformation was spread by certain elements of the media and members of Parliament anxious to be heard to express their concern. There is little doubt that sensationalist reporting depicting both positive and negative images of drug taking in this era stimulated interest and demand among large numbers of predominantly young consumers. It served also to draw drug takers to the attention of the authorities. In this way media reports were both directly and indirectly responsible for the extension of the drug control regime that led to the prohibition and punishment of psychotropic drug use.

The first wave of ‘designer’ drugs

Late in the 1960s, authorities in the United States and the United Kingdom began to express their concern at the appearance of a number of different synthetic hallucinogens, each of them analogues of controlled drugs but not themselves regulated under existing drug laws. Compounds such as MDA, MMDA, STP and TMA were being manufactured by clandestine operators and distributed on the illicit market. It was partly in response to the appearance of this range of synthetic analogues that the US Controlled Substances Act was enacted in 1970 to provide for the administrative scheduling of drugs. When chemical variants of methaqualone, PCP and amphetamine were seized later in the 1970s, each of these early ‘designer’ drugs (although they were not then referred to as such) was subsequently scheduled individually under the new Act.

Soon after the British Government received reports of the proliferation of hallucinogenic amphetamines in America in the late 1960s, it was prompted to take precautionary action by scheduling certain chemical formulas, such as MDA and TMA,
under the *Misuse of Drugs Act 1971*.67

In the spring and summer of 1974, police in the UK discovered that a ‘new’ drug, a chemical derivative of phenethylamine commonly known as ‘Bromo STP’, was being circulated among some drug users, but was not illegal since it had not yet been scheduled under the *Misuse of Drugs Act*.68 Experiments in the US had shown the drug to be a more potent hallucinogen than either STP (another phenethylamine derivative) or LSD, both of which were scheduled as Class A drugs.69 Following a recommendation by the UK Drug Advisory Council, established pursuant to the 1971 Act, Bromo STP was added to the list of scheduled substances in March 1975.70 At the same time that the Council recommended immediate action in relation to that specific compound, it also issued a warning that “further substances of a similar nature could be synthesised with relative simplicity by making relatively minor molecular changes to the basic structure of the chemical”.71 Accordingly, the Technical Sub-Committee of the Council began to explore ways in which to close the legal loophole allowing the production of such substances for misuse, while minimising interference with legitimate therapeutic use. In 1977, the British Government accepted its advice to modify the legislation by adding a single generic formula or description of controlled drugs.72 Although authorities were then aware of the existence of only around forty of those compounds, and a smaller percentage that were actually traded on the illicit market, the Standing Committee that considered and approved the 1977 Modification Order recognised the potential for hundreds of similar derivatives to be produced.73 The operation of the UK’s generic formula is explored in detail in Chapter 5 of this thesis.74

Despite the appearance of several phenethylamine analogues, at that period in the 1970s the manufacture of new synthetic compounds did not become an issue of major concern.75 There are a number of possible explanations for why it did not. One might be that the lack of publicity surrounding the discovery of the clandestine laboratory in the Midlands kept interest in variable chemical compounds to a minimum. The absence of media exposure over the criminalisation of new categories of drugs meant that the legislative change did not serve to stimulate demand or supply. It may also be that the precursor and essential chemicals used in the manufacture of amphetamine-type stimulants were not as readily available in the 1960s and 70s as they were in the decade that followed. Perhaps the primary reason is that Bromo STP has a number of unpleasant side-effects and was not particularly popular with young users.76 As the next Chapter reveals, it was not until the mid-1980s that the market was ripe for the large-scale spread of new synthetic psychotropic drugs manufactured specifically for the clandestine sector.

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69 See supra p 14 for a discussion of the 1971 Act. It will be recalled that Class A is reserved for those substances considered to be highly dangerous, with little or no therapeutic value.

70 See the *Misuse of Drugs Act 1971 (Modification Order)* 1975, S.I. No.421 and the *Misuse of Drugs (Amendment) Regulations* 1975, S.I. No.499. The full name of the compound in question is 4-Bromo-2,5-dimethoxy-α-methylphenethylamine.


73 Ibid.

74 See Chapter 5, infra pp 108-120, for a full explanation of the 1977 amendment, and an evaluation of the generic approach.


CHAPTER 2
THE THIRD GENERATION OF PSYCHOTROPIC DRUG USE; NEW SYNTHETIC DRUGS

South Wales is at the frontier of the battle to beat the threat of deadly so called 'designer drugs' from the United States. Only a handful of seizures of the perversely named Ecstasy have been made in Britain. 'We have got to stamp this out', said Detective Inspector John Wake of the South Wales Drug Squad. 'Nobody knows the full extent of the damage this can do. We believe it can lead to death'.

South Wales Echo, January 18, 1986

Over the past decade, law enforcement authorities have recorded a trend towards the increasing illicit production, distribution and consumption of a range of variable chemical compounds. The genesis of this third generation of psychotropic drug use can be traced back to the early years of the 1980s when underground chemists in clandestine laboratories began to manufacture significant quantities of new synthetic or 'designer' drugs which for the most part were not yet controlled at a national or international level at the time they appeared on the illicit market. In the United States, narcotic analogues became an issue of great concern and were linked to hundreds of fatalities within a short period of time. In other countries, however, and in later years in the US, it was not 'designer' narcotics but 'designer' psychotropics that drew the attention of authorities to the clandestine manufacture of 'designer' drugs and the difficulty of legislating to bring those substances under control. Traditionally, both national and international drug control programmes have been dominated by efforts to regulate the plant-based drugs, cocaine, heroin and cannabis. It is those narcotic substances that have been focused upon as the real threat to the health and welfare of society and the justification for a 'war' on illicit drug use. As a result, neither law nor policy, at a national or international level, was equipped to deal with the supply of variable chemicals destined for the illicit market or the demand for those drugs after they arrived.

There is no clear chronological line indicating when 'underground' chemists moved from synthesising a small number of distinct chemical compounds identified by authorities during the 'second generation' of synthetic drug use, to experimenting with the large-scale production of a range of NSDs that were not regulated under the laws of most jurisdictions at the time when significant quantities began to appear on the illicit market.

Recall from the previous chapter that from the mid-1960s to the mid-1970s authorities in the US and the UK had seized a small number of variants or 'analogues' of controlled

2 See the definition of 'designer' drugs in the introduction to this thesis and the Glossary of terms.
3 It is only in the UK where the 1971 Misuse of Drugs Act was modified in 1977 to include a generic definition covering certain groups of drugs, that NSDs such as MDMA (ecstasy) were illegal when they were seized on the illicit market. This is explained in more detail in Chapter 5.
substances. At that time, however, none of the new compounds became popular with users and there was little interest amongst clandestine operators in continuing their experimentation with NSDs. It was not until the 1980s that law enforcement authorities again expressed their concern over the manufacture of variable synthetic substances in illicit laboratories. Although, as shall be seen, the history of the appearance of those chemicals varies in each different country, most governments reacted with alarm when presented with evidence of the rapid expansion of a new generation of synthetic drug use.

**Synthetic narcotic drugs**

In the United States, the first reports of ‘designer’ drug abuse were not related to psychotropic substances, but to highly dangerous synthetic narcotics. As noted in the introduction to this thesis, the term ‘designer drugs’ was first coined in 1982 by American pharmacologist Gary Henderson to refer to narcotic analogues that were similar to opiates already controlled under domestic legislation, but were being manufactured in clandestine laboratories in a deliberate attempt to circumvent US drug law. In the US at that time, a substance was only illegal if listed under one of the five schedules of the 1970 Controlled Substances Act (CSA). In 1981, the US Drug Enforcement Agency (DEA) reported that an unscheduled alpha-methyl analogue of the narcotic drug fentanyl, known on the streets as ‘China White’, was being sold to users as a pure form of heroin. Although it was not identified in laboratory testing until 1981, alpha-methyl-fentanyl had been associated with narcotic overdoses in the State of California as early as 1979. Its extremely high potency increases the risk of fatal overdose; tests have shown Alpha-methyl-fentanyl to be approximately one thousand times more potent than fentanyl, a factor causing some users to die almost instantaneously. Many of the victims using China White were not aware that they had purchased a ‘designer drug’ and had little or no idea of how to prepare or cut it or of the hazards involved.

In the light of reports by the DEA of the increasing distribution of ‘designer’ drugs, the American Federal Government moved quickly to have them declared illegal. In September 1981, alpha-methyl-fentanyl was classified as a Schedule I drug under the US Controlled

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7 See Chapter 1, supra p 16.
8 R Seymour et al, The New Drugs: Look-Alikes, Drugs of Deception and Designer Drugs (USA, Hazelden Foundation, 1989), p 41. For a concise account of the clandestine manufacture of synthetic narcotic drugs from the early 1980s, see J Shafer, “Designer Drugs”, Science, March 1985, Vol.6, No.2, pp 60-67. In discussing the potentially explosive market for synthetic narcotics, Shafer issued a prescient warning that authorities should also be on the look out for highly potent substitutes based on the amphetamine molecule (ibid., p 67).
11 Ibid.
12 JM Cameron, “Synthetic Drugs Legislation: Broadening the Classifications by Defining ‘Controlled Substance Analogue’ as a Percentage of Common Structural Elements”, University of Detroit Law Review, Vol.64, 1987, No.775, p 776. Note, however, that fentanyl is a synthetic narcotic that has been tested by pharmacologists and used for many years for legitimate medical purposes. By the early 1980s, a large number of compounds structurally derived from fentanyl had been synthesised by the Belgium company Janssen Pharmaceutica. Certain of them, such as Alfentanil, Sufentanil, Lofentanil and Carfentanil have been successfully adopted for use in medical and veterinary practice. See A and A Shulgin, TIKHAL (Tryptamines I Have Known and Loved; The Continuation (Berkeley, Transform Press, 1997), p 349. It has been estimated that there are approximately 4000 analogues in the class of synthetic opiates, a “huge number” of which have been synthesised in an effort to discover an ideal potent analgesic without habit-forming properties. See K Valter and P Arrizabalaga, Designer Drugs Directory (Switzerland, Elsevier Science S.A., 1998), p 149.
Another two potent analogues, 4-Flourophenyl and tri-methyl-fentanyl, were temporarily scheduled in 1985 and permanently scheduled the following year. Since that time at least sixteen fentanyl analogues have been discovered in samples of illicit opiates seized on the streets.

Other dangerous chemical compounds have been produced by illicit chemists modifying the molecular structure of meperedin hydrochloride or pethedine. Two analogues, known as MPPP (1-Methyl-4-phenyl-4-propionyloxy-piperedine) and PEPP (1-Phenethyl-4-phenyl-4-piperidonol acetate), are respectively 30 and 70 times more potent than their parent drug and have a similar effect to heroin or morphine. It is not even the compounds themselves that present the most danger to users, but the highly toxic by-products that may be formed unless the drugs are synthesised under carefully controlled conditions. Both MPTP (by-product of MPPP) and PEPTP (by-product of PEPP) are neurotoxins capable of inducing an irreversible condition characterised by tremors, muscular rigidity, slurred speech and ultimately paralysis; ill-effects that have been likened to the degenerative Parkinson's disease. In July 1985, the US Justice Department exercised its temporary scheduling powers to have both PEPP and MPPP made illegal under existing drug laws. Both were later brought under permanent control. In view of the dangers associated with meperedine analogues, clandestine production and use has not continued to be popular and seizures have become more rare. They are, however, still of interest to clandestine operators since they can be easily manufactured from available precursor chemicals and are sufficiently potent that a small amount of starter material can yield a large profit.

**Policing a trend - The emergence of Ecstasy**

The renewed interest in variable synthetic stimulants was triggered by a trend involving the popular consumption and production of the chemical compound methylenedioxy-N-methylamphetamine (MDMA), better known as 'ecstasy'. MDMA belongs to a broader category or 'family' of drugs known as the phenethyamines. Although it was first synthesised by German chemists in 1891 and was patented by the E. Merck Pharmaceutical Company in 1914, investigations were discontinued with the outbreak of the First World War and MDMA was never marketed. There was little interest in the drug as a therapeutic agent until the mid-1970s when the eminent American chemist Dr Alexander Shulgin re-

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13 "Designer Drugs", Hearing Before The Subcommittee on Crime of the Committee on the Judiciary, supra n.9, p 80.
14 See the discussion of temporary scheduling powers agreed to by Congress in 1984 in Chapter 5, infra pp 123-124.
15 JM Cameron, supra n.12, p 777.
18 Ibid.
19 JM Cameron, supra n.12, p 778.
20 K Valter and P Arrizabalaga, supra n.12, p 148.
21 Ibid.
23 The category of phenethylamines and the properties of some the chemical compounds included within it are discussed further in this chapter, infra pp 33-37. Phenethylamines are the largest of the three categories profiled in the Index of Synthetic Psychotropic Drugs at Appendix A.
synthesised MDMA and, impressed by the effects he felt after ingesting it himself, promoted it to health professionals as a useful adjunct to psychotherapy. It is estimated that during the late 1970s and early 1980s several hundred accredited American psychotherapists began using MDMA in their treatments. The compound was considered by many to be a psychological tool useful for facilitating communication and acceptance and reducing the fear of emotional threats often experienced by patients. Until the early 1980s, however, production of the drug was small scale and therapeutic use was confined to certain urban areas within the United States. Many therapists were reluctant to publish preliminary findings from their patient studies for fear that any publicity would encourage illicit use of MDMA.

In the early half of the 1980s, non-therapeutic or recreational patterns of use began to attract the attention of the authorities, signalling the beginning of what would become a massive new market. Although MDMA was first encountered by the DEA in Chicago in 1972, there are very few reports of it appearing on the illicit drug market during the 1970s and it was not until a decade later that the DEA began to investigate claims concerning recreational use. In 1985, a US Congressional report revealed that the previous few years had seen an increase in production, promotion, distribution and consumption. MDMA was advertised in ‘underground’ literature as a legal euphoriant and appears to have been deliberately marketed for a younger audience. It is reported that in 1983 an individual involved in selling in Los Angeles deliberately chose to market it as ‘ecstasy’. Although the dealer thought it more appropriate to call the drug ‘empathy’, in reference to the feelings of affection and understanding that it promoted among users, he reasoned that ecstasy was a more exciting name and would have a greater appeal with consumers. During the same period, an aggressive marketing campaign was conducted in Texas and ecstasy was widely distributed in Dallas bars and night-clubs, rapidly becoming a “phenomenon” among certain groups of socially mobile young adults (reportedly “Dallas yuppies, college students and gays”) who could choose to purchase using pyramidal sales, 8000 numbers and credit-card options. According to the DEA, MDMA use rocketed from 1,000 doses per month nationally in 1975, to 30,000

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26 M Rosenbaum and R Doblin, ibid., p 136. The drug was used, for example, to break down communication barriers during the treatment of marital couples and to give trauma victims the courage to delve deeply into their own emotions to discover and address the real source of their problems.

27 J Beck and M Rosenbaum, supra n.25, p 2. Rosenbaum and Doblin estimate that from the early 1970s until the early 1980s, 500,000 doses of MDMA had been consumed, attracting little or no publicity and little or no attention from the police or DEA. See M Rosenbaum and R Doblin, supra n.25, p 136.

28 J Beck and M Rosenbaum, supra n.25.

29 Ibid., p 2. See also “Designer Drugs”, Hearing Before The Subcommittee on Crime of the Committee on the Judiciary, supra n.9, p 78.

30 Between 1978 and 1986, over 70,000 dosage units (tablets) of MDMA were submitted to laboratories of the DEA. See “Designer Drugs”, Hearings before the Subcommittee on Crime of the Committee on the Judiciary, supra n.9, p 79.

31 Ibid. Authorities discovered that pamphlets bearing the titles “Ecstasy, Everything Looks Wonderful When You’re Young and On Drugs”, “Flight Instructions For a Friend Using XTC” and “How To Prepare For an Ecstasy Experience” had been distributed on college campuses throughout the United States.


33 M Rosenbaum and R Doblin, supra n.25, pp 136-137.
doses per month in the city of Dallas alone by 1985.\textsuperscript{34} Unlike the narcotic analogues of fentanyl and meperidine, use of which was limited to certain geographical areas, MDMA quickly became popular in regions throughout the United States.\textsuperscript{35} While clandestine production of narcotic analogues declined rapidly after 1985 (largely in view of their lethal properties and the high rate of morbidity and mortality associated with their use)\textsuperscript{36} interest in ecstasy and related psychotropic compounds continued to spread.

Although MDMA’s parent drugs, MDA and methamphetamine, had been scheduled under US drug laws since the end of the 1960s,\textsuperscript{37} MDMA was not then known to authorities and had not been included under the schedules of the 1970 Controlled Substances Act. As a result, it was not a criminal offence to use ecstasy in the US for non-therapeutic or recreational purposes at the time certain sub-groups began to do so in the 1980s. In the light of publicity generated by popular consumption, it was inevitable that the drug would soon be brought under control and in July 1984, the DEA recommended that it be placed in Schedule I, to be treated as an extremely dangerous drug with a high potential for abuse and little or no medical utility.\textsuperscript{38}

United States authorities assumed that they were dealing with a little-known recreational drug and were not prepared for the controversy that followed. Shortly after the DEA announcement, an organised group of respected medical professionals, including physicians, researchers and therapists, gathered forces to object to the proposed scheduling of MDMA, arguing that placing the drug in Schedule I would prohibit legitimate medical use and restrict necessary research into its therapeutic potential.\textsuperscript{39} In response to these challenges, it was agreed that hearings would be held in three cities, Los Angeles, Kansas City and Washington, DC, in order to gather evidence before making a final control decision. Before the hearings could take place, a significant development occurred at the international level. In April 1985, the 22nd Meeting of the WHO Expert Committee on Drug Dependence recommended that MDMA be listed in Schedule I of the 1971 Convention on Psychotropic Substances.\textsuperscript{40} The WHO concluded that MDMA should be placed under the strictest control regime, despite the fact that they did accept some evidence of its therapeutic qualities and did urge nations to “facilitate research on this interesting substance”.\textsuperscript{41} The Committee’s recommendation was used by the US DEA in support of its case to place the drug under tight domestic control.

Researchers hoping to have time to conduct further tests and gather evidence on the beneficial

\textsuperscript{34} S Redhead (ed.), Rave Off: Politics and deviance in contemporary youth culture (Avebury, Aldershot, 1997), p 119. See also “Designer Drugs”, Hearing Before The Subcommittee on Crime of the Committee on the Judiciary, supra n.9, p 79.

\textsuperscript{35} “Designer Drugs”, Hearing Before The Subcommittee on Crime of the Committee on the Judiciary, supra n.9, p 79.

\textsuperscript{36} See the earlier discussion of narcotic analogues, supra pp 18-19.

\textsuperscript{37} “Designer Drugs”, Hearing Before The Subcommittee on Crime of the Committee on the Judiciary, supra n.9, p 9.

\textsuperscript{38} In support of the drug being placed in Schedule I of the CSA (reserved for the most dangerous and least therapeutically useful drugs) a DEA chemist submitted that “MDMA has a high potential for abuse based on its chemical and pharmacological similarity to MDA, its self-administration without medical supervision, its clandestine synthesis and its distribution in the illicit drug traffic”. See J Beck and M Rosenbaum, supra n.25, p 2.

\textsuperscript{39} M Rosenbaum and R Doblin, supra n.25. That the Government was surprised by the reaction of the medical community was made obvious by one DEA pharmacologist who stated that he had “no idea psychiatrists were using it”. See J Adler, “Getting High on ‘Ecstasy’”, Newsweek, 15 April 1985, p 96, cited in J Beck and M Rosenbaum, supra n.25, p 3.


\textsuperscript{41} Ibid., p 25. Note that the Chairman of the Committee, Professor Paul Graf, felt that international control was not warranted at that time and considered that the decision on MDMA should have been deferred until the WHO obtained further information on the alleged therapeutic usefulness of the drug.
properties of MDMA were soon disappointed. In July 1985, shortly before the first hearing took place, the DEA unexpectedly exercised emergency scheduling powers recently granted to it under the Comprehensive Crime Control Act of 1984,42 introduced in response to the appearance of a range of ‘designer’ narcotic drugs discussed above. The 1984 Act provided the Attorney General with the power to place a chemical compound under Schedule I for a period of one year (plus an additional six months if necessary) while the final scheduling decision was being made, where that substance had been found to pose “an imminent hazard to public safety”.43

It was obvious from the beginning of the formal hearings that the DEA was determined to have MDMA placed permanently in Schedule I of the 1970 Controlled Substances Act. That Act contains five schedules. While Schedules II-V are reserved for drugs that can be demonstrated to have varying degrees of medical value, Schedule I substances are those deemed to be dangerous with little or no proven therapeutic utility.44 In the event that a drug is so categorised, it may only be used by qualified researchers obtaining specific authorisation from the Federal authorities for limited medical or scientific purposes.45 In order for a drug to be placed in Schedule I, it must be found to satisfy three criteria: “a high potential for abuse, no accepted medical use and no accepted safety for use under medical supervision”.46 The DEA refused to accept evidence presented by medical practitioners who had long been using MDMA during therapy sessions, arguing instead that it satisfied the three criteria cited above and must be made subject to the strictest controls.

The majority of those defending MDMA at the hearings claimed that, while the drug should be brought under some system of control in order to outlaw non-medical consumption, placing it in Schedule I would prohibit valuable therapeutic use. Adding the compound to Schedule II or IV would allow practitioners to continue to utilise it for the proven benefit of patients.47 Those in support of MDMA rejected the DEA’s use of limited and inconclusive animal studies to show the abuse potential of the drug, citing instead three studies involving both human and animal subjects as proof of the safe and valuable use of MDMA under controlled conditions.48 A number of eminent psychiatrists testified on behalf of the

43 See the discussion in J Beck and M Rosenbaum, supra n.25.
44 Ibid., pp 4 and 6. Drugs are scheduled on a sliding scale depending on an assessment of their potential for abuse, balanced by their therapeutic qualities. Thus, substances with the highest potential for abuse and the lowest medical value are placed in Schedule I, while those with a low potential for abuse and significant therapeutic properties are placed in Schedule V. For a detailed analysis of the operation of the US Controlled Substances Act, see A Shulgin, The Controlled Substances Act: A Resources Manual of the Current Status of the Federal Drug Laws (Berkeley, Ronin Publishing, 1988).
45 In the United States, all scientific and medical research involving humans is regulated by the Drug Enforcement Agency (DEA) and the Food and Drug Administration (FDA), with the DEA regulating researchers and the FDA regulating the research protocols they are to follow. Although there is no federal review required for research involving non-human studies, researchers are obliged to get DEA approval before legally obtaining Schedule I drugs. See M Rosenbaum and R Doblin, supra n.25, p 144, fn 6.
46 M Rosenbaum and R Doblin, supra n.25, pp 138.
47 J Beck and M Rosenbaum, supra n.25, Appendix A, p 4. Therapists feared that although they could apply to have limited access to small quantities of Schedule I drugs, the administrative and bureaucratic hurdles involved would effectively prevent them utilising MDMA in practice. Proponents used the example of LSD in support of their argument that giving MDMA the status of a Schedule I drug would severely hinder research. After strict controls were placed on LSD in the 1960s, virtually all experimentation was discontinued.
48 One study conducted by Dr George Greer involved 29 patients who had been using MDMA, while another discussed by Dr Jack Downing used 21 healthy volunteers monitored before and after using the drug. Dr Charles Frith cited animal toxicity studies in support of the safe use of MDMA. See M Rosenbaum and R Doblin, supra n.25, p 138 and 145, fn 9.
therapeutic potential of the drug, presenting evidence to support claims that MDMA had been effectively used by therapists for a number of years and must be accepted as a legitimate tool for practice and research.

In May 1986, almost two years after the hearings had begun, DEA Administrative Judge Young issued his non-binding ruling in favour of the pro-MDMA camp, recommending that the drug be categorised under Schedule III. The Judge’s decision was based on three findings; “that MDMA had a low potential for abuse, that it had an accepted medical use and that there was accepted safety for use under medical supervision”.49 The DEA administrator did not, however, accept the recommendations of Justice Young and MDMA was placed permanently into Schedule I. Further protracted court action was to follow. An immediate challenge was launched in the US Court of Appeals, and in 1987 it was ruled that the decision to declare MDMA a Schedule I drug was administratively flawed and must be remanded back to the DEA for reconsideration. Several months later, the DEA once again placed MDMA in Schedule I, this time ensuring that the administrative rules had been satisfied.50 That act marked the end of a very public and acrimonious debate between law enforcement authorities, adamant that they must be able to prevent and punish recreational use of MDMA, and a substantial number of health professionals convinced that they had been denied access to a valuable therapeutic drug.

The massive amount of US media attention focused on MDMA since 1984 is arguably one of the most important factors that contributed to the increasing recreational use of this synthetic stimulant. The reaction of a group of therapists angered by the DEA’s scheduling proposal soon attracted the attention of both print and electronic media. By mid-1985, many of the major newspapers and magazines had published stories on the use and abuse of MDMA,51 many of which exaggerated and sensationalised the drugs reputed euphoric and therapeutic qualities;52 Other stories demonised the drug and its users, proclaiming MDMA as a new menace threatening to destroy the health and sanity of the young people attracted to it.53 Several commentators have pointed out that this is not the first time that the media has played a significant role in advertising a ‘new’ drug. Eisner comments that the media ‘hype’ surrounding the criminalisation of MDMA was reminiscent of the “hysteria and hyperbole” of

49 ibid., p 139.
50 Rosenbaum and Doblin argue emphatically that the rationale used by the DEA to justify this final decision was fundamentally flawed (supra n.25, pp 135-144). See further, B Eisner, supra n.32, pp 70-20 and also JE Riedlinger, “The Scheduling of MDMA: A Pharmacist’s Perspective”, Journal of Psychoactive Drugs; A Multidisciplinary Forum, Vol.17, No.3, Jul-Sep, 1985, pp 167-171.
52 The following is an extract from the article by J Adler appearing in Newsweek, entitled “Getting High on Ecstasy” (15 April 1985, p 96), cited in B Eisner, supra n.32, p 10. “This is the drug that LSD was supposed to be, coming 20 years too late to change the world. It is called MDMA - or ‘Ecstasy’- and users say that it has the incredible power to make people trust one another, to banish jealousy and to break down the barriers that separate lover from lover, parent from child, therapist from patient .... A New York writer who tried it compares it to ‘a year of therapy in two hours’. A Benedictine monk from Big Sur, Brother Steindl-Rast, says ‘a monk spends his whole life cultivating the same awakened attitude it gives you’. Of course, not everyone is taking it for the insight it provides. It has become popular over the last two years on college campuses, where it is considered an aphrodisiac. Drug-abuse clinics have seen kids who take a dozen or more doses a day to achieve an amphetamine-like high. Apparently the nation is on the verge either of a tremendous breakthrough or a lot more kids too strung out to come in from the rain’. It is not difficult to see that such a report would stimulate intense interest in the drug amongst young people attracted to exaggerated claims of the ‘incredible power’ of MDMA.
53 See, for example, the article “Dangerous Designer Drugs”, Sun Sentinel, Dallas, 2 July, 1985, cited in B Eisner, supra n.32, pp 24-25.
the crusade against LSD from 1966 to 1969.\textsuperscript{54} It should be remembered that although MDMA made an appearance on the US illicit drug market in 1972,\textsuperscript{55} since it was not accompanied by an aggressive marketing campaign and did not attract the attention of law enforcement authorities or the media, it did not then become popular with recreational users. One may speculate that, had MDMA been declared illegal when it was first recognised in those early samples analysed by the DEA, the publicity generated by that decision may have made it a popular stimulant during the 1970s. Rosenbaum and Doblin argue that without the media frenzy triggered by the 1984 scheduling controversy, it is likely that interest in MDMA would only have been spread by word of mouth and any increase in use would have been gradual.\textsuperscript{56} Such was the level of attention provided by the press campaign for and against the drug that it was only a matter of months before the phenomenon of ecstasy use was widely debated.

Part of the problem with the involvement of the media in the drug debate is not only the publicity given to particular substances or patterns of use, but inaccurate reporting responsible for the spread of misinformation. On many occasions, members of the press have confused MDMA with highly dangerous ‘designer’ narcotics, such as pethidine analogues. On July 2, 1985, the Dallas \textit{Sun Sentinel} carried an article claiming that:

The DEA called for an emergency ban on ecstasy after University of Chicago researchers found that the drug works by destroying large numbers of vital brain cells and may speed up the ageing process in a manner similar to the muscle degeneration produced by Parkinson’s disease. The DEA also reported 31 deaths from the drug, mostly in the San Francisco Bay area, with 26 of those deaths occurring after August 1, 1984.\textsuperscript{57}

It is apparent that the author had confused her facts and was quoting statistics related to the synthetic analogue MPTP, the toxic by-product of the narcotic drug MPPP.\textsuperscript{58} There have been numerous other instances where journalists have made the same mistake or have otherwise distorted evidence of the effects of MDMA.\textsuperscript{59}

\textit{‘Designer’ drugs in the UK}

In Britain there is no similar history of the manufacture or abuse of synthetic narcotics.\textsuperscript{60} Rather, the renewal of interest in variable chemical compounds was prompted by the spread of the ecstasy phenomenon. Unlike their US counterparts, UK therapists did not experiment

\textsuperscript{54} B Eisner, \textit{supra} n.32, p 14. Rosenbaum and Doblin write that the media loved MDMA. While the name ‘ecstasy’, and the Texas bar scene in which it was distributed were effective headline grabbers, its white affluent users made an interesting contrast to the stereotypical drugtaker. See M Rosenbaum and R Doblin, \textit{supra} n.25, p 140. Several interesting articles have been written on the role of the media in publicising certain drugs for a particular period in time. With regard to glue-sniffing, see EM Brecher, “How to Launch a Nation-wide Drug Menace” in \textit{Licit and Illicit Drugs} (Boston; Little Brown, 1972). In relation to the US epidemic of crack cocaine use during the 1980s, see C Reinaman and H Levine, “The Crack Attack: media and politics in America’s latest drug scare” in J Best (ed.), \textit{Images and Issues: Current perspectives on social problems} (New York, Aldine de Gruyter, 1989). Media attention focused on LSD is discussed in Chapter 1.

\textsuperscript{55} See \textit{supra} n.29.

\textsuperscript{56} M Rosenbaum and R Doblin, \textit{supra} n.25, p 141.

\textsuperscript{57} B Eisner, \textit{supra} n.32, pp 24-25.

\textsuperscript{58} See the earlier discussion of the narcotic analogues.

\textsuperscript{59} See J Beck and PA Morgan, “Designer Drug Confusion: A Focus on MDMA”, \textit{Journal of Drug Education}, Vol.16, No.3, 1986, pp 287-301. Once again, there are parallels to be drawn with media reporting of the LSD phenomenon, discussed in Chapter 1, much of which was inaccurate and sensationalist.

with the use of MDMA in psychotherapeutic treatment. Recreational use can be traced back to the early 1980s when small batches of the drug were couriered to England from New York to be used by an exclusive group of the young and avant garde: “The people that were using ecstasy recreationally during the period from 1982 to 1986 were the Soho elite: club runners and club faces; music journalists, designers, models and people connected with the fashion business...”. At that early stage, MDMA was not favoured as a dance drug, but was appearing at intimate private parties for the initiated guest. In 1985, the same year that police first seized the drug in Britain, the first ‘ecstasy parties’ were held for London club goers. Later that year, Peter Nasmyth published the first article in Britain about the effects of the ‘new’ drug and the trend towards its increasing use in the popular magazine, The Face. Although supply was still restricted, these events appear to mark the beginning of a cult of ecstasy use and all night revelry that would soon sweep over the United Kingdom.

In the 1990s ecstasy became synonymous with a subculture of young people whose recreational consumption of the drug at ‘rave parties’ and chic venues attracted the widespread attention of authorities in Britain and abroad. It is generally accepted that the birthplace of the ‘rave scene’ was the Spanish island of Ibiza attracting hundreds of British holiday makers throughout the summer months. Although MDMA had been available on the Island since the early 1980s, it was the summer season of 1987 that heralded the arrival of ‘House’ or ‘Acid House’ music, and the popular consumption of ecstasy by a crowd of young people intent on hours of energetic dance. The British Disk Jockeys that had generated the music style in Ibiza soon brought it home to London. Clubs opened up to play different variations of the house music theme, spawning an ecstasy dance scene that has been described as a “significant phenomena of British youth culture”. By the early 1990s, an estimated 20 to 30 thousand people were attending a rave every weekend in the North West of England, a substantial percentage of them enhancing their experience by consuming one or more synthetic drugs, primarily ecstasy, but often amphetamine and LSD. Certainly there were many young people attending organised raves and interested in Acid House music that were not been interested in consuming any illicit drugs. From the summer of 1988, however, until the time of writing, the dance scene has spread and the use of ecstasy by a subculture that grew around it has become increasingly common among large numbers of young people in major centres throughout the UK.

The phenomenal increase in ecstasy use in Britain during the late-1980s was partly the result of an expert marketing campaign specifically aimed at young adults. Clubs playing House music adopted the Smiley symbol, a logo with connections to 1970s dance music and connotations of the high supposedly achieved on a psychedelic drug trip. Various chart hits using lyrics referring to ecstasy and ‘Acid House’ proved enormously popular, while t-shirts, record covers and venue advertisements were often designed using symbols that would

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51 A literature search reveals that there is no documented use of MDMA in psychotherapeutic treatment in the UK. This is confirmed by Dr Les King, Senior Forensic Scientist, Forensic Science Service, London, Interview, March 2000.
52 M Collin, supra n.1, p 41.
53 Ibid., p 43.
55 The dictates of space and time prevent a more detailed review of the development of the ecstasy and ‘Acid House’ music scene and the subculture that grew up around it. Numerous texts have been written on the subject. See, for example, M Collin, ibid; B Eisner, supra n.32 and S Redhead, supra n.34.
56 H Shapiro, supra n.22, p 6.
59 S Redhead, supra n.34, p 127.
identify them with ecstasy. Just as the fascination with psychedelic drugs influenced fashion and music styles during the 1960s and 1970s, so too has the popularity of ecstasy and the rave scene influenced fashion and music from the late 1980s. Redhead suggests that the “first signs of a corporate push of the Acid House culture” came in the spring of 1988 when smiley badges and related memorabilia were sold in London markets and merchandising companies were set up to manufacture these products in bulk. Such an effective advertising campaign, reinforcing the link between rave culture and ecstasy use, played a significant part in publicising MDMA to a broad audience.

Once again, it is open to suggestion that the media’s sensational reporting of the increasing interest in ecstasy during the second half of the 1980s is another factor that is partly responsible for publicising the drug throughout Britain. In 1986, a local newspaper warned that South Wales was at the “frontline of the battle to beat the threat of deadly ‘so called’ designer drugs from the United States”. The article made reference to the “perversely named Ecstasy” and is typical of a plethora of emotive reports appearing in local and national newspapers. Throughout the late 1980s numerous stories were printed in the popular press warning of the relationship between the twin ‘evils’ of Acid House parties and ecstasy use. Headlines such as “Lush Life Lure That Snared Ecstasy Girl”, “Helicopter Swoops on Motorway Acid” and “Acid House Police in Terror Chase” suggested that a deadly new threat was corrupting thousands of young people. Presumably in an effort to increase sales and titillate their audience, many of the tabloids printed stories that were grossly exaggerated and/or factually incorrect. In 1988, a journalist for The Sun newspaper claimed that:

Police raided a huge Acid House disco yesterday - then fled to let 3,000 teenagers carry on raving it up at the sex and drugs orgy ... Sun reporters saw PUSHERS openly selling Ecstasy, a drug which heightens sexual awareness, but can lead to hallucinations and heart attacks... OUTRAGEOUS sex romps [were] taking place on a special stage in front of the dance floor.

It is difficult to imagine that all 3,000 teenagers allegedly present at the ‘Acid House disco’ had consumed ecstasy and were participating in the spectacle described. The media frenzy surrounding it and the ‘evils’ of the rave scene did not convince users of the dangers involved, but served to generate widespread interest among young adults.

Although it was not until 1985 that the first batch of ecstasy was seized by British police, in contrast to the US the drug had been illegal in the UK since 1977. MDMA’s parent compounds, MDA and methamphetamine, had both been the subject of abuse throughout the 1960s and were scheduled under the 1971 Misuse of Drugs Act and the 1971 UN Convention on Psychotropic Substances. Whilst MDMA had not been known to authorities and was therefore not specifically scheduled, as soon as a generic definition of phenethylamines was introduced under the 1977 amendment to the Misuse of Drugs Act, MDMA and its derivatives became Schedule A drugs, punishable by up to seven years imprisonment for
possession and up to fourteen years for supply.76 In 1986/87, when ecstasy was first emerging as a popular dance drug, many laboured under the mistaken belief that it was legal in Britain.77 In fact, UK drug law was unique in that, prior to the popularisation of new synthetic drugs, legislation had been modified specifically to regulate a category of variable chemical compounds so that it did cover MDMA and related compounds at the time the ecstasy phenomenon began to take hold.

It was not long before the rave subculture and the popular consumption of the drug associated with it spread into other countries around the globe. Just as the emergence and marketing of ecstasy in the US influenced the UK market, the US market was in turn influenced by the British rave scene. The success of one of the first large US raves organised in San Francisco in 1991 served to spark off dozens of other such events, many attracting in excess of 7000 young people eager to entertain themselves.78 Like the English 'Acid House' scene that preceded it, US rave culture was inextricably linked to the widespread use of ecstasy and a number of psychedelic drugs.79 As a result of advances in communication and information technology, young people in a large number of countries were soon flooded with information on dance music and the subculture that grew around it.80 Consequently, although the development of the trend and the scale of use varies, from the late 1980s the governments of many Western countries were made aware of a novel drug problem posed by the surging popularity of MDMA and the threat of related variable synthetic compounds.81

There are a number of obvious parallels to be drawn between the second generation of synthetic psychotropic drug use emergent in the 1960s and the third generation of new synthetic drug use that has plagued law enforcement authorities since the middle of the 1980s. In both generations synthetic drugs have been used recreationally by a significant percentage of teenagers and young adults. There are similar examples of sensationalist media publicity and a similar link between fashion and illicit drugs. In both generations, use of certain synthetics have come to symbolise a subculture of young people, many of them well-educated and middle class, whose social patterns of consumption generated fear and moral condemnation. Redhead points out that the relationship between ecstasy and the ‘Acid House’ scene prompted a “moral panic” similar to the panic surrounding recreational drug use in the 1960s and 1970s, and users were regarded as having many of the characteristics of the “folk devils” of that time.82 Prior to the criminalisation of amphetamines and LSD in the mid-1960s, certain types of amphetamines had long been abused — predominantly by middle aged consumers who ingested dangerous, often addictive quantities, but did not do so in a manner that attracted the attention of law enforcers.83 Similarly, in the years before ecstasy was labelled by the media and law enforcement authorities as a lethal ‘designer’ drug,

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76 See Misuse of Drugs Act 1971, Schedule 4 (Prosecution and Punishment of Offenders).
77 Rush: Drugs Uncovered, Channel 4, Monday, 9 November 1998, 9pm.
78 B Eisner, supra n.32, p xvii.
79 ibid., p xviii.
82 S Redhead, supra n.34, p 12, referring to Stanley Cohen’s influential text, Folk Devils and Moral Panics (London, Blackwell, 1972) which analyses the “mods and rockers” phenomena of the 1960s. Medermott suggests that the relationship between ecstasy and the rave scene is mirrored by the relationship between amphetamine and punk, LSD, cannabis and the ‘hippies’, and pep pills and ‘mods’. In his view, the role that drug use and subcultural values have played in defining the identities of several generations of British youth has been inadequately explored. See P McDermott, “MDMA Use in the North West of England”, International Journal of Drug Law and Policy, Vol.4, No.4, 1993, p 210 at 219.
83 See Chapter 1, supra pp 2-3.
amphetamines continued to be the subject of chronic abuse by large numbers of drug users.\textsuperscript{84} Yet since the chronic use of those drugs throughout the 1940s and 50s and the 1970s and 80s commonly involved an older, less visible and apparently less 'newsworthy' user, it did not attract the same type of condemnation or demands for action from the media, Government or law enforcement authorities. It is arguable, therefore, that in all three generations the legal response to particular synthetic drugs has not been based solely on an analysis of the dangers involved, but has been influenced by the type of users that became visible and the patterns of use that have generated fear and loathing.\textsuperscript{85}

For our purposes the most important difference between the market for synthetic psychotropics in the 1960s/70s and the current market that has developed following the ecstasy boom in the 1980s is the increasing popularity of new synthetic compounds and a trend towards experimenting with the manufacture of non-controlled analogues of drugs within the same familial group. A number of factors could be said to have contributed to this. First, the popularity of MDMA. The expansion of media and communication since the 1970s meant that by the 1980s the ecstasy phenomenon and rave party scene were widely publicised in many different countries. Not only were young people alerted to the existence of new and exciting chemical stimulants, but illicit manufacturers were reminded that it is possible to synthesise other NSDs falling outside the definition of controlled substances under domestic legislation.\textsuperscript{86} Secondly, precursors needed in the manufacture of MDMA and related compounds were widely available from the 1980s.\textsuperscript{87} Thirdly, access to Internet services has meant that the recipes for various NSDs have been freely distributed.\textsuperscript{88} Finally, as is explained below, the phenethylamine family to which MDMA belongs lends itself easily to chemical manipulation so that clandestine operators with a basic level of chemistry knowledge have been able to produce a range of NSDs.


\textsuperscript{85} This would accord with the views of Phillip Bean (P Bean, \textit{The Social Control of Drugs}, London, Martin Robertson and Co., 1974, p 5) and Professor RH Blum (RH Blum, "The International View of Drug Abuse", \textit{Society's Response}, 16 April 1973, p 23 at 25) who have suggested that in the 1960s and 1970s, the response of law enforcement authorities was determined by the type of user and the visibility and patterns of use associated with a drug. See Chapter 1, supra pp 13-14.

\textsuperscript{86} According to the UK National Criminal Intelligence Service (NCIS), a growing number of dealers are manufacturing and selling new analogues, marketing the products as stronger and more effective versions of ecstasy. J Bennett, "New risk of deadly designer drugs", \textit{The Independent}, 20 November 1998.

\textsuperscript{87} See the discussion of the availability of precursors, infra pp 43-48. According to Dr Les King (Senior Forensic Scientist, The Forensic Science Service, London) in determining which end-products they should produce, clandestine operators are more likely to be governed by the availability of specific precursor chemicals than by a desire to avoid existing controls.

\textsuperscript{88} Communication from the Commission to the Council and the European Parliament on the Control of New Synthetic Drugs (Designer Drugs) COM (97) 249, p 12. It has been suggested that the wealth of knowledge available to chemists via the Internet stimulates the production of two types of 'new' synthetic drug. Some are previously popular substances that have not appeared on the illicit market for a period of time (e.g. DOB), while others appear to be the work of chemists eager to experiment with entirely new compounds by exploring chemical avenues suggested on the Internet. Information supplied by Adrian Hayward, HM Customs and Excise, \textit{London, Interview}, March 2000. Not only does the Internet provide clandestine operators with recipes for the manufacture of end-products, it also facilitates the discrete purchase of chemicals via the Web-sites of chemical suppliers, making it increasingly difficult for authorities to detect suspicious purchasers. See Precursors and Essential Chemicals Frequently Used in the Illicit Manufacture of Narcotic Drugs and Psychotropic Substances: report of the INCB for 1999 on the implementation of article 12 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (E/INCB/1999/4), p 17.
**The dangers of synthetic (‘designer’) drug use**

Earlier discussion of the narcotic analogues of fentanyl and pethedine reveals the very high risk of morbidity and mortality linked to the consumption of these extremely potent substances and their bi-products. The focus of this thesis, however, is on the range of synthetic psychotropic drugs that have subsequently become popular. How dangerous are ecstasy, ecstasy-related compounds and the variety of new synthetic psychotropics that have been synthesised over the last decade?

The controversy provoked by the scheduling of MDMA in the US in 1985 indicates that there is some dispute as to the medical utility and potential harm associated with its consumption. A number of respected therapists argue that when used in a controlled environment MDMA does have proven therapeutic properties, helping to facilitate communication between patient and psychologist and improving self-esteem, mood and interpersonal relationships.89 It has been further suggested that there is a need for extensive research to test MDMA as a suitable drug for the treatment of other conditions, including depression and autism.90 According to this view, the relatively low risk presented by the consumption of MDMA is more than justified by the therapeutic utility of the drug.

Consumers have reported a range of positive and negative effects. The positive feelings associated with ecstasy, viewed by many recreational users as a relatively benign drug, include enhanced communication, empathy and understanding, greater energy, a sense of well-being and feelings of euphoria.91 Some users go further and claim that MDMA is a ‘gateway’ drug leading to positive transcendental or religious experiences.92 On the other hand, there are various undesirable physical and psychological effects experienced during and after intoxication, the most common being muscle tension, jaw clenching, increased sweating, blurred vision, ataxia (inability to co-ordinate voluntary movements), nausea, diminished sleep and loss of appetite.93 Although statistically, it is relatively rare for ecstasy to cause serious adverse physical effects, there are cases where users have reported longer term complications including liver inflammation and bone marrow problems.94 In the majority of instances, the deleterious physical and mental effects associated with ecstasy use result because the drug is consumed by tireless, dehydrated dancers in hot night-clubs that have little or no ventilation.95 Few ill-health effects are reported when MDMA is taken for therapeutic purposes in a carefully monitored environment.

There are different views on the adverse psychological impact attributable to MDMA. A number of users have complained of experiencing bouts of anxiety while on the drug and low-energy levels and a general lack of motivation for a few days after ecstasy consumption.96

90 Ibid., p 170. Some pro-MDMA researchers have gone so far as to assert that there is no other available drug that can be used so safely and successfully as an adjunct to psychotherapy.
92 RK Seigel, *ibid.*, p 351.
93 Ibid.
96 This experience of slight depression and low energy levels is known by ravers as feeling ‘cabbage’ (H Shapiro, *supra* n.22, p 7). It is difficult to determine whether that state can be blamed on the pharmacological properties of the drug, or the fact that people taking ecstasy at venues are likely to participate in hours of energetic dancing and have little sleep. It has been noted that there may be indirect adverse effects if the user takes further doses of MDMA or another drug, such as Temzepam (a
Although it is not physically addictive, use of any substance may become compulsive and excessive and certain individuals have been reported to binge on ecstasy on a daily basis over a significant period of time, regardless of the fact that they soon develop a tolerance for the drug. Several reports suggest that MDMA may be responsible for impairing judgement and damaging mental health. It has been noted, however, that existing research into the associated negative psychological problems is sparse and many of the studies undertaken thus far have been uncontrolled and of limited scientific use. As a result, the issue of the long-term neurotoxicity of MDMA, one of the most worrying aspects of increasingly widespread consumption, remains unresolved.

One of the more serious hazards involved is the difficulty of predicting the chemical content of a drug sold on the illicit market, or the idiosyncratic reaction of a particular user in different surroundings. Tablets marketed as ‘ecstasy’ have been found to contain a mixture of any number of substances, including MDMA, MDA, MDEA, MBDB, MDE, 2CB, ketamine, amphetamine, LSD, and pseudo-ephedrine. Other non-pharmaceutical substances, amongst them dried mushrooms and dog worming tablets, are reported to have been passed off as ecstasy. In early 2000, Dutch authorities were alarmed by the discovery of the poison strychnine mixed with ecstasy in a tablet handed in to testing authorities by a young user. It is believed that the batch of pills originated in Asia where strychnine is sometimes used in place of amphetamine for its stimulant properties. In 1993, the Time Out magazine published an article warning that “thousands of lives” were at risk as a result of spiked ecstasy tablets circulated on the illicit market. It was suggested by the author that “[d]rug agency workers believe that adulteration with heroin, LSD and even crushed glass and rat poison will eventually force casual users to shun the drug because of horrific side-effects”. Aside, 

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However, from the very real danger identified by the recent discovery of a strychnine mixture, many of the anecdotal reports suggesting that highly toxic adulterants have been found in ecstasy tablets have proved false, exaggerated or misleading. The more likely danger is that highly potent chemical analogues such as PMA (discussed below) will be sold as ecstasy, causing the death of users expecting to ingest a drug that is far less potent. Two other factors which determine the physical and psychological effects on drug takers are the ‘set and setting’ in which ecstasy is used. That is, the effect of a dosage of MDMA depends on the mood and expectations of a particular user as well as the context and surroundings in which the drug is consumed. This makes it difficult to predict the reaction of any particular user to a dosage of what has been sold to them as ecstasy.

There is no doubt that in certain circumstances consumption of MDMA itself may be fatal. Between 1987, when the drug first began to be consumed in significant quantities, until the end of 1995, ecstasy was recorded as the official cause of 42 deaths in the United Kingdom. There are a number of different reasons for the fatalities. In many instances, users have died after attending a ‘rave style’ dance venue. While ecstasy itself raises the body temperature, it also has stimulant effects that prolong hours of uninterrupted energetic dancing. Consequently deaths have been caused by over-heating (hyperthermia), dehydration and exhaustion, processes which can lead to the breakdown of muscle tissue, renal failure and widespread clotting of the blood. Several users have died after consuming excessive amounts of water (water intoxication or dilutional hyponatremia), perhaps in an effort to heed advice about cooling off between dances. In other cases, deaths have been attributed to an allergic response, liver breakdown or heart failure. None of the fatalities have resulted from an overdose of MDMA and the quantity of the drug needed to kill a human by overdose, as distinct from a venue-specific or idiosyncratic allergic response, is still unknown.

As a result of the media attention focused on high profile ecstasy-related deaths, members of the public may have a distorted idea of the degree of risk involved in consuming the drug. In July 1989, sixteen year old Claire Leighton collapsed and died after developing a rare reaction to a tablet of ecstasy purchased for her at Manchester’s Hacienda night-club. Ms Leighton was the first person known to have died as a result of ingesting MDMA. She was, as journalists put it, the first “Acid House fatality”, and national and international media were quick to publish stories of the killer drug ecstasy. In 1995, teenager Leah Betts fell into a coma outside a rave event where she had been celebrating her eighteenth birthday. During the weeks she remained unconscious, the tabloid press were able to publish reports under bold and dramatic headlines, following the anguish of her parents as they decided whether or not to turn off their teenager’s life support system. In Collin’s view, the reaction of the tabloids to this incident and their subsequent “War on Drugs” campaign “fired the lengthiest and most

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105 M Collin, ibid., p 292. It appears that the crushed glass story was based on unsubstantiated rumour. Heroin had never been found in a batch of MDMA, although it was present in a handful of pills containing a mixture of substances such as Ephedrine that were designed to simulate the effects of ecstasy. See also, EMCDDA, “New Trends in Synthetic Drugs in the European Union”, supra n.91, p 15.

106 Shapiro notes that MDMA is similar to LSD in this regard. See H Shapiro, supra n.22, p 8. See also EMCDDA, ibid., p 19.

107 EMCDDA, ibid., p 21.

108 Ibis.


112 S Redhead, supra n.34, p 14

113 Ibis.

114 M Collin, supra n.1, p 299.
hysterical drug panic of the decade". Some newspapers produced warning posters featuring Betts unconscious on her hospital bed and many sent undercover reporters out to catch the "murderers" who had supplied the drug. Like no other ecstasy case before it, the death of Leah Betts, an attractive middle class girl with articulate and outspoken parents, attracted enormous publicity apparently deliberately designed to engender outrage and moral panic. The number of ecstasy-linked fatalities must, however, be put into perspective. It is possible to determine the relative risk of dying as a result of consuming ecstasy in the UK by dividing the total number of deaths (42 in the 8 years between 1987 and 1995) by the total number of doses consumed (an estimated 143 million). In that case, the risk of death is shown to be 1 in 3.4 million instances. Compare national statistics showing that, in 1996 alone, 115,000 people died of smoking-related illnesses and 33,000 as a result of alcohol consumption. Although there is no doubt that ecstasy has been the cause of a number of tragic deaths or that any number of fatalities is significant, the debate over adequate regulation of dangerous drugs must be informed by factual, clear evidence of the risks involved, rather than the emotive stories often presented in the popular press.

A Range of New Synthetic Drugs

While there has been much attention focused on the widespread consumption of MDMA or ecstasy, less is known about the availability of other NSDs currently in circulation. A disproportionate amount of space has been devoted here to analysing the emergence of a trend towards the popular use of MDMA, since it was this substance that drew attention to the inability of existing national and international laws (designed to regulate plant-based narcotic drugs and stable pharmacological compounds) to control the spread of new chemical variants manufactured in illicit laboratories. Even in the United Kingdom where the emergence of several synthetic psychotropic compounds during the 1970s had prompted the Government to introduce generic legislation in 1977, it was not until the popularisation of ecstasy in the mid-1980s that law enforcement authorities raised the alarm over increasing illicit production and consumption of a new range of synthetic drugs.

There are, however, other less popular and less publicised 'designer' psychotropic drugs that have appeared on the illicit market, and anecdotal accounts of several new forms of ecstasy suggest increasing consumption levels. In reality, while it is possible in theory to synthesise an infinite number of designer drugs, in practice relatively few have become popular substances of abuse. Yet it is true that the last years of the twentieth Century saw a marked increase in the distribution of uncontrolled analogues not previously seized on the illicit market. Moreover, there is a significant possibility that more sophisticated law enforcement

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115 Ibid., p 300.
117 Ibid., p 21.
118 It has been pointed out that the use of ecstasy as the benchmark drug, against which other new drugs and trends are routinely compared, is a reflection of the "influence and weight of meaning" now afforded to a substance that was largely unheard of before the end of the 1980s. Ibid.
119 Ibid., p 12.
120 Precursors and Chemicals Frequently Used in the Illicit Manufacture of Narcotic Drugs and Psychotropic Substances: Report of the INCB on the implementation of Article 12 of the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, E/INCB/1998/4, para.133.
121 Information supplied by Dr Les King, Senior Forensic Scientist, London, Interview, March 2000. Dr King is responsible for producing a regular “Memorandum” on recent seizures of NSDs for distribution to representatives of Forensic Science Laboratories in the EU. The appearance of an increasing number of new synthetic drugs has been confirmed by Adrian Hayward, HM Customs and Excise, London, Interview, March 2000. Hayward points out that some of the substances are in fact medical compounds that have been identified by traffickers as having some potential for abuse (e.g. dextromethorphan, an
techniques, tighter controls over traditional precursors and the search for new ‘thrills’ will prompt clandestine manufacturers to experiment further with a broader range of non-controlled analogues.

Most of the NSDs encountered by law enforcement authorities fall into one of two broad classes or families of drugs. The most popular can be classified as phenethylamines, a category including MDMA and related analogues. Less often, authorities have reported the discovery of analogues within the tryptamine family. As this thesis is written for an audience which may not have a detailed knowledge of chemistry or pharmacology, it is important to develop a basic understanding in order to appreciate the ease with which synthetic compounds can be manipulated for the clandestine market. At Appendix A, an Index of Synthetic Psychotropic Drugs provides more detailed information on a large number of compounds that have been synthesised, many of which have appeared recently on the illicit market.

**Phenethylamines**

The ease with which parent compounds can be manipulated to produce an enormous number of synthetic substances not listed on the schedules of existing drug laws is best illustrated by reference to the category known as phenethylamines.

![Diagram 1- Structure of the phenethylamine](image)

- Rg is the ring structure
- Re, Rc, Rb, Ra, Rd and Rf are side chains

It is here that the compounds MDMA, MDE, MDA and related structures belong. The phenethylamines lend themselves to manipulation in two ways; first, by modification of the ring structure and secondly, by manipulation of the side chain. The majority of NSDs in the phenethylamine group (including MDMA) are ring-substituted compounds and will have hallucinogenic, empathogenic and/or stimulant properties. The smaller number of substances that have been substituted at the side-chain will have only stimulant properties or may be totally inactive. By experimenting with the parent structure of phenethylamine it is possible to produce hundreds of chemically related drugs. As discussed in later chapters, in the

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124 Ibid.
125 The World Health Organisation reports that there are almost 200 members of a family of drugs known as ‘amphetamine analogues of the MDA-type’, all of which share a core molecular structure. See World Health Organisation, “Amphetamine-type Stimulants”, supra n.5, p 6. See further, TA Dal
majority of countries and at the international level, drug control instruments are based on a 'substance-by-substance' approach so that it will be legal to consume the new compounds until the specific chemical definition has been added to the Schedules.\textsuperscript{126} Even in those countries that have adopted a generic or analogue approach attempting to cover a certain group of chemically related substances, a substantial number of derivatives may not be caught under the legislative definition.\textsuperscript{127}

In 1991 Alexander and Anne Shulgin published their popular and informative text entitled \textit{PIHKAL - a Chemical Love Story}.\textsuperscript{128} The title of this half novel/half clinical textbook is an acronym standing for "Phenethylamines I Have Known and Loved". \textit{PIHKAL} documents the personal experiences of Dr Alexander Shulgin, his wife Anne and a group of close associates, and their years of experimenting with phenethylamine derivatives synthesised in the author's home laboratory. Part 2 of the book lists the chemicals necessary to synthesise each of the 179 analogues, provides a step-by-step guide to manufacture and describes in full the sensations that are likely to follow consumption. Dr Shulgin is a highly skilled chemist and both he and his wife are well trained in the study of psychotropics. Their intention in publishing \textit{PIHKAL} was to inform others of the methods of synthesis, properties and appropriate use of phenethylamine compounds that they are convinced can and should be used as valuable tools for the exploration of the human mind and psyche.\textsuperscript{129} While the authors themselves do not advocate that the manufacture of those substances should be attempted or the final products tested by persons without the requisite knowledge or authorisation,\textsuperscript{130} the Shulgins' text has become a guide book for underground chemists wishing to manufacture various compounds intended for the illicit market, including pure MDMA and an assortment of ecstasy-type substances that may fall outside the scope of domestic legislation.\textsuperscript{131}

The recent appearance of a new range of molecules structurally related to MDA has helped to expose loopholes in the existing control regime. A number of national governments have reported seizures of related chemical compounds such as MMDA, MDE, MBDB, MDEA, 2C-I, 2C-T-7 and HOT-2.\textsuperscript{132} While the first two of those substances were added to Schedule I of the 1971 Convention on Psychotropic Substances in 1986 and 1990 (respectively) and

Carson, "An evaluation of the potential for clandestine manufacture of 3,4-methylenedioxyamphetamine (MDA) analogs and homologs", \textit{Journal of Forensic Sciences}, Vol.35, No.3, 1990, pp 675-697. Amphetamine itself can be manipulated to manufacture hundreds of compounds. It has been said that "[a]mphetamine remains the chemist's 'Cinderella' molecule. No other compound has displayed such a plethora of pharmacological, biochemical, and physiological effects, ... nor have many other molecules served as so versatile a starting base for the synthetic elaboration of a host of novel therapeutic agents". See JH Biel and BA Bopp, \textit{Handbook of Psychopharmacology}, 1978, cited in AK Cho and DS Segal (eds), \textit{Amphetamine and its Analogs} (London, Academic Press Ltd, 1994), p 3.

\textsuperscript{126} See the discussion of the domestic legislative models covering NSDs in Chapter 5.
\textsuperscript{127} See further Chapter 5.
\textsuperscript{128} A and A Shulgin, \textit{PIHKAL - a Chemical Love Story} (USA, Transform Press, 1993).
\textsuperscript{129} \textit{Ibid.}, p xii.
\textsuperscript{130} In their follow up text entitled \textit{TIHKAL}, the Shulgins begin with a warning that persons without legal authorisation should not attempt to synthesise the compounds described with the intention that they be ingested by humans since "[t]o do so is to risk legal action which might lead to the tragic ruination of a life". The authors state further that "any person anywhere who experiments on himself, or on another human being, with any one of the drugs described herein, without being familiar with that drug's action and aware of the physical and/or mental disturbances or harm it might cause, is acting irresponsibly and immorally, whether or not he is doing so within the bounds of the law". See A and A Shulgin, \textit{TIHKAL, The Continuation}, supra n.12, p xii.
\textsuperscript{131} On numerous occasions a copy of \textit{PIHKAL} has been discovered at the site of a clandestine laboratory raided by police. L King, "Designer Drugs based on Phenethyllamine", \textit{The Scientific Investigation of Drugs}, Conference, Airth Castle, 7-8 May, 1999. See the discussion of one such case in Chapter 5, infra, pp 117-118.
\textsuperscript{132} \textit{Ibid.}
should therefore be scheduled under the domestic drugs legislation of Parties to that
Convention, the others are not currently under international control and are not controlled
under the national laws of many Member States.

Seizures of N-Methyl-1-(3,4-methylenedioxyphenyl)-2-butanamine (MBDB) have
generated enough concern for countries to be considering further controls. Although there is
no information to suggest widespread abuse of this substance, it has recently been
encountered in fourteen of the fifteen EU Member States and in Asia and the United
States. Psychoactive effects are generally similar to MDMA and the drug is most frequently
sold as a type of 'ecstasy'. Yet although in animal trials MBDB has been shown to increase
serotonin release in the brain and to inhibit serotonin and noradrenaline re-uptake in the same
way that MDMA does, it is less potent than MDMA and does not appear to pose as
significant a risk. There have been no severe acute reactions for MBDB, as there have been
for MDMA and there are no reports of requests for emergency treatment. While a number of
governments have recently scheduled this drug under their own domestic drugs legislation, it
remains uncontrolled in many countries.

A far more dangerous compound recently discovered is P-Methylthioamphetamine,
otherwise known as 4-Methylthioamphetamine or 4-MTA. Since 1997, authorities in the
Netherlands and the United Kingdom have infrequently discovered 4-MTA circulated on the
illicit market. According to the London Toxicology Group that monitors developments in
clandestine drug production, 25,000 tablets seized by British authorities in 1988 probably
originated in the Netherlands. 4-MTA was first developed around 1993 by Professor David
Nicholls, an American researcher experimenting with the hope of marketing it as a possible
appetite suppressant or anti-depressant. Although it was never tested on humans,
underground chemists picked up on references in scientific papers, and it was soon leaked
onto the illicit market. The drug is sold on the street in tablet form known as 'flatliners', so

133 EMCDDA, Report on the assessment of MBDB in the framework of the joint action on new
synthetic drugs (Lisbon, EMCDDA, 1999), p 22.
135 EMCDDA, Report on the assessment of MBDB in the framework of the joint action on new
synthetic drugs (Lisbon, EMCDDA, 1999), p 15. Despite the fact that it is synthesised through
chemical reactions that are similar to those used in the synthesis of MDMA, the process involves
different precursor chemicals and MBDB cannot be produced accidentally during an attempt to
manufacture MDMA.
136 MBDB is scheduled in eight of the fifteen Member States of the EU (Austria, France, Germany,
Greece, Ireland, Italy, Luxembourg and the UK). In the UK and Ireland, MBDB has been controlled
since 1977 and 1987 (respectively), when those countries introduced generic scheduling (See Chapter
5). In the Netherlands, a decision was recently made that the relatively low risk posed by MBDB did
not warrant the drug being prohibited, although further monitoring and assessment was deemed to be
appropriate. See EMCDDA, Report on the assessment of MBDB in the framework of the joint action on
new synthetic drugs (Lisbon, EMCDDA, 1999), p 19. See Chapter 7, infra pp 217-218, for a discussion of
negotiations that took place during 1998 and 1999 to determine how the EU should respond to
MBDB.
137 Proposal for a COUNCIL DECISION defining 4-MTA as a new synthetic drug which is to be made
subject to control measures and criminal provisions, COM (1999) 307 final, p 1. See further
EMCCDA, Report on the Risk Assessment of 4-MTA in the Framework of the Joint Action on New
Synthetic Drugs (Lisbon, EMCCDA, 1999).
No.11, p 1.
See further, X Huang, D Marona-Lewicka and D Nichols, "p- Methylthioamphetamine is a potent new
called because of the 'out of body' experience it is supposed to induce\textsuperscript{140} (it is reported to have a mild stimulant effect, resulting in a feeling of calmness rather than euphoria\textsuperscript{141}). Negative side-effects include nausea, hyperthermia, pressure on the eyeball, thirst, shivering, confusion, memory loss, coma and heart attack.\textsuperscript{142} Most recent reports link the drug to at least five deaths in the UK and one in the Netherlands.\textsuperscript{143} Since 4-MTA was relatively unknown until recently it is not controlled under domestic laws in most countries.\textsuperscript{144} It was not until a significant quantity of the substance was seized that Governments were made aware of a weakness in existing laws allowing for the sale and possession of a highly dangerous new synthetic drug.\textsuperscript{145}

The chemical compound \textit{4-Bromo-2,5-dimethoxyphenethylamine (2C-B)}\textsuperscript{146} has recently been discovered on the illicit market in significant quantities. 2C-B is a phenethylamine derivative structurally similar to 4-methyl-2,5-dimethoxyamphetamine (DOM or STP), a drug that appeared on the original schedules of the 1971 Convention, and also 4-bromo-2,5-dimethoxyamphetamine (DOB), scheduled under the 1971 Convention in 1985.\textsuperscript{146} Seizures of 2C-B were first reported in the USA in Louisiana in 1978 and it was encountered sporadically around that time by law enforcement officers in several States including Texas, California, Oregon and Arizona.\textsuperscript{147} It was not until 1993, however, that the pattern and extent of abuse changed dramatically as large numbers of tablets, traded under the street name of 'Nexus', began to be distributed. A highly active and sophisticated promotional campaign was initiated in Florida where members of a distribution network printed fliers proclaiming Nexus as a 'natural' cure for impotence, frigidity and diminished libido.\textsuperscript{148} In other countries, including Australia, Canada, Germany, Japan, the Republic of Korea and the United Kingdom, it appeared over the course of the 1990s.\textsuperscript{149} 2C-B is one of three substances (along with GHB


\textsuperscript{142} \textit{Ibid.}, pp 2-3. Although the numerous side-effects experienced by users would suggest that 4-MTA is not likely to become a popular drug, there are legitimate concerns that it may be sold as a type of ecstasy to buyers expecting to get MDMA. Since the effects of 4-MTA take much longer to come on, consumers may take two or more tablets in rapid succession in the mistaken belief that they have been given a diluted pill.

\textsuperscript{143} EMCDDA, \textit{Report on the Risk Assessment of 4-MTA in the Framework of the Joint Action on New Synthetic Drugs} (Lisbon, EMCDDA, 1999), p 2. Early investigations suggest that in some cases the main cause of death was respiratory depression which followed 'serotonin syndrome' (a potentially fatal effect of serotonergic enhancing drugs. Symptoms include euphoria, drowsiness, constant rapid eye movement, rapid muscle contraction, rigidity, shivering and twitching). There have been ten non-fatal overdoses reported, five of them in the UK and five in Belgium. It appears that respiratory failure was also evident in many of those cases. Although the EMCDDA report mentions four deaths, a further fatality was reported in Scotland in 1999. Information supplied by Dr Les King, Senior Forensic Scientist, The Forensic Science Service, London, \textit{Interview}, March 2000.

\textsuperscript{144} EMCDDA, \textit{Report on the Risk Assessment of 4-MTA in the Framework of the Joint Action on New Synthetic Drugs} (Lisbon, EMCDDA, 1999), p 5. In 1998, only Sweden had placed 4-MTA permanently under control. Following an assessment of the drug under the EU's Early Warning System, all fifteen EU Member States are currently making moves to schedule 4-MTA under national drugs legislation.

\textsuperscript{145} While neither MBDB nor 4-MTA have been brought under international control, both substances were recently assessed under the Early Warning System (EWS) set up by the European Union. The operation of the EWS and action taken in respect of the first two compounds to be assessed is discussed in some detail in Chapter 7.


\textsuperscript{147} \textit{Ibid.}, p 15.

\textsuperscript{148} \textit{Ibid.}

\textsuperscript{149} \textit{Ibid.} See Chapter 5, \textit{infra}, pp 139-141, for a discussion of the case involving a dispute as to whether Nexus could be considered a controlled drug under a generic provision included in the drugs legislation of the Australian State of New South Wales.
and MBDB) that is currently being assessed to determine whether it should be brought under international control.\textsuperscript{150}

**Paramethoxyamphetamine (PMA),** a potent psychedelic many times more dangerous than pure MDMA, is a methoxylated phenethylamine derivative with hallucinogenic properties.\textsuperscript{151} Shulgin has written that the distribution of PMA on the illicit market in the United States and Canada some time in the 1970s resulted in several overdose deaths.\textsuperscript{152} Reports suggest that it was traded on the European market from 1991 and arrived in Australia around 1994.\textsuperscript{153} Although its highly toxic properties have meant that the drug is not popular, it is believed that small amounts are currently manufactured in clandestine laboratories and may be marketed on the street as a form of ecstasy.\textsuperscript{154} PMA was brought under international control when it was added to the schedules of the 1971 Convention in 1986.\textsuperscript{155}

**Tryptamines**

Following the success of *PIHKAL,* Shulgin and Shulgin wrote and released *THKAL* (Tryptamines I Have Known and Loved) in 1997.\textsuperscript{156} Once again, the book is divided into two parts, the first consisting of a semi-fictional account based on the authors’ experiences manufacturing and testing various compounds and their feelings towards the drug laws applicable in the US and the second containing the recipes for 55 tryptamine derivatives. Unlike the phenethylamine family, there has been limited interest in the illicit manufacture of tryptamine analogues.\textsuperscript{157} There are essentially two reasons why. First, since the structure of a tryptamine analogue does not lend itself as easily to modification it is not as conducive to clandestine synthesis. Secondly, not only are these compounds more difficult to manufacture, but the psychotropic effects of those currently in circulation are not as popular with users.\textsuperscript{158} There is little evidence to suggest that drug users in the dance scene are likely to move away from the use of stimulants in the phenethylamine family to experiment with a broader range of tryptamines. Apart from the fact that they lack the energy-boosting properties sought after by dancers, many tryptamines are inactive when ingested and must be smoked, injected or mixed with a monoamine oxidase inhibitor.\textsuperscript{159} Nevertheless, despite a lack of activity in the illicit trade in tryptamines to date, it is reasonable to predict that the transfer of information on these substances and the interest in clandestine manufacture of other ‘designer’ drugs may at some time in the future stimulate more widespread production of a range of tryptamine compounds intended for the underground market. It may be that the next emerging youth sub-

\textsuperscript{150} These three substances are currently being critically reviewed by the World Health Organisation which will make a recommendation as to whether they should be scheduled under the 1971 Convention on Psychotropic Substances. The WHO’s assessment is due to be completed in June 2000. *“Expert Committee on Drug Dependence, 31st Meeting, 23-26 June 1998, Internal Report of the INCB, 26 June 1998,* pp 13 - 15. See Chapter 6, *infra,* p 164. A discussion of the procedure for scheduling new drugs under the 1971 Convention is provided in Chapter 3.

\textsuperscript{151} Australian Bureau of Criminal Intelligence, 1994 *Australian Illicit Drug Report* (Canberra, ACBI, April 1995), p 53.

\textsuperscript{152} A and A Shulgin, *PIHKAL,* supra n.128, p 709. The compound was sold under the names of ‘Chicken Power’ and ‘Chicken Yellow’ and advertised as MDA.

\textsuperscript{153} Australian Bureau of Criminal Intelligence, 1994 *Australian Illicit Drug Report* (Canberra, ACBI, April 1995), p 53.

\textsuperscript{154} *Ibid.*

\textsuperscript{155} See Appendix C showing when substances were added to the Schedules of the 1971 Convention on Psychotropic Substances.

\textsuperscript{156} A and A Shulgin, *THKAL,* supra n.12.

\textsuperscript{157} Les King, “Designer Drugs Based on Phenethylamine”, *The Scientific Investigation of Drugs, Conference, Airth Castle, May 7-8,* 1999.

\textsuperscript{158} *Ibid.*

culture favours recreational drug use that facilitates ‘tripping’ rather than energetic dance so that different compounds within this family are experimented with to alter the consciousness.

There are several tryptamine analogues of varying potency that have appeared on the illicit market. Many of those produce psychic effects that are very similar to the effects of LSD, characterised by hallucinations, illusions and altered visual, oratory and sensory perceptions. Two such substances frequently subject to abuse are N,N-dimethyltryptamine (DMT) and N,N-diethyltryptamine (DET). Accordingly, they have been scheduled under the 1971 Convention on Psychotropic Substances and must be controlled by all Parties. Through chemical and structural modification of DMT, other non-controlled highly active analogues have been produced for the clandestine market, including the end-products N,N-dipropyltryptamine (DPT), N,N-bis (1-methylethyl) tryptamine (DIPT), N,N-di-2-propenyltryptamine (DAT) and 5-Methoxy-Dimethyltryptamine (5-MeO-DMT). Although use has been limited thus far, easy access to commercially available precursors has caused concern that synthesis and consumption are likely to become much more common in the near future.

**Supply and Control of new synthetic drugs**

Authorities struggling to control the traffic in NSDs must face two sides of the supply problem -- on the one hand, the clandestine synthesis of synthetic end-products in underground laboratories, and on the other, the diversion of chemical precursors from the licit market for use in the manufacture of synthetic psychotropic drugs. In relation to the first generation of synthetic drug use, quantities consumed for non-therapeutic purposes were obtained solely through the diversion of licit supplies. For the second generation, authorities were faced with the diversion of substantial quantities of amphetamines from licit traffic, in addition to the manufacture of a small number of hallucinogenic compounds in underground laboratories. The development of NSDs in the 1980s has been described as a “qualitatively different phenomenon” since these substances were not initially diverted from licit trade, but originated in illegal laboratories. The market for synthetic psychotropic drugs has proven itself to be remarkably flexible. Over the past two decades, a decrease in the licit production and consumption of amphetamine-type stimulants (ATS) has been accompanied by a massive increase in illicit trade. Most developed countries have discouraged the supply of ATS for therapeutic purposes, and these drugs are used now in the treatment of a much more limited number of medical conditions than they were initially prescribed for. On the other side, however, authorities have not been successful in

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160 K Valter and P Arrizabalaga, supra n.12, p 83.
161 Ibid., p 87.
162 Ibid., pp 91-93.
164 K Valter and P Arrizabalaga, supra n.12, p 89.
165 See the discussion in Chapter 1.
166 Recall that the illicit production of synthetic drugs dates back to the early 1960s when several underground ‘chemists’ began to manufacture quantities of amphetamine and methamphetamine as licit markets were brought under control. By the middle of the 1970s, authorities were detecting a significant number of clandestine laboratories each year. See UNDCP, “Amphetamine-Type Stimulants: A Global Review”, supra n.6.
167 Ibid., p 37.
168 Ibid.
169 INCB, Report of the International Narcotics Control Board for 1999 (E/INCB/1999/1), p 24. ATS abuse is, however, a complicated phenomenon raising different issues for developed and developing countries. While developed countries have limited the manufacture and diversion of licit supplies and must now address the burgeoning illicit market, many developing countries may be confronted by persistent or increasing abuse of ATS, resulting from the continuing oversupply of licit substances. See UNDCP, “Amphetamine-Type Stimulants: A Global Review”, ibid., p 37.
preventing the explosive growth in manufacture, traffic and consumption of a range of illicit chemical compounds.  

There is evidence of a massive increase in the clandestine production and consumption of synthetic drugs. The main indicators used to estimate the extent of global illicit manufacture are statistics on the detection and seizure of underground laboratories. Figure 1 illustrates that from the late 1970s, the number of detection’s of laboratories producing ATS increased steadily, peaking in the late 1980s. The slight decline in seizure rates since the 1990s (although they are still much higher than the mid-1970s) is unlikely to be due to a decrease in manufacture, but rather to the fact that laboratory operators have shifted their premises into countries where they are less likely to be reported. Fewer seizures may also suggest that manufacture is now increasingly concentrated in a smaller number of larger laboratories.

Most significant for the purposes of this research is Figure 2 showing that recent increases in the underground manufacture of drugs in the ‘ecstasy group’ have been even more pronounced than for other ATS. Although the production of these drugs still accounts for only a small percentage of the total quantity of ATS seized by drug enforcement authorities (approximately 4% globally, and 20% in Europe), the rapid growth of illicit laboratories

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171 Ibid., p 44. At an Expert Meeting on ATS convened in 1996, a number of reasons were suggested for the alarming increase in illicit use since the mid 1980s. These included, 1) needs and desires for higher levels of stimulus in a competitive modern society; 2) an increase in hedonistic behaviour; 3) a growing trend towards self-medication and 4) sensationalist media reporting generating publicity for new patterns of use. See Report to the United Nations Commission on Narcotic Drugs of the Expert Meeting in Amphetamine-type Stimulants held at Shanghai, China, UN Doc. E/CN.7/1997/6.
172 The UNDCP cautions readers at the outset that data on illicit markets is often fragmentary in view of the clandestine nature of the activity and the lack of resources necessary for gathering detailed information on drug trends. Analysing NSD use is particularly difficult given that many countries have only recently recognised the need to monitor those substances. UNDCP, “Amphetamine-Type Stimulants: A Global Review”, ibid., p 44.
173 The UNDCP suggests that a decline since the 1990s is primarily the result of fewer detections in the US, as clandestine manufacturers shift to Mexico. UNDCP, “Amphetamine-Type Stimulants: A Global Review”, ibid., p 44.
174 Ibid., p 45.
175 Ibid., p 45.
176 Ibid.
suggests that clandestine manufacture of ecstasy-type substances will continue to plague authorities in the immediate future.

Figure 2 - Global number of detected laboratories manufacturing methcathinone and substances in the ecstasy group

The past decade has marked a shift in the geographical patterns of illicit manufacture of all ATS, particularly those falling into the category of new synthetic drugs. A shift towards Europe can be seen in the manufacture of amphetamines. Figure 3 shows that a decline in the share of illicit manufacture in North America, from over three-quarters in 1986-1988 to one-quarter in 1991-1994, has been accompanied by an increase in the European share from around one-tenth to three-fifths during the same period. While most of the North American seizures were made in the United States, the majority of illicit laboratories in Europe were detected in the United Kingdom, Germany, the Netherlands and Poland. The Dutch in particular are important suppliers and several European countries (including the UK, France, Germany and the Nordic countries) have estimated that 70-80% of their illegally imported amphetamine originated in the Netherlands.

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179 Ibid., p 48. The UNDCP qualify these figures by pointing out that the high number of detections in Germany may not necessarily reflect high manufacturing volumes since the reports from that country relate to relatively small laboratories with low levels of output. By contrast, despite the small number of clandestine laboratories detected in the Netherlands, those operators are thought to produce large quantities of ATS. Illicit manufacture in Poland appears to be growing.
180 Ibid., p 49. In 1998, 357 seizures of synthetic drugs, in 26 countries spread over five continents, were in some way related to the Netherlands. Only 35% (124) of those seizures were made in the Netherlands, while 65% (233) were made elsewhere, particularly Germany and the UK. See Unit Synthetische Drugs, 1998 Annual Report (The Netherlands, SDU, 1999), p 9. Since 1990, Dutch law enforcement authorities, scientists and social workers have noted a considerable increase in the use, production and trade in NSDs. It was also recognised that the Netherlands was considered to be responsible for producing significant amounts of the end-product new synthetic drugs being exported to other countries. In response, the Dutch Synthetic Drugs Unit (USD) was set up in 1997 to map the production and sales of illicit NSDs so as to inform decision makers. For a detailed understanding of the objectives and achievements of the USD, see Unit Synthetische Drugs, The developments in the field of the national fight against synthetic drugs in The Netherlands and the role of the Synthetic Drugs Unit (USD) (The Netherlands, Unit Synthetische Drugs, 1998) or Unit Synthetische Drugs, Annual Report for 1998 (The Netherlands, Unit Synthetische Drugs, 1999).
Figure 3 - Global number of detected laboratories manufacturing amphetamine\textsuperscript{181}


Figure 4 depicts the regional breakdown of the detection of illicit laboratories manufacturing the ecstasy group of substances. Once again, the shift over recent years has been towards the illicit manufacture of these compounds within Europe, rising from virtually nothing in 1986-1988, to more than 50% of the illicit market during the period between 1991-1994\textsuperscript{182}. Although the scale of the problem varies greatly between different countries and regions\textsuperscript{183}, there is evidence of the increasing importance of the whole of Europe in the illegal manufacture of synthetic drugs. In particular, investigations reveal a "remarkable" shift in the production of NSDs to the countries of Eastern Europe\textsuperscript{184}. Despite several recent attempts by some operators in East and South-East Asia to manufacture ecstasy for their growing markets, the great bulk of tablets available are still smuggled in from Europe\textsuperscript{185}.

\textsuperscript{181} UNDCP, "Amphetamine-Type Stimulants: A Global Review", supra n.6, p 48.

\textsuperscript{182} Although the bulk of the substances seized during the latter period were labelled as MDMA, it should be noted that some countries lack the sophisticated equipment necessary to identify the exact chemical compound seized. UNDCP, "Amphetamine-Type Stimulants: A Global Review", ibid., p 49.

\textsuperscript{183} EMCDDA, "New Trends in Synthetic Drugs in the European Union", supra n.91, p 11. This would suggest that prevalence rates are highest in the UK, Germany and the Netherlands.

\textsuperscript{184} Unit Synthetische Drugs, The developments in the field of the national fight against synthetic drugs in The Netherlands and the role of the Synthetic Drugs Unit (USD) (The Netherlands, Unit Synthetische Drugs, 1998), p 2.

\textsuperscript{185} INCB, The Report of the International Narcotics Control Board for 1999 (E/INCB/1999/1), p 45. In Singapore, for example, authorities made their first discovery of a large-scale clandestine laboratory manufacturing ecstasy tablets in 1999.
A number of factors relating to the properties of NSDs and their production and distribution help to explain the expanding illicit trade and the difficulty of implementing effective controls. In comparison to the narcotic plant-based drugs of abuse, heroin, cocaine and cannabis, the illicit manufacture of synthetic drugs is a much simpler process. The manufacture of traditional narcotics requires cultivation of significant areas of land and is carried out in a limited number of countries where the large scale agricultural production of those plants is feasible.\textsuperscript{187} By contrast, synthetic drugs can be produced in clandestine laboratories close to the respective markets, thus reducing the risk that traffickers will be detected.\textsuperscript{188} Many ATS can be synthesised relatively easily in make-shift laboratories by persons with a basic understanding of chemistry.\textsuperscript{189} Since they are very similar in chemical structure (particularly those in the phenethylamine category discussed above), only minor structural modifications are necessary to produce a long-list of different end-products.\textsuperscript{190} According to the UNDCP, at least 30 ATS of clandestine origin have been discovered in different countries over the past decade, most of which had never been tested in the clinical environment.\textsuperscript{191} Structural modifications may be motivated by the shifting availability of precursor chemicals, or may be the result of a deliberate attempt to circumvent national or

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\textsuperscript{186} UNDCP, “Amphetamine-Type Stimulants: A Global Review”, supra n.6, p 49.

\textsuperscript{187} Ibid., p 44.

\textsuperscript{188} Ibid., p 44. The European Commission points out that the availability of necessary ingredients within the EU means that synthetic drugs can be produced locally, close to the areas of consumption. Communication from the Commission to the Council and the European Parliament on the Control of New Synthetic Drugs (Designer Drugs), Brussels, 23.05.1997, COM (97) 249, p 1.

\textsuperscript{189} UNDCP, “Amphetamine-Type Stimulants: A Global Review”, supra n.6, p 44. There is a considerable difference in the level of sophistication of clandestine laboratories detected by authorities, ranging from ‘kitchen-laboratories’ to high-tech set ups using the latest pharmacological equipment. Generally, those producing methamphetamine and methcathinone fall into the first category, whereas a number of laboratories synthesising substances in the ecstasy group uncovered in the Netherlands and the US are of the more sophisticated variety. This is because methamphetamine, methcathinone and related compounds are particularly simple to produce, while substances in the ecstasy group require slightly more chemistry know-how.

\textsuperscript{190} Communication from the Commission to the Council and the European Parliament on the Control of New Synthetic Drugs (Designer Drugs), Brussels, 23.05.1997, COM (97) 249, p 3.

\textsuperscript{191} UNDCP, “Amphetamine-Type Stimulants: A Global Review”, supra n.6, p 126. The majority of these are phenethylamines.
international laws reliant on a substance-by-substance approach to illicit drug control. One further problem faced by enforcement officers is that in comparison to plant-based drugs, NSDs are odourless and compact, making them easy to transport and extremely difficult to detect.

Strong economic incentives fuel the manufacture, distribution and popularity of ATS. According to the UNDCP, the expanding market is driven by low levels of expected risk in conjunction with high profits ('supply push') and low prices ('demand pull'). The production of illicit synthetic drugs in or near the area of consumption not only minimises the risk of trafficking, but also greatly reduces the input and trafficking costs, thereby allowing for a larger gross profit margin for ATS than for plant-based narcotic drugs. Higher gross profits are also ensured by the fact that the organisation of manufacturing and trafficking in ATS is less hierarchical than the distribution of plant-based narcotics, making for fewer stages leading to production and dissemination, and fewer persons that need to be paid off. A further factor responsible for the popularity of NSDs is that they cost the consumer relatively little in comparison to cocaine and other plant-based stimulants that have traditionally dominated the illicit market. As a result of the interaction of these economic incentives, recent years have witnessed an explosion in both the demand for, and supply of, highly profitable new synthetic drugs.

**Precursor and essential chemicals**

One major obstacle preventing the effective regulation of NSDs is the ease with which clandestine chemists can access a range of cheap and versatile precursor and essential chemicals used in their manufacture. A precursor chemical has been defined as one that is “used in the manufacture of a controlled substance, is critical to the creation and becomes part of the controlled substance”, whereas an essential chemical is a “solvent, reagent or catalyst used in the manufacture of a controlled substance”. In practice the term ‘precursor’ is often used to refer to all starter materials used in illicit manufacture. A variety of chemicals currently under international control are diverted from the licit market to be used in the illicit manufacture of new synthetic drugs. Figure 5 reflects global seizures of the ATS precursors controlled under international treaties between 1989 and 1994. During this time, the total seizure volumes have fluctuated between 2,000 and over 25,000 kilograms (and litres), with the major share made up of precursors used in the production of amphetamine, methamphetamine and methcathinone (1-phenyl-2-propanone or ‘P2P’, Ephedrine, Pseudoephedrine and Phenylacetic acid).

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192 For an explanation of the substance-by-substance approach to controlling NSDs and the alternative control models operating to regulate groups of variable synthetic drugs, see Chapter 5.
194 UNDCP, “Amphetamine-Type Stimulants: A Global Review”, *supra* n.6, p 82.
195 UNDCP, *World Drugs Report* (New York, Oxford University Press, 1997), p 129. Economic studies show that between one half to two-thirds of the final retail price represents the value added (difference between input and output prices) generated in the country where the drug is eventually consumed. In contrast, for ATS almost all the total retail price remains the ‘value added’ in the country of final consumption. UNDCP, “Amphetamine-Type Stimulants: A Global Review”, *supra* n.6, pp 83-87.
197 Communication from the Commission to the Council and the European Parliament on the Control of New Synthetic Drugs (Designer Drugs), Brussels, 23.05.1997, COM (97) 249, p 1.
From Figure 6 it can be seen that the total seizures of precursors in the ecstasy group (Safrole, Isosafrole, Piperonal and 3,4-methylenedioxy-P2P) are significant, but still relatively small, failing to reveal the widespread availability of the end-products on the illicit market. Fluctuations or indescrepencies in the figures available may be explained by the short period of time those substances have been under international control (all four of the 'ecstasy' precursors mentioned above were not originally scheduled under the 1988 Convention, but were added to Schedule 1 in 1992\(^{201}\)) and the fact that many countries are failing to fully comply with international reporting obligations.\(^{202}\)

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\(^{200}\) UNDCP, "Amphetamine-Type Stimulants: A Global Review, supra n.6, p 56.

\(^{201}\) "Implementation of the International Drug Control Treaties", Assessment of the International Narcotics Control Board of substances for possible inclusion in the tables of the 1988 Convention, UN, Economic and Social Council, Internal Memorandum, 10 February 1992, pp 13-16. See further, Chapters 4, infra p 82 and 6, infra p 183.

\(^{202}\) UNDCP, "Amphetamine-Type Stimulants: A Global Review, supra n.6, p 55.
Figure 6 - Seizures of precursors of the amphetamine group (amphetamine, methamphetamine and methcathinone) compared with precursors of the ecstasy group\textsuperscript{203}

\begin{figure}
\centering
\includegraphics[width=0.5\textwidth]{figure6.png}
\caption{Seizures of precursors of the amphetamine group (amphetamine, methamphetamine and methcathinone) compared with precursors of the ecstasy group.}
\end{figure}

Note: Each quarter of the pie represents the total global seizure of precursors of the amphetamine or the 'ecstasy' group in 1991 and 1994, respectively. Precursors of the 'ecstasy' group were placed under international control in 1992.

Since the publication of this Table in 1996 there have been an increasing number of reported cases of large scale diversion, attempted diversion and seizures.\textsuperscript{204} In 1998, several large shipments (24 tons) of the precursors P-2-P (used in the manufacture of amphetamine) and 3,4-MDP-2-P (used for ecstasy production) were stopped by Romania on course to Poland, Spain and Yugoslavia.\textsuperscript{205} In the following year, further seizures of both chemicals en route to laboratories in Poland were made by authorities in Hungary, while 3,4-MDP-2-P intended for the illicit market was seized in Slovakia.\textsuperscript{206} As a direct result, operators were forced to pay a very high black market price for 3,4-MDP-2-P or to look for alternative starter materials. It is perhaps due to restricted access to those chemicals that authorities in Germany and the UK have detected the increasing misuse of a number of non-scheduled essential oils, including Anise, Caryophyllus and Nutmeg, in the manufacture of MDMA.\textsuperscript{207} Other ecstasy precursors scheduled under the 1988 Convention, namely Piperonal, Safrole and Isosafrole, were seized

\textsuperscript{203} Ibid., p 58.
\textsuperscript{206} Ibid. China is increasingly being identified as a source country for quantities of both 3,4-MDP-2-P and P-2-P seized in Europe, prompting fears that traffickers will try to exploit South-East Asia as controls are tightened in other regions.
\textsuperscript{207} Ibid.
in smaller quantities, having originated primarily from Europe and the United States.208 Although seizure rates are still not as high as would be expected given the widespread availability of the end-product drugs, it appears that the greater focus on ecstasy precursors by law enforcement authorities may be responsible for the discovery of increasing quantities traded on the illicit market.

There are a number of reasons why controls over precursor chemicals have proved particularly difficult to implement. First, the quantities of chemical precursors required to produce synthetic drugs are far less than the quantities of botanical material needed to produce similar amounts of a plant-based narcotic drug.209 This means that even if a particular precursor has been brought under control, it may be possible to obtain amounts that are sufficient for the small-scale manufacture of ATS, but still fall below the threshold beyond which there must be mandatory record keeping. Secondly, clandestine operators may have access to a large and heterogeneous group of chemicals capable of acting as precursors in the production of a range of ATS.210 They originate in different regions of the world and are marketed in various forms for a range of legitimate uses. With respect, for example, to the four ecstasy precursors currently under international control, large scale manufacture for legitimate purposes makes it extremely difficult for authorities to implement rigid controls, and far easier for clandestine operators to have access to the range of necessary starter materials.

208 See Precursors and Chemicals Frequently Used in the Illicit Manufacture of Narcotic Drugs and Psychotropic Substances: Report of the INCB for 1999 on the Implementation of Article 12 of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (E/INCB/1999/4), p 25, Figure IX.
209 Ibid., p 50.
Figure 7 - Uses for precursors in the ecstasy group

Control is made more difficult by the fact that a variety of different methods may be used to synthesise the drugs, depending on what chemicals are available on the illicit market. For example, a number of oils such as Sassafras, Camphor or Ocotea oil can be used in the production of Safrole, a direct precursor to MDMA. Alternatively, Piperonylic acid, or Piperonyl alcohol can be used to synthesise Piperonal, also a direct precursor to MDMA. Furthermore, it is possible to synthesise one precursor from another (e.g., Safrole can be used to synthesise Piperonal or a range of other direct precursors) and one precursor can be used to synthesise different members of the same 'ring-substituted' family of synthetic drugs (e.g.,

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211 UNDCP, "Amphetamine-Type Stimulants: A Global Review, supra n.6, p 64.
212 EMCDDA, Synthetic Drugs in the European Community: Epidemiology and Demand Reduction Responses, supra n.210, p 24.
Safrole can be used in the production of MDMA, MDE, MDA etc.). The flexible options available to clandestine chemists make it possible for them to ‘shop around’ on the market, alternating between the precursors used depending on their availability at different periods in time.

In the manufacture of ATS, clandestine operators are certainly not limited to the eight precursor substances currently under international control. Technical reports submitted to the UNDCP suggest that in a number of countries there is experimentation in clandestine laboratories with a wide range of starter materials and substitute precursor chemicals. With the introduction of tighter controls over a limited list of precursors, clandestine operators have been inspired to experiment with different precursor chemicals and have shown a remarkable ability to adapt in order to avoid new regulations. One example involves Safrole, a precursor frequently used in the synthesis of MDMA and the major constituent of the naturally occurring essential oil, Sassafras. Very soon after Safrole was scheduled under the 1988 Convention in 1992, the first seizures of the essential oil itself (not scheduled under the Convention) were made in Africa. Another case is the relatively recent use of nutmeg oil, discovered in a clandestine laboratory for the first time in March 1994. Nutmeg is an essential oil with many legitimate uses but also contains a constituent called myristicin, that can be easily converted into the end-product MMDA. Widespread commercial use of a range of accessible starter materials makes it extremely difficult for authorities to be vigilant in monitoring domestic and international trade.

The problem summarised

When from the middle to the end of the 1980s a number of industrialised countries began to receive reports of a new synthetic psychotropic compound known as MDMA or ecstasy, they were not then aware that the ecstasy phenomenon would help to trigger an interest in the clandestine manufacture of a number of variable chemical compounds designed to evade existing national and international controls. While the illicit manufacture of ‘designer’ narcotic analogues in the US in the early 1980s did not continue to be popular and did not therefore present a long-term problem for authorities, an increasing number of synthetic psychotropic drugs not yet scheduled under national drugs laws are appearing on the illicit market. Although there is little doubt that MDMA remains the most popular of the new synthetic psychotropics, there is still the incentive for clandestine operators to experiment with the synthesis of a range of NSDs. The chapters that follow present an analysis of the legal response, at national, international and regional levels, to the perceived threat that they pose.

Ibid., p 24. See further, Precursors and Chemicals Frequently used in the Illicit Manufacture of Narcotic Drugs and Psychotropic Substances; report of the INCB for 1998 on the implementation of Article 12 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, E/INCB/1998/4, para.132. It is reported there that the implementation of precursor controls has encouraged clandestine manufacturers to look for alternative starter materials not tightly regulated. Thus, Benzaldehyde has recently been used for the manufacture of amphetamine, Benzyl chloride for methamphetamine, Ergot for LSD and Isatoic anydride for methaqualone.

UNDCP, “Amphetamine-Type Stimulants: A Global Review, supra n.6, p 64.

B Remberg et al, Potential Loopholes in Present Control Strategies; Ring substituted amphetamine analogues and their natural and synthetic precursors, Internal Memorandum, Vienna, UNDCP, 1994, p 1.

Ibid.

Ibid.

K Valter and P Arrizabalaga, supra n.12, pp 11-17 and pp 146-148.

UNDCP, “Amphetamine-Type Stimulants: A Global Review, supra n.6, p 49. Despite the appearance of a range of variable chemical compounds such as MDEA, MBDB, 4-MTA and 2-CB, none have achieved a significant share of the illicit market. See EMCDDA, Extended Annual Report on the State of the Drugs Problem in the European Union for 1999 (Lisbon, EMCDDA, 1999), p 51.

K Valter and P Arrizabalaga, supra n.12, pp 11-17.
PART 2: INTERNATIONAL CONVENTIONS GOVERNING NEW SYNTHETIC DRUGS

CHAPTER 3

THE 1971 CONVENTION ON PSYCHOTROPIC SUBSTANCES

The 1971 Convention builds on the experience obtained in the application of the narcotics control system. Its provisions were agreed upon only after difficult and protracted negotiations and represent compromises which reflect not only the inherent complexities but also the national and commercial interests involved. Report of the International Narcotics Control Board for 1980

When the third generation of synthetic psychotropic drug use became apparent in the mid-1980s, action was taken to bring a small number of compounds under international control. The relevant instrument amended to include end-product new synthetic drugs was the 1971 Convention on Psychotropic Substances [herein the 1971 Convention]. In 1986, seven new compounds were added to Schedule I, including MDMA, MMDA and DMA. Three synthetic psychotropics (MDE, N-OH-MDA and 4-methyl-aminoxnex) were added in 1990 and a further two (etryptamine and methcathinone) in 1995. It is likely that in the future more NSDs appearing on the illicit market will be judged to be sufficiently dangerous and their use sufficiently widespread to warrant them being placed in Schedule I and subjected to the strictest international regulations. This Chapter looks at the structure and operation of the 1971 Convention in order to determine how capable it is of responding effectively to the global supply of and demand for new synthetic drugs.

It is important to remember that in drafting the 1971 Convention countries were not primarily concerned with controlling psychotropic substances manufactured in the clandestine sector (with the notable exception of a small number of hallucinogens, including LSD), but rather those substances with a legitimate use, frequently diverted into the illicit market. Thus, the regulation of NSDs cannot be looked at in isolation and this Chapter presents a discussion of the effectiveness of the 1971 Convention in controlling both sides of the equation — substances manufactured for the licit market and later diverted for illicit use and NSDs manufactured solely for the clandestine sector. The justification for doing so is two-fold. First, the regulation of substances traded on the licit market is relevant to a full understanding of the control regime and the various interests at stake. Secondly, control over licit substances is important since some pharmaceuticals are broken down by clandestine chemists so that

1 INCB, Report of the International Narcotics Control Board for 1980 (E/INCB/1980/1), p 7. The importance of the national and commercial interests at issue is reflected in the comments of the French delegate early in the proceedings of the 1971 Conference convened to adopt the Treaty. J Mabileau stated that, “[t]imes had indeed changed since Governments had even been prepared to go to war to protect the commercial interests of [their] factories, which used to flood the markets of distant countries with heroin regardless of its effects on the local population. Amphetamines and the barbiturates which [are] even more dangerous, [are] at present being exported by the ton to those same distant countries, and that trade [is] legitimate. It [is] essential to give those distant lands the right to protect their people”. See “United Nations Conference for the adoption of a Protocol on Psychotropic Substances”, Official Conference Records, Vienna, 11 January-19 February 1971, Vol.II, p 63 [Herein 1971 Official Conference Records].

2 Those seven substances are Cathinone, DMA, DOET, MDMA, MMDA, PMA and TMA. See Appendix C showing the dates on which individual substances were scheduled under the 1971 Convention.

3 The criteria for scheduling a new substance under the Convention is discussed in some detail below.

their ingredients can be used in the manufacture of end-products sold on the illicit market.\(^5\) With respect to substances diverted from the licit trade, it is argued that the Convention provisions were too weak to prevent further widespread diversion and that industrialised countries must take the blame for insisting on watering down important measures in an effort to protect their own commercial interests.\(^6\) In relation to NSDs, the focus of this thesis, the problem is not the deliberate watering down of provisions since most of the compounds are by their very nature manufactured solely for the clandestine market and have therefore been placed in Schedule I to be subject to the strictest controls.\(^7\) The weakness of the 1971 Convention with regard to this category of drugs stems from the fact that it was not designed to cope with variable synthetic compounds manufactured in illicit laboratories and cannot be modified rapidly in order to respond.\(^8\)

No international drug control regime can be properly analysed or evaluated in the absence of an understanding of all the different considerations at stake. The discussion below clearly reveals that a range of factors -- health, commercial, moral and political -- were taken into account in the formulation of an international instrument to control psychotropic drugs. As shown in Chapter 4,\(^9\) similar considerations were at issue when countries came to adopt a treaty for the regulation of the precursor chemicals needed for clandestine manufacture, most of which have several legitimate uses. Looking at the bargaining behind the 1971 Convention not only provides an insight into why certain treaty provisions are inherently weaker than they might have been, but also highlights the multitude of factors that come into play in the negotiation of international drug controls. This and previous chapters presenting lessons from the past reveal that these considerations have always been involved in drug control. Future chapters\(^10\) confirm that they are still very important today in determining national, regional and international controls over end-product NSDs and the precursors used in their manufacture.

**International control of psychotropic drugs; early negotiations**

As early as the 1950s, international agencies concerned with curtailing the illicit trade in dangerous drugs were focusing on the need to strengthen national controls over certain psychotropic substances. In 1956, the Commission on Narcotic Drugs (CND)\(^11\) noted the

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\(^5\) An important example is the use of ephedrine in pharmaceutical products such as Sudafed cold relief to manufacture amphetamine and methamphetamine traded on the illicit market. Information supplied by Dr Vincent Murtagh, Senior Forensic Chemist, Australian Forensic Drug Laboratory (AFDL), Interview, January 1999.

\(^6\) See, for example, the discussion *infra* p 64.

\(^7\) Since most end-product NSDs are not recognised as having any legitimate therapeutic use (despite the arguments of a number of psychotherapists such as Shulgin that have been outlined in Chapter 2), there are no commercial interests at stake in their regulation and no powerful industry interest groups to argue against tight controls. As discussed in Chapter 4, however, many of the precursors used in their manufacture do have legitimate industrial and therapeutic uses and commercial considerations are important in determining the level of controls that will be accepted.

\(^8\) See the discussion of the complexity of scheduling provisions in the 1971 Convention that is responsible for the two to three year delay before new substances can be brought under control, *infra* pp 60-62.

\(^9\) See, for example, the bargaining by EU countries determined to protect their industry concerns in respect of the legitimate trade in certain precursor chemicals, Chapter 4, *infra*, pp 92-94.

\(^10\) See Chapters 5, 6 and 7, *infra*.

\(^11\) In 1946, the United Nations assumed responsibility for coordinating the international drug control regime previously under the aegis of the League of Nations. The CND was established the same year as a functional commission of the Economic and Social Council (ECOSOC) and remains the central UN policy making body dealing with drug control. See further, P Bean, *The Social Control of Drugs* (London, Martin Robertson and Co., 1974), p 45 and SK Chatterjee, *Legal Aspects of International Drug Control* (The Hague, Martinus Nijhoff Publishers, 1981), pp 73-103. General Assembly resolution 45/179 of 21 December 1990 created the UN International Drug Control Programme.
dangers arising from the abuse of amphetamines and urged governments to provide “adequate measures of control” to prevent such abuse. On numerous occasion’s during the next decade, the CND, the World Health Organisation (WHO) and the Permanent Narcotics Control Board (PCNB) all reiterated their concern over increasing levels of amphetamine abuse and each stressed the need for urgent and effective national controls.

At the Plenipotentiary Conference for the Adoption of a Single Convention on Narcotic Drugs [herein the 1961 Single Convention] in February and March of 1961, it was generally understood that that Treaty would not be used to control psychotropic drugs currently in circulation (amphetamines, tranquilisers and barbiturates). A resolution suggesting that those synthetic psychotropics be made the subject of a study to determine what level of controls should be adopted by the international community failed by one vote to obtain the required majority and could not be annexed to the official records of the Plenipotentiary Conference. Some commentators suggest that by 1961 it was already evident that the

(UNDCP), integrating into a single programme the three UN drug control units previously in existence; the Division of Narcotic Drugs, the United Nations Fund for Drug Abuse Control and the International Narcotics Control Board Secretariat. The UNDCP, based in Vienna, has the role of co-ordinating all UN drug control activities. See UNDCP, World Drug Report (Oxford, Oxford University Press, 1997), p 169. See Appendix D for an overview of the bodies involved in international drug control.


14 See, for example, the World Health Organisation (WHO), Technical Report Series, 1957, No.116, p 10 (section 10); 1964, No.273, p 11 (section 7); 1965, No.312, p 9 (section 7) and 1966, No.343, p 11 (section 8). In 1946, the International Health Conference in New York approved the constitution of the WHO which came into force on 7 April 1948 (http://who.org/aboutwho/en/history.htm). The WHO is the only agency, other than the INCB and the CND, which has been given a specific role in administering the international drug control treaties (See Article 3 of the 1961 Single Convention on Narcotic Drugs and Article 2 of the 1971 Convention on Psychotropic Substances). It is assisted by the Expert Committee on Drug Dependence which makes recommendations relating to, inter alia, additions to and deletions from the schedules of drugs under control and the transfer of substances from one schedule to another. Chatterjee (supra n.11, pp 282-292) suggests four broad functions for the WHO Expert Committee: (1) to consider the dependence liability of a drug and to determine the level of control, (2) to classify drugs in accordance with the level of control required, (3) to suggest solutions to problems related to dependence on drugs and (4) miscellaneous functions, e.g. education and training programmes. For further information on the history of the Expert Committee and its predecessors and the role of the WHO in international drug control, see SK Chatterjee, ibid., p 277-294.


increasing abuse of certain psychotropic drugs justified a system of international controls.\textsuperscript{18} Yet the majority of countries present were not willing to draw attention or resources away from the campaign against narcotic drugs.

Soon after the Single Convention was concluded the regulation of psychotropics was perceived as more urgent, in view of the expanding misuse of amphetamines amongst young people and a growth in the popular consumption of hallucinogenic drugs, particularly LSD.\textsuperscript{19} At the 18th session of the CND in 1963, representatives from several major industrialised countries, particularly Canada, France and the Netherlands, spoke of the increasing misuse of LSD by members of the younger generation, while a spokesperson for the WHO presented findings on the dangers involved.\textsuperscript{20} Later that year, the WHO Expert Committee suggested that the recreational use of LSD was reaching “alarming proportions” and immediate measures were called for to limit distribution and availability.\textsuperscript{21}

Despite early acknowledgement of the need for national control measures, it was not until the middle of the 1960s that the desirability of introducing international controls was formally considered. Early in 1965, the WHO’s Expert Committee on Addiction-Producing Drugs embarked on a study of the feasibility of international control over stimulants and sedatives.\textsuperscript{22} It recommended that the following six control measures be adopted by governments, only the last of which is international in character:

1. substances be made available only on medical prescription;
2. full accounting be required for all transactions from production to retail distribution;
3. all producers be licensed;
4. trade be limited to authorised persons;
5. unauthorised possession be prohibited and
6. import-export authorisation be established to regulate international trade.\textsuperscript{23}

In December of the same year, the CND established a Special Committee to consider control over barbiturates, tranquillisers and amphetamines.\textsuperscript{24} Although there was mention only of these three categories of drugs during discussions that lead to the establishment of the Special Committee, by the time it was ready to meet in August 1966, recreational use of LSD had attracted an enormous level of publicity\textsuperscript{25} and urgent attention was given to dealing with this hallucinogen. A resolution was adopted condemning all usage other than for specific

\textsuperscript{18}In an article published in 1977, Kusevic is critical of the slow progress towards international control over psychotropic drugs. See V Kusevic, “Drug Abuse Control and International Treaties”, Journal of Drug Issues, Winter 1977, p 37.
\textsuperscript{22}The WHO secretariat was asked to conduct the study at the World Health Assembly in May 1965. See Off. Rec. Wld. Hlth. Org., 1965, 143, 31, Eighteenth Session, Resolution WHA, 18.47.
\textsuperscript{23}World Health Organisation Technical Reporting Series, 1965, No.312, Section 7.
\textsuperscript{25}The Special Committee membership consisted of the USA, UK, USSR, United Arab Republic, Canada, Germany, France, India, Japan and Mexico. The meeting was also attended by observers from several other countries, along with representatives from the WHO, the Permanent Central Narcotics Board and the Permanent Anti-Narcotics Board of the League of Arab States. See the Committee’s Report; Document E/CN.7/498-E/CN.7/AC.6/8.
medicinal and scientific purposes.\textsuperscript{26} In respect of the other three categories, now assuming second place, the Special Committee endorsed those six measures that had been recommended earlier by the WHO Expert Committee. Finally, the Secretary General was asked to begin an urgent and detailed study of the legal, administrative and practical considerations involved in introducing a system of effective international control.

In late 1966, the CND discussed the Special Committee’s Report at its 21st Session. It was unanimously held that a separate international agreement should be concluded to promote mandatory national control of dangerous psychotropics.\textsuperscript{27} The CND accepted five of the six WHO recommendations, rejecting only the suggestion that the narcotic control regime’s system of import certificates and export authorisation should be extended to cover dangerous psychotropic drugs (the only recommendation relating to international rather than domestic controls). Although it was acknowledged that some form of import/export control was desirable, it was thought that this could be achieved by negotiating a simple cooperation agreement between exporting and importing authorities. The exception was LSD, in respect of which the Commission was adamant that application of full international controls, including import/export authorisations was appropriate.\textsuperscript{28}

It appears obvious then that, just as had been the case with national governments,\textsuperscript{29} international bodies were more alarmed by the recreational use of psychotropic drugs, particularly LSD, than they were by the chronic misuse of stimulants and sedatives that had been widespread for a number of decades. At both a national and international level, recreational patterns of drug use generated a great deal of concern and appeared to galvanise action.\textsuperscript{30} While there was some reluctance to impose international obligations on countries with respect to amphetamines, barbiturates and tranquillisers, substances manufactured by commercial operators with large financial interests at stake, there was no such hesitation in respect of the regulation of LSD, manufactured primarily in the clandestine sector and misused by highly visible young adults.

In 1967 the PCNB considered the options for extending the control regime to cover dangerous psychotropic substances not currently regulated at an international level, eventually concluding that it would be most appropriate to draft a separate instrument to deal with the specific problems involved in regulating psychotropic substances.\textsuperscript{31} The Board stressed that it was desirable that the instrument should be framed so as to cover those psychotropic drugs currently the subject of abuse, as well as those which might foreseeably be manufactured in

\textsuperscript{26} (E/CN.7/498, 1966). See the discussion in K Brun et al (eds), \textit{The Gentlemen’s Club: International Control of Drugs and Alcohol} (Chicago, University of Chicago Press, 1975), pp 244-245.


\textsuperscript{28} Thus, a separate resolution on LSD was submitted to the ECOSOC and later adopted by the Council at its 42nd Session (Resolution 1197 (XLII), cited in United Nations, Permanent Central Narcotics Control Board and Drugs Supervisory Body (1967), \textit{Final Report}, Document E/OB/23-E/DSB/25, p 25.

\textsuperscript{29} See the discussion in Chapter 1.

\textsuperscript{30} Chapter 1 makes reference to the arguments of Phillip Bean that the response of governments to drugs subject to abuse depends largely on the patterns of use. Visible recreational users have been considered more of a threat to mainstream society and have consequently been subject to stricter regulations and heavier criminal sanctions than those who may be chronic users of drugs, but do so less conspicuously. See P Bean, \textit{The Social Control of Drugs} (London, Martin Robertson and Co., 1974) p 118, discussed in Chapter 1, supra p 13.

\textsuperscript{31} The Board gave consideration to five other options for extending international controls to cover psychotropic drugs, including amending the 1961 Single Convention on Narcotic Drugs, the 1948 Protocol Regulating the Distribution of Narcotics or the 1925 International Opium Convention (See Appendix B). Problems with all five alternatives led to the inevitable conclusion that a separate international treaty was required. See further, United Nations, Permanent Central Narcotics Control Board and Drugs Supervisory Body (1967), \textit{Final Report}, Document E/OB/23-E/DSB/25, pp 24-30 (Economic and Social Council: Official Records).
the future. At the 22nd Session of the CND in 1968, this suggestion was accepted and the Secretary-General was requested to send Governments a questionnaire on the form of treaty that should be adopted and the type of controls suitable for each of the four categories of psychotropic drugs at issue; hallucinogens, amphetamines, barbiturates and tranquilizers.

Discussions at regular meetings of the CND between 1968 and 1969 led to the preparation of alternative texts of a Draft Protocol on the control of psychotropic drugs outside the scope of the Single Convention on Narcotic Drugs. It was evident even in these initial stages of negotiation that the road to controlling psychotropics would be extremely difficult to navigate. Countries argued over which substances should be controlled, the degree of control necessary, the role of the WHO and the CND in determining which substances should be scheduled and the right of countries to reject controls over certain drugs. One particular point of contention related to how substances should be categorised under each of the four schedules. It was generally accepted that hallucinogens, being a group of dangerous drugs with little or no medical use, should be placed in Schedule 1 and made subject to the strictest regime. When it came to amphetamines, however, several major psychotropic drug producing countries argued with non-producers over the level of controls that should be provided for. A document suggesting which drugs should be placed in each schedule was presented by the WHO Expert Committee in its 17th report and was accepted by the CND as the basis for negotiations at the upcoming plenipotentiary conference. According to Bruun et al, this was the only way in which Sweden was able to have stimulants included in the second schedule, against the initial resistance of major manufacturing countries, particularly Canada and the United States. The final draft Protocol prepared during the first Special Session of the CND in 1970 and later submitted to the 1971 UN Conference for the Adoption of a Protocol on Psychotropic Substances was described by the CND as “the result of a careful balancing of opposed views and preferences”. It was acknowledged by the Commission that certain compromises had to be made during the incipient stages of negotiation in order to ensure that most countries would find the draft protocol generally acceptable.

Controversy in the lead up to international control

Several drug producing countries and their industry representatives were suspicious of proposals for international controls that threatened to curtail their market for psychotropic

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32 This statement is important in respect of new synthetic drugs. As is argued in this Chapter, although the Convention may have been designed to be able to cover future drugs manufactured in the licit sphere and later diverted, it is not well equipped to deal with NSDs manufactured in clandestine laboratories specifically in an effort to thwart existing controls.


34 In 1969, the 23rd Session of the CND met to review those two first drafts of the Protocol and to hear the comments of member states. A third draft amended to take into account some of the suggestions put forward was prepared for consideration at the first Special Session of the CND in January 1970. For a discussion of the differences between the earlier drafts, see K Bruun et al, supra n.26, pp 249-252. It was initially suggested that in view of its close relation to the 1961 Single Convention, the new treaty might be termed a ‘Protocol’ on Psychotropic Substances. At the Vienna Conference, however, it was agreed that the instrument should be called a ‘Convention’ on Psychotropic Substances, presumably in order to emphasise that it was a separate instrument introducing controls over a category of drugs that were distinct from narcotic drugs. See “The Convention on Psychotropic Substances: A consideration of some variations it makes on the revised draft Protocol”, United Nations Bulletin on Narcotics, Vol.XXIII, No.3, July-Sept, 1971, p 1.


36 K Bruun et al, ibid., p 252.

37 Ibid., pp 252-253.

drugs. In 1967, the Bulletin on Narcotics published an article by the Swiss pharmacist Campanini expressing his personal view that Switzerland would be disadvantaged by measures to bring about international control. It was argued that strict control over psychotropics, particularly the proposed system for registration of imports and exports, would be difficult to achieve and that the administrative machinery needed would create "serious difficulties, especially at the pharmacy level". The author concluded that not only were existing national safeguards sufficient to limit abuse of psychotropic substances and protect public health, but that the Swiss system of controls was "infinitely preferable and more practical". The article provides an insight into the controversy provoked by efforts to bring about international control of psychotropic drugs in an arena where different interest groups, and different countries where those interest groups were powerful, were eager to have their own agendas protected.

The pharmaceutical industry repeatedly expressed its opposition to an expansion of the international control regime to regulate psychotropic drugs. In June 1968 the Pharmaceutical Industries Association (PIA) met in Stockholm, adopting a resolution that rejected the proposal for an international instrument to control psychotropic drugs. It was argued that national legislation was sufficient to limit misuse of psychotropics and that the trade in drugs should not be hampered unnecessarily by an onerous system of import/export authorisations. Furthermore, a decision to bring a substance under domestic control should be made by the national authority only after an investigation of the actual risks involved and only after statistical evidence was available to show the social harm caused by misuse of a particular drug. A similar resolution was adopted in May 1969 at a Rome meeting of the International Federation of Pharmaceutical Manufacturers Association (IFPMA). This body was concerned that the draft international protocol might lead to exaggerated regulation which would give international organisations plenary power to determine which substances would be brought under control and what degree of control they would be subjected to. Although the IFPMA accepted the need for some controls, it was argued that it would be more appropriate if the Association itself drafted a Convention, no doubt one that would safeguard the interests of its members.

After the Protocol on psychotropic drugs had been drawn up by the CND, the pharmaceutical industry made more vocal protests against the proposed international controls. Dr W.P von Wartburgh, legal adviser to the pharmaceutical firm Hoffman-La Roche, suggested that a new international treaty would not only be unsuccessful and unduly onerous, but would serve to stimulate illicit traffic in psychotropic drugs. Four main arguments were presented. First, the instrument would not prevent drug abuse since it is "well-known that administrative controls do not as such prevent the abuse of drugs by dependence-prone individuals". Secondly, it would lead to an increase in staff and administrative expenses. Thirdly, the operation of the 1961 Single Convention on Narcotic Drugs may be endangered in view of the dissipation of

40 Ibid., p 33.
41 At the 1966 Session of the CND, the Swiss delegate argued that amphetamines should not be placed under international control since "the effects of amphetamines on the individual and society were far from being as harmful as those of cocaine, cannabis and synthetic drugs". See E/CN.7/SR.552, cited in K Bruun et al, supra n.26, p 253. This statement is clearly false and there was ample evidence available at the time to show that amphetamine abuse had been increasing steadily over the past two decades and could be extremely dangerous. See, for example, the reports circulated by international agencies such as the CND, WHO and PCNB, cited supra nn 19-22.
42 See further, K Bruun et al, supra n.26, pp 253-4.
43 Ibid., p 254.
efforts and resources required to tackle drug abuse. Fourthly, over-regulation may restrict access to psychotropics needed for legitimate purposes. It was suggested that voluntary enactment of national control measures would be far more efficacious, but in the event that an international agreement was finally concluded it must be limited to substances that had been proven to pose an immediate international problem.\textsuperscript{46} It is clear that at the time von Wartburgh wrote some interest groups continued to espouse the view that abuse and regulation of narcotic drugs should be the greatest concern and that misuse of psychotropics (with the possible exception of LSD) was not so urgent as to justify interfering with commercial interests.

**Negotiating at the conference**

The United Nations Conference for the Adoption of a Protocol on Psychotropic Substances met in Vienna from 11 to 21 February 1971. Seventy-one countries sent representatives to the Conference and an additional four had observer status.\textsuperscript{47} Also in attendance were representatives from the WHO, CND, ICPO/INTERPOL and the Permanent Anti-Narcotics Bureau of the League of Arab States. Although it was only the 71 participating member States that enjoyed voting privileges, and although each State was ostensibly afforded an equal vote, the following discussion reveals the extent to which more powerful States and outside pressure groups operated to ensure that their own interests were protected. By the time the Vienna Conference met in 1971, it was agreed by most of the countries present that some form of international control over certain psychotropic substances was necessary. However, in an article he published six years later, the Executive Secretary of the Conference, Vladimir Kusevic, suggests that it was immediately evident at Vienna that countries still had very different views concerning which substances should be brought under control and the types of controls which should be implemented.\textsuperscript{49} As a result, a great deal of time was spent bargaining over separate articles of the Convention in an attempt to reach a compromise that would at once satisfy those countries calling for effective control over psychotropic drugs, and at the same time reassure drug producing countries that their market and industries would not be unduly fettered.

Countries represented at the conference divided roughly into two large groups with very different priorities. On one side were developed countries with strong pharmaceutical industries and a massive stake in the market for pharmaceutical substances.\textsuperscript{50} Most of these major industrialised powers argued for compromises that would not place too heavy a burden on their legitimate industries.\textsuperscript{51} On the opposite side of the divide were underdeveloped, non-

\textsuperscript{46} Ibid., p 126.

\textsuperscript{47} For a full list of the countries, specialised agencies and non-government organisations represented at the conference, see 1971 Official Conference Records, supra n.1, Vol. I, pp 3-13.

\textsuperscript{48} Ibid.

\textsuperscript{49} V Kusevic, supra n.18, p 38.

\textsuperscript{50} Ibid., p 39.

\textsuperscript{51} This was not true of all industrialised countries. Sweden had long been agitating for a system of international control over psychotropic drugs and continued to argue at the Vienna Conference in favour of a tight control regime (1971 Official Conference Records, supra n.1, Vol.II, pp 6-7). France stressed that the international community had a responsibility to implement a system of international control over psychotropic drugs and was generally in favour of more stringent controls (see 1971 Official Conference Records, supra n.1, Vol.II, 1973, p 63). Despite its opposition to certain control measures, the “large and very competent” delegation sent by the United States was eager to see some international controls agreed upon and has been described as one of the “prime movers” in bringing about the compromises necessary to secure agreement. According to Kusevic, the US “made a remarkable contribution although it had to accept certain regulations which it recognised would hamper ratification of the Convention”. See V Kusevic, supra n.18, pp 39-40. On the other hand, there were many industrialised countries that were more reluctant to accept a compromise solution. Austria, the country hosting the Convention, constantly argued against tighter controls and at the conclusion of the conference, joined Germany, Belgium and the Netherlands in voting against the 1971 Convention.
industrialised countries that had little or no market in psychotropic drugs but were in danger of being flooded with imports from industrialised States.\textsuperscript{52} These countries generally favoured the imposition of more stringent controls. Kusevic points out that a similar bifurcation occurred during conferences for the negotiation of treaties on narcotic drug control. In that case however, the drug producers were developing rather than developed countries and the attitudes of both camps were reversed.\textsuperscript{53} At narcotic drug conferences, large industrialised powers pressed for strict control over opium, coca leaves, cannabis and poppy straw, justifying international controls on the basis of a need to protect the entire international community from the “evil” of illicit drug abuse.\textsuperscript{54} In respect of narcotic drugs, industrialised powers put pressure on developing countries that were responsible for the bulk manufacture of those substances and were reluctant to accept an onerous control regime.\textsuperscript{55}

Having for several years recognised what was at stake in the negotiation of international controls, the pharmaceutical industry continued to be active throughout the Conference debate. Representatives were present both as part of the public witnessing the negotiations and as members of the delegations of individual countries. Reports reveal that major pharmaceutical manufacturers very often privately accompanied delegates of their countries “on a friendly basis”.\textsuperscript{55} Kusevic provides an interesting example of a group of six small Latin American countries who were inseparable throughout the conference and constantly voted together to reject control measures. The group was led by the head of one delegation who did not appear to speak fluent Spanish. It was soon discovered that this delegate was not a diplomat or a technical expert or a Latin American, but the Swiss representative of a large pharmaceutical firm operating in one of the Hispanic Countries. The apparent influence exerted was so obvious that the behaviour of the group was “a cause for hilarity among many other delegations”.\textsuperscript{57} Evidence such as this suggests that representatives of the pharmaceutical industry did not merely sit as silent observers, but exerted very real pressure on both developed and developing countries negotiating at the Conference.

One particular example illustrates the extent to which the industry influenced control decisions. The Swiss company Hoffman-La-Roche, then the world’s largest pharmaceutical corporation, made a significant profit from two of the drugs they produced, diazepam (Valium) and chlordiazepoxide (Librium).\textsuperscript{58} Despite opposition from the US delegation, the

\textsuperscript{52} V Kusevic, supra n.18, p 39.
\textsuperscript{53} Ibid., p 39.
\textsuperscript{54} In the Preamble to the Single Convention on Narcotic Drugs, it is stated that Parties “recognise” that they have a “duty to prevent and combat” the “evil” of narcotic drug abuse. The eleven narcotic drug Conventions concluded between 1912 and 1961 did not impose serious financial burdens on Governments like the US and UK since neither opium poppies nor coca plants were being grown in those industrialised countries. As Bean phrases it, “the great powers who were not producers were merely protecting themselves against the lesser powers who were”. See P Bean, supra n.11, p 26.
\textsuperscript{56} V Kusevic, supra n.18, p 39.
\textsuperscript{57} Ibid.
\textsuperscript{58} K Bruun et al, supra n.26, p 262.
Swiss succeeded in having those two substances withdrawn from Schedule IV of the 1971 Convention. As a result, a curious situation existed whereby the tranquilliser drug Meprobate (Miltown) which was the American competitor of the Swiss drugs, was subjected to controls, while the Swiss tranquillisers were not. Kettil Bruun et al suggest that the most significant expression of the commercial interests involved was "not so much the presence of pharmaceutical industry representatives on the delegations of the United States and Switzerland as the coincidence of national and commercial interests". According to the Chairman of the Technical Committee which recommended the removal of Valium and Librium from the control regime, this was one of the concessions that was necessary in order to secure any agreement at all on an international instrument to control psychotropic drugs. It appears to be just one example of what has been described as "horse-trading" which took place throughout the conference. Although one would presume that the US delegation was irritated by a decision that would protect the economic interests of the Swiss and adversely affect their own, a conclusion must have been reached that the sacrifice was necessary in this instance in order to secure a basic agreement.

One of the most powerful and frequently used arguments for weakening controls was that this was the only way in which the majority would be persuaded to adopt the Treaty. At one end, less developed countries (supported by Sweden and France) emphasised the importance of public health and the need to protect developing countries from being swamped by dangerous psychotropic drugs manufactured in developed States. These arguments were countered, however, by those stressing that for practical purposes, provisions had to be made weak enough that they would be acceptable to the majority of industrialised countries. It has been asserted that:

The force of this argument lay in the fact that there were moments during the conference when the countries desiring controls were not even certain that they would obtain a treaty which bore any resemblance at all to the original draft, so assailed were they by opposition.

It is somewhat ironic that it was the same wealthy Governments that demanded that narcotic drug producing countries accept rigorous controls in respect of those substances, that persistently argued that extensive controls over psychotropics would not be appropriate, in view of the financial burden that would be imposed. As shall be demonstrated, the conference bargaining or "horse trading" necessary to secure an agreement resulted in the acceptance of less rigorous controls over the international trade in psychotropic drugs subject to abuse.

59 Ibid., p 264.
60 Ibid., p 262. The Australian delegate was one of a number of State representatives who expressed their surprise at the decision to delete these two substances from the Schedules. It was noted that, "[t]he deletion ... seemed to have been due to a change in attitude on the part of some delegations between the first and second consideration of Schedule IV by the Technical Committee. Yet no new pharmacological data or information on social factors had come to hand in the interval to justify such a change. The reasons for it therefore seemed to be of a pharmaco-political or pharmaco-sociological nature". See 1971 Official Conference Records, supra n.1, Vol.II, 1973, p 113.
62 Ibid., p 265.
63 Ibid., p 261. For an example of a plea made by a wealthy industrialised country that the financial costs of controls imposed were untenable, see the comments made by the representative of Switzerland, 1971 Official Conference Records, supra n.1, Vol.II, 1973, pp 21 and 77.
Analysis of key provisions

In the following section the most significant of the 1971 Convention provisions are outlined and, where relevant, negotiations leading up to their adoption are discussed. Much of the debate in Vienna was taken up with the same arguments that had been mooted at the first Special Session of the CND in 1970, in particular the scope and degree of controls, how substances should be scheduled and the role of the CND and the WHO. By exploring some of the more salient provisions, determining how they were modified during the Vienna Conference and comparing them with similar provisions in the 1961 Single Convention on Narcotic Drugs, it is possible to see how the international control regime was intended to operate and the extent to which countries were willing to compromise on controls in order to design a treaty that would be accepted by the majority of participating States.

The scope of controls

The rationale for the extension of the international control regime is purportedly enshrined within the Preamble to the 1971 Convention. The Parties to the Convention, “being concerned” with public health and social problems resulting from the abuse of certain psychotropic drugs, were determined to take the “rigorous measures” necessary to prevent such abuse and to limit the illicit traffic that had developed. It was recognised at the outset, however, that since certain psychotropics were indispensable for medical and scientific purposes, their availability should not be unduly restricted.

One of the most controversial of the Convention provisions was Article 2, designed to regulate the scope of control over substances. It has been noted by other commentators that a disproportionate amount of time at the conference was spent negotiating a compromise over various parts of this Article. After protracted negotiation, the final text adopted at the 1971 conference was substantially different from the draft that had been prepared at the first Special Session of the CND, a reflection of the contentious nature of debate over the scope of the control regime.

Under Paragraph 1 of Article 2, where either a Party to the Convention or the WHO has information that would justify adding or deleting a substance from the Schedules, or transferring a substance from one Schedule to another, it shall notify the Secretary-General and provide all relevant information in support. Paragraph 2 requires the Secretary-General to transmit the notification and any relevant information to the Parties, the CND and the WHO.

In some circumstances, Parties are encouraged to apply provisional control measures where they receive information that a new substance should be scheduled. Paragraph 3 of Article 2 provides that in the event that the Secretary-General submits notification that a substance is suitable for inclusion in Schedule I or II, Parties are to “examine, in the light of all information available to them, the possibility of the provisional application to the substance of

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64 RG Smart et al, supra n.35, p 11.
65 Appendix E shows some of the more important differences between the 1961 Single Convention on Narcotic Drugs and the 1971 Convention on Psychotropic Substances.
66 Preamble, paras 1-3.
67 Preamble, para.4.
68 RG Smart et al (supra n.35, p 11) remark that no other provision received as much attention as Article 2. It was a major topic of debate for the Committee on Control Measures, the Technical Committee and three ad hoc working groups. Introducing the Report of the Committee on Control Measures, the French Chairman stated that it had taken four weeks of discussion to establish the final text of Article 2, one of the provisions which had met with the most opposition in his Committee. See 1971 Official Conference Records, supra n.1, Vol.II, p 66.
all measures of control applicable to substances in Schedule I or Schedule II, as appropriate” (there is no requirement to contemplate provisional control over Schedule III and IV substances). During the 1971 Conference debate, a paragraph giving the CND the authority to require Parties to enact interim controls over certain psychotrophic drugs, such as exists under the 1961 Single Convention in respect of narcotic drugs, was struck out of the final draft. It has been suggested that one of the weaknesses of the 1971 Convention is the absence of a power to require interim control over psychotropics. This is particularly relevant in the regulation of NSDs, since in view of the substantial bureaucratic and administrative hurdles involved it can often take between two and three years before a drug nominated for assessment is actually placed on a Schedule of the 1971 Convention, during which time uneven domestic controls allow for loopholes that may be exploited by clandestine operators. Further consideration should be given now to amending the 1971 Convention so as to introduce mandatory interim controls in circumstances where a particular compound has no recognised therapeutic use and has been proven to be highly toxic. This would enable the CND to oblige Parties to regulate new and dangerous compounds during the lengthy review period.

Since they are fundamental to our discussion and critique of the system of international control over synthetic psychotrophic drugs, the criteria relied upon to determine whether a substance should be brought under control will be spelt out in full. After the WHO receives information that a substance should be considered for scheduling, it first makes a preliminary assessment under Article 2(4) in order to determine:

(a) That the substance has the capacity to produce
   (i) (1) A state of dependence, and
       (2) Central nervous system stimulation or depression, resulting in hallucinations or disturbances in motor function or thinking or behaviour or perception or mood, or
   (ii) Similar abuse and similar ill effects as a substance in Schedule I, II, III or IV, and

(b) [whether] there is sufficient evidence that the substance is being or is likely to be

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70 See 1961 Single Convention on Narcotic Drugs, Article 3(3)(ii).
72 SK Chatterjee, supra n.11, p 473.
73 See Communication From the Commission to the Council and the European Parliament on the Control of New Synthetic Drugs (Designer Drugs), 23.5.97, COM (97) 249, p 3.
74 The procedure for amending the Schedules of the 1971 Convention is set out in the discussion below. In respect of the substantive Convention provisions, Article 30 provides that an amendment may be proposed by any Party to the Convention. The text and reasons for the amendment are to be communicated to the Secretary-General who will in turn communicate them to other Parties and the ECOSOC. At this point, the Council has two courses of action open to it. It may decide to (a) call a conference (convened in accordance with Article 62 of the Charter of the United Nations) to consider the proposed amendment, or (b) ask Parties directly whether they accept the amendment. If the latter option is taken, and a proposed amendment has not been expressly rejected by any Party within eighteen months, the amendment shall enter into force. In the event that an amendment is rejected by any Party, it will be for the Council to decide whether to call a conference in order to consider it further. Article 39 of the 1969 Vienna Convention on the Law of Treaties (United Nations, Treaty Series, Vol.1155, No.18232) states that a treaty may be amended by agreement among the Parties. The procedure for amendment is that spelt out in Articles 40 and 41, unless the amendment procedure is specifically outlined in the treaty, as it is in the 1961 and 1971 Conventions. See further, I Sinclair, The Vienna Convention on the Law of Treaties, 2nd edn (Manchester, Manchester University Press, 1984), pp 106-109. At the time of writing, there has not yet been any amendment of the substantive provisions of the 1971 Convention. Information confirmed by Loide Lungameni, CND, Correspondence, 17 March 2000.
abused so as to constitute a public health and social problem warranting the placing of the substance under international control . . . .

In the event that these threshold requirements are met, Article 2(4)(b) requires that:

the World Health Organisation shall communicate to the Commission [on Narcotic Drugs] an assessment of the substance, including the extent or likelihood of abuse, the degree of seriousness of the public health and social problem and the degree of usefulness of the substance in medical therapy, together with recommendations on control measures, if any, that would be appropriate in the light of its assessment.

In order to provide for objective decision-making with regard to whether and how to schedule a particular substance, the additional selection criteria reproduced in Table 1 were developed by the WHO in 1969. Table 2 sets out the supplementary guidelines subsequently developed in 1994.

Table 1 - Additional selection criteria developed in 1969

<table>
<thead>
<tr>
<th>Schedule</th>
<th>Criteria</th>
</tr>
</thead>
<tbody>
<tr>
<td>Schedule I</td>
<td>Substances whose liability to abuse constitutes an especially serious risk to public health and which have very limited, if any, therapeutic usefulness.</td>
</tr>
<tr>
<td>Schedule II</td>
<td>Substances whose liability to abuse constitutes a substantial risk to public health and which have little to moderate therapeutic usefulness.</td>
</tr>
<tr>
<td>Schedule III</td>
<td>Substances whose liability to abuse constitutes a substantial risk to public health and which have moderate to great therapeutic usefulness.</td>
</tr>
<tr>
<td>Schedule IV</td>
<td>Substances whose liability to abuse constitutes a smaller but still significant risk to public health and which have a therapeutic usefulness from little to great.</td>
</tr>
</tbody>
</table>

Table 2 - Supplementary guidelines developed 1994

- Where the 1969 criteria apply only in part, the scheduling recommendation should be made with higher regard to the risk to public health than to therapeutic usefulness.
- Notwithstanding the above, recommendations for inclusion in Schedule I should be made only when the 1969 criteria are fully met, with respect to both therapeutic usefulness and risk to public health.

The scheduling procedure provided for in the 1971 Convention is far more complex than the clear criteria contained in one paragraph of the 1961 Single Convention on Narcotic Drugs. Under the latter, the WHO may recommend the scheduling of a substance in the event that it is either liable to similar abuse and productive of similar effects as substances in Schedule I or II, or is convertible into such a drug. During negotiations at the 1971 Conference, it was decided that such a simple formula would not be appropriate for the scheduling of psychotropic drugs. There was concern that this may allow for the extension of controls to cover too many substances, thereby interfering with important commercial interests and

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75 These criteria were first developed by the WHO Expert Committee on Drug Dependence at its 17th meeting in 1969, at the time it was discussing proposals for international control over psychotropic drugs. They were intended to provide a guide for the drafting of a list of substances appearing on different Schedules that would be presented to the delegates at the conference convened to adopt the 1971 Convention. See 31st Report of the WHO Expert Committee on Drug Dependence", Technical Reporting Series, No.887 (Geneva, WHO, 1999), p 4.
76 At its 29th meeting in 1994, the WHO Expert Committee on Drug Dependence confirmed the 1969 criteria and developed supplementary guidelines. Ibid.
77 1961 Single Convention on Narcotic Drugs, Article 3 (3)(ii).
affecting considerations of public health involved in the marketing of pharmaceuticals. Therefore, the scheduling of psychotropics requires evidence that the substance “is being or is likely to be abused” under circumstances which “constitute a public health and social problem” that would justify the application of international controls. Bruun et al point out that the United Kingdom was more determined than any other country to enshrine the need for substantial evidence of abuse potential before a drug is brought under control. It had been feared that unless the Treaty required sufficient evidence of real or imminent abuse, the adoption of broad criteria might lead to excessive controls being placed on psychotropic substances with a genuine licit use.

There are several reasons why the complexity of the scheduling criteria under the 1971 Convention means that it is not able to respond rapidly to the appearance of new synthetic drugs traded on the illicit market. As a result of the complicated procedure described, any addition to the schedules can be expected to take between two to three years, during which time the new compound will not be under any international control. Since NSDs are manufactured in clandestine laboratories, the non-application of trade regulations has little significance. What is significant is that the delay provides room for the uneven application of domestic laws since there will be a long period where countries are not under any international obligation to schedule particular substances. This may encourage clandestine manufacturers to operate in those jurisdictions that have not introduced relevant domestic controls.

It is possible that the inclusion of the threshold requirement under Paragraph 4 (a)(i) that the drug has the “capacity to produce a state of dependence” may make it difficult to extend controls to encompass certain dangerous compounds. Although most substances covered by the 1971 Convention can be described as ‘dependence-producing’, there are certain compounds, notably LSD, that have no pharmacologically addictive qualities but may be considered harmful. This is particularly important in respect of the control of NSDs since it is not clear that compounds such as MDMA and related phenethylamines can be properly described as dependence producing. It is suggested that the basic scheduling criterion should

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79 Ibid., p 260.
80 Communication from the Commission to the Council and the European Parliament on the Control of New Synthetic Drugs (Designer Drugs), Brussels, 23.5.97, COM (97) 249, p 2.
81 See Chapter 6, infra pp 164-167, for a discussion of proposals to amend the scheduling process to make it better equipped to deal with substances manufactured for the illicit market.
82 SK Chatterjee, supra n.11, pp 460-461. “Drug dependence” has been defined by the WHO Expert Committee on Drug Dependence as “a state, psychic and sometimes also physical, resulting from the interaction between a living organism and a drug, characterised by the behavioural and other responses that always include a compulsion to take the drug on a continuous or periodic basis in order to experience its psychic effects, and, sometimes to avoid the discomfort of its absence”. See WHO Expert Committee on Drug Dependence, Sixteenth Report, Series No.407 (WHO, Geneva, 1969), p 16 and WHO Expert Committee on Drug Dependence, Eighteenth Report, Series No.460 (WHO, Geneva, 1970), p 7. LSD is not considered to be addictive within the common meaning of the term and it is doubtful that it fits within the meaning of “drug dependence” as defined by the WHO. Since a tolerance to LSD develops after a single substantial dose, a second dose taken on the following day is not likely to have any effect, meaning that most users will take the drug sporadically. EMCDDA, “New Trends in Synthetic Drugs in the European Union”, Insights, Series 1 (Lisbon, EMCDDA, 1997), p 43.
83 The absence of a withdrawal syndrome with ecstasy means that it is not considered to be ‘addictive’ within the common meaning of the term. Most users consume the drug periodically and may have an interval of many months in between dosages. It has been pointed out, however, that any substance use (and indeed any human trait) can become compulsive and excessive and there are a small number of users who have taken ecstasy on a regular basis regardless of the fact that they will certainly have developed a tolerance for the drug. EMCDDA, “New Trends in Synthetic Drugs in the European Union”, ibid., p 20. Given that the WHO definition of ‘dependence producing’ is fairly wide, it may be argued that there is a psychological compulsion to continue to take compounds like ecstasy. In one study conducted by Solowij et al in 1992, 2% of the sample surveyed described themselves as

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have been whether or not the drug has the capacity to cause harm, regardless of whether it is dependence producing.

A great deal of time at the conference was spent debating the parts of Article 2 that delineate the role of the World Health Organisation and the Commission on Narcotic Drugs. Under the 1961 Single Convention, the decision made by the CND as to whether and to what extent a drug should be controlled is based solely upon the recommendations of the WHO.\textsuperscript{84} It was thought by the drafters of the Single Convention that the decision as to whether or not a narcotic drug should be brought under control should be made based only on considerations of the physical dangers associated with use of the drug and its medical and pharmaceutical properties, without reference to the administrative, social and economic consequences of controls. Contrast Article 2, paragraph 4 of the 1971 Convention which provides that the WHO is to make an assessment of the substance (including the extent or likelihood of abuse, the seriousness of the public health and social problem and the usefulness of the substance in medical therapy) before “recommending” appropriate control measures to the CND.\textsuperscript{85} Under Article 2, paragraph 5, the final decision on what type of controls, if any, would be appropriate, is made by the CND after reviewing the WHO’s recommendation along with any “economic, social, legal, administrative and other factors” it believes to be relevant. Thus, the CND has the legal power to override WHO recommendations where it concludes that other considerations are of greater importance.

During the 1971 Conference, a number of attempts to circumscribe the discretion of the CND were defeated. Countries in favour of providing a strong role for the Commission, led by the American delegation, claimed that medical and scientific matters were not necessarily the most important factors in determining whether a substance should be brought under control.\textsuperscript{86} It was argued that the CND was best placed to consider a number of other factors that should be integral to decision making, including social problems resulting from drug abuse, law enforcement issues, the feasibility or practicality of recommendations and the economic impact of controls. Furthermore, some countries suggested that the Commission would be redundant if it were not given the power to reverse or alter WHO decisions, and that without it, there would be no voice for the concerns of individual countries who were represented only on the CND and not on the WHO’s Expert Committee on Drug Dependence.\textsuperscript{87} On the other hand, those countries in favour of a stronger role for the WHO argued unsuccessfully that the scheduling decision should be determined solely by balancing the degree of abuse with the suggested medical utility of a substance.\textsuperscript{88} It was suggested that States needing time to develop the administrative capacity to enforce controls could be accommodated by designing flexible sanctioning measures rather than changing the scheduling procedure. A compromise solution was sought. After protracted negotiation, Article 2(5) was framed to give the CND the power to finalise scheduling decisions on the basis of a range of considerations beyond the

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\textsuperscript{84} See the 1961 Single Convention on Narcotic Drugs, Art 3(3)(iii).
\textsuperscript{85} Instructions given to WHO representatives at the Conference in Vienna show that the WHO did not wish to argue over its right to have the same authoritative role under the 1971 Convention as it had been given under the 1961 Single Convention. It was prepared to accept a weakened role, apparently in an effort to end tensions between its own drug dependence officials and those working for the UN Division on Narcotic Drugs. See Dr Eva Tongue, “Reflections on the Development, Content and Acceptance of the Convention on Psychotropic Substances” in RG Smart et al, supra n.35, p 36.
\textsuperscript{86} D Kendall et al, supra n.71, p 7.
\textsuperscript{87} Ibid.
\textsuperscript{88} Ibid., p 7.
pharmaceutical properties of a drug. In order to ensure that the WHO continued to play a powerful role, it was provided that assessments made by the Organisation are determinative as to medical and scientific matters.

Another controversial issue debated during the 1971 Conference concerned the power given to Parties to decline to accept a scheduling decision. Under paragraph 7 of Article 2, a Party has the right to decline provided it submits written notice to the Secretary-General explaining that in view of certain “exceptional circumstances” it is not in a position to give effect to all the Convention provisions with respect to the particular substance to be scheduled. There is no such right not to accept scheduling decisions made pursuant to the 1961 Single Convention. Countries in favour of the right of non-acceptance under the 1971 Convention - the majority of industrialised countries including Britain and the US - produced three main arguments. First, in view of the lack of experience in controlling psychotropic drugs, incomplete scientific knowledge about their medical properties or utility and the vague standards for measuring abuse, it was easily conceivable that international authorities could make an error of judgement in deciding to schedule a substance. Secondly, since some countries had very little problem with abuse of psychotropic drugs, the control regime should be flexible enough to require them only to impose minimum controls so as not to inflict unnecessary burdens on their infrastructure. Thirdly, if mandatory controls were imposed, some countries would consider that the treaty infringed their right to sovereignty and would refuse to ratify. On the other side, less developed nations with no substantial drug manufacturing industry argued that the 1971 Convention would be ineffective in the absence of mandatory controls. It was pointed out by those countries that any international agreement involved the subordination of some national interests. Since opium producing countries had not been afforded the right not to accept scheduling decisions under the 1961 Single Convention, there was no justification for allowing industrialised countries to pick and choose between controls over psychotropic drugs.

The outcome of this heated debate was a compromise under which, although countries are permitted to exercise the right not to submit to scheduling decisions in “exceptional circumstances”, they are still obliged to adopt certain minimum controls. The types of minimum measures that must be introduced are dependent upon where the substance has been scheduled. Even if a country rejects the decision to control a drug added to Schedule I, it is still obliged to adopt quite rigorous measures, including the licensing of manufactures, the dispensation of drugs only on medical prescription and compliance with obligations to limit the import and export of the substance. The higher the schedule a drug has been placed in, the less onerous are the obligations on countries that decline to accept the decision to bring it under international control.

It appears that Sweden was one of the main advocates that initiated and secured this amendment in an attempt to bolster the position of the WHO (see K Bruun et al, supra n.26, p 260). According to Smart, however, it is doubtful that this compromise amendment convinced all interest groups that the role of the WHO is protected or strengthened under the 1971 Convention (RG Smart et al, supra n.35, p 12).

The US Drug Abuse Council suggests that the power of a Party to decline to accept a control decision was “the most controversial issue” in the drafting of the 1971 Convention. See D Kendall et al, supra n.71, p 7.

Ibid.


D Kendall et al, supra n.71, p 7.

Ibid.

See the 1971 Convention on Psychotropic Drugs, Article 2(7)(a). In respect of NSDs manufactured for the clandestine market and not recognised as having any therapeutic use, a Party that objects to a decision to add that compound to Schedule I would still have to prohibit unauthorised manufacture, sale, import and export.
A contentious provision included in the 1971 Convention allows countries to exempt from controls many of the preparations that contain psychotropic drugs. Although Article 3(1) specifies that a ‘preparation’ is ordinarily to be subjected to the same measures as the most strictly controlled drugs therein, Article 3(2) permits Parties to exempt a preparation containing a psychotropic substance other than one listed in Schedule I provided it has been: 

compounded in such a way that it presents no, or a negligible, risk of abuse and the substance cannot be recovered by readily applicable means in a quantity liable to abuse, so that the preparation does not give rise to a public health and social problem.

The wording of Article 3(2) is extremely general, leaving Parties with a wide discretion to determine whether there is a risk that substances could be misused. No similar provision permits opium producing countries to exempt certain preparations of narcotic drugs from the strict control regime set out in the 1961 Single Convention. The Single Convention allows for a preparation to be exempted only if the WHO finds that a substance is not liable to abuse, cannot produce ill-effects and is not easily recoverable, and on that basis the CND adds the particular preparation to a third Schedule. A proposal that preparations containing psychotropics substances be exempted only if listed on a fifth Schedule of the 1971 Convention was considered to be impractical in view of the large numbers of preparations that would have had to be included.

Once again industrialised countries were inclined to disagree with non-industrialised ones over whether or not there should be a provision allowing Parties to opt out of controlling preparations containing psychotropic drugs. The US Drug Abuse Council notes that the issue “produced intense controversy” so that “the language of Article 3 is a compromise produced by several difficulties”. Non-industrialised States suggested that if certain preparations were exempted from controls they could later be re-synthesised in order to extract psychotropic substances liable to abuse. On the other hand, countries in favour of an exemption for preparations argued that it was necessary to remove onerous controls over medications which may contain psychotropic drugs but do not themselves pose any danger. Under the compromise eventually procured, Parties can exempt a preparation from certain controls set out in the Convention, but must still agree to minimum controls such as licensing and export/import restrictions.

In contrast to the “exceptional circumstances” exemption in Article 2 of the 1971

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90 The term “preparation” is defined in Article 1 of the Convention as any solution or mixture containing a psychotropic substance, or one or more psychotropic substances in “dosage form”.
91 Parties could not exempt a preparation containing a new synthetic drug such as MDMA, MDE or MMDA, since those compounds appear in Schedule I. They could, however, exempt a preparation containing a substance that could be broken down in order to obtain the precursors used in the manufacture of new synthetic compounds.
92 See the 1961 Single Convention on Narcotic Drugs, Article 2(3), Article 3(4) and Schedule III.
93 D Kendall et al, supra n.71, p 8.
94 Ibid.
95 Ibid. Although there was some discussion of drafting a provision that could prevent re-synthesis, it was concluded that this would be impossible in view of the various methods that could be used in the extraction process. The majority of countries rejected a proposal for a provision that would have set universally applicable limits on dosage size and the maximum amount of controlled drug allowed per dose, since countries would still be able to juggle the size of the dose and the contents of the preparation in order to justify an exemption.
96 Article 3(3) provides that a Party cannot exempt a preparation from the requirements of, (a) Article 8 (licenses) in respect of manufacture, Article 11 (records), Article 13 (export/import controls), Article 15 (inspection) in respect of manufacturers, Article 16 (reports) and Article 22 (penal provisions).
Convention, a Party’s decision to exempt a preparation under Article 3(2) may be overruled by the CND in the event that the Commission receives information from a Party or the WHO that the exemption should be disallowed. However, even where the CND makes a determination under Article 3(4) that the exemption will be withdrawn, a country can still remove the preparation from most of the controls by relying on the “exceptional circumstances” clause in Article 2. Thus, as it was so aptly put by the US Drug Abuse Council, “the loophole for preparations in Article 3 is ultimately safeguarded by the loophole for psychotropic drugs themselves in Article 2”. It is little wonder then that Article 3 was the subject of an extended dispute between countries in favour of stricter controls, and others that continually pushed to have provisions watered down.

Absence of precursor controls

The 1971 Convention did little if anything to address the illegal diversion of essential and precursor chemicals required for the manufacture of end-products, a factor that undoubtedly contributed to the widespread abuse of synthetic psychotropic drugs. By 1971, the idea of controlling both natural and synthetic precursors was not new. Under the 1961 Single Convention, countries had agreed to a provision requiring them to control the manufacture and trade in substances that are “convertible” into one of the scheduled narcotic drugs and in Japan, specific precursors for amphetamine-type stimulants were placed under control as early as 1955. In an earlier draft of what was then the Protocol on Psychotropic Substances, an Article was included that would have adopted the concept of ‘convertibility’ from the Single Convention and required countries to effect control over a range of precursors used in the manufacture of psychotropic drugs. At the Vienna conference, however, the complexity of implementing such controls was considered to be overwhelming and the idea was abandoned. As a much weaker alternative, Parties agreed upon Article 2(9) which asks them to “use their best endeavours” to apply “such measures of supervision as may be practicable” to monitor substances that may be misused for the preparation of psychotropic drugs. There is no power for the CND itself to place substances under international control on the basis that they are frequently used in clandestine manufacture. It is now generally

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104 Recall that Article 2(7) permits Parties to reject certain scheduling decisions.
105 D Kendall et al, supra n.71, p 8.
106 1961 Single Convention on Narcotic Drugs, Article 3(3)(iii). Indeed, as far back as the 1931 Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs (League of Nations Treaty Series, Vol. CXXXIX, p 301) a provision had been included to capture substances which were not themselves subject to abuse but were ‘convertible’ into drugs of abuse. See Article 11(4) of the 1931 Convention.
107 It was not until after the enactment of the 1971 Convention that most other countries began to bring certain precursors involved in the manufacture of ATS under control. The Soviet Union did so in the mid-1970s and the United States in 1980. See UNDCP, “Amphetamine-type Stimulants: A Global Review”, UNDCP Technical Series, No.3, p 52.
109 A further difference between the 1961 and 1971 Conventions is that the 1961 Single Convention has always provided for the control of salts, ethers, esters and isomers of scheduled narcotics, while the 1971 Convention did not originally control any of these generic extensions (see the Glossary for a definition of these chemistry terms). In 1977, in light of a recommendation by the WHO, the CND agreed to add salts to each of the four schedules of the 1971 Convention (“21” Report of the WHO Expert Committee on Drug Dependence”, Technical Reporting Series, No.618, Geneva, 1978, pp 37 and 41). In respect of ethers and esters the WHO determined that at that time there was no evidence of abuse and no need to add this generic category to the Schedules of the 1971 Convention. It was concluded that the potential isomers of each substance should be considered individually on their merits (ibid., pp 37-38 and 41-45). In 1999, the CND amended Schedule I of the 1971 Convention by decision 42/2 of 16 March 1999, so that the stereoisomers of those substance are controlled (wherever their existence is possible) unless specifically excluded. Following recent assessments by the WHO, it is now generally agreed that there would be no significant benefit in adding esters or ethers to the 1971
accepted that a system designed to limit and monitor the manufacture of precursor chemicals is an integral component of an effective programme for drug control.\textsuperscript{109} The absence of precursor controls in the 1971 Convention allowed for the widespread distribution of starter materials used for the clandestine manufacture of "traditional" synthetics such as amphetamine, as well as a range of NSDs that have appeared on the illicit market over the past decade and a half.\textsuperscript{111} It is fortunate that the weakness of the 1971 Convention in this regard has been partly remedied by the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances which, as is explained in Chapter 4, provides for some control over a list of substances used in the manufacture of both narcotic and psychotropic drugs.

Degree of control required

Parties are required under Article 7 to adopt the most stringent controls to regulate substances placed in Schedule I of the 1971 Convention. It is this provision that governs legitimate use of any of the NSDs that have been scheduled since 1985, since each of them has been added to Schedule I.\textsuperscript{112} Article 7(a) states that it is obligatory for countries to prohibit all use of Schedule I substances "except for scientific and very limited medical purposes by duly authorised persons, in medical or scientific establishments which are directly under the control of their Government or specifically approved by them". A series of controls must be introduced by Parties allowing limited use of those drugs, including the licensing of persons involved with manufacture and distribution, record keeping requirements and monitoring of imports and exports. Countries are subject to strict regulations that require a significant commitment of administrative and financial resources.

The degree of control required for substances listed in the remaining Schedules II-IV is set out under Article 5. Article 5(2) obliges a Party to "limit by such means as it considers appropriate the manufacture, export, import, distribution and stocks of, trade in, and use and possession of, substances in Schedules II, III and IV to medical and scientific purposes". There are three major differences between the control regime imposed on Schedule I drugs, and controls on drugs in the remaining three Schedules. First, individual researchers and medical practitioners are not required to obtain approval to use substances outside of Schedule I. Secondly, although it may be "desirable", it is not mandatory for Parties to forbid the possession of drugs in Schedules II-IV except under legal authority (Article 5(3)). Thirdly, controls over drugs in the higher schedules are generally more gentle, allowing Parties significant discretion in dealing with what they perceive to be problems with the abuse of

\textsuperscript{109} See, for example, "Report of the Working Group on Psychotropic Substances" in RG Smart et al, supra n.35, p 217; WC Gilmore, "Drug Trafficking and the Control of Precursor and Essential Chemicals; The International Law Dimension" in WC Gilmore and AN Brown (eds), Drug Trafficking and the Chemical Industry, Hume Papers on Public Policy, Vol.4, No.1, Spring, 1996, p 3; World Customs Organisation, "Combating the Illicit Traffic in Drugs", Enforcement Sub-Directive, No.10/97, p 11-16 and 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, preamble, para. 8.

\textsuperscript{111} In its 1994 Report, the INCB expressed its regret that at the time the 1971 Convention was adopted Governments did not have the foresight to control the precursors to scheduled substances, a factor contributing to the development of clandestine manufacture. See "Effectiveness of the International Drug Control Treaties", Supplement to the Report of the INCB for 1994, E/INCB/1994/1/Supp.1 (New York, United Nations, 1995), p 5.

\textsuperscript{112} A Party may, for example, sanction the use of small amounts of certain scheduled compounds in the ecstasy family, e.g. MDMA, MDE or MMDA, for use in clinical trials designed to investigate the effect they have on the health of users.
these substances. Use of the nebulous phrase, "by such means as it considers appropriate" would appear to allow Parties unfettered discretion in determining how to regulate the bulk of dangerous psychotropic drugs. Article 5 must, however, be read in conjunction with Articles 8-16 that impose more specific obligations on countries to introduce controls by such means as licenses, prescriptions, record keeping and monitoring of international trade.13

Article 16 commits member States to providing the Secretary-General with such information as the CND determines to be necessary for the performance of its functions. In particular, it is mandatory for States to submit an annual report that will reveal any important changes in their domestic laws as well as significant developments in the abuse of and illicit traffic in psychotropic drugs within their territories.14 Where it is determined by a Party that a case involving illicit traffic or seizure of drugs is particularly important in view of the fact that it reveals new trends, significant quantities, illicit sources or unusual trafficking methods, countries must send a report of the incident to the United Nations as soon as possible after the event.15 Each country must decide for itself what information will be important enough to prompt them to prepare and submit a special report. In accordance with Article 16, paragraph 4, countries are obliged to furnish certain annual statistical reports to the INCB. The higher the Schedule in which a substance has been placed, the less dangerous the drug has been judged to be and the less information that need be submitted to the Board.

Although Article 16 appears to have been based on Article 18 of the Single Convention on Narcotic Drugs, there is one important difference to take into consideration. The 1971 text makes no provision for a system of estimates, such as has been included under the 1961 Single Convention.16 In the absence of an estimates provision, there is no obligation on Parties to provide the INCB with a prediction of the volume of psychotropic drugs required to satisfy the legitimate needs of that country nor any requirement that they inform the Board of the actual domestic level of consumption or the quantity of illicit drugs seized in their country or at border controls.17 During the conference debate, some representatives justified the exclusion of an estimates system on the basis that it would be impossible for developing countries to provide such information when they had no way of knowing the frequency of various diseases requiring treatment by psychotropic drugs.18 Others suggested that the financial and administrative burden of imposing an estimates system was not warranted since it would be of little help in limiting production levels.19 Critics have argued, however, that the absence of a system of estimates poses a serious impediment to the functioning of the import and export authorisation scheme and is one of the factors that has facilitated the continued diversion of drugs from licit to illicit channels.20 Had they been made a treaty obligation, estimates would have allowed international authorities to check whether many more pharmaceuticals are being imported into a country than are justified by therapeutic needs.

13 The limited word length of this thesis prevents a more detailed review of each of these important provisions.
14 Article 16, paragraph 1 (a) and (b).
15 Article 16, paragraph 3.
16 See the 1961 Single Convention on Narcotic Drugs, Articles 12, 19 and 21. Parties are required to submit estimates of the quantity of narcotic drugs necessary for medical and scientific purposes as well as the quantity needed for the manufacture of other goods and addition to stock piles. They must also estimate the size and location of land to be used to cultivate raw narcotic material, the quantity of drugs actually to be produced, the number of manufacturing outlets and the output of those establishments.
17 Chapter 6 discusses post-treaty UN resolutions that have introduced a voluntary system of estimates in respect of psychotropic drugs.
18 RG Smart et al, supra n.35, p 216.
19 Ibid.
Under Article 18, the INCB is required to prepare an annual report that includes an analysis of the information submitted by Parties pursuant to their treaty obligations, along with any observations and recommendations of the Board. These reports are submitted to the ECOSOC via the CND which is encouraged to make any relevant comments. Parties must agree to allow unrestricted publication and distribution of their reports.

**Controlling international trade**

Provisions regulating the international trade in end-product psychotropic drugs are not relevant to the control over NSDs with no recognised therapeutic use, manufactured almost entirely in the clandestine laboratory,\(^{121}\) but are vital in preventing the diversion of other psychotropics from the licit market. Article 12 of the 1971 Convention sets up a series of control measures. In relation to Schedule I and II drugs, any exporting country must obtain an import authorisation before it allows the drugs to be removed.\(^{122}\) If and when that exporting country receives the authorisation document, it is obliged to issue an export authorisation certificate, a copy of which will accompany the shipment. After the drugs have arrived at their destination, it is the duty of the importing country to endorse and return the authorisation. Under paragraph 3, the Convention provides for a series of ancillary controls over substances in Schedules I and II in an effort to prevent operators evading the regulations by importing through third countries or shipping the goods to bogus addresses. A Party exporting drugs listed in Schedule III need only notify the importing country after the goods have been dispatched and within 90 days of shipment.\(^{123}\) That Party has the option, rather than the obligation, of requesting the importing country to return a copy of the consignment endorsing the quantity received. Article 12 does not require any export/import authorisation for the international trade in Schedule IV substances.

Article 13 provides Parties with the option of imposing more rigorous controls over substances listed in higher schedules than are provided for under the preceding article. Any State Party may notify others, through the Secretary-General, that it prohibits the import of a drug in Schedule II-IV, in which case all others "shall take measures to ensure" that they do not allow the exportation of any such substances from their country. The object of this provision is to enable member States to take action to address particular drug problems in their country or region.\(^{124}\) During the Convention debate, Article 13 was watered down by the replacement of the wording "shall prohibit" that had originally been included in the draft treaty document, with the phrase "shall take measures to ensure". The change in terminology has been interpreted to mean that a Party, although required to adopt certain legal or administrative measures, is not obliged to provide for customs checks on all consignments moving across national borders.\(^{125}\) It is not at all clear what measures would be considered to be adequate in order to "ensure" that certain substances are not exported and countries may experience particular difficulty monitoring shipments of Schedule IV drugs since they can be transported in the absence of any import/export authorisation.\(^{126}\) The usefulness of the provision depends largely on how each Party defines its obligations under the Treaty and the extent to which it is prepared to make an effort to fulfil them.

The articles regulating import and export of psychotropic drugs under the 1971 Convention are weaker than similar measures controlling import and export under the 1961 Single Convention on Narcotic Drugs. Under the latter instrument, a government authorisation must

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\(^{121}\) The only exception would be the small amounts made available for clinical trials such as those undertaken in order to test the toxicity of specific compounds like MDMA.

\(^{122}\) See Article 12, paragraph 1.

\(^{123}\) See Article 12, paragraph 2.

\(^{124}\) D Kendall et al, *supra* n.71, p 11.

\(^{125}\) *Ibid*.

\(^{126}\) *Ibid*.  

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be obtained for each individual transaction involving the import and export of a narcotic drug, any preparation containing a narcotic drug and poppy straw.\(^{127}\) The only exception made is for certain preparations of narcotic drugs that have been listed in Schedule III. In contrast, the 1971 Convention requires government authorisation only in respect of Schedule I and II drugs. Furthermore, it provides for a wide exception to the import/export authorisation scheme in respect of certain preparations that have been exempted by Parties pursuant to Article 3.\(^{128}\) Brunn et al point out that export and import restrictions accepted as necessary by adherents to the 1961 Single Convention were considered by industrialised countries such as West Germany to be "impossible to carry out" in relation to psychotropics.\(^{129}\) Among the arguments put forward by the Danish delegation, it was suggested that the export declaration scheme being debated would hinder international trade in Schedule IV drugs and that the collection of statistics on manufacture and trade was of doubtful value.\(^{130}\) According to the Austrian Government, itself an exporter of psychotropic drugs, control measures should be the responsibility of importing rather than exporting countries.\(^{131}\) Predictably, industrialised countries with the most invested in exporting psychotropics manufactured in their jurisdictions were the most reluctant to accept stringent controls that it was feared would impede international trade and reduce the profit margin of their pharmaceutical industries.

**Enforcement of the Convention**

Article 19 sets out the enforcement procedure designed to ensure that participating States comply with their international obligations under the 1971 Convention. Paragraph 1 provides the INCB with the power to request an explanation from the Government of a country that appears to have failed to comply with the treaty provisions.\(^{132}\) The Board then has the option of asking the offending Party to adopt certain remedial measures that it deems to be necessary to ensure future compliance. Although initially the request for an explanation must be treated as confidential, if the INCB determines that an offending Party has either failed to provide an adequate explanation or refuses to adopt the remedial measures suggested in response, it may notify all other Parties, the CND and the ECOSOC and may, if satisfied that such a serious measure is required, advise other Parties to stop the export or import of psychotropic drugs to or from the country concerned.\(^{133}\) The Commentary to the 1971 Convention makes it clear that the initiation of the procedure under Article 19 is a very serious step.\(^{134}\) The Board will normally do so only if the failure to implement controls in one country or region appears to

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\(^{127}\) See the 1961 Single Convention on Narcotic Drugs, Articles 31 and 25(2).

\(^{128}\) See the discussion of the exemption of preparations, *supra* pp 65-66.


\(^{132}\) Note that the Board can request information from the Government of the country concerned, whether or not it is a Party to the Convention, but cannot question private institutions or individual persons.

\(^{133}\) Since the 1971 Convention does not give the INCB the authority to conduct mandatory inspections in member States, there is limited opportunity for independent checks on the veracity or accuracy of reports submitted to the Board. Contrast the situation with respect to narcotic drugs. Under Article 14 (1) of the 1961 Single Convention (as amended by Article 6 of the 1972 Protocol), the INCB may conduct its own investigation where it has information that the aims of the 1961 Convention are being endangered by the failure of any Party to respect treaty obligations. It has been pointed out, however, that the powers of enforcement in respect of both narcotic and psychotropic drugs are relatively weak, so that the efficiency of the international control system is largely dependent upon the compliance and cooperation of member States. See MC Bassiouni (ed.), "The International Narcotics Control System" in *International Criminal Law*, Vol.I (USA, Transnational Publishers, 1986), p 515 and in the revised edition, MC Bassiouni and JF Thony, "The International Drug Control System" in MC Bassiouni (ed.), *International Criminal Law*, Vol.I, 2nd edn (New York, Transnational Publishers, 1999), pp 905 and 917.

“endanger in a grave manner” the effective application of controls in another country or region. In Chapter 6 of this thesis, presenting a discussion of the actual implementation of treaty provisions, there is note of the fact that Article 19 was invoked in respect of six States in 1999.135 While in some cases countries have reacted by attempting to introduce the absent controls, others have failed to respond to the pressure applied by the Board and further ‘sanctioning’ allowed for under Article 19 will continue.

Prevention and penalisation

For the first time in the history of international drug treaties, a provision was included in the 1971 Convention obliging States to take action to reduce demand for illicit substances and to minimise the harm relating to their abuse. Under Article 20(1), Parties must take “all practicable measures” designed to prevent the abuse of psychotropic drugs and to provide for a system of early identification, after-care, treatment, rehabilitation and social re-integration of users.136 Paragraph 2 requires that Parties “as far as possible” promote the training of personnel to provide such services for drug abusers. The inclusion of this Article aimed at addressing the problems faced by drug users is encouraging and provides a welcome addition to a Treaty that concentrates primarily on controlling the supply of psychotropic substances. As Chaterjee points out, however, the actual implementation of Article 20 is “fraught with difficulties”.137 Use of the qualifying terms “all practicable measures” and “as far as possible” mean that it is impossible to ensure that countries fulfil their obligation to implement effective prevention programmes and provide for the care of drug users. The effectiveness of Article 20 and the standard of measures adopted will clearly depend on the socio-economic standards in each country and the variable health, treatment and political priorities of the Governments in power. As Chapter 4 reveals,138 Article 20 has since been supplemented by the demand reduction Article in the 1988 Convention which, although open-textured, does at least reiterate the importance of addressing the demand as well as the supply side of the equation.

The 1971 Convention leaves some room for debate over the domestic penal measures member States are obliged to enact in pursuance of their treaty obligations. Different obligations are imposed in respect of the various substances, depending upon which of the Schedules they appear in. Substances in Schedules II to IV are regulated under Article 5, paragraph 2 of which provides that “each Party shall ... limit by such means as it considers appropriate the manufacture, export, import, distribution and stock of, trade in, and use and possession of, substances in Schedules II, III and IV to medical and scientific purposes”. During the Convention debate, the United Kingdom, Canada and the United States were adamant that there should be no obligation on States to enact legislation providing that persons found to be in possession of Schedule II-IV drugs intended for personal use should be subject to criminal sanctions.139 Thus paragraph 3 of Article 2 is framed such that, although it is “desirable” that Parties do not permit the possession of substances in Schedules II to IV except under legal authority, there is no obligation on them not to do so. Even where a Party to the Convention legislates to disallow possession “except under legal authority”, that Party would not be obliged to prosecute the violating drug user under criminal law, but may rather opt for a civil

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135 See Chapter 6, infra p 161.
136 A similar provision was added to the 1961 Single Convention on Narcotic Drugs by the 1972 Protocol amending the Single Convention on Narcotic Drugs. Article 15 of the Protocol amended Article 38 of the Single Convention.
137 SK Chaterjee, supra n.11, p 482.
138 See Chapter 4, infra, p 101.
139 See 1971 Official Conference Records, supra n.1, Vol.II, p 164. The representative of the United Kingdom, Mr Beedle, expressed the view that since there was considerable variation between the legal systems of the countries present, it would be unrealistic to draft a Protocol that assumed laws on possession would be the same in all countries. In his view, each Government would be in the best position to assess the situation in their own countries so as to determine whether public health problems were serious enough to warrant making simple possession a criminal offence.
Compare the above with Article 7, paragraph (a), which states that in relation to Schedule I drugs, “the Parties shall prohibit all use except for scientific and very limited medical purposes by duly authorised persons, in medical or scientific establishments which are directly under the control of their Governments or specifically approved by them”. The Convention thereby imposes an obligation on Parties to proscribe the non-therapeutic use and possession of Schedule I substances. Article 22 governs the domestic penal measures that must be enacted by Parties to the treaty. Paragraph 1(a) of that Article states that “subject to its constitutional limitations”, each Party shall treat as a punishable offence, when committed intentionally, any action contrary to a law or regulation adopted in pursuance of its obligations under this Convention, and shall ensure that serious offences shall be liable to adequate punishment, particularly by imprisonment or other penalty of deprivation of liberty”. Some commentators, including the US Drug Abuse Council, suggest that Article 7, read in conjunction with Article 22, obliges countries to impose criminal sanctions on all unauthorised persons found to be in possession of Schedule I substances, regardless of whether the drug is intended for personal use or trafficking. Yet it is possible to argue that the Convention does not oblige countries to criminalise personal possession of any of the scheduled substances. In contrast to the very definite judgement of the US Drug Abuse Council, the authors of the UN Commentary on the Convention on Psychotropic Substances, having devoted several pages to a discussion of whether or not the instrument obliges Parties to criminalise the possession of Schedule I drugs intended for personal consumption, eventually conclude that the issue is open to debate. Again, in the Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 it is recognised that there is uncertainty as to whether Article 22 renders possession for personal consumption an offence. Since, as we shall see in the chapter that follows, there is no doubt that Parties to the 1988 Convention are obliged to criminalise the unauthorised possession of all drugs scheduled under the 1961 and 1971 Conventions, the issue as to what obligation is imposed by the 1971 Convention is not as pertinent as it was, except of course to those countries that have not yet ratified the 1988 Convention.

Parties to the Treaty have been given the scope to develop a number of alternative strategies to deal with drug offenders. Under Article 22(1)(b), notwithstanding the previous sub-paragraph, it may be provided that drug abusers undergo “measures of treatment, education, after-care, rehabilitation and social re-integration” either as a supplement or an alternative to punishment or conviction. This provision was a novel addition and nothing similar appears in the 1961 Single Convention. In view of the numerous qualifying clauses allowing each Party to modify their treaty obligations to suit domestic legal systems, Article 22 contains virtually no mandatory requirements. The extent to which it is utilised depends entirely upon whether a

140 D Kendall et al, supra n.71, p 12.
141 Chaterjee is critical of the inclusion of the phrase “subject to constitutional limitations” since it detracts from the strength of Article 22. Although he accepts that the degree of punishment for drug offences will necessarily depend upon local conditions, he argues that the proviso in the Convention is inappropriate, given that any intentionally committed offence warrants punishment of the perpetrator. SK Chaterjee, supra n.11, p 483.
142 Without debating the issue, the US Drug Abuse Council stated that the Convention obliges countries to impose criminal sanctions in relation to possession of Schedule I drugs, although not in relation to the drugs listed on other Schedules. See D Kendall, et al, supra n.71, p 12.
143 Commentary on the 1971 Convention on Psychotropic Substances, supra n.134, pp 347-352. There is insufficient space here to detail the arguments for and against whether the 1971 Convention should be interpreted as imposing an obligation to criminalise personal possession of Schedule I drugs. An in-depth discussion is provided in the Commentary.
145 See the discussion of Article 3 of the 1988 Convention in Chapter 4, infra pp 81-86.
Party has the finances, facilities and motivation to provide drug abusers with the range of important health and social services envisaged.

Ratification and reservation - A period of inaction

Although the Convention was open for ratification from 21 February 1971, it was not until 16 August 1976 that it entered into force, 90 days after it had been ratified by the requisite 40 member States.\textsuperscript{146} It therefore took two years longer to come into force than the 1961 Single Convention on Narcotic Drugs.\textsuperscript{147} It is somewhat ironic that the first five countries to ratify the 1971 Treaty, South Africa (27.1.72), Paraguay (3.2.72), Panama (18.2.72), Chile (8.5.72) and Bulgaria (18.5.72), were not responsible for the bulk manufacture of psychotropic drugs and did not have any developed pharmaceutical industry.\textsuperscript{148} By contrast the major psychotropic drug-producing countries delayed many years before they finally agreed to ratify the Convention;\textsuperscript{149} the United States postponed ratification until 1980, Australia until 1982, the United Kingdom until 1986 and Austria, the host of the 1971 Conference, until February 1997. In fact, at the time the Convention finally entered into force in 1976, France was the only major manufacturing country to have deposited its instrument of ratification.\textsuperscript{150} It was recently suggested that the reluctance of many industrialised countries to ratify within a reasonable period is largely responsible for the widespread availability of psychotropics on the illicit market and the increase in abuse of those substances.\textsuperscript{151} Even after the protracted negotiations involved in reaching a compromise on the text, a large percentage of the countries who had signed the 1971 Convention refused to formally accept their obligations by ratifying in a timely fashion.

Less developed/developing countries

It is not difficult to imagine that implementation of the Convention in less developed countries would require major revision of domestic law and the allocation of scarce resources. Malaysia was one country that expressed its reluctance to ratify since to do so would involve “an enormous investment of finances and professional man-power which we presently cannot afford”.\textsuperscript{152} In order to satisfy its obligations under the Treaty, the Malaysian Government needed to develop administrative procedures and support facilities, train support staff and revise its domestic legislation to bring a wide range of new substances under control. There were two major reasons given by the Nigerian Government for delaying ratification until 1981.\textsuperscript{153} First, there was little point in ratifying until Nigeria had developed the resources

\textsuperscript{146} Article 25 of the 1971 Convention provides that a country may become party to the Convention by signing it, ratifying after signing it subject to ratification or acceding to it. According to Article 11 of the 1969 Vienna Convention on the Law of Treaties, intention to be bound may be expressed by “signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed”. See further, I Sinclair, supra n.74, pp 29-50.

\textsuperscript{147} RG Smart et al, supra n.35, p 18. Having been opened for ratification on 25 March 1961, the 1961 Convention entered into force on 13 December 1964, 30 days after the fortieth Member State had ratified. It is curious that provision was made so that the 1971 Convention did not come into force until 90 days after it had been ratified by the 40th State, whereas under the terms of the Single Convention on Narcotic Drugs that instrument entered into force just 30 days after the requisite number of ratifications.

\textsuperscript{148} See Appendix F for a list of dates on which the Convention was ratified by Parties.

\textsuperscript{149} The ten countries identified as having a significant manufacturing industry around this time were Switzerland, UK, Japan, Netherlands, Italy, Czechoslovakia, US, France, West Germany and Hungary. By 1981, only the last four of those countries had ratified the Convention. RG Smart et al, supra n.35, p 18.

\textsuperscript{150} RG Smart et al, supra n.35, p 18.


\textsuperscript{152} RG Smart et al, supra n.35, p 119.

\textsuperscript{153} Ibid., p 133.
necessary to comply with Treaty obligations. Secondly, officials explained that they were initially hesitant to ratify since major psychotropic drug producing countries in Europe and America had not yet done so. Although many developing countries ratified the Treaty almost immediately in the hope that it would prevent the spread of dangerous psychotropics drugs manufactured in industrialised States, others shied away from the administrative and financial burden of implementing an instrument that had not yet been fully accepted by countries responsible for the menace.

**Developed/industrialised countries**

It is more difficult to justify the reluctance of wealthy industrialised countries, many of them major manufacturers of psychotropic substances, to accept their obligations under the 1971 Convention.

Numerous arguments were put forward by Government representatives, commentators and interest groups who opposed US participation in the Treaty. Some critics argued that loopholes and ambiguities in the text, including the ability to avoid application of some controls, the ineffectiveness of available sanctions and the reservation and denunciation provisions, meant that the instrument could be undermined by Governments and should not be supported.\(^{154}\) It was claimed that there was no justification for incurring substantial administrative costs to implement an instrument that could not effectively prevent the illicit trade in psychotropic drugs and that the United States could “more efficiently use its resources on national measures involving production quotas, import-export and other anti-smuggling controls, and on joint operations with foreign law enforcement authorities, than on the enforcement mechanisms of the Convention”.\(^{155}\) The strategic difficulty and administrative costs involved in ratifying and the imprecision and ambiguity of a number of provisions are factors that were heavily relied upon to argue that one of the world’s largest producers of psychotropic drugs should not be implementing international controls.

There are, however, many flaws in the arguments of those who opposed US ratification. It is somewhat ironic that the existence of ambiguities and loopholes should have been relied upon to argue against ratification when the US was one of the industrialised country largely responsible for having certain loophole provisions included and having other Articles watered down.\(^{156}\) Furthermore, although the Convention on Psychotropics has certain weak points, this is also true of the Conventions regulating international traffic in narcotic drugs which were adopted by opium-producing countries despite the heavy burden that fell on them. Finally, it is difficult to accept that the United States of America, a wealthy country with a sophisticated network of drug agencies, was justified in delaying ratification in view of the administrative and financial burden of implementing controls. The US did not accept that the cost of implementing narcotic controls could be used as an excuse by narcotic producing countries not to ratify international instruments regulating those drugs.\(^{157}\)

Several commentators writing around that time were highly critical of the US for neglecting an obligation to protect the international community from dangerous substances produced in their country and marketed abroad. In 1977, Kusevic, a former director of the CND and the Executive Secretary of the 1971 Vienna Conference, wrote an article castigating the US for

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155 D Kendall *et al.*, *supra* n.71, p 19.

156 It will be recalled, for example, that the US lobbied heavily to have the right to non-acceptance included (Article 2(7)) and to give the ultimate power to make decisions on the control of drugs to the CND, which could take into account undefined “economic, social, legal, administrative and other” considerations (Article 2(5)).

157 Kusevic discusses the burden of the narcotic control regime imposed on opium-producing States. See V’Kusevic, *supra* n.18, p 39.
delaying ratification.\textsuperscript{158} He surmises that one of the contributing factors was the pressure being applied by the pharmaceutical industry and the reluctance of the Government to accept international controls that would impinge upon foreign trade. The author wrote that:

If putting off ratification of the Psychotropic Convention means giving preference to the interests of a small number of businessmen over the health and welfare of hundreds of thousands of people, then other countries cannot be expected to sincerely support US leadership and agree to measures for reducing illicit opium production ... . If the US has no readiness to sacrifice something, and no feeling of international solidarity, it cannot expect more from other countries.\textsuperscript{159}

It was Kusevic’s view that the lack of adequate international controls had resulted in hundreds of thousands of people, particularly in Asia, becoming addicted to psychotropic substances marketed by unscrupulous and greedy manufacturers.

There were two primary reasons given for the decision to eventually ratify in 1980. First, despite the existence of tight domestic controls, trafficking of psychotropic drugs across the US and Mexican border had escalated and the United States had become “a victim of the current international inadequacies”.\textsuperscript{160} Secondly, since the US was one of the largest manufacturers of psychotropic substances, it was recognised that the failure to ratify affected its international reputation and ability to influence other global control decisions.\textsuperscript{161} The Senate Committee charged with analysing the 1978 Act commented that:

Equally as important as reducing the diversion of psychotropic substances, ratifying the Convention would strengthen our leadership in international drug abuse control by increasing our credibility as a nation willing to apply effective controls at home in order to cooperate in the prevention of illicit trafficking in other countries.\textsuperscript{162}

The United Kingdom, another country responsible for bulk manufacture and export of psychotropic substances, has offered an official explanation for its refusal to ratify the Treaty until 1986. One reason relates to the wide range of drugs controlled under Schedules III and IV.\textsuperscript{163} Since many of these were the subject of widespread legitimate use by practitioners, pharmacists and the general public, it was thought at the time that a campaign of information and voluntary controls by the medical profession would be more appropriate than the imposition of the criminal law, as required by the Convention.\textsuperscript{164} It is submitted, however, that this was not a valid objection to the Treaty given that, as outlined above, there is no obligation on Parties to impose criminal sanctions on persons found in possession of Schedule II-IV substances. Even for substances in Schedule I, in respect of which Parties are obliged to prohibit all use except for “scientific and very limited medical purposes”, it is arguable that the 1971 Convention does not require the imposition of criminal penalties for personal use

\textsuperscript{158} Kusevic provides an example of the “ruthless obsession over profits by some western commercial firms” that resulted in the spread of drug problems. Large quantities of barbiturates and amphetamines that were manufactured in industrialised countries were shipped to parts of Asia and Africa, creating massive problems with abuse of and addiction to psychotropic substances. \textit{Ibid.}, pp 39-40.

\textsuperscript{159} \textit{Ibid.}, p 50.

\textsuperscript{160} “Psychotropic Substances Act of 1978”, \textit{Report of the Committee on the Judiciary, United States Senate, on S.2399, to amend the Comprehensive Drug Abuse Prevention and Control Act of 1970 and other laws to meet obligations under the Convention on Psychotropic Substances relating to regulatory controls on the manufacture, distribution, importation and exportation of psychotropic substances, and for other purposes}, 27 June 1978, 95\textsuperscript{th} Congress, 2nd Session, Senate Report No 95-959, p 11.

\textsuperscript{161} \textit{Ibid.}, p 16.

\textsuperscript{162} \textit{Ibid.}, p 16.

\textsuperscript{163} For a full account of the UK Government’s reasons for delaying ratification, see the Government’s submission to the International Working Group, RG Smart \textit{et al}, \textit{supra} n.35, pp 166-168.

\textsuperscript{164} \textit{Ibid.}, pp 166-167.
offences. Another concern expressed by the Government was that the Convention left it open for other drugs of a high therapeutic value, particularly benzodiazepines, to be added to schedules III and IV in the future. There was further objection to what were perceived as “excessive” record-keeping and inspection requirements in relation to drugs in widespread therapeutic use. Just as their US counterparts had done, UK authorities argued that the financial cost and administrative hassle of implementing the broad provisions of the 1971 Convention dissuaded them from adopting a positive attitude to participation.

It is interesting to note that the UK went out of its way to stress that the decision to delay ratification was in no way related to any pressure exerted by the manufacturers of psychotropic drugs. Mr Brian O’Bubbear, a member of the Home Office Drugs Unit at the time that the Government was asked to report to the International Working Group in 1980, acknowledged that “economic interests (not by any means limited to those of developed countries) can be seen to be underlying all the international treaties in the drug control sphere”. However, he continues, “it would not be correct to ascribe the inability of the United Kingdom hitherto to ratify this Convention to the economic self-interest of the pharmaceutical exporting industry”. It was emphasised that, in relation to the control of both narcotic and psychotropic drugs, the UK would not allow trade considerations to take precedence over the goals of attaining international security and preventing drug abuse.

On 24 March 1986, fifteen years after the Convention was signed in Vienna, the UK finally deposited its instrument of ratification. The Home Affairs Committee on the Misuse of Hard Drugs claimed in 1985 that the Government had initially been reluctant to ratify the Treaty in view of legitimate concerns that the complexity of controls would make them difficult to implement, particularly in developing countries, and further, that the Convention itself gave no clear guidance as to the range of substances which could be added to the Schedules. Yet by 1985 it had been concluded that previous reservations were outweighed by the value of the Convention in promoting cooperation among the States and combating drug misuse. When announcing the decision to ratify the 1971 Convention, the then Home Secretary stated that “while he acknowledged that some of the reservations which had so far prevented the United Kingdom from ratifying the Convention remained ..., cooperation required effort on both sides”. The UK was already a Party to the Single Convention on Narcotic Drugs and by ratifying the 1971 Convention it would be “giving its backing” to international control over psychotropic drugs. It appears then that, as in the United States, the UK’s decision to eventually ratify was largely motivated by a desire to be seen to be fulfilling an international obligation to control dangerous substances that had been produced and marketed by its own pharmaceutical industry.

In the 29 years since the conclusion of the Treaty, all major manufacturing countries have gradually come to ratify the instrument, some much later than others. At the time of writing

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165 See the discussion supra pp 71-72.
166 There was a sense that although the Convention was “embodying a worthy desire of the international community to deal with the real problems of misuse of psychotropics”, it was “insufficiently sensitive to the legitimate views and needs of the medical profession and the public, and somewhat bureaucratic in its impact”. RG Smart et al, supra n.35, p 167.
167 Ibid.
168 Ibid., p 168.
170 Ibid., p 5.
there are 159 Parties to the 1971 Convention.\footnote{172} None of the 32 States that are not yet Parties - ten in Africa, five in the Americas, seven in Asia and four in Europe -- have any significant manufacturing industry, although all are obviously involved in importing psychotropic drugs.\footnote{173}

**Reservations**

Article 32 allows Parties considerable scope to make reservations to certain provisions in the 1971 text at the time they are expressing their intention to be bound.\footnote{174} It is specifically provided that States may make reservations to the first two paragraphs of Article 19 (measures that can be taken by the INCB to ensure compliance), Article 27 (territorial application) and Article 31 (reference of disputes to the International Court of Justice (ICJ)). Reservations to other Articles will be permitted provided that Parties inform the Secretary-General and provided the reservation has not been objected to by one-third or more of the other Parties to the Convention twelve months after the Secretary-General is informed. Although many of the States have indeed ratified the 1971 Convention subject to reservations, none are directly relevant to the control of NSDs manufactured in illicit laboratories. The majority of reservations were made in respect of the three Articles expressly referred to.\footnote{175}

Despite a number of important weaknesses outlined above, the conclusion of the 1971 Convention was a very significant step towards preventing widespread diversion and misuse of psychotropic substances. The point has been made that the Convention was aimed primarily at preventing the transfer of substances from the licit to the illicit trade. As Chapter 6 of this thesis reveals, it has been largely successful in doing so in respect of Schedule I and II substances but, partly as a result of some of the deficiencies discussed (primarily the absence of a system of estimates and the lack of import/export controls) it has not been able to prevent the diversion of substances in Schedules III and IV.\footnote{176} It is argued that since the Convention was never designed to deal with substances manufactured in the clandestine

\footnotesize{\begin{itemize}
\item [174] Article 2 (1)(d) of the 1969 *Vienna Convention on the Law of Treaties* defines a "reservation" as "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State". Article 19 provides that a State will be entitled to formulate a reservation at the time it expresses its intention to be bound unless (a) the reservation is prohibited by the treaty, (b) the treaty provides that only specific reservations may be made, not including the reservation proposed or (c) the reservation is incompatible with the object and purpose of the treaty. For a detailed discussion of the meaning of "reservation" and the circumstances under which reservations will be allowed, see I Sinclair, *The Vienna Convention on the law of Treaties*, supra n.74, Chapter 3, pp 51-82.
\item [175] In respect of Article 19, see the reservations made by Belarus, Brazil, Egypt, Hungary, Iraq, Mayanmar, Peru, Russia, South Africa and Ukraine. In respect of Article 31, reservations were made by Afghanistan, Bahrain, Belarus, Brazil, Cuba, Egypt, France, Hungary, India, Indonesia, Iraq, Libyan Arab Jamahiriya, Myanmar, PNG, Russia, South Africa, Tunisia, Ukraine and Vietnam. Reservations were made to Article 27 by Argentina, Australia, Belarus, Egypt, Hungary, South Africa and Yugoslavia. A complete list of reservations made at the time Parties deposited their instruments of ratification appears in "Multilateral Treaties Deposited with the Secretary-General", published on 31 December each year. See \url{http://www.untreaty.un.org}. Three governments, Canada, Mexico and the United States, made reservations to any present or future application of the Convention to the psychotropic plant peyote, in deference to the religious rites of native peoples occupying their territories. Germany is the only Government to have objected to certain record-keeping requirements imposed by the 1971 Convention. While Austria ratified the Treaty without reservation, it did submit a 'declaration' that Article 22 had been interpreted to allow for administrative penalties as an adequate sanction in cases of a minor nature.
\item [176] See Chapter 6, infra, p 159.
\end{itemize}}
laboratory, it is not well equipped to respond to the appearance of variable NSDs specifically created to meet the demands of recreational users. In Chapter 6 there is discussion of further action taken since the Treaty was concluded that is aimed at preventing the diversion of licit substances traditionally subject to abuse and improving international cooperation to address problems caused by the expanding manufacture and consumption of new synthetic psychotropics.
CHAPTER 4

THE 1988 CONVENTION AGAINST ILLICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES

The translation of international cooperation into a valid instrument for resolving problems in an interdependent world constantly involved the competing claims of what were perceived, not always correctly, as the best interests of individual States, regions or groups of countries. In the weeks ahead, she hoped delegations would be wary of over-emphasising individual interests and keep their sights fixed on the overriding aim: the adoption of a strong convention that commanded the support of the widest possible spectrum of Member States.

Acting President, Opening of the Conference for the Adoption of the 1988 Convention

From 25 November until 20 December 1988, the representatives of 106 States, joined by the specialised agencies of the United Nations, related UN bodies and intergovernmental and non-governmental organisations, gathered to participate in the Conference for the Adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The need for a new instrument to compliment the earlier 1961 and 1971 Conventions and to strengthen the international control regime was beginning to be recognised by governments by the early 1980s. In 1981, a UN General Assembly resolution noted that drug trafficking had reached "epidemic proportions in many parts of the world". It was apparent that States acting in isolation could do little to address the expanding global market for illicit drugs and at its 39th session in 1984, the General Assembly issued a resolution requesting the CND to consider the preparation of a draft Convention that would build upon existing international controls. Whereas previous UN drug treaties, including the 1961 Single Convention on Narcotic Drugs and the 1971 Convention on Psychotropic Substances, focus primarily on controlling the production of licit drugs and preventing their diversion into illicit markets, the 1988 Convention specifically targets illicit production and traffic and is aimed at strengthening law enforcement measures at a national and international level.

Although it does not appear that the issue of new synthetic or 'designer' drugs was ever discussed during negotiations for the 1988 Convention and there are no provisions specifically aimed at addressing this then new phenomenon, the Convention does have a significant impact on the present scheme for international control over those substances. It is somewhat curious that 'designer' drugs did not even rate a mention during the preliminary discussions on the draft treaty. Between 1984 when the Convention was first proposed by the General Assembly and its signing in 1988, synthetic narcotics had raised alarm in the United States and emergency scheduling and analogue legislation had been introduced in that country in response. Furthermore, as the discussion in Chapter 2 reveals, the ecstasy subculture was gradually gaining momentum during those years, particularly throughout the United States.

and the United Kingdom.7 The synthetic psychotropic compound MDMA had been permanently scheduled under the US Controlled Substances Act in 19868 and was added to Schedule I of the 1971 Convention that same year.9 Illicit traffic in variable synthetic substances or analogues of controlled drugs was not discussed at the 1988 Conference despite a recommendation by the Committee on Legal Aspects at the DEA sponsored “Controlled Substances Analog Leadership Conference” in 1986 that the proposed new treaty should deal with this problem10 and despite the fact that they were discussed in the annual reports of the INCB for both 1985 and 198611 and during the conclusion of the 1987 Multidisciplinary Outline of Future Activities in Drug Abuse Control.12 From a review of the Official Records of the Conference it is clear that the overall focus of negotiations was on plant-based narcotic drugs. Nevertheless, some of the provisions that were introduced had an important impact on national and international control over both synthetic and plant-based drugs, while one important Article laid the foundation for the extension of controls over the starter materials used in the manufacture of NSDs.

The following chapter highlights those Articles of the 1988 Convention with the most important impact on the regulation of new synthetic drugs of abuse. It does not detail each provision but rather concentrates on the negotiations over and effect of those that are most relevant for our purposes. What becomes immediately clear is that the negotiations for the adoption of the 1988 Convention were similar to those leading up to the 1971 Convention in one very important respect. Once again, certain industrialised countries determined the agenda for reform, proposing and accepting those Articles most suited to their own domestic political needs and yet bargaining to water down controls that were seen to threaten legitimate commercial interests.13

Analysis of key provisions

Scope and Objectives

The motivation behind the 1988 Convention is clearly expressed in the first paragraph of its Preamble. Parties saw the need for a new instrument dealing with drugs in view of the fact that they were:

Deeply concerned by the magnitude of and rising trend in the illicit production of, demand for and traffic in narcotic drugs and psychotropic substances, which pose a

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8 See Chapter 2, supra p 23.
9 See Chapter 3, supra p 49.
10 AC Church and FL Sapienza, Proceedings of Controlled Substance Analog Leadership Conference (United States Department of Justice, DEA, December, 1986), p 113. Although it is possible that there was some mention of ‘designer’ drugs at the Conference, that has not been detailed in the Official Conference Records. UNDCP staff present during negotiations confirm that ‘designer’ drugs were never on the agenda. Information supplied by Ms Katherine Volz, CND, UNDCP, Interview, September 1998.
12 Declaration of the International Conference on Drug Abuse and Illicit Trafficking and Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control (New York, United Nations, 1988), pp 42-43. The Multidisciplinary Outline highlights the emergence of ‘designer’ drugs before recommending that (a) national authorities consider modifying their laws to deal with new analogues and (b) appropriate UN agencies discuss the options available to strengthen international control over illicit manufacture and distribution.
13 Evidence is provided in the discussion that follows. See, for example, infra pp 92-93.
serious threat to the health and welfare of human beings and adversely affect the economic, cultural and political foundations of society. It was recognised that the three UN drugs treaties then operative did not provide an adequate means by which to develop the level of international cooperation required to address the growth in supply of and demand for illicit drugs. Article 2, paragraph 1 explains that the new treaty was drafted in order:

to promote cooperation among the Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension.

In view of several innovative (and often controversial) measures being introduced by the Convention, paragraphs 2 and 3 were included to ensure that treaty obligations would not infringe upon the recognised legal principles of sovereign equality and territorial integrity.

**Offences and Sanctions**

There was agreement that effective international cooperation required each country to prepare its own domestic criminal justice system so as to ensure that certain illicit activities would be punished as serious offences. Under Article 3, described by other commentators as the “cornerstone of the entire Convention”, States are required to make necessary modifications to their criminal laws in order to create a large number of offences relating to different aspects of the illicit trade in drugs.

Article 3, paragraph 1 (a)(i) imposes an obligation on Parties to establish as a criminal offence when committed intentionally:

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

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14 Preamble to the 1988 Convention, paragraph 1.
17 1988 Commentary, supra n.2, p 40.
18 Article 2(2) states that Parties shall fulfill their obligations under the Convention in a manner consistent with principles of “sovereign equality” and “territorial integrity” and “that of non-intervention in the domestic affairs of other States”. Article 2(3) further protects the sovereignty of individual States by providing that a Party “shall not undertake in the territory of another Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other Party by its domestic law”.
Under paragraph 1 (a)(iii), Parties are also obliged to criminalise the possession or purchase of narcotic or psychotropic drugs for the purpose of any of the trafficking related activities outlined above.\(^{20}\)

In a study of the impact of the 1988 Convention on the regulation of NSDs, paragraph 1 (a) (iv) is extremely important. That provision imposes a mandatory obligation on States to broaden their domestic criminal laws to cover the:

**manufacture, transport or distribution of equipment, materials or of substances listed in Table I and Table II, knowing that they are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances.**

This was the first time that an international treaty had required States to criminalise not only the end-product illicit drugs, but also a list of precursor substances used in their manufacture as well as the equipment and materials which may be used to synthesise, process or prepare the end-product. The 1988 Convention did not initially impose an obligation on States to criminalise dealings concerned with precursors used in the manufacture of the MDMA or ecstasy family.\(^{21}\) It did, however, set up a control mechanism which could in the future be used to regulate precursors for the ecstasy family and a broader range of NSDs.

What is the scope of the obligation on States to criminalise the manufacture, transport or distribution of equipment and materials used in the cultivation, production or manufacture of illicit drugs? Although neither of the terms “materials” or “equipment” are defined in the Convention, the UN Commentary suggests that they should be interpreted broadly to cover a “vast array of goods”.\(^{22}\) “Materials” may include a variety of items from non-scheduled chemical starter substances (e.g. over the counter pharmaceuticals, kerosene or diluents) to packaging materials and even the ice used to cool reactions, while “equipment” covers general laboratory equipment such as beakers, vacuum pumps and filters as well as specialised tableting and encapsulating machines. The Convention requires that there must be provision in domestic law enabling States to punish the manufacture or distribution of such goods by persons aware that they are intended for use in illicit trafficking or related activities.

Compare Article 3, paragraph 1, subparagraph (iv) with paragraph 1, subparagraph (c)(ii) requiring States to criminalise the **possession** of equipment, materials and Tables I and II substances known to be intended for cultivation, production or manufacture of illicit drugs. In contrast to the former provision, the latter is subject to subparagraph (c), providing a Party with an escape from their obligation where to create the offence would not be consistent with its “constitutional principles and the basic concepts of its legal system”. Anxiety over the fact that a bona fide purchaser of goods could face legal charges under laws enacted in pursuance of sub-paragraph (c)(ii) was one reason for the inclusion of this ‘opt out’ clause.\(^{23}\) It was recognised that since possession involves a continuing relationship to the goods, it is not essential that a suspect have the proscribed knowledge at the time they first acquire the equipment, materials or precursor chemicals.\(^{24}\) A person will have committed the offence even if they receive the goods innocently but then retain possession of them after becoming aware that they are intended for use in the production of illicit drugs.

\(^{20}\) Note that this provision deliberately excludes possession or purchase for personal consumption which is covered by paragraph 2 of Article 3.

\(^{21}\) Precursors used in the manufacture of ecstasy were subsequently scheduled in 1992. See the discussion infra p 90.

\(^{22}\) 1988 Commentary, supra n.2, p 289.

\(^{23}\) Ibid., p 289.

\(^{24}\) Ibid., p 74.
The obligations with respect to use of precursor chemicals imposed by Article 3 are very different from those outlined in Article 12 of the 1988 Convention (discussed further below). Whereas Article 3 obliges States to impose criminal penalties on persons who knowingly participate in the use of precursor chemicals in illicit manufacture, Article 12 sets out regulations for operators involved in the legitimate trade in scheduled precursors. Note that Article 3 does not require participating States to impose criminal penalties for the failure of those operators to fulfil the monitoring and reporting obligations set out under the latter provision.

Article 3(1)(a)(v) of the 1988 Convention imposes a mandatory obligation on Parties to criminalise the “organisation, management or financing” of any of the offences described in Article 3(1)(a). Negotiators at the 1988 Conference believed that this was an extremely important clause representing a significant advance on the existing drug treaties. It was thought that States needed to modify their domestic laws in order to pursue those in the upper echelons of the drug distribution hierarchy, thereby promoting the goal of cooperation to tackle the international traffic in illicit substances.

Another mandatory provision, Article 3, paragraph 1(b), introduced a wide-reaching reform requiring Parties to criminalise the laundering of profits and assets derived from the traffic in illicit drugs. Article 3(1)(b)(i) imposes an obligation to establish as a criminal offence:

The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with sub-paragraph (a) of this paragraph, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions.

It is backed up by sub-paragraph (b)(ii) requiring Parties to criminalise the concealment of the true nature, source, location and ownership rights of a property known to be derived from sub-paragraph (a) offences. The significance of this provision in relation to traffic in both narcotic and psychotropic substances should not be underestimated. Many States agreed to alter their national laws to create for the first time offences relating to the process commonly known as “money laundering”. Even States with relatively advanced money laundering legislation were forced to introduce amendments in order to comply with their Convention obligations.

The first two offences provided for in Article 3(1)(c) relating to the “acquisition, possession or use” of illicit proceeds and the “possession” of equipment, materials, or precursor chemicals used for the purpose of unauthorised drug manufacture, have been outlined above. There are two others. Sub-paragraph (c)(iii) provides that Parties are to establish the offence of publicly inciting or inducing others to commit Article 3 offences or to use drugs illicitly. Subparagraph (c)(iv) requires the creation of a criminal offence of “[p]articipation in, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of” any of the illicit drug related activities proscribed in accordance with Article 3. It has already been seen that in contrast to paragraphs 1(a) and (b), paragraph (c) is qualified by the proviso that the obligation to create offences is “[s]ubject to its [the Parties] constitutional principles and the basic concepts of its legal system”. This ‘opt-out’ or “safeguard clause”, as it has been described by Commentators, was included here in

26 WC Gilmore, supra n.19, p 6.
27 Ibid.
recognition of the fact that some of the offences provided for in paragraph (c), if widely
defined, would offend against constitutional guarantees of freedom of expression or basic
concepts of the Party’s legal system. This is particularly relevant to conspiracy and related
offences which are not known as crimes in all jurisdictions.

While paragraph 1 of Article 3 covers offences relating to production and trafficking of illicit
drugs, paragraph 2 imposes a positive obligation on Parties to criminalise the personal
possession of narcotic drugs and psychotropic substances. As discussed in the preceding
chapter, the 1971 Convention on Psychotropic Substances may be read as not requiring that
Parties establish possession for personal consumption as a criminal offence under their
domestic laws. By contrast, the 1988 Convention imposes an unequivocal obligation on
Parties to do so. Article 3(2) holds that:

Subject to its constitutional principles and the basic concepts of its legal system, each
Party shall adopt such measures as may be necessary to establish as a criminal offence
under its domestic law, when committed intentionally, the possession, purchase or
cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or
the 1971 Convention.

With the 1988 Convention obligations superimposed on the provisions of the 1971
Convention, any non-medical or non-scientific use of psychotropic drugs listed in the
Schedules of the earlier Treaty must now be made liable to penalties under the criminal law.
Note, however, that paragraph 2 is subject to the same ‘safeguard’ clause as is attached to
paragraph (1)(c) so that a Party may opt out of its obligations where criminalising possession
can be argued to be incompatible with fundamental principles enshrined in its constitution or
legal system.

In early negotiations leading up to the drafting of the 1988 Convention, personal use offences
had not been included in the list of activities that would have to be made a criminal offence
under Article 3. This is probably due to the fact that emphasis had always been on the need
for the new instrument to target serious acts of international drug trafficking. It was the
Mexican delegation that insisted at the final experts’ meeting in Summer 1988 that the
Convention cover all aspects of the trafficking problem, including acts of personal
consumption fuelling the market for illicit drugs. Underlying this amendment was a feeling
among the narcotic drug producing countries that the majority of the Convention provisions
(with the exception of precursor provisions in Article 12) were directed at them, while the

29 The 1988 Commentary states that those basic concepts may be embodied in “statute law, judicial
decisions or ingrained practice”. Ibid., p 72.
30 Ibid., p 72. If those offences are read widely and interpreted to mean any agreement to act rather than
action towards the commission of an offence, they may be regarded as a threat to certain fundamental
freedoms in some jurisdictions. In countries where the legal system allows for a wide degree of
prosecutorial discretion there is protection for those whose innocent conduct may technically fall
within a generally worded offence. There is no such protection, however, in the absence of this broader
discretion so that offences will need to be drafted tightly.
31 See Chapter 3, supra p 71. A very helpful summary of the obligations imposed by each of the three
operative drugs treaties in relation to criminalising personal use can be found in the 1988 Commentary,
supra n.2, pp 78-82. See also INCB, Report of the International Narcotics Control Board for 1992
32 Note that Article 3(2) is subject again to the “safeguard clause” so that establishment of the criminal
offences referred to must not conflict with a Party’s constitutional principles or the basic concepts of its
legal system.
33 WC Gilmore, supra n.19, p 8.
consumer countries did not have to accept onerous obligations.\textsuperscript{34} Although this argument was eventually prevailed and personal possession offences were included, Parties recognised that issues of expense and administrative practicality required that a distinction between acts of trafficking and possession be drawn when it came to the imposition of international obligations to cooperate to find and punish offenders.\textsuperscript{35} Thus, later provisions regarding the extradition of suspects, confiscation of proceeds of crime and mutual legal assistance relate only to the more serious offences outlined in paragraph 1.

Article 3 appears to have a restrictive impact on the range of policy options available to State Parties attempting to strike a balance between law enforcement measures and a socio-medical response to minimising the harm related to illicit drug use. The 1988 Convention does provide, however, for a range of non-punitive measures to be adopted either in addition or as an alternative to conviction or punishment, with the aim of minimising the harmful effects of drug use and rehabilitating the user. In relation to the production, manufacture, preparation, distribution, transport or sale offences provided for under paragraph 1, Parties are required under paragraph 4 to impose strict sanctions which “take into account the grave nature of these offences, such as imprisonment or other forms of deprivation of liberty, pecuniary sanctions and confiscation”. For those offences, Parties may provide that the offender submit to measures such as “treatment, education, aftercare, rehabilitation or social reintegration” in addition to the punishment meted out under the criminal law. Only in “appropriate cases of a minor nature” involving activities under paragraph 1 should those non-punitive or socio-medical responses be considered in the alternative to punishment or conviction. It is left to the individual state to determine what it considers will be appropriate cases of a minor nature and national Governments may hold very different views on the matter. Presumably, “minor” cases would include those where only small amounts of the illicit substance or the profits of its sale are involved or where the offender plays only a minor role in the commission of the offence. In relation to personal possession offences proscribed pursuant to paragraph 2, Parties can choose to provide non-punitive measures either in addition to criminal sanctions or in the alternative, thus allowing Governments some degree of freedom to determine their policy on the treatment of drug users. The activity of personal possession must, however, still be established as a criminal offence even where Parties determine to make a range of alternative measures available to penalise those who offend.

In spite of their obligations under Article 3, a small number of Parties have made a deliberate decision not to include personal possession as a criminal offence under their national drug laws. In Italy the possession of drugs for ‘personal use’ has not been a criminal offence since a referendum on the subject was passed in 1993.\textsuperscript{36} While it is a crime to possess drugs intended for trafficking, sale or export, possession of any illegal drug for personal use is subject only to administrative sanctions. An assessment as to the purpose of the possession is made by the judge on a case by case basis. A similar situation exists in Spain where consumption and possession for personal use has been decriminalised since 1983, so that administrative (rather than criminal) sanctions may be imposed where consumption occurs in public places.\textsuperscript{37} The Spanish judiciary determines what will constitute possession for personal use based on the quantity of the drugs found.\textsuperscript{38} Belarus is the only other European country that...


\textsuperscript{35} WC Gilmore, \textit{ibid.}, p 8. See also 1988 Commentary, \textit{supra} n.2, p 48.


\textsuperscript{37} By contrast, drug possession for the purpose of trafficking is subject to harsh penalties under Spain’s Penal Code (Ley Orgánica 10/1995, de 23 de Noviembre). Information provided by Mr Camilo Vazquez Belio, National Office of Drug Control, \textit{Correspondence}, 30 April 1999.

\textsuperscript{38} Information provided by Mr Camilo Vazquez Belio, National Office of Drug Control, \textit{Correspondence}, 30 April 1999.
has not made the possession of drugs for personal use a criminal offence.\textsuperscript{39} None of these countries made any specific reservation to Article 3(2) when ratifying the 1988 Convention.

These are not examples of the Parties merely providing for non-punitive measures in the alternative to conviction or punishment, as they are entitled to do under Article 3(4)(d). The imposition of administrative rather than criminal sanctions involves a rejection of what appears \textit{prima facie} to be a Convention obligation to establish possession of illicit drugs, whether intended for personal use or further trafficking activity, as a \textbf{criminal} offence. Quite deliberately, however, the Convention does not provide for the INCB to discipline Parties for failing to modify their national laws to incorporate Article 3 offences. Since Article 22 enforcement provisions apply only to Articles 12, 13 and 16,\textsuperscript{40} even where it is consistent with their legal and constitutional principles to do so a Party will not be chastised by the Board for failing to amend its legislation so as to make personal possession of controlled substances a criminal offence. It is obvious that the INCB is somewhat concerned that certain countries may have allowed for a \textit{de facto} legalisation of personal possession.\textsuperscript{41} The Legal Advisory Section of the UNDCP reports that the INCB is currently engaged in discussion as to whether administrative sanctions satisfy the requirements under Article 3(2).\textsuperscript{42} A decision has been made, however, not to single out any country to request an explanation of their domestic policies and not to negotiate bilaterally to seek an amendment thereof.

The 1988 Convention does \textbf{not} impose an obligation on Parties to criminalise the consumption and traffic in new synthetic drugs not specifically scheduled under previous drug control treaties. This is because the 1988 Convention refers back to the 1961 and 1971 Conventions in defining what substances are to be subject to international controls.\textsuperscript{43} Parties are required to establish Article 3 criminal offences in relation to the chemical compounds MDA, MDMA (ecstasy), MMDA and MDE, added to Schedule I of the 1971 Convention between 1985 and 1990,\textsuperscript{44} and must also criminalise any particular NSD that is subsequently added to either of the Schedules (unless that Party submits written notice to the Secretary-General that it is not in a position to do so, following the procedure set out in Article 2(7) of the 1971 Convention). It would be possible in the future to make it obligatory for States to criminalise NSDs if a clause were to be added to the Schedules of the 1971 Convention extending control to substances that are analogues of those specifically listed. As discussed in Chapter 6, however,\textsuperscript{45} UN drug control bodies have rightly dismissed the idea of advocating such a significant amendment in view of the practical and political difficulties involved.

Article 3 of the 1988 Convention should be read alongside Article 4 which imposes an obligation on Parties to establish jurisdiction over the offences it has created in accordance with the preceding paragraph. Negotiators felt that such a provision was necessary in view of the “uncertainty and controversy” relating to the limits imposed by customary international

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\textsuperscript{40} See the further discussion of Article 22, infra p 102.


\textsuperscript{42} Information provided by Ms Frances Sinha, Legal Officer, Legal Advisory Section, UNDCP, \textit{Correspondence}, 15 July 1999.

\textsuperscript{43} See, for example, Article 3. See also the definitions of ‘Narcotic drug’ and ‘Psychotropic substances’ in Article 1.

\textsuperscript{44} See Appendix C for a list showing when individual compounds were scheduled under the 1971 Convention.

\textsuperscript{45} See Chapter 6, infra, pp 164-165.
law rules on the right of States to legislate where this will have an extraterritorial effect. Article 4 applies only to the more serious drug trafficking offences covered by Article 3(1), and not therefore, to offences relating to personal possession. The Article sets out certain circumstances in which it will be obligatory for Parties to establish jurisdiction over an offence and others where there will be a discretion as to whether or not jurisdiction is provided for. Since there are multiple grounds for the establishment of jurisdiction, particularly in relation to the activity of drug trafficking which crosses many country borders, it is possible for one offender to have breached the law in at least two countries. The Convention does not address the question of which Party should have priority in the event that there are competing jurisdictional claims.

Precursor controls

Another provision of critical significance, particularly in relation to the regulation of NSDs, is Article 12 providing for a system of controls to regulate “[s]ubstances frequently used in the illicit manufacture of narcotic drugs and psychotropic substances”. In the decade leading up to the negotiation of the 1988 Convention, members of the international community were becoming increasingly aware that an effective global plan of action against drug trafficking must involve tighter controls over precursor and essential chemicals used in the manufacture of illicit drugs. In 1986, the CND called for the inclusion of such measures in the new Convention and in the Multidisciplinary Outline of Future Activities in Drug Abuse Control drafted the following year it was asserted that new Convention provisions were required to introduce more comprehensive control over narcotic drug precursors and to provide for some control over the precursors needed for the manufacture of psychotropic substances. This was intended to strengthen international drug control in two ways; first, the prompt reporting of suspect transactions involving trade in precursors would facilitate the discovery and apprehension of traffickers and secondly, the seizure of illicit consignments would reduce the quantity of precursors available for clandestine manufacture. However, a note of caution included in the Multidisciplinary Outline is one that lies at the heart of the controversy over the extent and nature of effective precursor control. Although provisions must be effective enough to limit the diversion of chemical precursors for use in illicit manufacture, care must be taken to impose a “minimum of burden on legitimate commerce”. During the Conference negotiations Parties disagreed as to how this balancing act should be achieved and it was a long and often tense debate leading up to the adoption of a final version of Article 12.

46 1988 Commentary, supra n.2, p 100. Article 4 concerns only the establishment of jurisdiction and not the exercise of jurisdiction, which is covered in other provisions.
47 Parties are obliged to establish jurisdiction over Article 3, paragraph 1 offences in four instances: first, where the offence is committed in its territory; secondly, where the offence is committed on board a ship flying the Party’s flag or an aircraft registered under the Party’s laws; thirdly, when a Party does not extradite an alleged offender present in its territory on the grounds that the offence has been committed on its territory or on board a vessel flying its flag or an aircraft registered under its laws at the time the offence is committed and fourthly, when the Party does not extradite an offender on the basis that the offence has been committed by one of its nationals. In addition, the Convention sets out a number of circumstances which may lead Parties to establish jurisdiction over paragraph 1 offences.
49 Declaration of the International Conference on Drug Abuse and Illicit Trafficking and Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control, supra n.12, p 40.
50 The UN Draft Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; A Report on the Status of the Draft Convention, the US Negotiating Position, and Issues for the Senate, 100th Congress, 1st Session, Committee, SFR-100-64, pp 3-4, cited in Gilmore, supra n.19, p 25.
51 Declaration of the International Conference on Drug Abuse and Illicit Trafficking and Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control, supra n.12, p 40.
52 Ibid., p 40.
Although it is nowhere defined in the treaty, the scope of the phrase “substances frequently used in the illicit manufacture of narcotic drugs and psychotropic substances” can be determined by the contents of the original Tables I and II listing the chemicals to be regulated by Parties. Those Tables include different types of chemical substances; some that are the precursors for psychotropic drugs, and others that are essential chemicals used mainly as reagents or solvents in the creation of the final product. A decision was made during the Conference not to make reference to ‘precursor’ and ‘essential’ chemicals in the Convention, since, as the Canadian delegation explained, experts involved in the drafting of what would become Article 12 had tried unsuccessfully for two years to agree on a sound scientific definition. The terms were, however, subsequently defined by the Chemical Action Task Force (CATF) in their Final Report (the definition quoted by this author in Chapter 2) and are now understood to be part of the parlance of international drug control. As mentioned in Chapter 2, in practice the term ‘precursor’ is widely employed (although not entirely accurately according to the strict scientific definition) to refer to all substances listed in Tables I and II along with other chemicals used in the manufacture of illicit drugs. This is the sense in which it has been used by the UN General Assembly, the UNDCP, and the European Union and it is in this sense that it is used throughout this thesis.

While the 1988 Convention certainly breaks new ground in the regulation of materials needed to manufacture end-product illicit drugs, the notion of controlling both natural and synthetic precursors was conceived of long beforehand. At a national level, the record is believed to be held by Turkey which placed acetic anhydride, a chemical used to convert opium or morphine into heroin, under legislative control in 1927. In response to the massive increase in amphetamine abuse following the Second World War, Japan introduced controls over specific precursors of ATS as early as 1955. In the United Kingdom the trade in precursors has been monitored since 1971 when authorities became aware of a growing market for illicitly manufactured amphetamines. International controls were first introduced in the 1931 Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, imposing obligations on Parties to restrict access to certain types of “convertible substances”. Further measures were provided for by the 1961 Single Convention on Narcotic

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55 See Chapter 2, supra p 43.
58 See, for example, the discussion of precursor controls in UNDCP, Amphetamine-type Stimulants: A Global Review, UNDCP Technical Series, No.3 (Vienna, UNDCP, 1996), pp 50-66.
59 See, for example, Communication from the Commission to the Council and the European Parliament on the Control of New Synthetic Drugs (Designer Drugs), Brussels, 23.05.1997, COM (97) 249 final.
61 It was not until after the enactment of the 1971 Convention that other countries began to bring certain precursors involved in the manufacture of ATS under control. The Soviet Union did so in the mid-1970s and the United States in 1980. See UNDCP, Amphetamine-type Stimulants: A Global Review, supra n.58, p 52.
62 L Hay, supra n.60, p 3.
Drugs which lists a number of starter materials in its Schedules and contains a general provision enabling the scope of the Convention to be extended to cover a substance which is “liable to similar abuse and productive of similar effects as the drugs in Schedule I or II or is convertible into a drug”. As discussed in the preceding chapter, a deliberate decision was made not to control precursors used in the manufacture of psychotrophic drugs, thereby allowing for gaps in the drug control regime and contributing to an expansion in the illicit manufacture of those substances.

The introduction of Article 12 was the first attempt to prompt all countries to enact comprehensive legislation to control the trade in certain precursor chemicals and to cooperate to strengthen international action to prevent use of those materials in the production of illicit drugs. By the time delegates convened in Vienna to adopt the 1988 Convention, the composition of Tables I and II had already been worked out after considerable debate during meetings of the Review Group assigned for the task. Thus, it was the actual operation and extent of precursor controls, rather than the types of substances that should be scheduled that was the focus of discussion at the Conference. Table I contains substances (at that time six) which have a relatively limited application for legitimate purposes and for which there is a small volume of international trade. The other six substances in the original Table II have a much wider range of uses and are traded in larger quantities. Nine out of the twelve substances initially scheduled are used in the production of psychotrophic substances that have been traded on the black market since the mid-1960s and are scheduled under the 1971 Convention. The remaining three are needed for the manufacture of narcotic drugs.

Thus far the Tables have been amended on two separate occasions. In 1990, the Chemical Action Task Force (CATF) was mandated to review the operation of international controls and to suggest how they should be strengthened. Following their recommendations, a further ten substances were brought under control, five of which are used in the illicit manufacture of psychotropics and five in the manufacture of narcotic drugs. The latest amendment was made on 7 March 1999 when Norephedrine, a substance frequently used in the clandestine manufacture of amphetamine, was added to Table I. Thus, out of the total number of 23

64 It lists, for example, “ecgonine, its esters and derivatives which are convertible to ecbgonine and cocaine”. See the discussion in 1988 Commentary, supra n.2, p 252.

65 Chapter 3, supra p 66. See also the discussion in the 1988 Commentary, supra n.2, p 253 and in the Declaration of the International Conference on Drug Abuse and Illicit Trafficking and Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control, supra n.12, p 40. Recall that there is a generally worded provision in both the 1961 and 1971 Conventions requiring that States “shall use their best endeavours to apply to substances which do not fall under this Convention, but which may be used in the illicit manufacture of drugs, such measures of supervision as may be practicable”. This provision is extremely vague, however, and therefore of minimal use, since it does not indicate the scope of controls (the type of substances covered) or the meaning of “such measures of supervision as may be practicable”.

66 See the comments of Mr Trincellito (USA), in 1988 Official Conference Records, Vol. II, supra n.1, p 263. Although there was some suggestion made by the Representatives of Sri Lanka (ibid., p 263) and Turkey (ibid., p 252) that acetic anhydride used in the conversion of opium to heroin should be transferred from Table II (then referred to as List B) to Table I (then List A), this proposal was never debated since Parties accepted that negotiations over the draft Lists prior to the Conference had gone on long enough. The original draft Tables presented to the Conference (see 1988 Official Conference Records, supra n.1, Vol I, p 83) are the same as the final Tables adopted.


68 ibid.


70 See CND Decision 43/1 of 7 March 2000. The background to and reasons for the scheduling of Norephedrine are discussed in ECOSOC, “Changes in the scope of control of substances”. Note by the
precursors, fifteen relate to psychotropics (including amphetamines, LSD and ecstasy-related stimulants) and eight to narcotic drugs.\textsuperscript{21}

It can be seen that although Article 12 allowed for the first time for the possibility that certain precursors used in the manufacture of drugs in the ecstasy family could be brought under control, they were not initially included in Tables I and II. The reason for not listing some of those precursors in 1988, despite the fact that MDMA had been scheduled under the 1971 Convention two years earlier, appears to be that circulation had not yet become widespread and recreational use of the drug was not then a significant concern for most countries. Between the late 1980s and early 1990s, use of MDMA and the publicity that surrounded it exploded, prompting the CATF to recommend in 1992 that four new precursors used in the manufacture of MDMA and related chemicals be added to Table I.\textsuperscript{22}

**Figure 1 - Original Tables I and II of the 1988 Convention**

<table>
<thead>
<tr>
<th>Table I</th>
<th>Table II</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ephedrine</td>
<td>Acetic anhydride</td>
</tr>
<tr>
<td>Ergotamine</td>
<td>Acetone</td>
</tr>
<tr>
<td>Ergotamine</td>
<td>Anthranilic acid</td>
</tr>
<tr>
<td>Lysergic acid</td>
<td>Ethyl ether</td>
</tr>
<tr>
<td>1-phenyl-2-propanone</td>
<td>Phenylacetic acid</td>
</tr>
<tr>
<td>Pseudoephedrine</td>
<td>Piperidine</td>
</tr>
</tbody>
</table>

\textit{Secretariat, E/CN.7/2000/7.} It was the Government of the USA that proposed, in September 1997, that this chemical should be brought under international control. Note should be taken of the fact that after consultation with the WHO, the CND was determined to schedule Norephedrine in spite of the fact that only 12 of the 33 Parties (32 countries and the European Commission) that responded to the questionnaire sent out by the Secretary-General supported or recorded no objection to the proposal. \textit{Ibid.}, p 4. The European Commission was not in favour of scheduling since although Norephedrine is used as a precursor to amphetamine in the US, it is not thought to be used for illicit manufacture in Europe. Thus, Member States did not consider that it was justified imposing additional control requirements on industry. Information supplied by Linda Ward, European Commission, \textit{Interview, March} 2000.

\textsuperscript{21} See Appendix G showing the illicit uses for all 23 precursors scheduled. The 1988 Convention also controls the salts of most of the substances, whenever the existence of such salts is possible (the salts of Hydrochloric acid and Sulphuric acid listed on Table II are specifically excluded). One technical problem with the scheduling regime under the 1988 Convention is that there is an absence of any reference to the ethers, esters, isomers (or stereoisomers) of scheduled substances. Although the 1961 Single Convention provides clear guidance as to when these generic forms are to be brought under control, no such guidance was initially provided for in the 1971 Convention (see Chapter 3 for a discussion of the subsequent amendments) and none is provided in the 1988 Convention. This has left the situation unclear and imposes an unnecessary burden on UN bodies charged with the responsibility of monitoring adherence. See B Remberg et al, \textit{Potential Loopholes in Present Control Strategies: Ring-substituted amphetamine analogues and their natural and synthetic precursors}, Internal Memorandum, Vienna, UNDCP, 1994, p 6. In 1996, an Expert Meeting on Amphetamine-type Stimulants recommended the need to consider amendments to the 1988 Convention that would clarify the situation with respect to isomers, stereoisomers, ethers and esters. “Abuse of and Illicit Trafficking in Stimulants”, \textit{Report of the Expert Meeting on Amphetamine-type Stimulants held at Shanghai, China, from 25 to 29 November 1996}, ECOSOC, E/CN.7/1997/6, 6 January 1997. At the time of writing no further action has been taken.

\textsuperscript{22} Those four precursors are safrole, isosafrole, 3,4-methylenedioxyphenyl-2-propanone and piperanol. UNDCP, \textit{Amphetamine-Type Stimulants; A Global Review, supra n.58, p 55.}

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Recall that the first steps to precursor control are set out in Article 3, imposing a mandatory obligation on States to establish certain criminal offences.\textsuperscript{73} By contrast, Article 12 does not require the imposition of criminal penalties but provides for a series of regulatory measures to be introduced by Parties in order to build a system to monitor the internal and external trade in precursor materials. Article 12 begins with a general obligation in paragraph 1 providing that:

The Parties shall take the measures they deem appropriate to prevent diversion of substances in Table I and Table II used for the purpose of illicit manufacture of narcotic drugs or psychotropic substances, and shall co-operate with one another to this end.

With respect to internal trade, paragraph 8 imposes a more specific obligation on States to “take measures they deem appropriate to monitor the manufacture and distribution of substances in Table I and Table II which are carried out within their own territory”. It goes on to suggest a number of optional initiatives that “may” be implemented in order to fulfil this obligation. Parties “may” chose to control all persons and enterprises involved in legitimate manufacture and distribution, to control under licence premises used for manufacture or distribution or to require that licensees obtain a permit for such operations. They “may”, furthermore, impose restrictions on the quantities that can be accumulated by manufacturers and distributors so as to prevent them from possessing an excess of substances beyond what is required for legitimate business. Although this paragraph obliges Parties to take some action to monitor internal trade, there is no obligation to implement all or any of the specific measures recommended.

Mandatory obligations with respect to substances in Tables I and II are imposed by paragraph 9 which deals primarily with restrictions on international trade. Under sub-paragraph (a) each Party “shall” establish and maintain a system allowing it to monitor international trade in Table I and II substances so as to facilitate the identification of suspicious transactions. To this end, Parties are obliged to cooperate with those involved in legitimate trade -- manufacturers, importers, exporters, wholesalers and retailers -- who in turn must be made responsible for notifying competent authorities when they become aware of suspicious transactions. Drafters of the 1988 Convention clearly recognised that any successful scheme to prevent the diversion of substances from legitimate sources depends heavily upon securing the cooperation of those involved in the trade.\textsuperscript{74} This involves competent authorities maintaining links with industry to provide for a two-way flow of information; industry will be better informed of what it is required to do in order to conform with regulations, while the authorities, it is hoped, will receive strategic information about developments within the chemical industry and the nature of diversion from legitimate trade.

\textsuperscript{73} See the discussion supra p 82.

\textsuperscript{74} 1988 Commentary, supra n.2, p 267.
Paragraph 9 specifies other measures that States are obliged to take in order to provide for effective control over international trade in precursor chemicals. Sub-paragraph (c) requires that each Party shall, as soon as possible, notify the competent authorities or services of other Parties concerned where they have reason to believe that a Table I or II substance to be imported, exported or transited is destined for the illicit market. Although this obligation is imposed on the Parties themselves, much of the information will come from commercial operators reporting what they perceive to be suspicious transactions and the effective operation of the provision depends upon a solid commitment from the industry itself. Under sub-paragraph (d), Parties must require that all imports and exports of those substances be “properly labelled and documented”. ‘Proper labelling’ means that commercial documents such as invoices and customs, transport and shipping forms must include the name and quantity of the substance carried, as well as the name and address of the exporter, importer and, when available, the consignee. Sub-paragraph (e) requires that those documents are maintained by the commercial operators involved for at least two years and are made available to be inspected by the competent national authorities during that time. A final mandatory obligation to be noted here is that set out under sub-paragraph (b), specifying that each Party must provide for the seizure of a Table I or II substance where there is evidence that it is to be used in the illicit manufacture of narcotic drugs or psychotropic substances. This is the only provision in paragraph 9 that is not focused solely on substances intended for international trade, but also covers any suspicious domestic transactions between commercial operators.

One of the more contentious issues debated at the 1988 Conference was the level of international monitoring that would be accepted by Parties engaged in the international trade in restricted precursors. Article 12, paragraph 10 (a) states that:

In addition to the provisions of paragraph 9, and upon request to the Secretary-General by the interested Party, each Party from whose territory a substance in Table I is to be exported shall ensure that, prior to such export, the following information is supplied by its competent authorities to the competent authorities of the importing country:

(i) Name and address of the exporter and importer and, when available, the consignee;
(ii) Name of the substance in Table I;
(iii) Quantity of the substance to be exported;
(iv) Expected point of entry and expected date of dispatch;
(v) Any other information which is mutually agreed upon by the Parties.

Note that in contrast to paragraph 9, the more onerous monitoring obligations under this paragraph are not imposed in relation to Table II substances.

A number of industrialised countries responsible for the production and transport of precursors listed in Tables I and II objected to an original proposal that would have provided for a much more stringent system of notification under paragraph 10. An early draft of this provision put before the Vienna Conference required that each Party exporting a substance in Table I supply the information discussed above in relation to every transaction, not merely where a prior request had been submitted to the Secretary-General by the interested Party. This original wording was, however, strongly opposed by several producer countries, primarily the then twelve Member States of the European Economic Community, supported

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75 It is pointed out in the 1988 Commentary (ibid., p 269) that it may be useful if national legislation requires additional information, for example, the names of intermediate brokers and shipment routes (including locations and expected dates of export).

76 Negotiations over what is now Article 12 (Article 8 in the draft text) can be found in the 1988 Official Conference Records, supra n.1, Vol.II, pp 246-261. See especially, pp 247-248.
by China and Japan. An insight into the debate which ensued is best provided by the European Commission itself:

The Latin American and other developing countries wanted systematic and, in practical terms, bureaucratic controls on chemical and pharmaceutical substances covered by Article 12, see (sic) this as a quid pro quo for the controls imposed on them under the 1961 and 1971 Conventions on natural drugs and psychotropic substances. The United States and the Eastern bloc countries for their part were prepared to accept this approach ..., which would not affect them too much, in return for other concessions by the developing countries concerning the Convention as a whole. The Community was virtually alone in calling for selective controls, where abuse was suspected, or at a partner’s request, rather than systematic ones which would have hit it hard (the EEC being the main exporter of these products to the developing countries) and would have amounted to a non-tariff barrier, discriminating against the Community, in respect of this trade.  

The EEC argued in favour of an amendment that would have made notification obligatory only in cases where it was “suspected that the substances might be used for illicit purposes”,  

It was suggested that since many of the substances in Tables I and II were the subject of a considerable volume of international trade intended for legitimate purposes, it would be too impractical, time consuming and expensive to impose notification requirements in respect of all transactions. These claims were disputed by less developed countries, supported in this instance by the United States which argued that all industrialised drug producing and exporting countries had an international responsibility to accept strict controls in relation to precursor chemicals, even if there were inevitably some economic costs involved in doing so. It was suggested that if the EEC proposal had been accepted it would have added little more than had already been provided for under paragraph 9(c).

78 See Economic and Social Council Records, E/CONF.82/C.2/L.13/Add.7, 8 December 1988. The earlier draft read as follows:

In addition to the measures set out in paragraph 9, each Party from whose territory a substance in List A [now Table I] is to be exported shall ensure that, prior to such export, the following information is supplied by its competent authorities to the competent authorities of the importing country:

The name and address of the exporter and importer;

The designation of the substance in List A;

The quantity of the substance exported;

The presumed point of entry and estimated date of dispatch.

An EEC proposal, put forward by the Greek delegate, was that the section be amended to read:

In addition to the provisions of paragraph 9, each Party from whose territory a substance in List A is to be exported shall ensure, if it is suspected that the substance might be used for illicit purposes, that prior to export, or before its arrival at its final destination, the following information is supplied by its competent authorities to the competent authorities of the importing country:

The name and address of the exporter and importer if known ...

The compromise eventually agreed upon was the current paragraph 10, reproduced in the text above.

80 See, for example, the comments of representatives from the US, Argentina and Brazil, 1988 Official Conference Records, supra n.1, Vol.II, pp 251-252.

93
After days of negotiation, a compromise solution brokered largely with the assistance of the Canadian delegation was eventually agreed upon. This accommodates the request of EEC countries that notification provisions not apply in all cases, but is slightly different from their proposal that notification need only be made where there are suspicious circumstances. Under the final version of paragraph 10, in the event that the interested Party submits a request to the Secretary-General, exporting countries must supply the relevant information in all cases involving shipment of a Table I substance to the particular country making the request.

A number of countries, including India, Pakistan and Hungary, suggested that paragraph 10 (a) should be expanded to include List B (now Table II) substances. The inclusion of this further category of precursors was, however, strongly opposed by the majority. It was generally seen to be impractical since Table II includes chemicals which are widely used for common pharmaceutical products and are the subject of thousands of movements around the globe. Sub-paragraph (b) provides for a Party to adopt “more strict or severe measures of control” if it considers that this would be “desirable or necessary” to prevent diversion of precursors used in illicit trade. Accordingly, a Party has the option to enter into separate agreements with exporting States to require that a pre-export notification be issued in respect of substances in both Tables I and II.

The EEC further insisted that paragraph 10 should be watered down in respect of the obligation to inform other Parties of the operators involved in the transaction. It was first suggested that the words “if known” be inserted after the requirement to supply the name of the importer and exporter into the paragraph so that a country would be obliged to provide that information only where it was readily at hand. Mr Hobbing, representative for the European Commission, claimed that it would be impractical to require countries to provide these details for every transaction since a review of trade arrangements revealed that in many instances the name of the importer and even the country of import were not known at the time of export. According to his calculations, “[e]xports experience in the Community showed that about 30 per cent of all merchandise exported from Community countries was floating merchandise – exported goods floating on the high seas with the final buyer not yet known.” In that case it would only cause confusion if the exporter notified the possible country of import of such a shipment prior to its dispatch since the goods may well end up at a different destination. Most delegates outside of the EEC, again including the United States, strongly disagreed with this lax approach to monitoring international trade. In the words of the Brazilian representative:

The diversion of chemical and pharmaceutical products and precursors ... was an important aspect of the drugs situation. States which produced and exported those substances must accept the burden that the introduction of controls and monitoring would place on licit transactions in those substances, just as the States in which plants and other substances were a primary source of narcotic drugs must accept the burden of control of their normal transactions in those substances.

82 Ibid., pp 254 and 256.
83 Ibid., pp 255-257.
84 The example given in the Commentary is ephedrine which is widely used in the manufacture of medicinal drugs. 1988 Commentary, supra n.2, p 270.
85 There is also provision for stricter measures to be adopted pursuant to Article 24. See ibid., p 270.
86 Ibid., p 250.
87 Ibid.
88 Mr Saboia, ibid., p 252. In a similar vein, the Brazilian representative, Mr Aguilar, remarked that, “it was very disheartening that some delegations, while adopting very tough attitudes towards countries affected in that way [by narcotic drug production] and advocating measures to force their peasants to destroy their crops, nevertheless proposed flexible provisions for global monitoring and control of one of the most important inputs in the process of narcotics production”. Ibid., p 255.
According to Mr Trincellito of the US delegation, “an undeclared import without control was one of the drug traffickers best friends”. Mr Asbali, representing the Libyan Arab Jamahiriya, raised a very valid point when he commented that he did not understand the EEC argument since it would surely be possible to discover the name of the importer and at the very least the country of destination and there could be no effective monitoring system unless it was mandatory to do so.

Under the compromise agreed upon, although it is compulsory for Parties to provide the name and address of the importer and exporter (only, in light of the amendment discussed above, in the event that a specific request is submitted), the name of the ultimate consignee need only be included where this information is available to the exporting state. The EEC proposal that information be submitted either before export or before arrival at the final destination was not accepted so that, in the event of a request by the interested Party, notification must be made prior to the dispatch of the goods.

In assessing the role of the EEC in the drafting of international precursor controls, one should focus not only on what was eventually agreed to, but on what EEC countries tried to have accepted as a compromise. Had the original amendment submitted by the EEC been adopted in its entirety, exporting countries would have been obliged to notify another country at risk of receiving a suspicious consignment as to who were the exporter and importer involved, only if they had received information suggesting suspicious circumstances, and only in the event that they had been bothered to collect any details of the operators involved and only at some time before the goods were due to arrive at the final destination. This was a very determined effort by the EEC to seriously weaken precursor controls. In that form, paragraph 10 (a) would have been at best considerably muted, and at worst a completely ineffectual tool for monitoring legitimate trade. While the final version of paragraph 10 is much less strict than the original draft, it at least provides for some protection for importing countries concerned that they are likely to receive a flow of substances frequently diverted into the illicit trade.

The final Article 12 provisions to note are those that dictate the way in which new chemical precursors are added to, transferred between or deleted from Tables I and II. Paragraphs 2 to 7 set out the lengthy procedure which must be carried out before an amendment to the Tables is made. If either a Party or the INCB has information that would justify the inclusion or deletion of a new substance or the transfer of a currently listed substance from one Table to another, it shall notify the Secretary-General and provide evidence supporting the notification. The Secretary-General has responsibility for distributing relevant information to Parties, the CND and the INCB and Parties are to send their comments concerning notification back to the Secretary-General. Paragraph 4 provides that it is then for the INCB, whose decision will be determinative as to scientific matters, to provide the CND with an assessment of the substance so that the Commission may decide whether the amendment will be made. Thus, unlike the situation that exists under the 1961 and 1971 Conventions, the WHO plays no role in the scheduling of new substances under the 1988 Convention.

The criteria by which the INCB determines whether and how a particular substance should be brought under control are spelt out in paragraph 4:

If the Board, taking into account the extent, importance and diversity of the licit use of the substance, and the possibility and ease of using alternative substances both for licit

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80 Ibid., p 251.
81 Ibid., p 251.
91 The compromise was first suggested by Mr Paye, representing Senegal. Ibid., p 252.
purposes and for the illicit manufacture of narcotic drugs or psychotropic substances, finds:

(a) That the substance is frequently used in the illicit manufacture of a narcotic drug or psychotropic substance;
(b) That the volume and extent of the illicit manufacture of a narcotic drug or psychotropic substance creates serious public health or social problems, so as to warrant international action,

it shall communicate to the Commission an assessment of the substance . . . .

Once the CND has made a decision as to whether the Tables should be amended it must notify all Parties to the Convention. Parties may, within 180 days after having been notified, request that there be a review by the ECOSOC which has the power to confirm or reverse the Commission’s decision.

As significant as any other paragraph in Article 12 is paragraph 14, amounting in effect to a loophole provision deliberately built in to allow Parties to avoid controls over certain pharmaceutical preparations containing scheduled precursors. It states as follows:

The provisions of this Article shall not apply to pharmaceutical preparations, nor to other preparations containing substances in Table I or Table II that are compounded in such a way that such substances cannot be easily used or recovered by readily applicable means.

Paragraph 14 is significantly more flexible than the equivalent paragraphs providing for the exemption of certain preparations that appear in both the 1961 and 1971 Conventions. Not surprisingly given the traditionally hard-line stance against narcotic drug misuse, the most stringent provision appears in the 1961 Convention. It does not provide for the Party itself to decide that a preparation containing a narcotic drug should be exempt. Where the CND, acting in accordance with a recommendation from the WHO, finds first, that a preparation is not liable to abuse, and second, that it is not capable of producing ill-effects and third, that the drug therein is not readily recoverable, it may recommend that that preparation be added to a third Schedule. By contrast, under the 1971 Convention it is possible for a Party to decide that a substance has been “compounded in such a way that it presents no, or negligible, risk of abuse and the substance cannot be recovered by readily applicable means, so that the preparation does not give rise to a health and social problem . . . .”, in which case the Party can decide to exempt the preparation from certain of the control measures that would ordinarily be applicable. That Party will, however, still be under an obligation to impose some controls, including licensing and inspecting manufacturers and submitting reports to the relevant UN drug monitoring bodies.

There are a number of reasons why Article 12, paragraph 14 must be viewed as too broad and the scope of its operation unclear. One of the major difficulties is that there is an ambiguity as to whether the phrase “compounded in such a way that such substances cannot be easily used or recovered by readily applicable means” applies to both pharmaceutical and non-pharmaceutical preparations, or only to the latter. That is, there is an issue as to whether the phrase should be read as being conjunctive and thus applicable to both types of preparation, or whether it should apply only to pharmaceutical preparations, as a strictly grammatical reading of the paragraph would suggest. Grammatically, were the phrase intended to apply to both pharmaceutical and non-pharmaceutical preparations, it would have made more sense for

92 1961 Single Convention on Narcotic Drugs, Article 2(3), Article 3, para.4 and Schedule III.
93 1971 Convention on Psychotropic Substances, Article 3, paras 2 and 3. See the discussion of this provision in Chapter 3.
there to be a comma after “Table II” and before “that are compounded”. Moreover, the drafting history of the paragraph would suggest that the qualifying phrase applies only to non-pharmaceuticals since it was not included in the first draft produced in June and July of 1987, but was added subsequently at the time the paragraph was expanded to include non-therapeutic preparations. This supports the conclusion that paragraph 14 should be interpreted so as to exempt all pharmaceutical preparations from Article 12 controls.

A contrary view is put forward in the UN Commentary which states that “logic would seem to suggest” that the qualifying phrase applies also to pharmaceutical preparations so that they cannot be exempted where they could be easily broken down to obtain the precursor chemicals listed in Tables I and II. It is pointed out that even if the purchase of pharmaceuticals intended for the large-scale diversion of precursor chemicals had not been contemplated at the time the Convention was negotiated, that practice has since flourished, thereby justifying a reading that includes both types of preparation. This second interpretation is favoured also by the INCB. In its 1996 Report, the Board reminds all Governments that pharmaceutical preparations containing substances in Tables I and II are not exempt unless compounded in such a way that they cannot be easily used or recovered by readily applicable means. Despite these subsequent pronouncements, it is unfortunate that paragraph 14 was drafted in such an ambiguous manner, thereby allowing for the application of very different levels of control by States, depending on which interpretation is preferred.

Even if one reads the qualifying clause as applicable to both pharmaceuticals and non-pharmaceuticals, there are no guidelines as to the scope of the exemption provided by paragraph 14. In contrast to the 1961 and 1971 Conventions, the term ‘preparation’ is nowhere defined in the 1988 Convention. While the meaning of “pharmaceutical preparation” is reasonably clear, it is not at all clear how far “other preparations” should extend. Some guidance is provided by the UN Commentary which explains that non-pharmaceutical preparations would cover a broad range of commercial and industrial goods including nail polish remover, paint thinner and cleaning agents. No guidance is given, however, in either the Convention itself or the Commentary, as to the meaning of the phrase “easily used or recovered by readily applicable means” so that in relation to both pharmaceutical and non-pharmaceutical preparations it will be for State Parties themselves to determine the likely risk of recovering precursors. An example of the potential problems this causes involves the large scale trade in ephedrine and pseudoephedrine-based products, such as cold relievers bought over the counter, many of which have been exempted from Article 12 controls by a large number of countries. Ephedrine can be easily isolated by breaking down pharmaceutical products and may be used in the clandestine manufacture of amphetamine and methamphetamine, as well as new synthetic amphetamine derivatives synthesised by

94 1988 Commentary, supra n.2, p 274. Despite the existence of Articles exempting certain preparations from at least some control measures in both the 1961 and 1971 Conventions, there was no preparations clause at all in early drafts of the 1988 Convention. In June and July of 1987, participants at the open-ended intergovernmental expert group meeting proposed that a new paragraph be added to the working draft excluding from precursor controls “preparations intended for therapeutic use”. At the second meeting of the expert group in October that year, it was suggested that not only therapeutic preparations but other preparations with a legitimate industrial use may need to be exempted from precursor controls. Given that the exemption was to be expanded, it was agreed that a further qualification should be added so that non-therapeutic preparations would be exempt only if the scheduled precursors would not be easily recoverable.

95 Ibid., p 275.


97 1988 Commentary, supra n.2, p 274.

98 Ibid. See also B Remberg, supra n.71, p 6.
clandestine operators in an attempt to circumvent the law.\textsuperscript{99} Since the imposition of Article 12 controls in relation to all such preparations would be likely to increase costs for pharmaceutical companies that manufacture them, countries with a large stake in the pharmaceutical industry may not willingly accept this as a solution to reducing the use of those products in the clandestine manufacture of synthetic drugs. The Convention does not make it clear as to when States will nevertheless be obliged to insist that Article 12 controls are applied to certain preparations so as to prevent their diversion into the illicit trade.\textsuperscript{100}

Before leaving precursor controls, one weakness in addition to those discussed above should be identified. The 1988 Convention does not impose any obligation on Parties to submit annual records of the quantities of scheduled precursors they deal with, nor any estimates of their annual legitimate needs. Under the 1961 Single Convention, Parties are required to submit to the INCB both an estimate of the quantities of scheduled narcotic drugs to be utilised for licit medical needs,\textsuperscript{101} as well as statistical returns indicating the actual consumption, import and export of those drugs.\textsuperscript{102} Recall, however, that the 1971 Convention has been criticised for failing to require Parties to supply estimates of their psychotropic drug needs.\textsuperscript{103} As is discussed in Chapter 6, the ECOSOC has recently urged Parties to voluntarily supply estimates on trade in Table I precursors to the Board and many are in fact doing so.\textsuperscript{104} It is submitted, however, that consideration should be given to amending the 1988 Convention so as to introduce this as a mandatory treaty obligation.\textsuperscript{105} The monitoring of accurate

\textsuperscript{99} Information supplied by Vincent Murtagh (Forensic scientist for Australian Government Analytical Laboratory (AGAL), \textit{Interview}, January, 1999.

\textsuperscript{100} There is no space in this thesis to detail several other Convention provisions that impose specific obligations in respect of precursors used in the manufacture of licit substances. Article 18, for example, obliges Parties to “apply measures to suppress illicit traffic in narcotic drugs, psychotropic substances and substances in Tables I and II in free trade zones and in free ports that are no less stringent than those applied in other parts of their territories”. The aim of this provision is to prevent free trade zones and ports, created to attract investors who are offered tariff and tax incentives and minimal control procedures, from becoming a safe haven for drug traffickers. See 1988 Commentary, \textit{supra} n.2, p 346. Article 19 imposes on Parties an obligation to take action to prevent use of the mails for the purpose of illicit traffic and to co-operate with each other to achieve that goal. An inexhaustive list of the measures that must be taken in this regard is set out in Paragraph 2. This Article goes much further to impose controls over the mails system than do either the 1961 Convention (Article 31(8)) or 1971 Convention (Article 12(3)(b)). By 1988 it was recognised that the reliability and cost effectiveness of posting drugs, combined with the difficulty of detecting illicit substances among the massive volumes of licit traffic, required a more comprehensive series of international controls. See 1988 Commentary, \textit{supra} n.2, p 351.

\textsuperscript{101} 1961 Single Convention on Narcotic Drugs, 1961, Articles 12 and 19.

\textsuperscript{102} 1961 Single Convention on Narcotic Drugs, Article 20.

\textsuperscript{103} See Chapter 3, \textit{infra} p 68.

\textsuperscript{104} 1988 Commentary, \textit{supra} n.2, p 282. See Chapter 6, \textit{infra} p 160.

\textsuperscript{105} The procedure for amending substantive Convention provisions outlined in Article 31 of the 1988 Convention is significantly different from that set out in the other operative drug control treaties. The 1961 and 1971 Conventions contain virtually identical provisions allowing for an amendment to be proposed by a Party, through the Secretary-General to the ECOSOC. The Council then has the option to convene a conference to discuss the amendment or to ask the Parties directly whether they will accept it, in which case an amendment will automatically enter into force if no Party objects within 18 months of it having been circulated. Article 31 of the 1988 Convention provides for a similar procedure for distributing a proposed amendment to Parties, except that the Secretary-General may do so without seeking the authority of the ECOSOC. The significant difference is that Article 31 specifies that the amendment will only come into force where it has not been rejected by a Party within 24 months after it has been circulated and only with respect to a Party after it has deposited an instrument expressing consent to be bound. For further discussion of Article 31 and the rationale for the different procedure, see the 1988 Commentary, \textit{supra} n.2, pp 411-415. See Chapter 3, n.74 for details of the amendment procedure under the 1971 Convention and coverage in the Vienna Convention on the Law of Treaties. As with the 1971 Convention, at the time of writing there has not yet been any amendment
statistical estimates along with records of actual trade in respect of Table I and II substances (or at least for Table I substances frequently used in illicit manufacture), makes it possible for the INCB to compare and contrast the flow of precursor chemicals in different countries and therefore to identify those in which imports have begun to exceed legitimate needs. This provides some insight into whether importation of certain precursors has increased despite the fact that legitimate needs have not, and indicates where a percentage of the need (and therefore a percentage of the profits generated for the pharmaceutical/chemical industry) is being fuelled by the illicit market. Countries themselves can be forced to monitor their imports and to compare them to what they have suggested will be the amounts necessary for therapeutic or industrial purposes.

**Control over materials and equipment**

Article 13 requiring States to impose controls over materials and equipment utilised for illicit production and manufacture is a provision which has the potential to impact upon the trade in NSDs, although it is not yet clear how significant an impact that will be. It has already been seen that States are obliged under Article 3 to create offences in relation to the manufacture, transport, distribution and possession of materials and equipment that are intended for use in the illicit manufacture of narcotic and psychotropic drugs. Article 13 provides further that:

The Parties shall take such measures as they deem appropriate to prevent trade in and the diversion of materials and equipment for illicit production or manufacture of narcotic drugs and psychotropic substances and shall co-operate to this end.

Although this Article imposes a positive obligation to do something, it does not stipulate the types of measures that should be implemented by States. While there are countries that may consider it necessary to enact legislation restricting the sale of specific types of laboratory equipment connected with illicit production, others may regard it as sufficient to warn retailers of the potential for illicit use of their products and to request that they check their customers’ credentials.\(^{106}\) In relation to more sophisticated equipment, e.g. tableting machines used to press out pill shapes for prescription drugs, vitamin pills and ecstasy type substances, it would seem possible to require that sellers (a) keep records of their transactions and (b) notify authorities of suspicious circumstances, since those machines would ordinarily be used by a restricted number of professional buyers. There are indeed cases where police have been alerted to the possibility of illicit dealings by retailers who have sold or been asked to sell equipment in circumstances that make them suspicious that it may be used in the manufacture and refinement of illicit drugs.\(^{107}\) However, the level of sophistication of laboratory operations varies and some substances can be easily produced with basic tools such as are found in high school science departments and amateur chemistry sets.\(^{108}\) In practice it would seem to be extremely difficult, if not impossible, to monitor sales of common laboratory equipment used for multiple purposes by amateurs and professionals alike. One further problem in implementing Article 13 is that a large percentage of the necessary materials and equipment

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\(^{106}\) Recall that Article 3(1)(c)(ii) imposes an obligation (subject to the constitutional safeguards clause) on States to criminalise the possession of equipment and materials intended for use in illicit drug production and manufacture. Article 5(1)(b) requires that measures be adopted to enable the confiscation of materials and equipment used in the commission of an offence.


\(^{108}\) The UNDCP notes that there are considerable differences in the level of sophistication of clandestine operations which range from kitchen laboratories to high tech arrangements using the latest in sophisticated equipment. See UNDCP, *Amphetamine-Type Stimulants: A Global Review*, supra n.58, p 44.
are traded second hand.\textsuperscript{109} If the second hand trade includes the full range of materials needed from laboratory equipment to weighing scales and tableting machines, it is unlikely that sales could ever be curbed effectively enough to make a significant dent in the illicit market for NSDs.

In the original version of what would become Article 13, Parties were required to implement much more defined obligations in relation to two particular types of equipment. The original draft commenced with a general requirement that Parties cooperate to suppress illicit trade in materials and equipment used for the manufacture of narcotic drugs and psychotropic substances.\textsuperscript{110} A second paragraph would have imposed a mandatory obligation on Parties to provide pre-export notification to an importing Party of the intention to export a tableting or encapsulating machine while a third paragraph would have obliged Parties to consider making it a requirement that tableting and encapsulating machines be registered with an appropriate national authority and that their domestic sale or other disposition be notified. Why were much stronger provisions that would have required closer monitoring of the trade in these two pieces of machinery withdrawn from the final draft? The Records of the Conference report that “many representatives” held the view that paragraphs 2 and 3 would first, be difficult to implement, and secondly, have an adverse and unacceptable impact on international trade in tableting and encapsulating machines needed for the legitimate pharmaceutical industry.\textsuperscript{111} Delegations decided in favour of a much less enforceable general provision that imposes an obligation only to do what each country regards as necessary and not in relation to any specific material or equipment. In doing so, they appear to have missed an opportunity to effectively monitor the trade in two types of equipment essential for the large scale production of new synthetic drugs.

**Strengthening international cooperation**

The 1988 Convention is, as explained above, primarily a law enforcement treaty and the bulk of the remaining Articles are devoted to strengthening international cooperation in the fight against illicit traffic in narcotic drugs and psychotropic substances. There are, for example, provisions to cover confiscation of both proceeds of crime and illicit narcotic and psychotropic drugs,\textsuperscript{112} extradition of offenders,\textsuperscript{113} mutual legal assistance,\textsuperscript{114} cooperation and training\textsuperscript{115} and controlled delivery.\textsuperscript{116} Although each of these Articles deals with extremely important control measures, they are of general relevance, rather than of particular import with regard to NSDs, and will not be expounded upon in this chapter.

\textsuperscript{109} B Donald and I Birnie, *supra* n.107.

\textsuperscript{110} 1988 *Official Conference Records*, *supra* n.1, Vol.1, p 8. What is now Article 13 was originally Article 9 in the draft Convention.

\textsuperscript{111} 1988 *Official Conference Records, ibid.*, p 25. The Records do not specify which countries the representatives objecting to the early draft were from.

\textsuperscript{112} Article 5 does not, however, cover confiscation of the precursor chemicals listed in Tables I and II.

\textsuperscript{113} Article 6.

\textsuperscript{114} Article 7.

\textsuperscript{115} Article 9 provides for Parties to cooperate with one another to facilitate the transfer of information and expertise that will assist law enforcement. Article 10 imposes a positive obligation on Parties to cooperate to assist and support transit States, particularly developing countries that are in need of technical assistance, to strengthen their law enforcement regime to combat illicit trafficking. To this end Parties may undertake to offer financial assistance to such transit States so as to support the development of their infrastructure and may enter into bilateral or multilateral agreements to enhance international cooperation in the area of drug control. Although there is an obligation on Parties to the Convention to offer assistance as regards law enforcement techniques, there is no similar obligation (or even suggestion) that States offer resources and/or expertise to help less developed countries reduce drug demand and eliminate the suffering of drug users. It is submitted that this would have been a very useful way (arguably equally or more useful than law enforcement measures) of strengthening cooperation between countries to alleviate the harm caused by the illicit drugs trade.

\textsuperscript{116} Article 11.
Demand reduction

It is significant that in a treaty devoted to enhancing law enforcement provisions there is only one paragraph of one Article that imposes a positive obligation on States to adopt measures aimed at demand reduction and reducing the human pain related to drug use. Paragraph 4 of Article 14 states:

The Parties shall adopt appropriate measures aimed at eliminating or reducing illicit demand for narcotic drugs and psychotropic substances, with a view to reducing human suffering and eliminating financial incentives for illicit traffic …

It goes on to specify that measures may be based on recommendations from bodies within the UN and on the Comprehensive Multidisciplinary Outline adopted by the International Conference on Drug Abuse and Trafficking in 1987 as it pertains to efforts in prevention, treatment and rehabilitation.\(^{117}\) The difficulty with this broadly worded provision is that, despite the best intentions of the drafters, the phrase “measures aimed at eliminating or reducing illicit demand” is so flexible that countries are free to interpret the paragraph in any way they wish. To one State the only way to reduce demand and eliminate the hazards of drug trafficking may be to impose the most severe penalties on all those connected with the trade from traffickers to addicts, whereas to another reducing demand with a view to ending human suffering may require a policy of decriminalising personal possession offences and the allocation of finances to establish outlets providing confidential information and treatment for addicts.\(^{118}\) It must be understood that although paragraph 4 of Article 14 has some symbolic value, given that it acknowledges there are illicit drug issues outside of law enforcement that should be addressed by Parties, in practice it imposes no real obligation to modify law or policy in order to accommodate a demand reduction strategy. Existing policies, punitive or non-punitive, could be argued to be aimed at reducing illicit demand. The amorphous nature of “demand reduction” is discussed further in the conclusion to this thesis, which suggests the need for greater emphasis to be placed on reducing demand and minimising harm in relation to NSDs.\(^{119}\)

Reporting and enforcing compliance

Two very important provisions are set out in Articles 20 and 23 requiring that Parties furnish details on illicit drug traffic and national controls to agencies of the UN who will analyse and publish the information for the benefit of all members of the international community. Article 20 imposes an obligation on Parties to provide the CND with information on the operation of the 1988 Convention, particularly as regards domestic laws and regulations which give effect to treaty provisions, and cases of illicit traffic that are considered unusual or important in view of new trends, quantities involved, sources of supply or methods of distribution. In relation to NSD controls it will be extremely useful to have a body of current information on the

\(^{117}\) Declaration of the International Conference on Drug Abuse and Illicit Trafficking and Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control, supra n.12.

\(^{118}\) Compare, for example, the different philosophies of Governments in Sweden and the Netherlands. Sweden adopts a ‘zero tolerance’ hardline approach to drug users and considers that demand reduction is a step towards the elimination of drug use. By contrast, the Netherlands has long considered that demand reduction involves ‘harm minimisation’, i.e. accepting that some people will continue to use drugs and taking measures to ensure that they can do so as safely as possible. R Lewis and J Sherval, “Demand reduction activities related to ‘new synthetic drugs’: MDMA (ecstasy), other amphetamines and LSD in European Union member states”, Report for the European Monitoring Centre for Drugs and Drug Addiction, May 1997, pp 27 and 33. This is discussed at much greater length in the Conclusion to this thesis. It is submitted there that the Dutch approach is more preferable, particularly in relation to NSDs.

\(^{119}\) See Conclusion, particularly p 248-253.
movement of precursor chemicals used in their manufacture, although clearly the utility of this Article will depend on whether States have the infrastructure and inclination to effectively monitor trafficking routes. Article 23 requires the INCB to prepare an annual report analysing the information supplied by Parties and to provide, where appropriate, recommendations to enhance the effective implementation of the Treaty. This serves a number of purposes. First, it collates information submitted by Parties in order for the UN agencies to determine the nature of drug trafficking and to assess the ‘success’ of international measures to reduce it; secondly, it shares that information with other Parties so that they may be aware of the spread of certain drugs in their region and the suitability of domestic laws that have been implemented in other States to deal with the problem and, thirdly, it provides a means by which to encourage or shame States that have not satisfied their Convention obligations into doing so, since most will not want to be seen by other members of the international community to be reluctant or lax in imposing controls. As submitted above, it is arguable that there should have been further reporting obligations in respect of the actual trade in precursor chemicals listed in Tables I and II so as to facilitate the collection and distribution of statistics on the quantities of chemicals transported between States and the extent to which this surpasses estimates of legitimate needs.

Finally, mention must be made of the enforcement provisions set out in Article 22. Paragraph (a) is a general provision stating that where the INCB receives information suggesting that the aims of the Convention are not being met with respect to an area over which it has competence, it may invite a Party to furnish any relevant information. The Board can only take further action, however, where the issue concerns a failure to fulfil the aims and obligations set out in Articles 12, 13 and 16. Notably, this does include obligations with respect to precursor controls but does not cover criminal sanctions set out in Article 3, nor international cooperation measures in Articles 4-11. With respect to Articles 12, 13 and 16, the Board may call upon the Party suspected of breaching its obligations to take remedial action. Should the Board then find that its request has been ignored it may draw this to the attention of the other Parties, the Council and the Commission, presumably with the intention ofpressuring the Party concerned to adjust its behaviour rather than risk damaging its reputation and being subjected to the criticism of the international community. In contrast to the equivalent provisions under both the 1961 and 1971 Conventions, Article 22 does not give the Board the power to recommend the suspension of exports and imports of scheduled substances to a country that has failed to provide an adequate explanation or to take remedial action when requested to do so. While it is arguable that the inclusion of a more severe sanctioning power would have been one way in which to ensure greater control over precursor chemicals, it is extremely unlikely that Parties would have agreed to this given that so many of the precursors scheduled have important therapeutic and industrial uses.

Final clauses - Signing, ratification and reservation

The 1988 Convention was the first international drug control instrument opened to be signed not only by States but by “regional economic integration organisations” deemed to have the requisite competence in respect of matters covered in the Treaty. This meant that for the

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120 Since 1992 when the four precursors to the ecstasy family were added to Table I of the Convention, Parties have been obliged to supply the CND with information on any cases involving new trends or a significant increase in the quantity of precursor chemicals being seized.

121 See the discussion in this Chapter on the decriminalisation of possession deemed to be for personal use by Spain and Italy, supra pp 85-86. Even if this were considered to be contrary to Convention obligations the INCB could not take action under Article 22.

122 The relevant provisions are Article 14(2) of the 1961 Convention and Article 19(2) of the 1971 Convention.

123 Article 26(c) provides that the 1988 Convention is open for signature by “regional economic integration organisations which have competence in respect of negotiation, conclusion and application of international agreements in matters covered by this Convention, references under the Convention to
first time the European Economic Community (EEC) was given the power to sign a drugs treaty as a separate entity. It was the Commission of the European Communities which proposed, at a review group meeting in June/July 1988, that the draft text be amended to allow regional economic integration organisations to become Parties to the Convention. A majority of participants agreed and on 8 June 1989, the Convention was signed by both the EEC and each of its Member States. See Proposal for a COUNCIL DECISION on the United Nations Convention against illicit Traffic in Narcotic Drugs and Psychotropic Substances concluded in Vienna on 20 December 1988 COM (89) 26 final, p 6; 1988 Official Conference Records, Vol.II, p 316, para 6 and 1988 Commentary, supra n.2, p 398.

This second paragraph was not included in the earliest drafts but was added subsequently as a result of meetings of the Working Group on Final Clauses during the 1988 Conference negotiations. The aim was to provide other Parties with a clear understanding of the role that will be played by an economic integration organisation in implementing the Convention. See 1988 Commentary, supra n.2, p 403.

Council Decision of 22 October 1990 concerning the conclusion, on behalf of the European Economic Community, of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (90/611/EEC) OJ No L 326/56. On 8 June 1989, the 1988 Convention was signed by the EEC and by its Member States. The EC deposited its instrument of formal confirmation to the 1988 Convention with the Secretary-General on 31 December 1990.

Annex: Competence of the European Economic Community as regards the matters covered by the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Declaration pursuant to 27(2) of the Convention), 24.11.90, OJ No L 326/57. In the next paragraph it is explained that the exercise of powers that have been transferred by Member States to the Communities is subject to continuous development. Accordingly, the Communities reserve the right to make further declarations pursuant to Article 27(2) of the 1988 Convention.


See Appendix H for a list of the Parties to the 1988 Convention and the dates on which they ratified. There were not, for example, the measures in place to ensure that Article 5 confiscation provisions or Article 12 precursor controls could be fully implemented at the time that those four countries ratified in 1989. Information obtained by reviewing records at the UNDCP, September 1998, and confirmed by Loide Lungameni, CND, Telephone Interview, January 2000.
countries are Party to the Convention. At the time of writing Switzerland is the only major trading country that has not yet acceded to the Convention.

In view of the complexity of several relatively novel provisions introduced by the 1988 Convention, it is understandable that it took the majority of countries at least several years to put in place the necessary structures to enable them to ratify. Certain provisions, particularly Article 3 offences, Article 5 on confiscation of the proceeds of crime, Article 7 mutual legal assistance and Article 12 precursor controls, introduced measures which required controversial amendments to existing legislation and in some cases the enactment of new legislative instruments. It does not appear that there were the same influences at play here as there were in the aftermath of the 1971 Convention when industrialised countries were reluctant to accept the responsibilities they had previously agreed to in view of the potential impact on commercial operators. Since the 1988 Convention was mostly aimed at strengthening controls over plant-based narcotic drugs, the majority of developed countries moved fairly quickly to implement its provisions and many of the developing countries wished to be seen to be embracing rigorous international drug controls.

In contrast to both the 1961 and 1971 Conventions, the 1988 Convention contains no article dealing with reservations. During the Conference negotiations, different versions of a draft article were debated. While some delegates expressed the view that a provision should be included to indicate that no reservations were permitted, others felt that there should be a circumscribed right to make reservations in relation only to particular articles or only where this would not be contrary to the object and purpose of the Convention. Eventually it was determined that no article on reservations should be included so that the scope of the right to make reservations would be determined by general international law on the subject. For our purposes it is sufficient to recall that this is governed by the 1969 Vienna Convention on the Law on Treaties along with the 1986 Vienna Convention on the Law of Treaties between States and International Organisations. Article 19 of both of those instruments stipulates that where a Convention makes no reference to reservations, they will be permitted unless incompatible with the object and purpose of the instrument.

There are no reservations to the 1988 Convention that are specifically relevant to control of NSDs. In particular, it should be noted that no countries objected to Article 12 controls over precursor chemicals. The Government of the Netherlands submitted an “Understanding” that despite the reference to “illicit traffic” in Articles 17, 18 and 19, and the despite the fact that “illicit traffic” was defined under Article 1 as “offences set forth in article 3, paragraphs 1 and 2”, that term was intended to be used in a limited sense, taking into account the context

132 Ibid. Although the Board notes that Switzerland does nevertheless apply some of the control measures set out in the 1988 Convention, all States that have not yet done so are urged to become Parties to the treaty.
133 See 1988 Commentary, supra n.2, p. 49, which acknowledges that in relation to Article 3, for example, the scope of the provision and the nature of the obligations imposed meant that some Parties had to enact complex implementing legislation in order to be in a position to fully comply with its terms.
134 1961 Single Convention on Narcotic Drugs, Article 49 and 50.
135 1971 Convention on Psychotrophic Substances, Article 32.
139 See “Multilateral Treaties Deposited with the Secretary-General”, http://www.un.treaty.un.org. As was the case in respect of the 1971 Convention on Psychotrophic Substances, the most frequent reservation submitted related to the Article providing that disputes could be referred to the International Court of Justice (Article 31 in the 1971 Convention and Article 32 in the 1988 Convention).
in each case. On this understanding, countries would not be obliged, for example, to board and search a vessel pursuant to Article 17 because it was suspected that a small quantity of an illegal substance intended for personal use was being transported. Given the wide scope for Articles 17 to 19 and the more intrusive powers they allowed, the Netherlands did not consider it appropriate that they should apply in relation to all Article 3 offences.

It is possible to conclude that the 1988 Convention is an important tool in controlling the spread of illicit synthetic drugs. While the Convention has certainly not prevented the expansion of a market for NSDs, there are important provisions that have generally boosted international cooperation in respect of the control over both narcotic drugs and synthetic psychotropic substances. Perhaps the most significant provision for our purposes is Article 12, establishing for the first time a system for the regulation of starter materials used in the manufacture of psychotropic drugs that could be broadened in 1992 to include four main precursors used in the manufacture of NSDs in the ecstasy family. There is scope for more precursors to be added at a later date should this be judged to be an effective way in which to deal with a wider range of chemical compounds appearing on the market.

As in the negotiation of all international drugs treaties to date, debate over the 1988 Convention was not concerned solely with considerations of limiting access to dangerous drugs but was influenced by the commercial and political agendas of the more powerful States. Recall the comments of the Acting President at the Opening of the 1988 Conference convened to adopt the Treaty. It is obvious from the debate over Article 12, a sample of which is reproduced above, that despite her plea for delegations to be wary of over-emphasising their self-interests, once again several industrialised countries did vigorously pursue their own agendas. It is interesting to note that it was not the United States that applied pressure for the relaxation of precursor controls, as it had done in respect of end-product psychotropics during negotiations for the 1971 Convention, but rather the countries of the EEC that were wary of imposing potentially onerous and expensive controls. Whether or not the adoption of more stringent measures would have prevented the further spread of precursors used in the manufacture of end-product illicit synthetics is a matter for speculation. What the ‘bargaining’ in respect of precursors does show is that we must be ever aware of the political and economic interests that continue to influence both national and international drug control. While this and the previous chapter show that those interests significantly influenced what would be accepted in 1971 and in 1988, other Chapters in this thesis argue that such interests are still extremely important in shaping the control decisions made today.

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140 Ibid.
141 See, for example, UNDCP, *Amphetamine-type Stimulants: A Global Review*, supra n.58, pp 45-46.
142 See supra n.1.
143 See Chapter 3.
PART 3: THE LEGAL RESPONSE TO NEW SYNTHETIC DRUGS

CHAPTER 5

THE DOMESTIC LEGISLATIVE RESPONSE TO NEW SYNTHETIC DRUGS

In an era of ‘designer drugs’, a list which referred to drugs which are presently traded for recreational use would be obsolete from the outset. Small variations in chemical formulation can result in a new drug which is outside the existing framework of prohibition though it is substantially similar to existing drugs in its deleterious effects and black market potential. It is necessary to provide an extended definition capable of bringing these variant forms of existing drugs within the framework of prohibition as they are developed.

Australian Model Criminal Code Officers Committee (1998)¹

At a national level, the emergence of a class of new synthetic (or ‘designer’) drugs has prompted many governments to modify their legislation in one form or another in an effort to control the range of variable chemical compounds traded on the illicit market. Two different types of drug laws are relevant to a study of the domestic legislative response to NSDs. First, there are drug laws specifically designed to deal with end products, the new synthetic drugs themselves. It is those end-product controls with which this Chapter is concerned. Secondly, the scheduling of end-product drugs has been accompanied by controls over the key precursor and essential chemicals used in the manufacture of chemically based drugs. A detailed discussion of domestic precursor legislation is beyond the scope of this thesis.² It is sufficient for our purposes to appreciate that, upon ratification of the 1988 Convention, Parties are required to apply the control measures outlined in Article 12 to the list of 23 chemicals appearing in Tables I and II.³ As noted in the previous Chapter, since 1992, Table I has included four of the precursor chemicals used in the manufacture of NSDs in the ecstasy group.⁴ In respect of the fifteen Member States of the European Union, further obligations in dealing with the substances listed in Tables I and II are enshrined in EU law, discussed in

² For a non-chemist the domestic legislation governing control over precursors may seem impenetrable. In the three main jurisdictions investigated below in respect of their control over end-product new synthetic drugs, legislation has been modified and/or specifically enacted in order to enable the countries to meet their obligations under the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. In the United States, the relevant legislation is the Chemical Diversion and Trafficking Act of 1988, 21 CFR, Parts 1310 and 1313; Domestic Chemical Diversion Control Act of 1993, Public Law 103-200 and Methamphetamine Control Act of 1996, Public Law 104-237. In the United Kingdom, it is the Dangerous Drugs (Substances Useful for Manufacture) Regulations 1991, No.1285; The Controlled Drugs (Substances Useful for Manufacture) (Amendment) Regulations 1992, No.2914 and The Controlled Drugs (Substances Useful for Manufacture) (Intra-Community Trade) Regulations 1993, No. 2166 (referring to the relevant regulations that the UK is required to adopt under European Union law). In Australia, control over the import/export of precursors is governed by the Commonwealth Customs Act 1901, Act No.6 of 1901, to be read alongside the Customs (Prohibited Imports) Regulations 1956, No.90. State and Territory governments are responsible for enforcing regulations imposed on their own industries. In the State of New South Wales, for example, see the Poisons and Therapeutic Goods Act 1996, Act No.31 of 1996 and the Poisons and Therapeutic Goods Regulations 1994.
³ See Chapter 4 for a discussion of Article 12 controls.
⁴ See Chapter 4, supra p 90 and also Chapter 6, infra p 183.
Chapter 7. Since the 1988 Convention specifies that nothing in that Treaty prevents States adopting stricter controls than are set out therein, there is scope for some countries to control more of the precursors used in the illicit manufacture of drugs, including NSDs, than others. The formulation of a common list of substances judged to be the most frequently accessed by clandestine manufacturers, in relation to which all countries agree to take certain measures, is the only way to address inconsistencies in the domestic control regimes.

There are basically three legislative models currently used to regulate NSDs manufactured for the illicit market (i.e. the end-product of experimentation with a range of precursor materials). The majority of governments have retained the traditional substance-by-substance or substance-specific model, whereby a compound is controlled only if its unique chemical formula is included on a limited list appearing on a Schedule to the relevant drug control Act. In a small number of industrialised countries, however, governments have instigated fairly radical legislative reform, altering the way in which a controlled drug is defined. The 'generic approach' introduced in Ireland and the United Kingdom classifies classes or 'families' of controlled drugs which are all made subject to the same penalties for illicit possession, manufacture and distribution. A third model has been adopted in the United States where any compound may be considered a "controlled substance analogue" provided it is found by a court to have a chemical structure and pharmacological effect "substantially similar" to a substance previously scheduled. Variations of the latter two approaches have been introduced in New Zealand and by the Federal and State Governments of Australia. In any of the countries mentioned the procedure for permanent scheduling may be accompanied by an 'emergency scheduling' scheme allowing for the rapid control over new substances soon after they are detected by law enforcement authorities.

Despite the significant amount of publicity given to ‘designer’ drugs, and despite acknowledgement by authorities that illicit manufacturers continue to find loopholes in the law, very little has been written on the legal response to NSDs. There does not appear to have been any comparative evaluation of national legislation that has aimed to identify the strengths and weaknesses of different control regimes. The following chapter has three principal aims. First, to raise awareness about the legislative response to variable NSDs and its ramifications, not widely known about by citizens or policy makers. Secondly, to stimulate further debate amongst academics, surprisingly quiescent thus far, over what are radical and far reaching laws. Finally, it is hoped that the discussion below may be of modest assistance to decision makers charged with the responsibility of deciding which, if any, of the models outlined provides for the most effective control over a potentially enormous range of synthetic drugs.

How one determines the success or suitability of drug controls will depend upon the criteria used to judge them by. From the viewpoint of law enforcement authorities, each of the approaches outlined below has its own inherent weaknesses. Not one of the legislative models provides for comprehensive coverage of all the potentially dangerous synthetic drugs that may appear on the illicit market. From another perspective, that of those who argue in favour of a more liberal approach to drug control, it may be difficult to see the justification for

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5 The obligations on EU countries with respect to precursor control are explained in detail in Chapter 7.
6 Article 24 of the 1988 Convention provides that a Party may adopt more strict measures than it is obliged to under the Convention if they are judged to be “desirable or necessary for the prevention or suppression of illicit traffic”.
7 As this Chapter reveals, this is the case in all but two countries in Europe and in the majority of countries in Asia and the Pacific.
8 Discussed infra p 108.
9 See infra p 122.
10 See infra pp 133. Relevant sections of the different legislative models adopted in the three main jurisdictions profiled in this Chapter appear at Appendix I.
criminalising the manufacture and possession of broad groups of substances, many of which have not yet been proven to be either dangerous or the subject of widespread misuse. Whichever perspective one adopts, there are fascinating questions of a legal and socio-legal nature that are prompted by the legislative response to new synthetic drugs.

**The Generic Approach**

**The case of the United Kingdom**

When in 1977 the United Kingdom amended legislation to bring two generic categories of psychotropic drugs under control, it was the first time that any national Government had modified drug laws specifically in response to the identification of new synthetic compounds on the illicit market.11 An earlier unsuccessful attempt to introduce a group classification of controlled synthetic drugs was made in 1964 when a generic definition based on the phenethylamine nucleus at the heart of many amphetamine derivatives was included in the original Drugs (Prevention of Misuse) Act 1964.12 In that instance, the Government was not responding to the clandestine sector, but had adopted a generic provision to control twenty central nervous system stimulants and anorectics legally marketed at the time. Since it soon became clear that this was insufficiently precise and had inadvertently embraced many more substances than had been intended by legislators, the substance-by-substance approach was re-introduced in the 1971 Misuse of Drugs Act.13

In 1974, during a raid on an illicit laboratory in the Midlands, British authorities discovered that two amateur chemists were synthesising a psychotropic drug not included in the Schedules of the Misuse of Drugs Act 1971. That substance was identified as Bromo STP, a potent chemical derivative of phenethylamine that had been discovered earlier by US authorities and had only recently appeared on the illicit market in Britain.14 While the UK Government’s immediate reaction was to have the chemical formula for Bromo STP added to the list of controlled drugs,15 the discovery of this previously unscheduled substance prompted it to consider a more comprehensive reform of existing controls in an effort to regulate a range of chemical compounds that could later be introduced on to the illicit market. Two years after the discovery of the Midlands laboratory, a Modification Order was passed to alter the way in which controlled drugs were defined. The Technical Sub-committee of the Advisory Council on the Misuse of Drugs (ACMD)16 recognised the problem of designing an amendment that would close the legislative loophole allowing clandestine chemists to produce a range of legal psychotropics not yet listed under existing schedules, and yet would

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11 Note that a different type of generic model had been introduced earlier in some US States in response to the popularity of LSD and related hallucinatory compounds during the 1960s and 70s. See further discussion, infra p 122. It was the Government of the UK, however, that was the first to introduce generic controls at a national level.

12 Public General Statutes, 31 July 1964, Chapter 64. See further, the discussion by the WHO Expert Committee on Drug Dependence, 21st Report, 1978, Technical Reporting Series, No.618, p 47.

13 Misuse of Drugs Act, 1971, 27 May 1971, Chapter 38. That Act must be read in conjunction with the Misuse of Drugs Regulations 1985 (as amended). While the Act sets out which substances are controlled and the penalties for unauthorised possession, the Regulations provide exemptions for authorised therapeutic use.


16 The role of the Advisory Council on the Misuse of Drugs in set out in the Misuse of Drugs Act, Section 1.
not interfere with legitimate production of substances for therapeutic purposes. The solution, it concluded, was to introduce a generic description of two different groups or ‘families’ of controlled psychotropic drugs. In contrast to the 1964 legislation, this generic system of classification would be more refined and specifically targeted towards the manufacture of illicit drugs.

The Misuse of Drugs Act 1971 (Modification) Order 1977 was enacted on 26 July and came into operation on 20 September 1977. It will be recalled from Chapter 1 that under the 1971 legislation, drugs are classified on a sliding scale as Class A, B or C, depending on an assessment of their dangerous properties, weighed against their legitimate therapeutic use. Class A drugs are those that are considered to present the greatest danger and are consequently subject to the most stringent penalties. The 1977 Order operated to amend Part 1 of Schedule 2 of the earlier Act by adding the following paragraphs (b) and (c) to the list of Class A drugs already under control:

(b) any compound (not being a compound for the time being specified in sub-par (a) above) structurally derived from tryptamine or from a ring-hydroxy tryptamine by substitution at the nitrogen atom of the sidechain with one or more alkyl substituents but no other substituent;

(c) any compound (not being methoxyamphetamine or a compound for the time being specified in sub-par (a) above) structurally derived from phenethylamine, an N-alkylphenethylamine, α-methylphenethylamine, an N-alkyl-α-methylphenethylamine, α-ethylphenethylamine, or an N-alkyl-α-ethylphenethylamine by substitution in the ring to any extent with alkyl, alkoxy, alkylenedioxy or halide substituents, whether or not further substituted in the ring by one or more other univalent substituents.

In short, the new paragraphs extended control to two different groups of synthetic drug; certain compounds structurally derived from tryptamine and certain chemical derivatives of phenethylamine.

The 1977 Modification Order meant that a range of chemical combinations that could possibly be produced in clandestine laboratories were from that point on classified as Class A drugs alongside cocaine, LSD and opium derivatives, and were subjected to the strictest penalties. Any person summarily convicted of an offence involving the supply or production of a derivative caught by the new paragraphs could be fined up to £400 and/or imprisoned for a maximum term of 12 months. A person convicted on indictment for the supply or production of a Class A drug offence could be fined an unlimited amount to be determined by the Court and/or imprisoned for a maximum of 14 years. Persons convicted for possession offences could be incarcerated for 12 months and/or fined £400 if tried summarily, but, if tried on indictment, could be jailed for 7 years and/or fined an unlimited amount. Thus, as a result of the 1977 Modification Order harsh penalties were made applicable for offences involving a range of NSDs, some recently synthesised and others awaiting discovery, some with dangerous properties and others that would be relatively harmless.

19 See Chapter 1, supra p 14.
The introduction of generic definitions into UK law is made possible because of a scheduling philosophy that does not require proof of the harmful properties of a drug, or indeed that a substance is being abused, but only that there is the potential for it to create a social problem. Section 1 of the Misuse of Drugs Act sets out guidelines for the Advisory Council on the Misuse of Drugs (ACMD), a body established to monitor drug abuse and to advise the Government on appropriate reforms. It is there stated that the ACMD is to make recommendations with respect to "drugs which are being or appear to them likely to be misused and of which the misuse is having or appears to them capable of having harmful effects sufficient to constitute a social problem ...". Although many of the compounds captured under the generic groupings will have very little effect or could be argued to be completely innocuous, their manufacture, sale or possession can be made subject to strict penalties since it could be argued that all NSDs are likely to be misused and are capable of becoming a social problem. This appears to be reflective of a judgement by decision makers that the act of taking drugs for non-therapeutic purposes is immoral per se, regardless of whether a substance can be proven to cause physical harm. Recreational drug taking itself is viewed as a threat to the social order. As is discussed later in this Chapter, this view is in contrast to that adopted in the Netherlands, where the Government requires proof of actual physical danger, along with actual abuse, before a substance can be scheduled.

The fact that tryptamine and phenethylamine derivatives were classified as Class A drugs in 1977 reflects the UK Government's determination to prevent and punish the circulation of a category of non-therapeutic new synthetic compounds. The discovery of Bromo STP in the Midlands laboratory appears to have been an isolated incident and did not stimulate much interest in a new range of hallucinogenic chemicals. One decade earlier, however, the Government had witnessed a dramatic increase in LSD use and a period where that drug became extremely popular with a certain sub-group of young people. Strong support for the 1977 Modification Order from both Houses of Parliament suggests that politicians were anxious to avoid any trend involving the popular consumption of new mind-altering psychotropics. Just as the patterns of use (recreational) and the types of users (visible young adults) influenced the decision to criminalise amphetamine and LSD in the mid-1960s, so to did evidence of the potential for similar patterns of use and users prompt the Government to introduce radical generic legislation to capture large groups of synthetics drugs.

Since 1977, a further four generic definitions covering four additional families of drugs have been added to Schedule 2 of the Misuse of Drugs Act 1971. One of those definitions relates to a group of psychotropic substances, a family known as the 5,5 disubstituted barbituric acids that have been classified as Class B drugs. The remaining three are non-psychotropic substances -- fentanyl and pethedines included as Class A drugs and anabolic substances classified as Class C.

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21 A review of the 179 compounds profiled in *PIHKAL* shows that many of them were not found to be active in humans at the doses experimented with. See A and A Shulgin, *PIHKAL: A chemical love story* (USA, Transform Press, 1992), pp 532 and 538.
22 See Chapter 1, supra p 16.
23 See Chapter 1, supra pp 11-15.
26 S.I. 1986/2230.
27 S.I. 1996/1300. In addition to the six 'generic family' definitions mentioned above (tryptamines, phenethylamines, 5,5 disubstituted barbituric acids, fentanyl, pethedines and anabolic substances), the UK *Misuse of Drugs Act* uses three over-arching generic definitions to control the derivatives of scheduled substances. For every substance listed in each of the classes of controlled drugs (classes A, B and C) two standard generic definitions extend control over (1) stereoisomeric forms of the named drugs and (2) salts of the named drugs (or their stereoisomeric forms). Furthermore, for Class A drugs
Operation of the generic definition

Out of the six categories of drugs covered by generic classification under UK drug laws, only one has proved to be a significant problem. Authorities report very little misuse of ‘designer’ tryptamines, barbiturates, fentanyl, pethedines or anabolic substances. By contrast, an increasingly broad range of phenethymines are subject to abuse. Included within this category are MDMA, MDA, MDEA and a great number of related compounds that may be sold as ecstasy on the illicit market. As explained in Chapter 2, phenethymines lend themselves most easily to structural modification by manipulation of the side chain and ring structure and can be produced through relatively simple methods of synthesis. Although the parent compound phenethyamine has no clear pharmacological effect and is not a controlled substance, from it a seemingly unlimited number of derivatives with very different pharmacological effects and varying levels of potency, can be produced. As an example, compounds that are ring-substituted with alkyl, alkoxy, alkylenedioxy or halogen (Position Rg in Figure 1) will most often have hallucinogenic properties and all those specifically scheduled under the Misuse of Drugs Act appear in Class A (e.g. 2,5-dimethoxyamphetamine, and the group of 3,4-methylenedioxyamphetamine). Substances which are mono or disubstituted at the α-position (Re and Rd in Figure 1) are likely to be stimulants and all examples in the Act are classified as Class B or Class C controlled drugs (e.g. Amphetamine and Benzophetamine). While Amphetamine itself is a Class B drug, certain ATS come within the category of phenethyamines and structural analogues will be classified as Class A if they are found to be encompassed by the generic definition.

Figure 1: The Chemical structure of phenethyamine (2-phenethylamine)

Generic control over the phenethyamine family under the Misuse of Drugs Act can be better understood by referring to Figure 1. The term phenethyamine is a shortened version of the chemical name 2-phenyl-ethyl-amine. A phenethyamine compound is a Class A controlled drug if the following four requirements are satisfied:

only, a third generic definition covers the esters and ethers of named drugs (and their stereoisomeric forms). The salts, esters and ethers of certain controlled substances have been covered under UK drug legislation from as far back as 1964. Isomers have been under control since 1 January 1971. Information supplied by Mr Richard Rhodes, Action Against Drugs Unit, UK Home Office, Correspondence, 8 March 1999. Recall from Chapter 3, n.109, that salts were added to the Schedules of the 1971 Convention on Psychotropic Substances in 1977. The 1971 Convention does not, however, oblige States to control esters, ethers or isomers of psychotropic substances. An explanation of those terms is provided in the Glossary.

29 See the discussion of phenethyamines in Chapter 2.
32 LA King, supra n.30, p 2.
1. Rg is/are alkyl, alkoxy, alkylenedioxy or halogen,
2. Ra is hydrogen or alkyl,
3. Rb, Rd, Re and Rf are all hydrogen and
4. Re is hydrogen, methyl or ethyl.

As previously noted, derivatives covered under paragraph (c) include MDMA, MDA and MBDB. As a result, manufacture, import and possession of those compounds has been a criminal offence in the UK since 1977, long before the marketing of ‘ecstasy’ in the middle of the 1980s. Despite the mistaken belief among some users that MDMA or ecstasy was not a controlled drug in Britain when it first became associated with the ‘Rave’ phenomenon,33 the United Kingdom was one of the few countries where the possession of ecstasy was already illegal at that time. Although STP and Bromo-SP were specifically scheduled under their chemical names before 1977, both are effectively covered under the generic definition and their separate listing is now redundant.

The generic approach adopted under the 1977 Modification Order is considered by the UK Government to be an extremely effective reform. According to the Drugs Branch of the Home Office, the Government is satisfied that this system of controlling generic groups is the most appropriate and the most effective way in which to limit the harmful use of NSDs.34 In its view, “[n]one of the [six generic family] definitions has led to any difficulty in the application of the law since they came into force between 10 and 20 years ago, whether in terms of the pharmacological industry, the enforcement authorities, the forensic science service or the courts”.35 Accordingly, the present Government would be extremely reluctant to consider any substantive change in the existing control regime.

Yet it is still possible for clandestine chemists to manufacture a number of psychotropic substances with a range of pharmacological properties and varying degrees of potency, that are not controlled under the present Misuse of Drugs Act. Law enforcement authorities are now aware of the existence of new synthetic or ‘designer’ phenethylamines that do not satisfy the four criteria outlined above and are consequently not yet under control. It must be understood firstly that there are two different chemical compounds -- one known as 1-phenylethyl-amine and another known as 2-phenyl-ethyl-amine -- that can be manipulated to produce a designer analogue.36 Only 2-phenyl-ethyl-amine are covered by the generic definition. This is a result solely of the chemistry nomenclature since by definition 1-phenylethyl-amine cannot be shortened to ‘phenethylamine’. Although this does not generally present a major problem since it is the 2-phenyl-ethyl-amines (2-phenethylamines) that produce the stimulant and hallucinogenic effects most likely to interest operators manufacturing for the illicit market, since 1993 there have been seizures of 1-phenethylamines made in several European countries.37 Very little is known about their pharmacology, epidemiology or clandestine synthesis.38

33 Rush: Drugs Uncovered, Channel 4, Monday, 9 November 1998, 9pm.
34 Information supplied by Mr Stephen Pike and Mr Richard Rhodes, Home Office Drugs Unit, Interview, 2 February 1998.
37 LA King, AJ Portman-van de Meer and H Huizer, “1-phenylethylamines: a new series of illicit drug?”, Forensic Science International, Vol.77, 1996, p 141. It was originally thought that the compounds had been made by mistake by clandestine operators trying to synthesise the more potent 2-phenethylamine family. Closer examination of the evidence revealed that they had been deliberately prepared.
38 Ibid. The authors conclude that if 1-phenylethylamines continue to appear on the illicit market, there will be a greater need for study of their synthesis, biochemistry, pharmacology and epidemiology.
More significantly, there are a large number of 2-phenyl-ethyl-amines that are not encompassed by the generic definition. Alexander and Anne Shulgin’s voluminous text, *PIHKAL*, referred to in Chapter 2, drew attention to the vast range of hallucinogenic and stimulant drugs based on the 2-phenethylamine nucleus that can be prepared relatively easily by illicit manufacturers with a basic understanding of chemistry.\(^{39}\) Publication of this book prompted the UK Government to review each of the 179 substances (all 2-phenethylamines) synthesised by Dr Shulgin, in order to determine how many are caught by the generic definition in Part 1, Paragraph (b) of the Misuse of Drugs Act.\(^{40}\) The Advisory Council on the Misuse of Drugs concluded that since only 145 of those substances are already under control, the publication of *PIHKAL* may encourage underground chemists to experiment in an effort to manufacture the remaining 34 new and legal ‘designer’ drugs.\(^{41}\) Accordingly, the Council recommended that all 34 should be controlled by listing each separately as a Class A drug under Paragraph (a) of Part 1, Schedule 2. At the time that the ACMD made their recommendation, authorities were aware that only one of the substances, a compound known as N-hydroxy MDMA or FLEA, was being traded on the illicit market.\(^{42}\) Quantities of FLEA had been reported in drug seizures in the Netherlands and were expected to make their way onto UK drug markets. According to the Shulgins, most of the 34 compounds to be added are likely to have either undesirable side effects or low potency or both, thereby making them unattractive to those interested in consuming recreational drugs.\(^{43}\) The Home Office has decided, however, that it would be safer to criminalise all 179 of the substances listed in *PIHKAL*, given the popularity of the Shulgins’ text and the fact that none of the uncontrolled analogues are recognised as having any potential therapeutic value.

Several other new phenethylamines have recently made an appearance on the illicit drugs market, thereby drawing the attention of the Government to loopholes under UK law. In July 1998, British authorities seized approximately 25,000 tablets containing the chemical 4-methylthioamphetamine (4-MTA), a potent serotonin-releasing agent thought to be responsible for at least four deaths in the United Kingdom and one in the Netherlands.\(^{44}\) As a result of the recent haul, 4-MTA is currently being considered for admission to the list of Class A drugs. At the same time that the ACMD made its recommendation in relation to scheduling the 34 *PIHKAL* substances, it also recommended that another compound known as N-methylphenethylhydroxymphetamine (or N-hydroxymphetamine), should be brought under control.\(^{45}\) Again quantities have been found in illicit tablets discovered in the Netherlands and the UK.\(^{46}\) Unlike 4-MTA or the 34 *PIHKAL* substances, N-hydroxymphetamine is not ring-substituted and will be categorised as a Class B, rather than a Class A drug. While the compound itself has properties similar to amphetamine and has been sold as an end-product, it can also be used as a precursor chemical in the manufacture of amphetamine and benzylmethylketoxime.

According to the Technical Committee of the ACMD, it would not be appropriate to redraft the generic definition in paragraph (b) with the aim of including a wider range of

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\(^{39}\) A and A Shulgin, *PIHKAL*, supra n.21. See the discussion in Chapter 2.

\(^{40}\) Information supplied by Richard Rhodes, Drugs Branch, UK Home Office, *Correspondence* (3), November 1998.

\(^{41}\) See the Index of Synthetic Psychotropic Drugs at Appendix A, highlighting the 34 *PIHKAL* compounds due to be scheduled individually.

\(^{42}\) I.A King, supra n.30, p 5.

\(^{43}\) Ibid., p 7.


\(^{45}\) I.A King, supra n.30, p 6.

\(^{46}\) Ibid.
phenethylamines. Although there is no technical or legal obstacle to prevent this, Government experts are conscious that controls have worked comparatively well over the last twenty years and they are not willing to risk increasing the complexity of generic classifications. Furthermore, a broadening of the generic terms could result in unacceptably stringent control over a range of manufactured drugs believed to have some significant actual or potential clinical value.

In order to make an informed control decision, the Home Office consults a large number of interested organisations that could potentially be affected by a proposed scheduling decision. While there is no statutory obligation on the Government to confer with outside parties before amendments are enacted, their comments are invariably invited as a matter of good practice. In relation to the 36 phenethylamine compounds recently considered, a letter dated 12 August 1998 was sent by the Home Office to 76 interest groups, among them the Association of British Pharmaceutical Industry, the Company Chemists' Association Ltd, and the British Dental and Veterinary Associations. The Home Office was prepared to consider any submission from persons concerned that the new scheduling plans would adversely impact on their legitimate trade and interest groups were specifically requested to identify and quantify any direct or indirect costs that would be likely to arise as a result of the additional controls. It was not anticipated, however, that there would be any serious opposition from industry. Out of the 36 substances to be scheduled, 35 have been recommended for classification as Class A drugs based on the fact that they are potentially harmful and have no accepted therapeutic use. Although the remaining substance, N-hydroxyamphetamine, is to be classified under Class B, the Government has not currently given any marketing authorisation to allow the drug to be sold as a medicine in the United Kingdom.

As in other jurisdictions in Europe, one of the major issues determining the efficacy of control over synthetic substances falling through the loopholes of the UK legislation is the length of time that it takes to arrange for a new compound to be added to existing Schedules. It appears at present that the procedure set out in the 1971 Act ensures that there will be a substantial gap between the time a scheduling amendment is proposed and the time that the new substance is brought under control. Section 2 of the Misuse of Drugs Act provides that Schedule 2 may be amended by Order in Council only after consultation with the ACMD and with the approval of both houses of Parliament. Getting through that process can take a considerable period of time. The ACMD began to consider the 34 PIHKAL compounds in 1994 and did not make its recommendation on control until November 1996. In May 2000, those substances have still not yet been scheduled, although current forecasts suggest that the issue will be put before Parliament in June of this year. In relation to those 34 substances, the lengthy scheduling process does not appear to present major problems since there is little interest in the drugs and no evidence of widespread manufacture by illicit chemists. The

47 Ibid. Information confirmed by Mr Richard Rhodes, Drugs Branch, UK Home Office, Telephone Interview, 3 November 1998.
49 Information supplied by Mr Richard Rhodes, Action Against Drugs Unit, UK Home Office, Correspondence, 8 March 1999.
51 Ibid.
52 Ibid.
53 Section 2(2) and (5).
54 Information supplied by Mr Richard Rhodes, Action Against Drugs Unit, UK Home Office, Correspondence, 8 March 1999.
55 According to Simon Hewitt of the Action Against Drugs Unit, UK Home Office, the lengthy delay is a result of limited resources in the legal advisory section, which is busy with other issues. Interview; March 2000. Clearly then, the addition of the compounds is not on the Government's list of priorities.
delays may be more problematic in circumstances where a dangerous new synthetic substance is marketed skillfully by illicit manufacturers and becomes popular with consumers in a relatively short period of time. The UK does not have any scheme in place for the emergency scheduling of NSDs and at this stage has no plans to introduce one. According to the Home Office it is not considered likely that a completely unknown new and dangerous substance will appear on the market but in the event that it does, it should be possible to bring it under control “within a matter of months” where that is judged to be necessary. Yet expert pharmacologists have predicted the likelihood that new compounds will continue to appear, perhaps in greater numbers, and the Home Office has not yet proven that it could act quickly in the event of an ‘emergency’. Clearly, a balance must be sought between the need to give careful consideration to control decisions that may have serious ramifications for drug users and legitimate traders and the need for timely action to halt the spread of a dangerous new compound. It does not appear that the balance has presently been struck in favour of protecting the public.

The Misuse of Drugs Act 1971 controls a number of substances in the tryptamine family. While some are specifically listed in Schedule 2, Part 1 of the Act, others are subsumed by the generic definition added in 1977. Interestingly, Lysergic Acid Diethylamide (LSD), one of the best known and most frequently used of the tryptamines, is not covered by the 1977 generic definition. Instead, LSD and its analogues are controlled by the inclusion in Schedule 2, Part 1 of the phrase “Lysergide and other N-alkyl derivatives of lysergamide”. Of the 55 tryptamines listed in TIHKAL, the second book by A and A Shulgin, 29 are not caught by the generic provisions of the Misuse of Drugs Act. In considering how these substances could be brought under control, the London based Forensic Science Service suggests that it would be possible to modify the generic definition of tryptamines so as to include a further fourteen of the TIHKAL compounds. The remaining fifteen not subsumed by the amended clause could be separately scheduled. However, since very few of those substances have appeared on the clandestine market, the Home Office does not consider that it is yet necessary to debate the options for scheduling.

Although the generic definitions added by the Misuse of Drugs Act 1971 (Modification Order) 1977 have only been tested in Court on a very limited number of occasions, the case law in this area is extremely interesting and has not been the subject of any academic debate. In R v Couzens and Frankel, the appellants challenged their convictions for an offence

56 Information supplied by Mr Richard Rhodes, Action Against Drugs Unit, UK Home Office, Correspondence, 8 March 1999.
57 This is the view held, for example, by Dr Les King, Senior Forensic Scientist, The Forensic Science Service, London and Dr Vincent Murtagh, Senior Forensic Scientist for the Australian Government Analytical Laboratory (AGAL).
58 The following five tryptamines are specifically listed in Schedule 2, Part 1(a): bufotenine; psilocin; N,N-diethyltryptamine, N,N-dimethyltryptamine and etryptamine. Specific scheduling of the first four of those substances is in fact redundant since they are caught by the generic definition. Two structurally related substances, lysergamide and lysergide, are not covered by the broad generic definition and are scheduled individually. Information supplied by Dr Les King, Senior Forensic Scientist, The Forensic Science Service, London, Interview, March 2000.
60 Information supplied by Dr Les King, Senior Forensic Scientist, The Forensic Science Service, London, Interview, March 2000. Schedule 2, Part 1(b) could be amended so that the phrase “ring-hydroxy tryptamine” is replaced with “ring-hydroxy or ring alkoxy or ring-alkylenedioxy tryptamine”.
61 The Index of Synthetic Psychotropic Drugs appearing at Appendix A indicates the specific TIHKAL compounds that are not captured by the generic definition.
62 Information confirmed by Mr Simon Hewitt, Home Office, Action Against Drugs Unit, Interview, March 2000.
involving the production of a Class A drug, namely MDMA or ecstasy, significant quantities of which had been found at the first appellant’s flat. At trial, Couzens argued that although the powder confiscated did contain MDMA, it could not be considered a controlled drug within the meaning of the 1971 Act since MDMA was not specifically listed on any schedule to that Act and did not fall within the generic definition in paragraph 1(c) of the second schedule; that is, it did not fall within the definition of a compound structurally derived from the phenethylamine family in the manner stipulated. At first instance it was submitted for the accused that in order to satisfy the statutory definition, MDMA would have to have been produced in one of the particular ways specified in paragraph 1(c) and that since he had produced the drug by a different route it could not be considered a controlled substance. When the trial judge rejected that submission, Couzens pled guilty to the charge. On appeal, both applicants argued that the trial judge had wrongly rejected the submission.

The appellants were forced to dispute evidence provided by the only expert scientific witness appearing at the trial. This chemist (referred to as Dr G.) gave evidence that, first, the powder found did contain the substance MDMA and secondly, MDMA was structurally derived from a phenethylamine known as N-alkylphenethylamine by substitution in the ring with an alkylene-dioxy substituent. The structure of a molecule, he explained, relates to the way in which the atoms making up the molecule are joined together. In the case of N-alkylamethylenephethylamine, one or more of the hydrogen atoms in a molecule could be replaced by one of alkylenedioxy in order to produce MDMA. Thus, it was the Doctor’s opinion that although MDMA was not specifically named in any schedule of the 1971 Act, it certainly fell within the generic definition of a controlled drug under paragraph 1(c).

It was argued by the appellants that the substance in question was not controlled since the procedure that they had followed in order to produce MDMA did not involve a chemical process to achieve a substitution of alkylenedioxy into the ring of the molecule, as set out in the statute. Both at trial and before the Court of Appeal, the appellants suggested that the term “structurally derived from” should be given its ordinary dictionary meaning and required the Crown to prove that the powder confiscated had in fact been structurally derived from one of the substances listed in the manner specified. The two alleged that they had begun with the starter material isosafrole which already contained alkylenedioxy, thereby eliminating the need for them to engage in any type of chemical substitution. Evidence was given by Dr G. that it was possible to manufacture MDMA from non-controlled, legal substances, including isosafrole, which already have the alkylenedioxy substituent in the ring of their molecules. It was not possible, however, for him to determine by analysis what had been the starter material in this instance.

The Court of Appeal rejected this argument in favour of the Crown’s submission that subparagraph (c) should be read as a definition which simply identified the drugs under control, and not as one which specified that a drug would only be controlled if produced from one of the substances defined by a particular chemical process. It was held that, although in most cases Parliament’s intention should be determined by giving words in a statute their ordinary and natural meaning, where the subject matter was highly technical, as in paragraph

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64 Ibid.
65 Ibid., p 822.
66 Ibid., p 823.
67 Ibid., p 823.
68 At the time the offences were committed, Isosafrole was not controlled under UK precursor legislation. Recall from Chapter 4 that following the recommendations of the CATF, four of the precursor chemicals used in the manufacture of MDMA were added to Table I of the 1988 Convention in 1992. From that time on Parties to the Convention were required to introduce the control measures set out in Article 12.
69 Ibid., p 822.
1(c), words must be given their ordinary and natural meaning as interpreted by a limited number of persons trained and qualified to understand them. In this case the only evidence provided by such an expert was to the effect that subparagraph (c) encompassed a wide range of hallucinatory substances which could be produced with molecules that have a particular type of structure. The Court of Appeal was entitled to accept the opinion of that expert that “structurally derived from” was a term of art describing the substances to be proscribed by reference to their molecular structures rather than to the chemical process by which they had been manufactured. It was concluded that the words in the statute could not have been intended by Parliament to confine the substances caught to a limited number of end-products synthesised in a particular way -- first, because expert evidence had been provided that it would be extremely unlikely that hallucinatory substances could be produced by literally following the words of the statute and secondly, because that would result in an absurd finding that it would be a criminal offence to manufacture MDMA in one way, but perfectly legal to produce it using a different chemical process. The testimony of Dr G. had made it clear that it would be enormously difficult, if not impossible, to determine in each case what the starter material had been and which chemical process was used.

In September 1997, police alerted by intelligence that a 21 year old had been purchasing quantities of the precursors needed for the manufacture of synthetic drugs discovered a range of NSDs during a raid on his family home in Cambridgeshire. Examination of the chemicals seized at the house indicated that the young suspect, Michael Collins, had manufactured the Class A drugs 4-bromo-2,5-dimethoxyphenethylamine (2CB or Nexus) and 4-bromo-2,5-dimethoxyamphetamine (DOB or Bromo STP), both compounds caught by the generic definition of phenethylamine in the Misuse of Drugs Act. Collins was also discovered to be in possession of necessary precursor chemicals, along with a copy of PIIKAL and personal notes suggesting that he was intending to experiment with a number of the analogues listed therein. Charges were brought against the accused for producing, supplying and possessing a controlled Class A drug, contrary to the Misuse of Drugs Act 1971. An interesting argument was put by the defence counsel. First, it was asserted that the defendant had not intended to manufacture the controlled drugs 2C-B and DOB, but rather the N-hydroxy analogues of those compounds (i.e. N-hydroxy 2CB and N-hydroxy DOB) which are not controlled since they are not captured by the generic definition of phenethylamine. Furthermore, it was

70 It is somewhat curious that the defence in this case did not try to call their own expert witness to argue that paragraph 1(c) should be given a strictly literal reading and thereby required the Crown to prove that a substance had been structurally defined in the manner specifically outlined. It may be that such a favourable witness was impossible to locate or that the defence did not have the resources to seek them out. The situation was very different in the cases contested in the United States and Australia, where both sides called highly qualified experts who offered conflicting evidence on whether or not a substance could be considered to be controlled under the relevant drug laws. See further discussion below.

71 The Court of Appeal also rejected the appellant’s argument that the phrase “by substitution in the ring to any extent” imparted a positive human act of intervention at some stage after the identification of the first substance. R v Couzens and Frankel, supra n.63, p 823.

72 Ibid., p 824.

73 R v Michael Andrew Collins, unreported, committed for trial from Huntingdon Magistrates Court to Peterborough Crown Court, 18 May 1998, Crown Prosecution Papers- NFR/CCCP 09/(04.97). Information on this case was initially provided by Peter Claxton and Dr Mike Jenkins in their lecture, “The Case of Michael Collins”, The Scientific Investigation of Drugs, Conference, Airth Castle, 7-8 May 1999. Subsequent information was obtained by viewing Court transcripts and preparatory documents provided by the Crown Prosecution Service, Cambridgeshire.

74 See the Index of Synthetic Psychotropic Drugs at Appendix A for the full chemical names of these drugs.

75 The generic definition does not encompass compounds in which one of the hydrogen atoms on the nitrogen is substituted by a hydroxyl (-OH) group. “Scientific Evidence in R v Michael Collins”, prepared by DCM Jenkins, 14.1.99, Forensic Access, Berkshire, MJ/4022/98, supplied by Crown Prosecution Service, Cambridgeshire.
suggested that the chemical compounds seized could originally have been those N-hydroxy analogues but the heat involved in the forensic analysis process had caused them to decompose to the corresponding illegal amine.

There were a number of reasons for rejecting both elements of this defence. First, Collins had admitted in the police interview shortly after he was arrested that he had manufactured 2CB and had only changed his argument after consulting with his lawyer. Secondly, handwritten notes were discovered at the laboratory detailing experiments to manufacture 2C-B and DOB, not their N-hydroxy analogues. Thirdly, at Collins' home authorities seized precursors and intermediates required for the production of the controlled drugs. In respect of the contention that the heating process could have produced erroneous results, the prosecution called expert evidence to show that none of the tests used could have caused the breakdown of the legal hydroxy compounds to the controlled analogues. The main method of forensic analysis relied on was a technique known as Gas Chromatography/Mass Spectroscopy (GC/MS), causing some, but not complete degradation of the product. Analysis of the powders and residues discovered at Collins' home revealed that only one component was present after analysis, i.e. 2C-B or DOB, with no indication of any N-hydroxy products as would have been the case if this had been the original material. Other tests involving Thin Layer Chromatography (TLC), carried out at room temperature so that no thermal degradation of the sample would result, clearly revealed that the compounds analysed were 2C-B and DOB. Finally, a testing procedure known as Nuclear Magnetic Resonance Spectroscopy (NMR), involving no heating of the substance, was used to confirm the original analysis that the powders confiscated contained the controlled drugs. Despite the failure of the defence arguments here (the accused was convicted and sentenced to five years imprisonment) arguments were put forward that should alert authorities to the need for caution in applying testing procedures and it will be interesting to see if such issues are ever raised again in a more ambiguous analogue case.

In a number of instances authorities have been forced to think of innovative ways in which to allow for the seizure and prosecution of NSDs that are not specifically scheduled and are not captured by the generic definitions. In July 1998, a lorry entering the UK from the Czech Republic was seized by customs officials in Dover carrying approximately 25,000 tablets of 4-MTA, one of the 36 compounds due to be separately scheduled some time in the year 2000. Since the tablets contained no controlled drug, the operators could not have been prosecuted under the Misuse of Drugs Act. It was still possible, however, for Customs to seize the entire truckload of goods, given that the 4-MTA was found alongside a quantity of Cannabis and Cannabis resin, both classified as Class B drugs. Section 141(1) of the UK Customs and Excise Management Act 1979 authorises the forfeiture of the container in which controlled drugs are concealed. In another case 4-MTA sent through the post in a small

76 Each of these arguments is set out in "Further Statement of witness, Peter Brian Claxton, Forensic Scientist, Huntington Laboratory", 26 January 1997, Lab. Ref. F/97/05457.
77 NMR is a testing method which enables scientists to measure the absorption of radio wave energy while the sample is held within a powerful magnetic field, so as to identify its exact composition. For the purposes of the case, an experiment was conducted during which the legal N-hydroxy analogues were synthesised. They were then tested and found to be different to the substances seized by both proton NMR and Carbon-13 NMR. For non-chemists, it is enough to appreciate that tests revealed that the seized substances were sufficiently different in chemical structure to satisfy forensic scientists that they could not have been N-hydroxy analogues at the time they were confiscated.
78 EMCDDA, Report on the Risk Assessment of 4-MTA in the Framework of the Joint Action on New Synthetic Drugs (Lisbon, EMCDDA, 1999) Annex IV, p 2. It is thought that the drugs were originally manufactured in Belgium or the Netherlands.
79 Information supplied by Joe Onofrio, Senior Customs and Excise Officer, HM Customs and Excise, London, Interview, May 1999.
80 Customs and Excise Management Act, 1979, Chapter 2. Section 141(1) reads: "Where any thing has become liable to forfeiture under the Customs and Excise Acts -
packet was seized by Customs.\textsuperscript{81} The sender in this case could not be charged with supplying a controlled drug but could be charged with fraud since he had falsely identified what was contained within the packet.\textsuperscript{82}

In the event that a suspect found manufacturing, possessing or distributing a non-scheduled compound honestly believes that he or she is dealing with a controlled substance, it may be possible for the prosecution to secure a conviction for attempt to commit a crime under the Misuse of Drugs Act 1971. In one such case, James Docherty was found in possession of 20 white tablets in a Scottish nightclub in 1994. Although when interviewed by police Docherty confessed that the tablets were ecstasy, they were later examined by forensics and were found not to contain any controlled substance. The accused was charged under Section 19\textsuperscript{83} (attempt to commit a crime under Section 5(3)) since he did indeed intend to supply tablets he mistakenly believed to contain a controlled drug.\textsuperscript{84} An appeal from conviction was dismissed by the High Court of Justiciary in 1996.\textsuperscript{85} The Court rejected the appellant’s argument that since the tablets he had in his possession did not in fact contain a controlled drug, it was not possible for him to have attempted to possess a controlled drug in contravention of the Act. It was held that in respect of the charge of attempt, it is not necessary to consider whether or not it is impossible for the completed crime to be committed.\textsuperscript{86} All that needs to be shown is that the accused has the necessary \textit{mens rea} and has taken some positive step towards executing his purpose.

There is another option for prosecuting those responsible for making and distributing non-scheduled NSDs that does not appear to have been utilised by law enforcement authorities.\textsuperscript{87} Under the Medicines Act 1968,\textsuperscript{88} it is forbidden to sell, supply, export or manufacture any “medicinal product” without the requisite license (Sections 7 and 8). Although NSDs are manufactured in the clandestine sector for recreational use, they appear to be captured by the definition of “medicinal product” in Section 130(1) as a substance sold, supplied, exported or manufactured for use by human beings for “medicinal purposes”. “Medicinal purposes” is further defined in Section 130(2) as including the purpose of “preventing or interfering with the normal operation of a physiological function, whether permanently or temporarily, and

\begin{itemize}
  \item[(a)] any ship, aircraft, vehicle, animal, container (including any article or passengers’ baggage)
  \item or other thing whatsoever which has been used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture, either at a time when it was so liable or for the purpose of the commission of the offence for which it later became so liable; and
  \item[(b)] any other thing mixed, packed or found with the thing so liable, shall also be liable to forfeiture.
\end{itemize}

\textsuperscript{81} Information supplied by Joe Onofrio, Senior Customs and Excise Officer, HM Customs and Excise, London, \textit{Interview}, May 1999.

\textsuperscript{82} The offender can be charged under Section 167(1) of the \textit{Customs and Excise Management Act} 1979 which reads:

\textbf{If any person either knowingly or recklessly –}

\begin{itemize}
  \item[(a)] makes or signs, or causes to be made or signed, or delivers or causes to be delivered to the Commissioners or an officer, any declaration, notice, certificate or other document whatsoever …
  \item being a document produced or made for any purpose of any assigned matter, which is untrue in any material particular, he shall be guilty of an offence under this section and may be detained; and any goods in relation to which the document or statement was made shall be liable to forfeiture.
\end{itemize}

\textsuperscript{83} Section 19 reads in full: “It is an offence for a person to attempt to commit an offence under any other provision of this Act or to incite or attempt to incite another to commit such an offence”.

\textsuperscript{84} Section 5(3) prohibits the possession of a controlled drug with intent to supply.


\textsuperscript{86} \textit{Ibid.}

\textsuperscript{87} Information confirmed by Mr Simon Hewitt, Home Office, Action Against Drugs Unit, \textit{Interview}, March 2000.

\textsuperscript{88} Medicines Act 1968, 25 October 1968, Chapter 67.
whether by way of terminating, reducing or postponing, or increasing or accelerating, the operation of that function or in any other way\(^\text{89}\). This would certainly describe the effect of a stimulant like MDMA and related ecstasy compounds which are manufactured specifically for the purpose of interfering with the physiological functions of the human body. The major problem with relying on the Medicines Act to prosecute dealings with NSDs is that the maximum penalty that can be imposed is two years imprisonment, as compared with fourteen years for manufacture and supply under the Misuse of Drugs Act.\(^\text{89}\) If the compound in question proved to be extremely dangerous, this would not be considered adequate. Yet if it were not found to be harmful, the two year penalty would seem to be far more appropriate a punishment for failing to satisfy licensing regulations. Although the Medicines Act could not, of course, be used to prosecute a person for possession of an unscheduled compound, it does provide for a remedy against those seeking to profit from the clandestine manufacture of untested goods.

Generic provisions under the Misuse of Drugs Act may be viewed as problematic for two very different reasons. On the one hand, the classification of families of drugs as controlled substances by definition of their chemical structure does not embrace a significant number of compounds, some of which (particularly 4-MTA) have been shown to be extremely harmful. It is submitted that this would not be a major difficulty, even in the event that such a compound proved popular, provided the UK develops a more effective system for the rapid scheduling of NSDs. On the other hand, it may be argued that a generic definition of controlled substances has the potential to result in unreasonably harsh penalties being imposed on persons wishing to engage in harmless experimentation with NSDs. As mentioned above, since amphetamine itself is classified as Class B, it will therefore attract lower penalties than certain analogues that will be classified as Class A drugs if found to come within the generic definition in paragraph (c). What is the justification for the imposition of a more severe penalty in relation to a certain analogue despite the fact that it may be found to have almost identical pharmacological properties or even where it could be proven to be far less hazardous than the parent compound? Authorities may submit that all chemicals that have been modified in a manner that means they are included in the generic definition (by substitution either at the ring or the side-chain) are likely to have stimulant and/or hallucinogenic properties\(^\text{90}\) so that recreational use of these substances should be penalised regardless of whether they are as physically dangerous as other Class A drugs. Furthermore, it could be asserted that the aim of the UK Misuse of Drugs Act is to discourage clandestine production and in order to do so harsh penalties must be imposed in relation to all chemical compounds encompassed by the generic definition of phenethylamines. It is arguable, however, that it may have been more prudent to rely on a remedy under the Medicines Act. In that case, the unlicensed sale, export, import or manufacture of substances could have been discouraged and penalised, while ordinary possession would not have been subject to heavy sanctions.

Thus far, the generic provisions have only been used to prosecute a limited number of substances, primarily MDMA. This is due to the fact that law enforcement authorities have not made a significant number of seizures involving NSDs other than MDMA or those specifically listed under the Schedules of the 1971 Act. The introduction of generic legislation was intended to be a deterrent measure and it may be argued that this has successfully discouraged clandestine operators from experimenting with a variety of new synthetic compounds. It is suggested, however, that a more important reason for the absence of variable NSDs is that, given the popularity of MDMA and the failure of existing drug controls to limit

\(^{89}\) Section 45(8). The Medicines Act provides for law enforcement authorities to be authorised to enter premises to investigate whether the Act is being contravened (S.111) and to seize goods and documents appearing to be evidence of a breach (S.112).

\(^{90}\) A point made earlier in reference to the manipulation of phenethylamine compounds. See supra p 111.
the widespread availability of that drug, there is less incentive for operators to experiment with the manufacture of new compounds falling outside of controls. If the future brings a significant increase in the distribution of different NSDs, prosecution authorities may be faced with an increasing number of cases that will put the effectiveness of the generic definitions to the test. The philosophy driving drug scheduling will be put under further scrutiny in the event that a mind-altering substance is proven to be harmless, and yet is nevertheless captured by the generic definition and prosecuted as a Class A drug.

The case of Ireland

In 1987, Ireland became the only other EU country to adopt ‘generic family’ definitions based on the UK model outlined above. The Misuse of Drugs Act, 1977 (Controlled Drugs) Declaration Order, 1987,\(^1\) was expressly intended to curb the recent increase in the abuse of ‘designer’ drugs by extending controls to encompass a range of compounds related to the list of substances already scheduled.\(^2\) The Irish Act covers five of the six generic families included under the equivalent UK legislation. Substances chemically related to tryptamine, phenethylamine, fentanyl and pethidine are controlled under Part 1 of the Schedule, paragraphs (a) to (d), directly copied from the UK provisions.\(^3\) Substances structurally related to barbituric acid are controlled under Part 2 of the Declaration Order, once again modelled directly on the UK equivalent. Irish authorities, like their counterparts in the United Kingdom, are concerned by the appearance of a new range of chemical compounds not covered under the generic provisions and have been prompted to consider expanding existing controls.\(^4\) There has recently been discussion of the need to add the 36 compounds discussed above -- 34 listed in PIHKAL, along with 4-MTA and N-hydroxyamphetamine -- to those specifically listed on existing schedules.\(^5\) At the time of writing, however, no further action had been taken and it is legal to possess each of those compounds in Ireland.


\(^{92}\) In a Summary of the 1987 Declaration Order and related Regulations, the purpose of the Regulations is expressed as being “to curb the abuse of certain of those substances in those Conventions [the 1961 Single Convention on Narcotic Drugs and the 1971 Convention on Psychotropic Substances] and certain other drugs, precursors and designer drugs, which has become common in recent years”. “Misuse of Drugs Regulations, 1988 (S.I. No. 328 of 1988), Misuse of Drugs (Exemption) Order, 1988 (S.I. No. 326 of 1988), Misuse of Drugs (Designation) Order, 1988 (S.I. No. 327 of 1988) - Summary”, Internal memorandum, provided by Department of Health and Children, Government of Ireland.

\(^{93}\) Note that the wording used is identical in every respect, other than the fact that paragraphs in the Irish legislation refer to “substances structurally derived from ...” rather than “compounds structurally derived from”.

\(^{94}\) Information supplied by Noelene Quinn, Pharmacist, Department of Health and Children, Dublin, Telephone conversation, 12 February 2000.

\(^{95}\) Ibid.
The Analogue Approach

The case of the United States of America

As was made clear in Chapter 2, in the United States the concept of manufacturing chemical variants that are pharmacologically similar to controlled substances, and yet not themselves under control, is not new. During the 1960s and 1970s, US police seized quantities of amphetamine and mescaline analogues, including MDA, DMA, TMA, DOM, DOB and STP. In the 1970s analogues of the hallucinogenic drug phencyclidine (PCP) and the depressant methaqualone were synthesised in a small number of clandestine laboratories. Several of these newly identified substances were added individually to the list of prohibited drugs. Since the beginning of the century, US drug control legislation had been developed to regulate a limited list of substances judged individually to be too hazardous to be left uncontrolled. Under The Uniform Narcotic Drug Act of 1932, the first attempt to introduce a comprehensive and uniform national law covering dangerous drugs, the substances under control were those specifically listed in the legislation. Subsequent Acts followed the same reactive pattern; in the event that ‘new’ drugs became problematic, each one was added to a list of controlled substances some time after it had been discovered on the illicit market.

In a very small number of US States, authorities responded to the emergence of this first wave of previously uncontrolled hallucinogens not only by scheduling substances individually, but by modifying their drug control legislation to include a broader ‘group’ definition of controlled substances. In Ohio, the relevant drug statute was modified in the mid-1960s, thereafter proscribing in addition to a specific list of substances, “any other compound, mixture, preparation, or substance which produces hallucinations or illusions when introduced into the body”. Maryland was another State that reacted to the increasing popularity of a range of synthetic hallucinogens by attempting to introduce a different type of ‘catch-all’ definition into its drug laws. Like other States, Maryland had added LSD to the schedule of its drug laws soon after the hallucinogen was proclaimed to be a social menace in the late 1960s. The relevant provision was unusual, however, in that it defined LSD as “d-Lysergic acid diethylamide or 7-methylindo[4, 3-fg] quinoline-9-carboxylic acid” [an obscure carboxylic acid] and any other similar drug or comparable compound. Despite these isolated instances where Acts were modified to catch a small ‘group’ of hallucinogens, in most State jurisdictions of the US, and at a national level, legislators were satisfied by a substance-

98 In the case of LSD, for example, a number of US States added the drug to their list of banned substances following reports of its abuse during the 1960s. Eventually, the Drug Abuse Control Amendments of 1965 (21 USC 355 (1965), amended by 21 USC 801-904 (1970)) made possession of LSD and a limited number of hallucinogens a federal offence. See JM Cameron, “Synthetic Drugs Legislation: Broadening the Classifications by Defining ‘Controlled Substance Analogue’ as a Percentage of Common Structural Elements”, University of Detroit Law Review, Vol 64, 1987, p 775 at p 782, citing Brecher, Licit and Illicit Drugs, pp 367-68
99 Ohio Revised Code, Section 3719.40. In the 1969 case of In re Baker (18 Ohio App. 2d 276, 248 N.E. 2d 620 (1969)), a juvenile defendant was successfully prosecuted under this effects-based provision when he sold teaspoons of an asthma remedy (asthmador), instructing his clients that it would “put them on a trip” if they swallowed it. The substance did indeed have hallucinogenic properties and could induce mania and delusions if used in the way the defendant had instructed it should be.
100 Maryland Code, Article 27, Section 122B. In the case of Mason v State of Maryland (Md. App. 632, 256 A.2d 773 (1969)), the defendant successfully challenged his conviction under the “similar drug or comparable compound” provisions. In the opinion of the appellate court the evidence presented was not sufficient to support a finding that the substance DMT found on the accused was sufficiently similar to LSD.
specific approach to controlling dangerous drugs. Elsewhere in this thesis the comment has been made that the first wave of clandestine synthetic drug manufacture involving the production of LSD and other hallucinogens during the 1960s and 1970s did not become a major problem for law enforcement authorities. Rather, like other phases or fads of those decades, the interest in consuming and mixing a range of new psychedelic compounds appeared to have waned by the middle of the 1970s. At that time, therefore, there was not the impetus for the US Government to introduce a uniform generic approach to controlling variable synthetic drugs subject to abuse.

In the early 1980s, a disturbing trend involving the clandestine production of a series of 'designer' drugs prompted calls for a federal response to synthetic drug control. We have seen that it was not ecstasy that raised the alarm over the second wave of synthetic variants not controlled under existing drug laws. Rather, authorities had discovered that extremely dangerous narcotic analogues were being traded as high grade heroin, and were responsible for a large number of deaths within a short period of time. For the first time, authorities had uncovered a trade in totally synthetic, highly potent narcotic compounds, many of them thousands of times stronger than their parent drug and it was soon recognised that the permanent scheduling procedure was not flexible enough to cope with the new trend. Under Section 811, Title 21 of the United States Code, the Attorney General has the power to place new substances on the permanent schedules of existing drug laws, following a lengthy scheduling procedure which involves a scientific and medical evaluation of the substance in question by the Secretary of Health and Human Services, in addition to notice and a hearing by the Attorney General in accordance with the Administrative Procedure Act. Since the permanent scheduling procedure may take in excess of fifteen months, it clearly does not allow for rapid control over synthetic compounds whose chemical structures can be altered overnight.

It was in response to the phenomenon of designer narcotic drugs that the US Government introduced the Comprehensive Crime Control Act of 1984, commonly referred to as The Emergency Scheduling Act. This had the effect of amending Section 811 by adding to it subsection (h), a provision allowing the Attorney General to place a drug temporarily in Schedule I of the Controlled Substances Act, following a much speedier assessment of its pharmacological properties. Temporary scheduling can be approved provided such action is judged to be "necessary to avoid an imminent hazard to the public safety". A substance may be temporarily scheduled for a period of one year (with an additional six months if necessary) while the final scheduling decision is being made. Between 1985 and 1990, sixteen new

101 AC Church and FL Sapienza (eds), Proceedings of Controlled Analog Leadership Conference (USA, US Department of Justice; DEA, 1986), p 3. See also Chapter 1, supra p 16.
102 Ibid. Analogues of the parent drug fentanyl, e.g. 3-methylfentanyl, were associated with over 100 deaths in California between those six years. For further discussion of the narcotic analogues, see Chapter 2.
104 CL Smith, supra n96, p 117.
108 In the 1987 case of United States of America V Spain, 825 F, 2d 1426 (10th Cir. 1987), the Court of Appeal held that the subdelegation of temporary scheduling power to the Administrator of the DEA under Section 811(h) was not constitutionally valid. Subdelegation was considered to present a threat to the separation of powers doctrine. See further, "The Emergence and Emergency of Designer Drugs:
analogue were brought under control pursuant to the 1984 Act.\(^{109}\) The circumstances under which subsection (h) was very quickly put to the test are a reflection of how rapidly new substances began to appear on the market and the nature of the 1980s ‘designer’ drugs phenomenon.

Such was the interest in these drugs that by 1986 the US Government had determined that emergency scheduling provisions alone would not be enough to effectively deter clandestine production. The *Controlled Substance Analogue Enforcement Act of 1986*\(^{110}\) (known also as the *Designer Drug Enforcement Act") ushered in a more radical change in the way in which new synthetic drugs were controlled. This law served to amend the *Controlled Substances Act* by providing that under certain circumstances “controlled substance analogues” are to be treated as Schedule I drugs.

The exact provisions are reproduced below:

**Section 1202. Treatment of Controlled Substance Analogues**

Part B of the Controlled Substances Act is amended by adding at the end the following new section:

**Section 203** - A controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of this title and title III as a controlled substance in Schedule I.

**Section 1203. Definition**

Section 102 of the Controlled Substances Act (21 U.S.C 802) is amended by adding in at the end thereof the following:

**Section 32 (A)** Except as provided in subparagraph (B), the term ‘controlled substance analogue’ means a substance --

(i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II;

(ii) which has a stimulant, depressant or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or

(iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.

(B) Such term does not include --

(i) a controlled substance;

(ii) any substance for which there is an approved new drug application;

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\(^{110}\) On 27 October 1986, the *Anti-Drug Abuse Act of 1986* (Public Law 99-570) was signed by the then President Ronald Reagan. Subtitle E of Title I of this law is the *Controlled Substances Analogue Enforcement Act of 1986* (codified at 21 U.S.C 813, Section 32).

(iii) with respect to a particular person any substance, if an exemption is in effect for investigational use, for that person, under section 505 of the Federal Food, Drug and Cosmetic Act (21 U.S.C 355) to the extent conduct with respect to such substance is pursuant to such exemption; or

(iv) any substance to the extent not intended for human consumption before such an exemption takes effect with respect to that substance.

The 1986 Act introduced a unique legislative model criminalising the unauthorised use of a range of synthetic analogues not specifically listed in the Schedules of existing drug laws, but chemically related to those that are. There is a marked difference in the rationale behind the 1984 subsection (h) emergency scheduling provision and the analogue amendment of 1986. Subsection (h) may be used to avoid the protracted permanent scheduling procedure only where there is some evidence that a newly identified drug poses an "imminent hazard" to public health. By contrast, the 1986 Analogue Act is intended to anticipate designer drugs that may later come on to the market, allowing the US to prosecute for unauthorised activities involving compounds without requiring that they be separately scheduled or proven to be dangerous, either at that time or in the future.

The fact that unspecified analogues are categorised under Schedule I, thereby attracting the highest penalty, reflects the perceived seriousness of the 'designer' drug scare and the determination of US authorities not to tolerate experimentation with compounds intended for recreational use. Just as they are in the United Kingdom, the variety of ecstasy-related compounds (MDEA, MBDB etc.) will be prosecuted at the highest end of the penalty scale. All controlled substances falling within the definition in Section 32A attract the same penalty despite the fact that some may be extremely harmful and others relatively innocuous. That is, the penalties attached to dealings with a particular designer drug are not dependent upon an assessment of its dangerous properties, but rather, the activity of selling, producing or consuming a designer drug intended for recreational rather than therapeutic use is regarded as wrongful per se.

At the time the United States introduced its analogue laws, it was not legal to manufacture for sale or to sell or distribute new synthetic analogues destined for the illicit market. Persons involved could have been prosecuted under the Federal Food, Drug and Cosmetic Act for failing to obtain the license required to manufacture, sell, import or export a new drug. There were two reasons why this was not considered to be adequate to deal with the problem of designer drugs. First, the penalties that can be imposed under the Act are relatively light and secondly, the Food and Drug Administration responsible for administering the Act did

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112 United States drug law is structured so that in addition to the Federal Controlled Substance Act of 1986, each State may have in force its own drug laws under which a prosecution can be brought. In some US States, e.g. Texas, legislation has been modified to introduce analogue laws modelled on the Federal provisions, although not necessarily identical. See US Currency v State of Texas, 774 S.W.2d 17 (1989). The decision as to whether a prosecution will be brought under the State or Federal law depends on an agreement between enforcement authorities as to the most suitable option. Information supplied by Jacque Freeman, Publications Office, DEA, Washington DC, Telephone Interview, May 1998. For a history of the US Federal drug laws, see A Shulgin, Controlled Substances; A Chemical and Legal Guide to the Federal Drug Laws, 2nd edn (Berkley, Ronin Publishing, 1992).


114 Federal Food, Drug and Cosmetic Act (21 U.S.C., Sections 301-392) (1982 and Supp. IV 1986). See, for example, Section 355 (no person shall introduce any new drug unless approval has been obtained from the Secretary of Health and Human Services) and Section 360 (every manufacturer shall register their name and premises with the Secretary of Health and Human Services).

115 Section 333 provides that the penalty for breaching a relevant provision of the Act is imprisonment for a maximum of one year or a fine of $10,000, or both. Any person convicted of the same offence for a second time can be imprisoned for a maximum of three years or fined a maximum of $10,000, or both.
not have the necessary resources to investigate illegal operations.8 Accordingly, no prosecution was ever brought under this Act and far reaching legislation allowing for the imposition of severe penalties for the manufacture, production, sale and possession of NSDs was introduced.

In opting for the analogue model described above, the US Government made a deliberate decision not to follow the example of generic legislation adopted in the UK in 1977. Two reasons have been suggested for rejecting the generic praxis. First, it was thought that defining the parameters of classes of generic substances could be arbitrary. Furthermore, there was some concern that the generic model would result in the imposition of regulatory controls on the legitimate manufacture, distribution, import, export and research use of a range of substances falling within the class designation, thereby retarding legitimate endeavours and drug development. The UK Home Office denies that its generic legislation has ever had any negative impact on legitimate trade or research, since qualified professionals can always apply for permission to deal with any of the substances scheduled under the Misuse of Drugs Act. 9 Yet in the opinion of US authorities the analogue model, requiring the court to assess in each case whether a compound falls within the definition of controlled substances, is less likely to impede bona fide trade and licit drug development.

A number of fascinating appeal court cases have dealt with the issue of whether or not a new synthetic drug can be rightly classified as a “controlled substance analogue” under the 1986 Act. In each case, that question will be one for the trier of fact (the jury where one is present). From a review of a sample of those cases it is immediately clear that there is much room for the defendant to argue that the analogue provisions are ambiguous or vague, at least as they have been applied in his or her circumstances. Cases have been decided both for and against the appellant, with the outcome contingent upon the peculiar facts of the case, the nature of the compound involved and the range of expert evidence that can be adduced. It is because of this inherent confusion generated by the law that it is argued here that the US model is not the most suitable for dealing with new synthetic drugs of abuse.

Since the passage of the Controlled Substances Analogue Enforcement Act of 1986, several defendants have unsuccessfully appealed their convictions on the basis that the federal analogue provisions are so vague as to be unconstitutional. In the 1993 case of USA v Walter Franz, a District Court in Florida dismissed the defendant’s appeal from conviction for numerous offences involving the chemical compound MDMA, some of them committed at a time when MDMA was not specifically listed as a Schedule I substance, but purportedly came within the definition of a “controlled substance analogue”. Franz argued that an Act criminalising the manufacture and distribution of controlled substance analogues was unconstitutionally vague and/or that MDMA was not an analogue within the meaning of the statute. The Court began by affirming that “a penal statute must define the criminal offence with sufficient definiteness so that people of ordinary intelligence can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory

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116 See the discussion in CL Smith, supra n.96, p 117.
121 In fact, the defendant appealed the earlier decision on five grounds, each of which were dismissed by the Court. In addition to the two grounds cited above in the text, it was also asserted that MDMA could not be both an analogue and a Schedule I Substance as the prosecution had suggested, that the permanent scheduling of MDMA by the DEA in 1988 violated a remand order of the First Circuit the previous year and that the findings of the DEA were not based on any substantial evidence, therefore making the scheduling unlawful. See ibid., p 1479.
enforcement". In this case, however, it agreed with earlier authority confirming that the definition of "controlled substance analogue" in the 1986 Act does satisfactorily define the scope of the criminal offences committed under it. Thus, it could not be said to be unconstitutionally vague either standing alone, or in the circumstances of this case. As regards the argument concerning MDMA, the specific compound at issue, expert evidence had been given to show that it could be said to be "substantially similar" in both chemical structure and pharmacological effect.

Yet there are circumstances where courts will accept a challenge to a charge brought under the US Controlled Substances Analogue Act on the basis that the definition of a controlled substance analogue as applied to the particular substance involved and the facts of the case is unconstitutionally vague. In USA v Damon Forbes et al, the District Court of Colorado dismissed an action against defendants who had been charged with the distribution of alphathyltryptamine (AET) in violation of the Analogue Act. AET was not itself listed on any schedule to the Act but was alleged to be "substantially similar" in chemical structure to dimethyltryptamine (DMT) and diethyltryptamine (DET), both of which are Schedule I controlled drugs. The facts of this case are unique. The defendants had not manufactured AET themselves, but had rather purchased it from the Sigma Chemical Company via the US mail and had re-packaged it and sold it on to other purchasers. Although AET was withdrawn from sale as an anti-depressant in the 1960s on account of its unacceptable toxic side-effects, it was still possible for members of the public to purchase directly from two chemical manufacturers in the US, in the absence of any restrictions as to who ordered the drug or how it was to be used.

The Court dealt initially with a question of statutory construction disputed by the parties. The defendants asserted that Section 32 of the Analogue Act (reproduced in the text above) involves a two-pronged definition requiring the prosecution to prove:

(i) that the analogue has a substantially similar chemical structure to one already under control and
(ii) that it has a substantially similar (or greater) stimulant, depressant or hallucinogenic effect on the central nervous system or

(i) that the analogue has a substantially similar chemical structure and
(ii) that it was represented or intended to have such an effect.

It was argued by the Government, however, that a substance may be a controlled analogue provided it satisfies any one of the three clauses in Section 32. Four main reasons were given by the Court for rejecting the Government’s argument and accepting the defendant’s construction of the Act. First, the application of basic grammatical principles suggested that the prosecution must prove two elements of the definition (clauses (i) and (ii) or clauses (i)

123 In United States of America v Granberry, 916 F.2d 1008 (5th Cir. 1990), the Court concluded that a “controlled substance analogue” is clearly and specifically defined, in terms readily comprehensible to the ordinary reader”, so that the Act does provide adequate notice of what conduct is prohibited. In its view there was “nothing vague about the statute”. In United States of America v Desurma, 865 F.2d 651, 653 (5th Cir. 1989), it was held first, that there is no vagueness in the Analogue Act itself and secondly, that the legislative history of the Act makes it clear to defendants what crimes are proscribed.
124 The then recent cases of United States of America v Desurma, ibid and United States of America v Raymer, 941 F.2d 1031, 1045-46 (10th Cir. 1991), were cited as authority to confirm that MDMA could indeed be considered a “controlled substance analogue” within the meaning of the Act.
125 United States of America v Damon Forbes et al, supra n.119, p 232. This case is discussed by the Shulgins in TIHKAL: The continuation, supra n.59, p 439.
126 Ibid., pp 234-237.
and (iii). Secondly, the basic rule of statutory construction that a statute must be construed so as to avoid unintended or absurd results favoured the defendants. Otherwise, if clause (ii) were read independently, alcohol or caffeine could be considered controlled substance analogues because they are capable of inducing stimulant or depressant effects substantially similar to controlled substances and if clause (iii) were read independently, powdered sugar represented to be cocaine could be prosecuted as a controlled analogue. Thirdly, the defendant’s argument was supported by the legislative history of the Act, given that both the Senate Judiciary Committee and the House of Representatives envisaged a two-pronged definition of controlled substances during negotiations over the proposed Analogue Act.127 If, as the Government contended in this case, a substance could be found to be a controlled analogue in the absence of any requirement that it have a substantially similar chemical structure, the stated purpose of Congress would be significantly and improperly expanded. Finally, both government and defence witnesses had testified that the question of the structural similarity of a particular compound to a scheduled drug must be evaluated partly in conjunction with an evaluation of the molecule’s hallucinogenic and stimulant activity. Since structurally similar substances will have a similar pharmacological effect on the central nervous system, a finding of similar effects provides at least an indication that the molecular structure of a ‘new’ drug should be classified as substantially similar. It was therefore held that a compound could be classified as a controlled substance analogue only if it satisfied clause (i) of Section 32(A) in addition to either clauses (ii) or (iii).

The defendants moved to have the prosecution dismissed on the basis that it violated their right to due process protected under the Fifth Amendment to the Constitution of the United States.128 It was argued that the statutory definition of a controlled substance analogue as applied to AET in the circumstances of this case was unconstitutionally vague. Justice Babcock reitered two important reasons why vague laws would offend the Fifth Amendment constitutional guarantee.129 First, laws must give persons of ordinary intelligence a reasonable opportunity to know what is prohibited so that they may vary their actions accordingly. If not, vague laws may trap the innocent by not providing them with fair warning. Secondly, laws must provide explicit standards for law enforcement authorities so as to avoid arbitrary and discriminatory application.

The relevant statutory standard to be determined was based on the phrase “the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II”. Since this wording incorporates a scientific term of art, experts in the fields of chemistry and pharmacology were called to give evidence in order to determine its meaning. The Court held that while in other cases “substantially similar” could be adequately defined and its meaning applied to the compound in question, in the circumstances of this

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127 See S.1437, 99th Cong., 1st Sess., 131 Cong. Rec. 17,842-43 (1985) and H.R. 5484, 99th Cong., 2d Sess., 132 Cong. Rec. H6628 (Sept.11, 1986). In respect of what is now paragraph (iii) of Section 32(A), the American Chemical Society argued in the House of Representatives that in order to provide adequate protection for legitimate research, the Government should be required to prove not only that a substance had been represented to have a certain substantially similar effect, but also that it did in fact have a substantially similar effect in addition to a substantially similar chemical structure. This idea was firmly rejected by the Department of Justice which considered that in certain circumstances paragraph (iii) would provide for straightforward convictions without having to wait for a lengthy assessment of the pharmaceutical properties of a drug.

128 The Fifth Amendment reads as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury … , nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation.

129 USA v Forbes, supra n.119, p 236-237.
case, as applied to AET, the term did fall foul of the vagueness doctrine.\textsuperscript{130} It was noted that there was a "great diversity of opinion" as to whether or not the structure of AET was substantially similar to DMT or DET.\textsuperscript{131} On behalf of the defendants, two expert neuropharmacologists gave evidence that the chemical structure of AET was not substantially similar to the controlled drugs, since it could not be derived from "minor manipulations or tinkering" with the DMT or DET molecule.\textsuperscript{132} Furthermore, AET could not be said to have a "substantially similar" hallucinogenic or stimulant effect on the central nervous system, as is required under the federal Act. On its side, the Government relied upon the evidence of DEA chemist Frank Sapienza who testified that AET can and should be considered a controlled analogue under the statute.\textsuperscript{133} Although he agreed that it could not be synthesised from either DMT or DET, Sapienza based his finding that the drug was "substantially similar" to those two compounds on the fact that all three share a structural family root (the tryptamine family) and all produce some degree of hallucinogenic and stimulant activity. It is interesting to note, however, that another DEA chemist, Roger Ely, contradicted Sapienza, testifying that the chemical structure of AET could not be considered "substantially similar" to either DMT or DET.\textsuperscript{134} Ely was focusing on another component of the AET molecule known as the amine group and concluded that while AET is a "primary amine", both DMT and DET are "tertiary amines". As a result, Sapienza was moved to admit that "reputable scientists in this field disagree even on the methodology applicable to determine structural similarity".\textsuperscript{135}

In addition to the lack of scientific consensus as to whether AET had the requisite structural similarity, there were other factors that made it extremely difficult for the public to determine whether or not the substance was prohibited, providing evidence of the vagueness of the statute as applied to these facts. Even on the day of the trial, AET was freely available for purchase through the US mail system and had never been scheduled by the Government despite the fact that it was taken off the pharmaceutical market in the 1960s.\textsuperscript{136} It was somewhat contradictory, therefore, for the defendants to be prosecuted and left open to conviction for a charge attracting very serious penalties. A decision in favour of the defendants was said to be further supported by a purposive construction of the 1986 Analogue Enforcement Act. A review of the legislative history of that Act shows that it was directed at underground chemists who manipulate molecules of controlled drugs in an attempt to create uncontrolled new compounds.\textsuperscript{137} In this case, the defendants had not created or marketed a new designer drug, but were distributing a pre-existing drug obtainable through the post.

According to the Court, it was perhaps even more important a factor in its decision to dismiss the action that the analogue definition as applied to AET was so vague as to permit arbitrary enforcement. In 1990, although the defendant had been investigated by the DEA for allegedly distributing AET, US attorney Ken Buck had declined to prosecute at that time, reasoning that the conflicting opinion of government experts as to whether the compound had the requisite structural similarity made it impossible to prosecute it as a controlled analogue.\textsuperscript{138} In 1992, Forbes was prosecuted by the same office for exactly the same alleged offence. The only thing to have changed in the two years in between were the personalities of the government prosecutors and the chemists attached to the DEA. In the Courts view, "[t]his prosecution

\textsuperscript{130} Ibid. Justice Babcock cited \textit{US v Schneiderman}, 968 F.2d 1564, 1568 (2\textsuperscript{nd} Cir. 1992) and \textit{US v Protex Industries, Inc.}, 874 F.2d. 740, 743 (10\textsuperscript{th} cir. 1989) as authority for the proposition that a statute may be found to be impermissibly vague not only on its face, but also as applied to the particular circumstances of a case.

\textsuperscript{131} Ibid., p 233.

\textsuperscript{132} Ibid., p 233.

\textsuperscript{133} Ibid., pp 233-234.

\textsuperscript{134} Ibid., p 234.

\textsuperscript{135} Ibid., p 234.

\textsuperscript{136} Ibid., p 233.

\textsuperscript{137} Ibid., pp 235-236.

\textsuperscript{138} Ibid., pp 234 and 239.
illustrates precisely the evils attending delegation of basic policy decisions for ad hoc, subjective resolution by those who wield prosecutorial power”. The Government had not prosecuted the chemical company who sold AET to the defendants and provided no “non-arbitrary” reason as to why it had now decided to attempt to prosecute these particular defendants for a very serious drug offence. Moreover, there were no guidelines or standards provided in the statute that would inform the exercise of prosecutorial discretion.

This review of prosecutions pursued under the Act shows that there is much room for ambiguity over the question of what compounds can be classified as controlled drugs. What is the meaning of “substantially similar” in relation to either chemical structure or psychotropic effect? How similar is substantially similar? Since there are “infinite degrees of similarity”, any prosecution under the Act is likely to involve a battle between two expert witnesses regarding the substance’s similarity to any of those already specified in the Schedule. In Shulgin’s view, this “hopelessly vague” term was chosen deliberately so as to allow drug enforcement authorities the freedom to interpret it as they wish; differently in different situations. He points out that one observer looking for something specific may consider two drugs to be quite similar, while another observer looking for something else will find them completely different. The amorphous nature of the term is well expressed by DEA chemist Frank Sapienza commenting in the case of US v Forbes, discussed above, that “reputable scientists in this field disagree even on the methodology applicable to determine structural similarity”.

It has been suggested that a solution to the vagary of the substantially similar test in relation to chemical structure could be found by defining “similarity” in terms of the percentage of identical structural elements required to satisfy this part of the definition of a controlled drug analogue. Cameron argues that the degree of similarity could be quantitatively determined by comparing the number of atoms in the substance in question with the number of those atoms found in a scheduled drug. This requirement would then be expressed as a percentage -- a controlled analogue would be one that was, for example, 50% similar to a drug already under control. Were this test to be applied to the group of highly potent designer fentanyl analogues that appeared in the early 1980s, each one would have been found to be at least 80% similar. It seems likely, however, that there would still be room for dispute over the percentage of similarity that should be required in order for a substance to be considered a controlled analogue. While setting the percentage too high would prevent the successful prosecution of a range of designer drugs that may later appear on the illicit market, requiring too low a percentage correlation may over-extend the proper reach of the criminal law and penalise the possession of harmless compounds. Furthermore, Cameron’s suggestion has no bearing on the second part of the analogue definition and there would still be room for hours of court debate over the meaning of substantially similar central nervous system effect.

There is considerable scope for disagreement, even among experts, as to whether a substance produces the requisite effect and what type of tests should be carried out in order to satisfy the effect requirement in Section 32(A)(ii). It may be argued that animal studies supposedly showing stimulant or depressant effects are not adequate to prove a similar effect on the

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139 Ibid., p 239.
140 Immediately after the decision in Forbes was handed down, the DEA reacted by proposing that AET be placed in Schedule I. In 1993, emergency scheduling legislation was used to bring the compound under control. See A and A Shulgin, TIHKAL; The Continuation, supra n.59, p 441.
141 JM Cameron, supra n.98, p 790-792.
143 USA v Forbes, supra n.119, p 234.
144 JM Cameron, supra n.98, p 792-793.
145 Ibid.
It would be even more difficult to prove that a substance had a hallucinogenic effect on a laboratory animal that would indicate hallucinogenic effects in humans. Researchers are not, however, permitted to test illicit drugs seized in criminal investigations on human subjects. If animal studies were found to be unacceptable, the prosecution may seek to prove substantially similar effect on the basis of the testimony of purported users. The credibility of such testimony could, however, be disputed by the defence on the basis that users may have succumbed to the undue influence of prosecuting authorities. Furthermore, it would be difficult to prove that an identical analogue had been ingested by the witness.

There are several other platforms from which to launch an attack on the wide reaching US analogue provisions. Writing two years after it was brought into effect, Smith suggests that the hasty passage of the 1986 Act resulted in a poorly drafted piece of legislation that may have unintended ramifications. First, he points to the uncertainty of the language used in the statute which leaves it open to a challenge under the void-for-vagueness doctrine. This was indeed a fair warning given the vagueness arguments mounted in court challenges since the article was written. Secondly, there may be room for a challenge under the separation of powers doctrine which holds that Congress cannot “defer legislative responsibility to courts by enacting an ambiguous statute and then expecting the courts to enforce it”. The Department of Justice made no attempt to include in the legislation a definition of “substantial similarity”, nor any guidelines for governing enforcement. It was thought better to leave it to the courts to interpret the Act in a way that would subsequently provide notice to the public of what activity is unlawful. Indeed, the Department specifically stated that it was “confident that the federal courts will construe [substantial similarity] in such a manner as to uphold it constitutionally”. Although, as we have seen, defendants have chosen to rely on the void-for-vagueness argument rather than the separation of powers doctrine, the opacity of the language adopted in the 1986 Act leaves it open to be challenged on more than one constitutional basis.

It would be improper to debate the propriety of the US approach without expressing the current concerns of an interest group that objects to the wide reaching analogue law on the ground that it inhibits research into the utility of synthetic drugs as psychotherapeutic tools. One of the best known among them is Dr Alexander Shulgin, co-author of the controversial publications PIHKAL and TIHKAL, and the man credited with the re-invention of MDMA. In his view, the Controlled Substance Analogue Enforcement Act of 1986 “presents a shameful barrier to a very important segment of scientific research”. Shulgin begins by suggesting that allowing the DEA to influence whether or not medical research will be approved is totally inappropriate. Although responsibility for the approval of a new drug still rests with the Food and Drug Administration (FDA), the DEA can interfere with decisions by determining which analogues they will prosecute under the 1986 Act. That is, the FDA would not be likely to allow an application for a new drug approval where the substance in question has been identified as a controlled substance analogue. Shulgin argues that the influence of the DEA is such that permission to conduct research involving human subjects “is, for the

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146 CL Smith, supra n.96, p 127.
147 Ibid., p 127.
148 Ibid., p 137.
149 Ibid., pp 128-133.
150 Smith points out that the 1948 case of US v Evans (333 U.S. 483) was apparently the last time when such a separation of powers challenge was mounted. However, although an argument based on statutory invalidation under the separation of powers doctrine has not been used in recent years, it has not been discredited. CL Smith, ibid.
152 A and A Shulgin, TIHKAL, supra n.59, p 350.
most part, now given or withheld according to reasons of politics, not of science". It is suggested that there is an important body of research involving exploration of the mind (not merely the brain) that can only be performed using human subjects. Emotions or experiences such as empathy, imagination, ego inflation, creativity, morality and the search for meaning are all experienced uniquely by humans and as such are qualities that cannot be demonstrated by experimenting with laboratory animals. Since the official position, however, is that there is nothing to be gained by the exploration of a normal, healthy person’s state of mind, the risk involved in human experimentation for these purposes is not tolerated and even highly qualified chemists cannot gain approval for the testing required. Shulgin does not advocate a totally unregulated sphere and believes that there should still be laws to ensure that researchers experimenting with human subjects first, obtain informed consent, secondly, seek peer review, and thirdly, accept personal responsibility themselves by initially trying out their analogue at or above the recommended dosage before dispensing it to another human subject. At present, it is arguable that valuable discoveries are jeopardised by the existence of a wide-reaching federal law that prevents qualified researchers conducting experiments on psychotropic tools of the mind.

The US Government appears at this stage to be content with its unique legislative scheme for the control of analogues and there are no plans to modify the approach, despite the problems identified above. The US provision has a wider reach than the generic definition under UK law. Whereas the UK Misuse Of Drugs Act does not cover 34 of the 179 chemical compounds listed in PIHKAL, the DEA claims that most, if not all, of those compounds would be encompassed by the definition of “controlled substance analogue”, and could be prosecuted under Section 203 of the Controlled Substances Act where they were intended for human consumption. According to the DEA the introduction of the analogue statute in 1986 has resulted in a notable decrease in the production and distribution of a range of designer drugs. Since clandestine chemists are now aware that a loophole in the legislation has been closed, there is no longer the incentive to experiment with new ‘legal’ compounds. It could be argued, however, that the reduction in illicit manufacture of new ‘designer’ drugs is just as likely to be a result of market forces (the popularity of existing plant-based narcotics as compared to the more dangerous synthetic varieties and the availability and popularity of MDMA and existing psychotropics). In the future, shifting market forces may make it more profitable for manufacturers to experiment again with a range of new compounds not listed in current schedules. In that case, there are a number of solid grounds upon which to challenge a prosecution under the unique US analogue laws.

153 Ibid., p 354.
154 Ibid., p 353. In his introduction to TIHKAL the writer Nicholas Saunders claimed: “What this book achieves is profound. The information contained here provides a stepping stone for explorers of the spiritual side of our existence. A time will come when the legal and social taboos against psychedelic research will dissolve, and scientists will use this pioneering book to help them explore the uncharted territories of existence and the presently forbidden zones of the mind and life itself”. A and A Shulgin, TIHKAL, supra n.59, p xvii.
155 Shulgin lauds MDMA as an example of the type of compound that should be tested as a valuable mind tool and a useful adjunct to psychotherapy. Prior to its scheduling in 1985, MDMA was considered by numerous therapists to be an extremely useful drug that freed a patient in psychotherapy from the anxiety and lack of trust that often inhibit successful counselling sessions. Under controlled conditions, the potential health risk is minimal and in fact, MDMA has been shown to have less toxicity than fenflouramine, an appetite suppressant approved by the FDA. See A and A Shulgin, PIHKAL, ibid., p 357, and also the discussion in Chapter 2.
156 Ibid., p 354.
157 FL Sapienza, supra n.109, p 9.
158 Communication from the Commission to the Council and the European Parliament on the Control of New Synthetic Drugs (Designer Drugs), 23.05.97, COM (97) 249 final, p 4.
A Hybrid approach - The Generic/analogue model

The Case of Australia

In the federation of Australia, responsibility for the regulation of illicit drugs is divided between the federal Commonwealth power and the six States and two Commonwealth Territories.\(^{159}\) Control over the legal and illegal import and export of controlled substances is the responsibility of the Federal Government under the Commonwealth Postal Act of 1901.\(^{160}\) However, the illegal manufacture, possession and sale of controlled drugs is regulated by each State and Territory Government which enacts its own separate legislation.\(^{161}\) As a result, there is little harmony in the approach to dealing with new synthetic drugs of abuse and only a limited number of jurisdictions have specifically modified their laws in an effort to tackle the issue.

As in the United Kingdom and the United States, it has always been possible to prosecute the unlicensed manufacture, sale, import and export of unscheduled NSDs under legislation governing production and distribution of therapeutic drugs. Section 20 of the Commonwealth Therapeutic Goods Act 1989\(^{162}\) provides that it is an offence to import, export, manufacture or supply "therapeutic goods", unless those goods are registered with the appropriate authorities or are exempt from the registration requirements. Even substances destined for the illicit market and manufactured purely for recreational purposes are covered by the definition of "therapeutic goods" in Section 3,\(^{163}\) so that it would be technically possible to prosecute suppliers and manufacturers of NSDs under this legislation or separate State or Territory legislation governing therapeutic goods.\(^{164}\) Nevertheless, it is not considered to be appropriate for dealing with clandestine manufacture and has never been used in relation to NSDs either prior to the introduction of analogue legislation in certain States and Territories, or in those

\(^{159}\) For a general overview of the distribution of powers between the Federal and State Governments of Australia, see P Hanks, *Australian Constitutional Law; Materials and Commentary*, 5\(^{th}\) edn (Sydney, Butterworths, 1994).

\(^{160}\) *Customs Act* 1901, Act No.6 of 1901. This Act should be read alongside the *Customs (Prohibited Imports) Regulations* which comprise Statutory Rules 1956, No.90 (as amended).

\(^{161}\) The relevant drug legislation in Australian States and Territories is as follows: *Drug Misuse and Trafficking Act* 1985, Act No.226 of 1985 (New South Wales); *Drugs, Poisons and Controlled Substances Act* 1981, Act No.9719 of 1981 (Victoria); *Drugs Misuse Act* 1986, Act No.36 of 1986 (Queensland); *Misuse of Drugs Act* 1981, Act No.66 of 1981 (Western Australia); *Controlled Substances Act* 1984, Act No.52 of 1984 (South Australia); *Poisons Act 1971*, Act No.81 of 1971 (Tasmania); *Misuse of Drugs Act NT* [1990], Act No.12 of 1990 (Northern Territory) and *Drugs of Dependence Act* 1989 (originally Ordinance No.S.109 of 1989) (Australian Capital Territory). These Acts should be read alongside the relevant Regulations that govern other activities involving prohibited drugs such as handling and analysis by law enforcement authorities, sale of implements used to administer drugs and possession of forged prescriptions. In New South Wales, for example, see the *Drugs, Misuse and Trafficking Regulation 1994*.

\(^{162}\) Act No.21 of 1990.

\(^{163}\) "Therapeutic goods" are defined to include goods that are represented to be, or are likely to be taken for "therapeutic use". "Therapeutic use" means, *inter alia*, use in or in connection with "influencing, inhibiting or modifying a physiological process in persons or animals". Clearly, new synthetic drugs like MDMA and its related analogues must modify the physiological process in the human that ingests them. Even compounds proven to be inactive when synthesised (see, for example, several of those profiled in the *Index of Synthetic Psychotrophic Drugs* at Appendix A) would still be caught under the definition since they will have been "represented" as being active drugs capable of modifying a physiological process in humans.

\(^{164}\) The Commonwealth *Therapeutic Goods Act* is not intended to apply to the exclusion of law in the States and Territories of Australia, so that unauthorised manufacture may also breach separate legislation in those jurisdiction. See S.4(2).
remaining jurisdictions that have not yet introduced group scheduling. The main reason for this is that the maximum penalties applicable for breach of the Therapeutic Goods Act are too low to act as a deterrent to clandestine manufacturers experimenting with compounds not captured by existing drug laws. Since the primary aim of the Act is to regulate rather than punish, the maximum penalty that can be imposed is a monetary fine and there is no provision at all for a term of imprisonment.

Commonwealth customs legislation has been amended to cover a wide range of synthetic analogues. Although MDMA has been available in Australia since the mid-1980s, it was in the early 1990s that drug law enforcement authorities began to report a significant number of seizures involving this particular compound as well as various other chemical compounds similar in structure and psychotropic effect. With the increasing publicity surrounding the ecstasy phenomenon and related ‘designer’ drugs of abuse and the apparent influx of substances arriving from Europe and the United States, the Commonwealth Government determined that the existing substance-by-substance approach was not adequate to prosecute those responsible for the third generation of synthetic drug abuse. In 1990 the Commonwealth Attorney General’s Department introduced an amendment adding to the existing Schedule VI of the Customs Act 1901 the following category of controlled substances:

A substance (“drug analogue”) which is, in relation to another substance (being a substance specified elsewhere in this Schedule, or a stereoisomer, a structural isomer (with the same constituent groups) or an alkaloid of such a substance): -
(a) a stereoisomer; or
(b) a structural isomer having the same constituent groups; or
(c) an alkaloid; or
(d) a structural modification obtained in 1 or more of the following ways:

(i) by the replacement of up to 2 carbocyclic or heterocyclic ring structures with different carbocyclic or heterocyclic ring structures;
(ii) by the addition of hydrogen atoms to 1 or more unsaturated bonds;
(iii) by the addition of 1 or more of the following groups, namely alkoxy, cyclic diether, acyl, acyloxy, mono-amino and dialkylamino groups with up to 6 carbon atoms in any alkyl residue; alkyl, alkenyl and alkynyl groups with up to 6 carbon atoms in the group, where the group is attached to oxygen (for example, an ester or an ether group), nitrogen, sulphur or carbon; and halogen, hydroxy, nitro and amino groups;
(iv) by the replacement of 1 or more of the groups specified in subparagraph (iii) with another such group or groups;
(v) by the conversion of a carboxyl or an ester group into an amide group; or

(c) otherwise an homologue, analogue, chemical derivative or substance substantially similar in chemical structure;

166 The Therapeutic Goods Act specifies that the maximum penalty for breach of Article 20 is 240 penalty units. Under Section 4AA of the Crimes Act 1914 (Cth), Act No.12 of 1914, a penalty point is defined as $110.
169 The definition of “drug analogue” in Schedule VI of the Customs Act 1901 was inserted by the Customs and Excise Legislative Amendment Act 1990 (No.111/90). This commenced at the date of Royal Assent on 21 December 1990.
however obtained, except where the drug analogue is separately specified in this Schedule.

As amended, the Australian Commonwealth Customs Act contains one of the broadest provisions regulating a group of controlled drugs anywhere in the world. It is more wide reaching than any of the generic or analogue models thus far surveyed in this comparative chapter. The Customs Act allows for the prosecution of offences involving substances that come under either a “structurally derived” definition not unlike that introduced in the United Kingdom (paragraph (d)) or a “substantially similar” definition, similar to but broader than the one incorporated in US legislation (paragraph (e)). In the UK, for new compounds to come within one of the six generic family groups they must have been structurally derived by modification in the specified manner. Compounds falling outside the structural definition, a number of which have recently been identified, will not be controlled.170 By contrast, under the Commonwealth Customs Act, even where a substance is not found to have been derived in the manner proscribed in paragraph (d), it can still be prosecuted under paragraph (e) as a “homologue, analogue, chemical derivative or substance substantially similar in chemical structure” to one already listed, however it has been obtained. Thus, it appears that each one of the 36 compounds that will be separately added to Schedule I of the UK Misuse of Drugs Act sometime this year could possibly fall within the definition of a controlled drug under the Customs Act, thereby allowing for the prosecution of any person found to be importing or exporting such a substance into Australia. Unlike the US provision,171 paragraph (e) contains no requirement that the drug be found to have a particular effect or to have been intended to have such an effect. It would therefore appear to be far easier for prosecuting authorities in Australia to argue that any unscheduled chemical derivative is a controlled drug than it is for their American counterparts.

Thus far, the operation of the analogue and generic paragraphs included in the Customs Act have been tested only in a very limited number of cases. In 1996, the County Court at Melbourne heard the case against Amanda Karen Stevenson and Tara Jeanette Watson charged with offences in relation to transportation of the drug N methyl 1, 34 methylene dioxyphenyl, 2 butanamide (MBDB).172 While MBDB is not separately listed, it was alleged by the Crown to be a “homologue” that was “substantially similar in chemical structure” to the controlled drug MDMA and thereby prohibited under paragraph (e) of Schedule VI. A government chemist called by the Crown testified that MBDB did satisfy the accepted definition of a “homologue”.173 In his view scientists would not differ in their opinions as to whether or not one substance was a homologue of another since there was an accepted definition of this chemical term. Furthermore, MBDB could be said to be “substantially similar in chemical structure” to MDMA on the basis that the structures were the same, apart from the addition of a CH2 group to form the later compound.174 The vagary inherent in the phrase “substantially similar” is effectively illustrated by the following exchange between counsel for the Crown and the expert chemist called to give evidence.

170 See the discussion of the proposed scheduling of 36 compounds not caught by the generic definition in the UK Misuse of Drugs Act, supra p 113.
171 See the discussion of the US Controlled Substances Analogue Act of 1986, supra p 124.
172 R v Stevenson and Watson, unreported, 27 June 1996.
173 A “homologue” was described by the chemist giving evidence in the case, as referring to “two compounds which differ by a consistent chemical unit so it is part of the series which change by that same chemical unit. So, for example, with the MBDB and the MDMA, they change by a CH2 group”. R v Stevenson and Watson, 27 June 1996, Transcript, T6339A, p 5.
174 This was further elaborated upon during the hearing when the witness explained that MBDB has “the majority of the same structure as the MDMA, except that hanging off the phenyl group of the MBDB is a four chain carbonate, whereas hanging off the structure of the MDMA is a three chain carbonate”. Ibid.
[Crown] - But you must get to the stage, mustn’t you, in relation to such chemicals, where the chemical structure is different to the degree that you couldn’t say that they were substantially similar chemical structures?
[Chemist] - Well, eventually you’ll get to that point, certainly.
[Crown] - Where’s the line drawn?
[Chemist] - A good question. I couldn’t give you a definition of where you draw the line. Perhaps you’d look at a percentage of – of the molecules that were similar.\(^{178}\)

In this case, the expert witness advised that MBDB may well be over 90 per cent similar to MDMA. On behalf of the accused, defence counsel did not dispute the Crown’s claim that MBDB should be considered a homologue of MDMA but concentrated on rejecting the argument that the two substances were “substantially similar”. The Court preferred the advice of the expert witness, concluding that 90 per cent similarity was certainly enough to be said to be “substantial”.\(^{176}\) Both accused were found guilty and sentenced to two years imprisonment.\(^{177}\)

In the Australian Capital Territory (ACT or Canberra), legislation prohibiting the unauthorised manufacture, distribution and possession of controlled drugs was amended to include “drug analogues” at around the same time that the above amendments were made to the Commonwealth Customs Act. The analogue provisions were initiated by the Commonwealth government immediately prior to the ACT becoming self-governing.\(^{178}\) Any changes after 1989 have been made by the ACT Legislative Assembly. A paragraph beginning “A substance (‘drug analogue’) which is, in relation to another substance ...”, that is identical to the one inserted in the Customs Act cited above was included at the end of Schedule 2 (Prohibited Drugs) in what was then the Drugs of Dependence Ordinance 1989 (now the Drugs of Dependence Act 1989).\(^{179}\) When the Drugs of Dependence Regulations were made in 1993, Schedule 2 was moved from the principal Act to the Regulations. Sub-paragraphs (a) to (e) coming at the end of the Regulations are identical to the sub-paragraphs regulating drug analogues under the Customs Act. A prohibited “drug analogue” is a substance that has been structurally modified in one of the five ways specified under paragraph (d) or is otherwise found to be “substantially similar in chemical structure” as per paragraph (e). Since no person has yet been prosecuted under the “drug analogue” provisions, the substance of the amendment has not yet been put to the test.\(^{180}\)

From a law enforcement perspective the analogue provisions in the Commonwealth and ACT legislation may be considered favourable since they appear to capture a limitless number of substances that are in some way chemically related to those already under control. It is

\(^{175}\) Ibid., p 7.
\(^{176}\) Ibid.
\(^{177}\) "Certified Extract - A Return of Prisoners Convicted at the Sittings of the County Court held at Melbourne, Sentenced on the 19th day of February 1997". Information supplied by County Court of Victoria, Melbourne.
\(^{178}\) Prior to 1989, the ACT was governed by Commonwealth Ordinances which were delegated legislation under the Seat of Government (Administration) Act 1910 (Cth). In 1988, the Commonwealth passed the Australian Capital Territory (Self Government) Act 1988 (Cth) along with related legislation which resulted in the ACT becoming self-governing from 11 May 1989. On that date, the Drugs of Dependence Ordinance 1989 became the Drugs of Dependence Act 1989 (ACT) under Section 34 of the Self-Government (Consequential Amendments) Ordinance 1989 and any subsequent amendments became the responsibility of the ACT Legislative Assembly. Information provided by Anna Lennon, Legal Officer, ACT Department of Justice and Community Safety, Correspondence, 31 March, 1999.
\(^{180}\) The ACT Department of Justice and Community Safety, having consulted the ACT Director of Public Prosecutions, confirms that there have not yet been any prosecutions under the analogue provisions of the Act. Information provided by Anna Lennon, Legal Officer, ACT Department of Justice and Community Safety, Correspondence, 31 March 1999.
difficult to conceive of a chemically based substance that could not be argued to be "substantially similar" in chemical structure to one already listed in the schedules, although this will be dependant, of course, on what that term is eventually interpreted to mean.

The result is that the most severe penalties applicable for unlawful drug use can be imposed on activity involving certain analogues, regardless of what the pharmacological properties of individual substances actually are. Under the ACT Drugs of Dependence Act 1989, the unauthorised sale of a prohibited drug analogue carries extremely harsh penalties - life imprisonment for the sale of a commercial quantity, 25 years imprisonment and/or $100,000 fine for sale of a traffickable quantity or sale of a lesser amount to a person under the age of eighteen, and in any other case a $10,000 fine, five years imprisonment or both.181 Manufacture or wholesale of a prohibited substance can attract a maximum penalty of $20,000 or ten years imprisonment or both.182 Possession and administration is punishable by a $5000 fine and/or imprisonment for two years.183 Under each of those categories, there is a defence built in for authorised users or sellers of a scheduled drug.184 Unlike the US Controlled Substances Act, however, there is no defence allowing for the accused to argue that the substance in question was not intended for human consumption.185 Neither is it an element of the offence that the prosecution prove that the drug was intended to be used for human consumption, as it is under the US statute.186 Theoretically, therefore, it is possible that the unlicensed inventor mixing various chemicals in an effort to manufacture a weed killer or household cleaner could be prosecuted under the analogue provisions. One bucket of the new weed killer could easily come within the amount considered to be a "traffickable quantity" of the scheduled substance purported to be "substantially similar" in chemical structure (2 grams for PCP, 0.5 grams for MDA, or MDMA, 0.002 grams for LSD187), thereby allowing for the possibility that the accused may be incarcerated for ten years for the manufacture of that drug and a period of life if he or she sells their new discovery to the neighbour. Admittedly, it is unlikely that charges would be brought in relation to a controlled analogue unless there was a reasonable basis for the suspicion that a substance was being manufactured for use as a non-therapeutic drug. It is possible, however, that authorities could mistakenly believe that a suspect was manufacturing a recreational drug, in which case they would be free to prosecute a case involving the illegal manufacture of a “prohibited substance” without having to show what use that substance was intended for. Given the extremely broad nature of the Commonwealth and ACT provisions, both Acts must capture a very large number of substances that are completely innocuous. There does not appear to have been any debate over the philosophical justification for prohibiting all dealings (supply, manufacture and possession) in relation to substances that have not been proven to cause any harm and are not even suspected of having a harmful effect.

The State of New South Wales (NSW) is another jurisdiction that has specifically modified its laws to deal with new synthetic drugs. NSW has replaced the restrictive substance-by-

181 Section 164(2).
182 Sections 161(2) and 163(2). Under Columns 2 and 3 of Schedule 2 of the Drugs of Dependence Regulations, traffickable and commercial quantities are to be calculated as follows: The minimum traffickable quantity and the minimum commercial quantity, respectively, of - the drug of dependence or prohibited substance in relation to which the substance is a drug analogue; or if there is more than 1 such drug or prohibited substance - the drug or prohibited substance referred to in paragraph (a) in relation to which the minimum traffickable quantity and the minimum commercial quantity are the least.
183 Section 171(1)-(3).
184 See Sections 161(3) (manufacture), 163(3) (wholesale), 164(4) (sale or supply) and 171 (4) (possession and administration) of the Drugs of Dependence Act 1989
185 Controlled Substances Analogue Enforcement Act of 1986, Section 32A.
186 Controlled Substances Analogue Enforcement Act of 1986, Section 203.
187 See Schedule 2 of the ACT Drugs of Dependence Regulations.
substance approach with a generic definition of controlled substances that is comparatively wide reaching, although not nearly as broad as the two Australian Acts discussed above. In 1995, the Drug Misuse and Trafficking Act 1985\(^{18}\) was amended so as to cover the generic family of drugs that had already been brought under control by the Commonwealth and the ACT.\(^{189}\) At the end of Schedule 1 of the 1985 Act, there is inserted a definition of “[p]rohibited plant or prohibited drug” that reads as follows:

Any substance that is an analogue of a drug prescribed in this Schedule, being a substance that has psychotropic properties, is not separately specified in this Schedule and is, in relation to the drug, any of the following:

(a) a structural isomer having the same constituent groups as the drug,

(b) a structural modification obtained in one or more of the following ways:
(i) the replacement of up to 2 carboxylic or heterocyclic ring structures with different carbocyclic or heterocyclic ring structures,
(ii) the addition of hydrogen atoms to 1 or more unsaturated bonds,
(iii) the addition of 1 or more of the following groups having up to 6 carbon atoms in any alkyl residue, namely, alkoxy, cyclic diether, acyl, acyloxy, monoalkylamino and dialkylamino groups,
(iv) the addition of 1 or more of the following groups having up to 6 carbon atoms in the groups and being attached to oxygen, namely, alkyl, alkenyl and alkynyl groups (for example, ester groups and ether groups),
(v) the addition of 1 or more of the following groups having up to 6 carbon atoms in the group and being attached to nitrogen, sulphur or carbon, namely, alkyl, alkenyl and alkynyl groups,
(vi) the addition of 1 or more of the following groups, namely, halogen, hydroxy, nitro and amino groups,
(vii) the replacement of 1 or more groups specified in subparagraphs (iii)-(vi) with 1 or more other groups so specified,
(viii) the conversion of a carboxyl or an ester group into an amide group.

It will be noted that the series of sub-paragraphs (i) to (viii) of the above Act are almost identical in substance to the equivalent paragraphs (d)(i) to (v) in Schedule 2 of the ACT Drugs of Dependence Regulations and (d)(i) to (v) of Schedule VI of the Commonwealth Customs Act.\(^{190}\)

There are two major differences between the NSW Act and its Commonwealth and Territory counterparts that restrict its reach. First, the NSW Act relies solely on the ‘generic family’ model and does not include a second ‘catch all’ paragraph purporting to cover compounds that are “substantially similar” in chemical structure. The prosecution will be required to call expert evidence to show that the structural modification could be carried out in one of the ways described in the eight sub-paragraphs of paragraph (b). This may be not be too difficult to do. Paragraph (b) is expressed in specific chemical terms and is capable of catching a wide variety of variable chemical compounds related to those already under control.\(^{191}\) There is,

\(^{18}\) Act No.226 of 1985. The Act is to be read with the Drugs (Misuse and Trafficking) Regulations 1994.

\(^{189}\) The NSW analogue provision came into force on 1 November 1995 (Government Gazette No.131 of 27, October 1995, p 7419).

\(^{190}\) Although the NSW Act breaks the regulations into eight as opposed to five paragraphs, there is no difference in the substance of those provisions.

\(^{191}\) I am grateful for the assistance of Dr Vincent Murtagh, Senior Forensic Chemist, Australian Forensic Drug Laboratory (AFDL) for his patient explanation of the chemistry involved in this provision, Interview, January 1999.
however, a second factor that restricts the scope of the NSW legislation. In order for the substance in question to be classified as a prohibited analogue the prosecution must prove that it has “psychotropic properties”. There is no such requirement under any of the other Acts discussed above and the psychotropic properties phrase was deliberately introduced into the NSW Act in order to limit the reach of the analogue provision. In the view of senior pharmacologists working at the NSW Division of Analytical Laboratories (DAL), the analogue provision under the Commonwealth Customs Act is dangerously broad and is capable of encompassing an indefinite number of innocuous and non-active substances.192 When consulted over the proposed legislative amendment in NSW, pharmacologists at DAL expressed their opinion that in order to minimise the risk that persons would be unfairly prosecuted under the NSW Act, the onus should be on the prosecution to prove that the drug in question has “psychotropic properties”. The problem with the inclusion of such a phrase is that it is again an amorphous term that has not been explained further in the legislation and has not yet been tested in a court of law.193 No person has thus far been charged with illegal possession, manufacture, or sale of a substance not specifically scheduled, but alleged to come within the definition of a prohibited drug analogue in Schedule 1.194 In the event that they are, it will be open to the accused to call on expert witnesses to engage in lengthy and expensive debate over the meaning of “psychotropic properties”. It is arguable that it would not be sufficient for the Crown to show that a substance had psychotropic properties when administered to laboratory animals such as rats or monkeys.195 Rather, it would be required to conduct human trials for which it would be difficult if not impossible to get government approval. It may be suggested that “psychotropic properties” in humans could be inferred from animal testing or from the similarity of the chemical structure of the analogue concerned to other compounds with a psychotropic effect, just as in the McEwen Case discussed below where “hallucinogenic properties” could be proven without the need to rely on human tests.196 It is not entirely clear, however, how courts are likely to proceed.

The prosecution of a ‘designer drug’ case under the NSW Drug Misuse and Trafficking Act 1985 prior to the 1995 amendment reveals the inadequacy of the previous ‘group’ definition operating in NSW and is suggestive of problems that may arise under the new provision. Despite the fact that the defendants in McEwen, Simpson, Simpson and Marcovich197 were eventually convicted of the illicit manufacture and supply of a prohibited drug, their prosecution required a lengthy, expensive and complicated trial. The case turned on whether a substance identified as 4-Bromo-2,5-dimethoxyphenethylamine (commonly known as 2C-B

192 Information supplied by Dr John West, DAL, NSW, Interview, January 1999.
193 The Oxford Medical Companion (J Walton, JA Barondess & S Loch eds) (Oxford, Oxford University Press, 1994), p 816) defines “psychotropic drugs” as “drugs that have an effect on the mind, altering the mental or emotional state, for example, tranquillisers, antidepressents, hypnotics etc”. In the Psychiatric Dictionary (R J Campbell ed), 7th edn (Oxford, Oxford University Press, 1996, p 599) “psychotropic” is defined as “an imprecise term used to describe a drug whose primary effect is on the central nervous system (psychopharmacologic agent). Included are drugs with legitimate application(s) in medicine (particularly psychiatry), as well as drugs of abuse”. Both definitions provide an indication of how broad the term is and how likely it is that the ‘psychotropic’ character of a drug will be open to debate in court.
194 Information confirmed by Jeff Smith, Criminal Review Tribunal, NSW Government, Correspondence, 30 September 1999.
195 A point made by Vincent Murtagh, Senior Forensic Scientist, AFDL, Interview, January 1999.
196 See infra n.197.
197 The case at first instance was decided by the District Court, unreported decision, 27 August 1996. An appeal from the decision was dismissed by the NSW Court of Appeal in 1998; (1998) 99 A Crim R 421. Three of the defendants (Richard and Helen Simpson and Marcovich) were convicted under the NSW Drug Misuse and Trafficking Act of a charge of knowingly taking part in the manufacture of not less than the commercial quantity of a prohibited drug (Nexus) (under S.24(2)). Richard Simpson and Marcovich were each convicted on one charge of supplying not less than the commercial quantity of that drug (S.25(2)). McEwen was convicted of charges relating to methyampheamine and ecstasy (SS 25(2) and 33(4)).
or Nexus\textsuperscript{198}) could be considered a prohibited drug under the Act. Section 3(1) defines the term “prohibited drug” as being any substance specified in Schedule 1. At the time the case was brought, Schedule 1 contained a long list of prohibited drugs, one of which was described as:

“2-5-Dimethoxy-4-methylampetamine and other substances structurally derived from methoxyphenylethylamine, being those substances having hallucinogenic properties”\textsuperscript{199}

Since the chemical name for ‘Nexus’ was not specifically listed in the Schedules, it was essential for the crown to prove that this compound fell within the generic phrase cited above. That is, the onus was on the crown to show that Nexus (a) was structurally derived from methoxyphenylethylamine and (b) had properties describable as “hallucinogenic”.

During the trial at first instance, both the prosecution and the accused called expert witnesses to argue over whether Nexus satisfied either of these two elements. In respect of the first one, the defence called Dr Alexander Shulgin, experienced chemist and author of \textit{PIHKAL} and \textit{TIHKAL}, who told the Court that that even though it was possible in theory to derive Nexus from methoxyphenylethylamine using “blackboard chemistry”, in practice it would be too cumbersome and difficult a process. In his view, Nexus could not be described as being “structurally derived” from the parent drug since no chemist would think of manufacturing it in this way.\textsuperscript{200} The Court, however, rejected Shulgin’s argument and followed that put forward by the Crown that it was sufficient to prove structural derivation on the basis of blackboard chemistry, i.e. provided it was theoretically possible. Two expert pharmacologists supplied diagrammatical charts to support their evidence that it was possible, at least theoretically, to structurally derive Nexus from the initial compound.\textsuperscript{201}

The jury was forced to wade through the conflicting evidence of experts in order to determine the meaning of the term “hallucinogenic”. In the view of the defence witnesses, Dr Shulgin and another distinguished expert in the area of Forensic Psychiatry, Professor Finlay-Jones, a substance could be termed “hallucinogenic” only where it induced “a phenomenon in which a completely convincing reality surrounds a person with his eyes open, a reality that he alone can experience and interact with”.\textsuperscript{202} It was, they considered, extremely rare for a substance to have hallucinatory effects and it could not be claimed that Nexus went so far as to induce the sensory phenomenon described above. In contrast, Dr Allan, an experienced pharmacologist called for the Crown, provided the Court with a much looser definition, suggesting that a substance could be called “hallucinogenic” where it resulted in “subjective sense perceptions for which there isn’t any appropriate external source”.\textsuperscript{203} After weighing the conflicting views of expert witnesses, the jury appears to have accepted this looser definition of the term. They were satisfied by evidence adduced by the Crown that Nexus was a substance prohibited under the \textit{Drug Misuse and Trafficking Act} -- a compound structurally derived from

\textsuperscript{198} See discussion of the compound 2C-B in Chapter 2, supra p 36 and in the \textit{Index of Synthetic Psychotropic Drugs} at Appendix A.

\textsuperscript{199} Methoxyphenylethylamine is the group name for the derivatives of the chemical phenylethylamine which may have ‘methoxy substituents’ added. For a number of years the \textit{Drug Misuse and Trafficking Act} has used ‘group’ definitions in relation to a limited number of prohibited drugs. After the drugs Bufotenine, NN Dimethlyltamine, Lysergic acid, Lysergide, Psilocin and Psilocylin appear on the Schedules of the Act, the following clause is added - “and its derivatives being those derivatives with hallucinogenic properties”. See the discussion at (1998) 99 A Crim R 421, pp 428-429. The 1995 analogue amendment clause did not remove these earlier generic definitions, but merely added the more comprehensive analogue provision at the end of the existing Schedule.

\textsuperscript{200} \textit{Ibid.}, pp 433-435.


\textsuperscript{202} \textit{Ibid.}, p 439.

\textsuperscript{203} \textit{Ibid.}
methoxyphenylethylamine and properly classified as hallucinogenic.

The Nexus case was finally laid to rest when an application for special leave to appeal from the decision of the Court of Criminal Appeal was rejected by the High Court, Australia’s highest federal court. On 9 October 1998, all four grounds of appeal against the convictions were dismissed. First, the High Court did not accept the assertion that the lower court had erred in classifying the question as to whether Nexus was a prohibited substance within the meaning of the Drug Misuse and Trafficking Act as a question of fact to be determined by the jury. Secondly, it rejected the defence submission that since the precise chemical formula for Nexus had been added to the Schedule of the relevant Act on 10 October 1994, soon after the four accused had been charged, there had effectively been an admission by the Executive that Nexus was not previously under control. In the Court’s view, the Government had not admitted any such thing, but had merely taken action to avoid the possibility of another time-consuming court debate in any future case involving the Nexus compound. A third ground relied upon in the written submissions (although barely advanced in oral argument) was based on the contention that the trial involved an element of retrospectivity and an absence of fair notice since the convictions depended exclusively on what the jury made of the concepts “structurally derived” and “hallucinogenic”. In the High Court’s view, there was nothing unfair or retrospective about a conviction dependent upon the jury deciding on the meaning of such concepts, on the basis of a balancing of expert evidence. The fourth ground of appeal based on the direction of the Trial Judge as to the state of mind which had to be proven by the prosecution was not accepted and special leave to appeal the Court of Criminal Appeal decision was rapidly dismissed.

Prosecution of the McEwen case sheds some light on how the subsequent analogue amendment is likely to be interpreted in court when or if it is eventually put to the test. Under the older provision, two conditions must be satisfied for a substance to be considered a controlled drug -- first, it must be structurally derived from methoxyphenylethylamine and secondly, it must be shown to have hallucinogenic properties. Under the amendment the two conditions to be proven are, first that the substance has been structurally modified in one of the ways prescribed in pars (i)-(viii) and secondly, that the compound has psychotropic properties. The amendment opens up the possibility that a chemical derivative may be found to be prohibited if it is based not only on a limited number of drugs after which a short ‘generic type’ definition is added (e.g., methoxyphenylethylamine, lysergic acid or psilocin) but on any of the drugs in Schedule 1 of the Drug Misuse and Trafficking Act 1985. Under the amended provision, there will not be the same sort of argument about the meaning of “structurally modified” as there was in the McEwen case in relation to the meaning of “structurally derived”. The new amendment requires that the prosecution prove that the substance has been structurally modified in one of the eight ways set out in paragraphs (i)-(vii). Although this would suggest that the “structurally modified” term is narrower than “structurally derived”, the eight ways specified would cover most means of synthesis and the provision is extremely wide reaching. The reasoning of the Court of Criminal Appeal in McEwan suggests that it will be sufficient for the prosecution to show that it is theoretically


205 Interestingly, Justice Michael Kirby did comment that he had a “lot of sympathy” for the complaint that Parliament ought to have made such a vague offence as that in question, but that this was the will of Parliament and could not be challenged in a court of law (See Markovich v The Queen, ibid., p 2). Presumably, Justice Kirby would have even more sympathy for a complaint concerning a prosecution under the Commonwealth Customs Act 1901 or the South Australian Controlled Substances Act 1984, the analogue provisions of which are much broader, and are more likely to facilitate the prosecution of a substance not intended for human consumption and/or completely innocuous.

206 Information supplied by Vincent Murtagh, Senior Forensic Chemist, AFDL, interview, January 1999.
possible that the substance has been so modified (blackboard chemistry) even if it is extremely unlikely that this was how it has been modified in practice. Once again, it is probable that both the prosecution and defence will call their own expert witnesses in the field of pharmacology and chemistry to testify that the substance is or is not capable of being modified in such a way.

Just as McEwen involved a time consuming debate over the meaning of ‘hallucinogenic’, any charge brought under the subsequent amendment is likely to involve conflicting expert evidence over whether the substance in question has “psychotropic properties”. Although there is no one agreed definition of that term, it appears to be extremely broad, wider in reach than hallucinogenic and it is not likely to be difficult to argue that a particular drug has such an effect. In bringing a charge under the analogue provisions, the prosecution could seek to rely on the type of evidence accepted in McEwen to argue that “psychotropic properties” could be inferred from a number of sources, without the need to resort to lengthy and difficult human trials. Dr Allen, witness for the prosecution, based his finding that Nexus had hallucinogenic properties on four sources: 1) literature containing reports of the hallucinogenic action of the compound in humans; 2) studies involving animals and animal tissue; 3) textbooks showing that substances within the class of which Nexus is a member have a strong likelihood of being hallucinogenic and 4) feedback information from the Internet. Although no laboratory research had been undertaken, the Court accepted that each of these sources looked at together amounted to weighty evidence of the hallucinogenic properties of Nexus. Similar factors, it could be argued, might provide a sufficient evidential basis for a finding of “psychotropic properties”, without the need for experiments with human subjects that would prove the matter conclusively.

When a recent ‘designer drug’ attracted the attention of Australian authorities in late 1998, an opportunity existed to test the reach of the new analogue amendment. Three separate seizures of the chemical compound 4-Methylthioamphetamine or 4-MTA, commonly referred to on the street as ‘flatliner’, were made by police not in NSW, but in the State of South Australia. 4-MTA is far more toxic than MDMA and has been linked to five recent deaths in Britain and one in the Netherlands. Although no seizures had yet been made in NSW, anecdotal reports suggested that the compound was being circulated on the Sydney dance scene and the State Government was concerned to act immediately to bring the drug under control. Information supplied to the Government by their pharmacological experts suggested that it was probable that 4-MTA would be encompassed within the wide-reaching analogue provision inserted at the end of Schedule 1 so that a successful prosecution involving the compound could already be brought in the absence of any modification of the Schedule. By contrast, it is not captured by the UK generic provisions and was therefore not illegal in Britain when quantities were first seized by authorities in October 1998. The case of 4-MTA illustrates the much wider reach of the analogue legislation operative in NSW.

207 A majority of chemically based substances could be argued to “affect the mind” by “altering the mental or emotional state”, thereby satisfying the dictionary meaning of ‘psychotropic’. See the definition cited, supra n.193.
210 Information supplied by Dr Les King, Senior Forensic Scientist, The Forensic Science Service, London, Interview, March 2000. See the discussion of 4-MTA in Chapter 2, supra p 35 and in the Index of New Synthetic Drugs at Appendix A.
211 This was the advice given to the NSW Criminal Review Tribunal (CRT) charged with the task of preparing any necessary amendment. Information supplied by Jeff Smith, CRT, Interview, January 1999.
The NSW Government was determined, however, to remove any doubt over the issue and 4-MTA was added to the list of prohibited substances under Schedule 1 only days after media reports were circulated. It seems clear that such decisive action was, at least in part, politically motivated. With a State election approaching and a campaign focusing heavily on law and order issues, the NSW Premier was anxious to be seen to be taking a firm and immediate stance against any new threat of drug abuse. According to a News Release issued by the Premier’s Office, the scheduling of 4-MTA provided “further evidence of the Government’s zero tolerance towards illegal drugs”. 213 This incident suggests that there is no need for emergency scheduling legislation in NSW where the Premier can act alone to have a substance scheduled within days without seeking the approval of Parliament, provided there is the political will to do so. 214 The one significant reason for scheduling a newly identified substance by name even where it is probably caught by a ‘group’ definition is that this removes any possibility of a protracted court case to argue over whether the compound can be considered a prohibited analogue for the purpose of the 1985 Act. It is likely, therefore, that where authorities are informed of the discovery of a potentially dangerous new substance in another jurisdiction, the State will not rely on the analogue provision, but will add the precise chemical to the list of controlled drugs before it is discovered in NSW.

In South Australia, the only Australian jurisdiction where 4-MTA has appeared in a street seizure, it would seem possible for those involved to be prosecuted under analogue provisions despite the fact that the specific chemical compound is not listed separately on the Schedules of the relevant drug law. This State became the first in Australia to introduce group scheduling when in 1986 analogues were added to the definition of prohibited drugs under the Controlled Substances Act 1984. 215 The relevant words of Part 1, Section 4 of that Act read:

(2) A substance is an analogue of another for the purposes of this Act if

(a) they both have substantially similar chemical structures; or
(b) they both have substantially similar pharmacological effects.

(3) An analogue of a drug of dependence or a prohibited substance (not being an analogue that is itself declared by regulation to be a drug of dependence or a prohibited substance) is by virtue of this subsection a prohibited substance. 216

It is immediately obvious that this legislation is far broader in scope than the analogue provision under the US Controlled Substances (Analogue Enforcement) Act, from which the wording of the two sub-paragraphs (a) and (b) appears to have been drawn. It will be recalled from the discussion above that Section 32(A)(i) and (ii) of the US law requires the prosecution to prove that the substance has both a substantially similar chemical structure to one already controlled and a substantially similar stimulant, depressant or hallucinogenic effect on the central nervous system. In South Australia, the Crown need only prove one of these factors — i.e. that the drug has the requisite standard of similarity in relation to either chemical structure or pharmacological effect — thereby making it far easier to demonstrate that a substance satisfies the definition of a prohibited analogue. There is no separate section in the South Australian Act equivalent to Section 203 of the US Act requiring the prosecution

213 “State Government to Prohibit ‘Flatliner’”, News Release, NSW Premier's Department, 10 January 1999.
214 Section 44 of the Drug Misuse and Trafficking Act sets out the procedure for amending Schedule 1.
215 Controlled Substances Act 1984, Act No.52 of 1984, as amended by the Controlled Substances Amendment Act, Act No.64 of 1986.
216 A large number of substances are specifically listed as either “drugs of dependence” or “prohibited substances” in Schedules 1-3 of the Act.
to prove that the analogue in question was intended for human consumption. Once again, although the South Australian legislation has not yet been tested in court, it is possible to speculate on the issues that will be litigated. Prosecution and defence witnesses are likely to disagree on the meaning of “substantially similar” in relation to both “chemical structure” in sub-paragraph (a) and “pharmacological effect” in sub-paragraph (b).217

On 26 April 2000, the accused involved in the discovery of 4-MTA pleaded not guilty to a charge of possessing a controlled substance analogue in contravention of the 1984 Act.218 He is due to appear before the District Criminal Court in Adelaide later this year. The Department of Public Prosecutions has not yet been informed whether a challenge to the charge will be on the basis of the search carried out by police when the compound was seized or on the technical aspects of the analogue law.219

In view of the disparity in criminal laws currently operating in different States and Territories of Australia, a Model Criminal Code seeking to standardise various areas of the criminal law has been prepared at the behest of the Standing Committee of Attorneys-General. The Code is not binding on Governments, but is intended as a guide to be followed as closely as possible. In their recently submitted Report on “Serious Drug Offences”, the Model Criminal Code Officers Committee (MCCOC) included recommendations for harmonising State and Territory laws regulating new synthetic or ‘designer’ drugs.220 Paragraph 1 of Regulation 5, states that a substance will be considered a “controlled drug” for the purposes of the Criminal Code if it is (a) a substance specified in Table 1 or (b) a “related drug”:221 Under paragraph 2, a “related drug” is defined as a stereoisomer, positional isomer, ether or ester of any drug listed in Table 1 or a structural modification of any of the substances specified in Table 1 (their stereoisomers, isomers, ethers or esters), provided it has been obtained in a particular way. The types of structural modifications specified are almost identical to those outlined in paragraphs (i)-(v) of the Commonwealth Customs Act (reproduced above) and in the NSW and ACT drug laws. There is no similar requirement to that in the NSW legislation that the substance be proven to have a “psychotropic effect”.

Quite deliberately the MCCOC declined to introduce a catch-all provision similar to that in the ACT and Commonwealth models, that is, the clause purporting to control a substance that is “otherwise an homologue, analogue, chemical derivative or substance substantially similar in chemical structure ... however manufactured or actually obtained”. The Committee criticised such catch-all provisions as lacking any determinate meaning,222 commenting that the issue of “substantial similarity” would have to be decided on the basis of expert evidence and yet the ACT and Commonwealth Acts offer no criteria by which experts are to determine the level of similarity required. In the Committee’s view, this leaves open the possibility that

217 Stedman’s Medical Dictionary defines ‘pharmacological’ as: “1. Relating to pharmacology or the composition, properties, and actions of drugs”, or “2. Sometimes used in physiology to denote a dose (of a chemical agent that is or mimics a hormone, neurotransmitter, or other naturally occurring agent) that is so much larger or more potent than would occur naturally that it might have qualitatively different effects”. See M Spraycar (ed.), Stedman’s Medical Dictionary, 26th edn (Baltimore, Williams and Wilkins, 1995), p 1340. Neither of these definitions prevent the likelihood of extended debate over whether a particular compound could be argued to produce ‘pharmacological effects’.

218 The accused, a minor referred to a ‘S’, is charged under Section 32(1)(e) of the Controlled Substances Act 1984 in respect of the offence of possession of a controlled substance analogue. It is alleged that in the early hours of 13 September 1998 he was searched by police and found in possession of 83 tablets and two half tablets containing 4-MTA.

219 Information supplied by Andrew Williams, Solicitor, South Australian Department of Public Prosecutions, Adelaide, Correspondence, 25 May 2000.


221 Regulation 5 is produced in full at Appendix I.

222 Model Criminal Code Report, supra n.1, p 269.
the margins of criminality will be “the subject of an irreconcilable dispute”.\textsuperscript{223} There is need for a more strictly defined approach such as that in paragraph 2(e) of Regulation 5 which specifies the grounds for a finding of structural similarity. The Committee was equally critical of the catch-all provision in South Australia which purports to go even further than the ACT and Commonwealth legislation, allowing similarity of chemical structure or pharmacological effect as alternative bases for the imposition of criminal liability, without providing any indication as to the meaning of substantial similarity in either case.\textsuperscript{224} Although the South Australian legislation appears to have the advantage of being simply expressed and easily comprehended, in the Committee’s view such simplicity is achieved at the cost of certainty of application. It was pointed out that since unlawful dealings in controlled drugs expose the accused to severe penalties, it is essential that the criminal law in this area is sufficiently certain to enable the public to determine what chemical compounds are illegal.\textsuperscript{225} In conclusion, the Committee recommended that in the remaining Australian jurisdictions still reliant on the substance-by-substance model (Queensland, Western Australia, Victoria, Tasmania and the Northern Territory), legislation be amended so that the list of controlled drugs includes a class closely related to those specified in the schedules.\textsuperscript{226} The category of related drugs should, however, be specified with as much chemical precision as possible so as to remove uncertainty and avoid unnecessary litigation over whether compounds manufactured in the future are to be considered controlled drugs.

\textbf{The Substance-by-Substance Approach}

The majority of national governments have not altered the basic structure of their drug control legislation in response to the phenomenon of variable NSDs. Rather, new synthetic compounds have been added to the schedules of existing drug legislation some time after they have been identified as harmful, or potentially harmful, substances subject to abuse. Thirteen of the fifteen members of the European Union, five of the eight State and Territory jurisdictions in Australia, and countries in Africa, Asia and South America still rely on a substance-by-substance (or substance-specific) approach.\textsuperscript{227}

\textsuperscript{223} Ibid.

\textsuperscript{224} The Committee point out that “substantial similarity of pharmacological effect” is even less determinate than similarity of chemical structure. Since the pharmacological effect of new designer drugs are frequently uncertain, experts are likely to disagree and authoritative opinion may lag behind the development of illicit use and trade. \textit{Ibid.}, p 271.

\textsuperscript{225} \textit{Ibid.}, p 267.

\textsuperscript{226} Although the dictates of space prevent any further analysis of national ‘designer’ drug legislation, it should be noted here that New Zealand introduced a ‘designer’ drug law in 1987, one after South Australia legislated against the perceived new threat. Authorities appear to have considered the British, South Australian and American models discussed above before deciding on a text that they believed would incorporate the best aspects of both the generic and analogue approach. New provisions were added to the \textit{Misuse of Drugs Act} 1975 (Act No.116 of 1975) by the \textit{Misuse of Drugs Amendment Act} (No.2) 1987 (Act No.193 of 1987). The distinctive legislation consists of three parts: Section 2 providing a definition of controlled drug analogue; Section 29C specifying defences to charges relating to controlled drug analogues and Part VII of the Third Schedule providing a list with specific examples of substances that could be classified as ‘controlled drug analogues’ for the purposes of the legislation. Perhaps the most interesting distinguishing feature of the NZ law is that ‘analogues’ not specifically scheduled are classified as Class C, rather than Class A drugs, so that they attract a much lower penalty in the first instance. Individual compounds can be transferred to another Class if tested and found to be hazardous. See further, GJ Sutherland, “Designer Drugs’ Legislation in New Zealand and Elsewhere”, \textit{Analog}, Vol.10, No.3, October 1988, p 2. At the time of writing, no prosecutions had been brought under the Act. Information supplied by Brigid Borlase, Attorney General’s Department, Government of New Zealand, \textit{Correspondence}, 22 July 1999 and 1 March 2000.

\textsuperscript{227} In those continents only the USA and Canada have introduced legislation aimed at controlling groups of analogues (Information confirmed by reviewing drugs legislation of UN member States in the Office of the CND, Vienna, September 1998).
There is no doubt that this traditional formula allows for loopholes that can be manipulated by clandestine manufacturers. For persons with some degree of chemistry knowledge, it is possible to produce a range of ‘designer’ drugs, structurally based on controlled substances but not themselves illegal at the time when they first appear on the illicit market. In order to understand the ease with which synthetic substances can be manipulated and the difficulty of developing effective control, consider the structural variability of a parent group of amphetamine analogues – the phenylethylamines. From this parent group it is possible to produce a large number of distinctive chemical substances by manipulating only slightly a part of the chemical chain. Chemists have written on the enormous potential for the structural modification of a simple parent compound in order to produce at least hundreds of uncontrolled analogue substances.\(^2\) a large number of which have already been manufactured and have been shown to cause central nervous system stimulant and/or hallucinatory effects.\(^2\) Based on experiments and scientific theory based calculations, it is reasonable to predict that many more of the hundreds of variants that may possibly be produced will have powerful psychotropic qualities.\(^2\)

Adopting the substance-by-substance approach to scheduling, legislation can only be reactive to a range of NSDs and legislators will always be at least one step behind clandestine operators seeking to make a profit through the sale of designer drugs. From the law enforcement perspective, there are several problems with this scheduling philosophy. First, it may not be possible to prosecute those involved where authorities discover an unscheduled synthetic substance traded on the illicit market. This would not seem a particularly serious dilemma if such a discovery involved only persons found to be in possession of small quantities intended for personal use, but would be frustrating if authorities had located the manufacturers or distributors of a large haul consisting of a new and dangerous synthetic substance intended for the clandestine market. Secondly, a country in which a particular compound was controlled (either because group-scheduling had been introduced or because the substance was specifically scheduled) could not request that a person be extradited from a country adopting the substance-specific approach that had not scheduled the compound, since there would not be the requisite element of dual criminality. Finally, and perhaps more important, it may be argued that the substance-by-substance model serves to encourage clandestine chemists to experiment with variable compounds in an effort to exploit loopholes in the existing control regime.

Despite the apparent limitations of this scheduling procedure, many governments have considered and rejected the idea of introducing a generic provision aimed at capturing a group of psychotropic drugs.

Swiss authorities provide various reasons for their view that it is neither feasible nor necessary to adopt a generic model in response to the appearance of new synthetic drugs. First, since scheduling decisions are handled by the Swiss Federal Office of Public Health (SFOPH) rather than the legislature, new substances can be brought under control relatively quickly without relying upon slow legislative procedures.\(^2\) Secondly, the introduction of a generic approach would require a major change in the scheduling procedure and may confuse


\(^2\) A and A Shulgin, ibid.

\(^2\) B Reimberg, supra n.106, p 8.

\(^2\) Information supplied by Christian Stamm, Deputy Head, Section for Control and Licenses, SFOPH, Bern, Switzerland, Correspondence, 19 November 1998.
the general public by expecting them to interpret complex rules of chemistry in order to determine whether a substance has in fact been brought under control.232 Accordingly it has been suggested that a generic definition may interfere with the recognised principle nullem crimen nulla poena sine lege, requiring that offences should be clearly defined by the law.233 Thirdly, Swiss drug enforcement authorities do not consider that there is any need for generic legislation in their country since very few clandestine laboratories have been uncovered in Switzerland and there have not been seizures of a wide range of ‘designer’ drugs falling outside the existing legislative controls.234

It seems clear that the adequacy of the substance-by-substance approach will be dependent largely on the existence of a scheme for the rapid scheduling of substances proven to be dangerous, as soon as possible after they have appeared on the illicit market. Under the Swiss Law on Narcotic Drugs and Psychotropic Substances of 3 October 1951, the definition of narcotic drugs is deliberately broad, capable of encompassing a wide range of both narcotic and psychotropic substances.235 The SFOPH bears the responsibility of efficient scheduling and has been delegated the power to introduce an ordinance in order to have a new synthetic drug added to the list of those already under control.236 This is argued to be the fastest way possible within the existing legal system to regulate a newly identified substance, allowing for the application of controls within four weeks, depending on the perceived urgency of the drug problem.237 Since there is no need to seek the approval of Parliament and all technical decisions are left in the hands of an expert committee trained in public health, NSDs can be scheduled soon after they have been uncovered by law enforcement officers and separately identified as dangerous.

Sweden is another European country that has recently debated changes to the substance-by-substance approach in the light of weaknesses exposed in the existing control regime by the appearance of NSDs. On several occasions authorities have considered and rejected proposals for the adoption of a generic or analogue model designed to regulate a group of psychotropic drugs.238 In late 1998 when changes in the Narcotic Drugs Punishment Act239 and new legislation on the prohibition of certain hazardous products were submitted to Parliament, ideas put forward included the possible introduction of a generic provision regulating the category of amphetamine-type stimulants.240 A considered decision was made not to introduce generic or analogue scheduling. First, it was feared that a group definition would cover too many substances with no narcotic effect and secondly, it was thought to be more appropriate

232 Ibid.
233 Ibid. The principle nullem crimen sine lege is discussed at much greater length in Chapter 6 in the context of a discussion of whether broadly worded analogue provisions may conflict with principles enshrined in international instruments for the protection of human rights. Basically the nullem crimen principle requires that no person shall be subject to criminal prosecution for any act or omission that did not constitute a criminal offence under national or international law at the time it was committed. This has been interpreted broadly to mean that States have a duty to draft laws that clearly define the criminal activity to be prohibited, so that members of the public can regulate their activity accordingly.
234 Information supplied by Christian Stamm, Deputy Head, Section for Control and Licenses, SFOPH, CH-3003 Bern, Switzerland, Correspondence, 19 November 1998.
235 Ibid.
236 Eight chemical compounds (MDMA and seven other amphetamine derivatives) were prohibited in 1996, in accordance with an ordinance introduced by the SFOPH on March 17 and coming into force on April 22.
237 Information supplied by Christian Stamm, Deputy Head, Section for Control and Licenses, SFOPH, correspondence (2), 10 March 1999.
238 Information supplied by Mr Bertil Pettersson, National Institute of Public Health, Correspondence (1), 19 November 1998.
239 Narcotic Drugs (Punishment) Act (1968:64).
240 Information supplied by Mr Bertil Pettersson, National Institute of Public Health, Correspondence (1), 19 November 1998.
to specify which substances were classified as psychotropic drugs so as to avoid any technical legal arguments over whether certain chemical derivatives were included. It is interesting to note that although Sweden and the Netherlands have traditionally taken a very different attitude towards drug control -- Sweden adopting a 'hardline' view of drug use and users and the Netherlands persisting with a 'harm minimisation' approach -- both claim that the introduction of a generic provision to capture a group of NSDs would be against their broad 'philosophy' for effective drug control.

The Swedish Government did recognise, however, that existing scheduling laws provided for too long a delay between the time a dangerous new substance was seized on the illicit market and the time it was brought under control, thereby necessitating the introduction of a scheme for the rapid (or 'emergency') scheduling of NSDs. Under the newly implemented Act on the Prohibition on Certain Goods Dangerous To Health, the Swedish Government, acting on the advice of the National Institute of Public Health, may place NSDs under control soon after they have been identified. Section 3 of the Ordinance accompanying the Act imposes an obligation on the National Police Board and the Customs Administration to report immediately to the National Institute where they suspect that a new substance is subject to misuse or that there are changes in the patterns of misuse of a known substance. Under Section 3 of the main Act, it is forbidden to "import, transfer, produce, acquire with a view to transfer, offer for sale or possess" any of the scheduled substances. The penalty for intentional breach of that Section is a fine or a sentence of up to one years imprisonment. Where further investigation reveals that a substance poses a more serious threat, it can be transferred to a schedule of the Narcotic Drugs (Punishment) Act, which provides for much harsher penalties.

Seven substances were listed as "goods dangerous to health" when the Act entered into force in 1999. One of those, the chemical compound 4-MTA, will shortly be moved to the Narcotic Drugs (Punishment) Act in accordance with a recent decision by the European Council that all EU Member States must control 4-MTA as they would do any other drug appearing in Schedule I or II of the 1971 Convention on Psychotropic Substances. Although (unlike the US emergency scheduling legislation discussed above), there is no time limit for the scheduling of substances under the new Act, it is intended that there should be a regular review of the list so as to determine whether any substances should be transferred to other legislation or deleted. In practice, application of the Act on the Prohibition of Certain Goods Dangerous To Health is likely to concern only those substances manufactured in the

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241 Information supplied by Mr Bertil Pettersson, National Institute of Public Health, Correspondence (1), 19 November 1998. Pettersson explains further that authorities have decided it would be too problematic to ask the judiciary to take responsibility for determining whether a substance should be classified as a prohibited substance. By listing each compound separately on the Schedules, a decision can be made by the Swedish Government acting on the advice of experts in the area of pharmacology. Bertil Pettersson, National Institute of Public Health, Correspondence (2), 12 February 1999.


244 It has been estimated that a decision on whether to schedule a new substance under the Act will take less than six months from the identification of the compound. Information supplied by Bertil Pettersson, National Institute of Public Health, Correspondence (4), 1 October 1999.


246 Those seven substances appear in the appendix to the Ordnance on the Prohibition of Certain Goods Dangerous to Health. They are MBDB, BDB, 4-MTA, 2C-B, 2C-T-2, 2C-T-7 and PMMA.

247 4-MTA is one of two substances to have been assessed pursuant to the European Council's 1997 Joint Action on New Synthetic Drugs. See the discussion in Chapter 7.

248 Information supplied by Bertil Pettersson, National Institute of Public Health, Correspondence (4), 1 October 1999.
clandestine laboratory that are not considered to have any legitimate industrial or therapeutic use. A recent suggestion that GHB be considered for control under the new Act, given that it is frequently subject to abuse in regions of Sweden, was rejected since that compound is a registered pharmaceutical product in certain European countries. At present, there are no new substances being considered by the Swedish Government for emergency control.

Dutch authorities have long been aware of the increasing misuse of synthetic drugs and it is widely recognised that the Netherlands is one of the major centres for the clandestine manufacture of amphetamine-type stimulants. Those involved in the regulation of drugs have, therefore, for some time considered whether and how laws should be amended in response. Under the Dutch Opium Act, most drugs are controlled using substance-specific scheduling. Although a limited number of generic formulations are in place to capture groups of analogues structurally related to LSD and certain controlled opiates, a decision has been made that it is not appropriate to develop a generic formula to cover the group of ATS.

There are a number of persuasive reasons given by Dutch authorities for rejecting the generic approach to ATS control. The Forensic Laboratory of the Ministry of Justice has expressed its fear that this would be unworkable since it would be too difficult in every case to produce conclusive evidence that a compound fits within the generic definition. It was pointed out that trials would be long and expensive given that prosecution and defence could call on conflicting forensic experts to testify on their behalf. The Ministry of Health, responsible for making recommendations in relation to scheduling changes, considers generic provisions unattractive for very different reasons. First, for the same reason articulated by Swiss authorities that generic provisions might confuse citizens as to what is classified as a controlled drug. Secondly, there is a fear that the generic approach may unwittingly encompass large numbers of synthetic drugs with a present or future legitimate use. Thirdly, under generic legislation, all NSDs which are not specifically scheduled but which fall within a broad chemical definition would be controlled drugs subject to the same sanctions, regardless of their potential to cause different harmful effects. This is in conflict with the broad aims of the Ministry of Health to ensure that punishments provided for in the Opium Act are proportionate to the harmful properties of the substance concerned, so as to reduce the marginalisation and criminalisation of those individuals using less dangerous

249 Section 2(3) of the new Act stipulates that it shall not be applicable to medical products approved within the EU.
250 Information supplied by Bertil Pettersson, National Institute of Public Health, Correspondence (3), 27 September 1999.
252 The Dutch Opium Act (Opiumwet); Act of 12 May 1928 for the determination of regulations with regard to opium and other narcotic substances. The Act was considerably revised in 1976 and 1993 in order to accommodate international treaty obligations.
253 Analogue provisions are set out in footnotes to the lists of substances in the Opium Act. For example, a footnote to the reference to Lysergic acid amide in List I, Part A, indicates that mono and dialkylamide, the pyrrolidine and morpholine derivatives and substances obtained by the introduction of methyl-, acetyl- or halogen groups are also controlled. Information supplied by Dr Robert JJ Ch. Lousberg, Senior Inspector for Narcotic and Psychotropic Drugs in the Netherlands, Correspondence (2), 21 April 1999.
254 Information supplied by Dr Robert JJ Ch Lousberg, Correspondence (3), 26 April, 1999. As explained above, in trials in the United States where it has been argued that NSDs fall within the definition of “controlled drug analogues”, prosecution and defence have called conflicting forensic experts to testify on their behalf.
255 Information supplied by Mr ADJ Keizer, Head of The Drugs Policy Division, Swiss Ministry of Health, Welfare and Sport, Correspondence, 28 October 1998.
256 ibid.
drugs. There is one final reason for retaining the substance-by-substance approach that reflects the different scheduling philosophies of the Netherlands as compared to other countries, such as the UK. Dutch policy dictates that drugs can only be scheduled where there is clear evidence not only of their harmful properties, but also that they are being subject to abuse. Drug use per se is not viewed as conduct worthy of punishment, but will only be criminalised if the drug in question is causing actual harm. Thus, a separate decision must be made for each individual compound.

Given the very large market for synthetic drugs and the recent appearance of a number of variable compounds not specifically scheduled, Dutch authorities have looked to legislative provisions beyond the Opium Act in order to punish those responsible. There are two other options for prosecuting persons involved in the sale, manufacture or distribution of a chemical compound not specifically listed. First, they may be charged under Article 174 of the Dutch Criminal Code which forbids the sale of goods determined to be hazardous for the common health and carries a maximum penalty of fifteen years. Onus is on the prosecution to prove (a) that the goods are dangerous, (b) that the seller knew the goods are dangerous and (c) that he or she failed to warn the buyer at the time the transaction was made. The problem with Article 174, however, is that proving all three elements of the offence is extremely difficult and there is much room for extended debate in court. In respect of the first element of the offence, there is scope for dispute over whether a particular substance is dangerous. Many fairly innocuous substances can become dangerous if taken in excess and if danger depends on balancing benefits to harm, a value judgement may come in to determining both these sides of the equation. It has already been seen that a chemist like Alexander Shulgin will have very different ideas about the degree of harm associated with a compound such as MDMA and the amount of benefit (spiritual/emotional/mental health benefit) that can be obtained from it, than certain members of the US DEA. Prosecution authorities have been further frustrated by the difficulty of proving the last two elements, that is, that the seller was aware of the danger involved and the buyer was not. In a number of cases this has allowed for drug sellers to escape conviction.

Just as in the three main jurisdictions profiled above -- the UK, US and Australia -- it is not legal in the Netherlands to manufacture, sell, import or export a new chemical without the requisite license granted by authorities. Although it has not been used for such a purpose thus far, it would be possible to prosecute the manufacturer or seller of an unscheduled compound under the Act on Medicines Supply. The main limitation here is that the maximum penalty for breaching the Act (six months imprisonment) is relatively low and consequently the

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257 Information supplied by Dr Robert JJ Ch Lousberg, Senior Inspector for Narcotic and Psychotropic Drugs, Inspectie voor de Gezondheidszorg, Correspondence (3), 26 April, 1999.
258 Information supplied by Mr J.J.T.M. Pieters, National Co-ordinating Public Prosecutor, Synthetic Drugs Unit, The Netherlands, Interview, March 2000. In comparison, in the UK, substances can be scheduled where there is evidence of their potential for misuse regardless of whether they have actually ever been seen on the illicit market.
259 Information supplied by Mr J.J.T.M. Pieters, National Co-ordinating Public Prosecutor, Synthetic Drugs Unit, The Netherlands, Interview, March 2000. See the further discussion in Chapter 2.
260 Information supplied by Mr J.J.T.M. Pieters, National Co-ordinating Public Prosecutor, Synthetic Drugs Unit, The Netherlands, Interview, March 2000.
261 See Shulgin's assessment of MDMA in PIHKAL, supra n.21, p 738 and the further discussion in Chapter 2, supra pp 20-23.
262 Article 174 has proved to be useful in facilitating successful prosecutions in relation to sale of the unscheduled compounds GHB and 4-MTA. In the case involving 4-MTA, however, it was pointed out that 'dangerous' is a vague term, since even water consumed in excessive quantities over a short period of time will result in death. Information supplied by D Benammar, Council to Mr Pieters, Synthetic Drugs Unit, The Netherlands, Interview, March 2000.
263 Act on Medicines Supply; Act of 28 July 1938 providing for new regulations with the supply of medicines and the practice of pharmacy.
investigation techniques that can be used by law enforcement officers are limited.264 As a result, consideration is now being given to amending the Act on Medicines Supply so as to increase the possible maximum penalty from six months to six years. While the United States cited the limited sanctioning power under their equivalent of the Medicines Act (the Federal Food, Drugs and Cosmetic Act) as a reason for introducing broad analogue laws, the Dutch have rejected group scheduling in favour of amending existing laws to provide for what is arguably a more appropriate punishment. It should be noted that both the Dutch Criminal Code and the Act on Medicines Supply may allow for criminal penalties to be imposed on the manufacturers and distributors of dangerous compounds, but not on drug users themselves, in keeping with the Dutch policy of targeting those responsible for supplying the illicit market.

In the Netherlands problems caused by the emergence of a trend towards variable NSDs have been dealt with in part by the introduction of an emergency scheduling provision into The Dutch Opium Act. In urgent cases involving the identification of a non-scheduled drug proven to have harmful effects, Article 2, part 3 of the Act gives power to the Ministry of Health, Welfare and Sport to place any new drug (synthetic or non-synthetic) under control.265 If necessary, the procedure can take three to five days from the moment the decision to schedule is made to the time that the prohibition becomes effective. A National Assessment Committee that evaluates changes in the patterns of drug use and the type of substances available informs authorities of the need for law or policy change in the light of developments in the volatile drug scene.266 Despite the limitations of the substance-specific approach and despite the suggestion by some members of the prosecution service that consideration should be given to the introduction of a broader generic provision,267 the Government is firm in its decision that existing mechanisms are capable of dealing with variable new compounds in a manner compatible with the Dutch philosophy on drug control.

The point has already been made that one major consideration for the effective control of NSDs is the length of time that it takes for a newly identified substance to be added to the schedules of existing legislation. Where there is an efficient procedure for the rapid scheduling of a substance proven to be dangerous, the disadvantages of the substance-by-substance approach are minimised. Thirteen European countries (five of them members of the EU) have introduced a scheme for emergency scheduling which in most cases vests power in the competent authorities responsible for health and/or medicinal products, or in the Council of Ministers, to issue a decree or regulation adding a new substance to the list of those already under control.268 Rapid scheduling depends not only on having the appropriate provisions in place but also on the efficiency of drug control machinery and the political will of the government concerned. It remains to be seen whether the administration of schemes in place will be effective enough to limit the spread of a range of new synthetic compounds that are likely to appear on the illicit market during the first decade of this new millennium.

264 In order, for example, for the police to be authorised to conduct a raid on a laboratory suspected of producing harmful drugs, the minimum penalty for committing the offence must be at least four years imprisonment. H Pieters, “Changes in the Synthetic Drugs Market, Synthetic Drugs: Newsletter of the Synthetic Drugs Unit (USD), No.7, November 1999, p 4.
265 Information supplied by Dr Robert JJ Ch Lousberg, Senior Inspector for Narcotic and Psychotropic Drugs, Inspectie voor de Gezondheidszorg, Correspondence (1), 28 October 1998.
266 Ibid.
268 These thirteen countries are Austria, Belgium, Cyprus, Estonia, France, Germany, Latvia, Lithuania, Malta, Netherlands, Norway, Switzerland and the Ukraine. See Pompidou Group/International Narcotics Control Board Conference on Control of Psychotropic Substances in Europe (Strasbourg, 7-9 December 1998), Implementation of Control Measures for Psychotropic Substances By Member States of the Council of Europe and Other Countries Participating in the Conference, P-PG/PSYCHOTROP (98) 1, p 13.
In the light of recent information on the vast expansion of NSD use in Europe, it is useful to compare the different attitudes of national governments to issues of control. In a recent questionnaire distributed to the governments of most European countries, twelve of the twenty-eight countries responding reported that they had no system for generic or analogue scheduling and no emergency scheduling scheme. Nevertheless, twenty-one countries considered that their national system for the scheduling of psychotropic drugs was fully adequate to satisfy current drug control requirements. Only seven countries classified their systems as inadequate; at the one extreme was Armenia where there is no national legislation on psychotropic drug control in existence, while at the other end of the spectrum were Sweden and Germany, both with comprehensive drug laws but in need of reforms specifically designed to speed up the scheduling process so as to deal expediently with new compounds found to be subject to abuse.

From the above review it is clear that many European countries are not willing to change the basic philosophy of the substance-by-substance approach to drug control. There are two conditions that arguably make it unnecessary for them to do so. First, where there is little evidence of a market for the clandestine manufacture of a range of designer drugs, i.e., variable chemical structures that have been designed to get around the law, and secondly, where there are procedures in place for the emergency scheduling of a substance proven to be dangerous, pending a more thorough risk assessment and the assigning of permanent control. If these two conditions are satisfied, and particularly where there is a system for the efficient exchange of information between national governments, countries can move quickly to prevent the spread of a dangerous new synthetic and substance-specific legislation is arguably the most appropriate model.

The Civil and Common law divide

It is necessary here to draw attention to certain procedural differences between common law and civil law jurisdictions that may influence a decision as to which of the legislative models can and should be introduced in response to the third generation of new synthetic drug use. Does it make a difference that in countries where the Government has moved away from a substance-specific approach -- the UK and Ireland with their generic provisions and the US, Australia and New Zealand opting for the analogue model -- there is a system of common law in place, whereas all thirteen of the EU Member States that have chosen to retain the substance-specific approach work within the civil law tradition?

The answer is that despite differences between the operation of the criminal law in common and civil jurisdictions, both could accommodate a generic or analogue amendment designed to regulate groups of illicit substances. There is, however, one important distinction between the two systems that should sound a note of caution. In a number of the civil law countries, prosecution authorities cannot exercise the same degree of discretion as can their common law counter-parts. That is, although they will have a discretion as to whether to prosecute in the event that there is an insufficiency of evidence, where there is a sufficient evidential basis to suggest that an offence has been committed, there is no discretion not to proceed on the

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269 Armenia, Bulgaria, Czech Republic, Denmark, Finland, Iceland, Hungary, Moldova, Romania, Slovakia, Spain and Sweden. Recall from the discussion above that Sweden has since introduced an emergency scheduling scheme.

270 Austria, Belgium, Croatia, Cyprus, Czech Republic, Denmark, Estonia, France, Hungary, Iceland, Latvia, Lithuania, Malta, Netherlands, Norway, Slovakia, Slovenia, Spain, Switzerland, Ukraine and the United Kingdom.

271 Armenia, Bulgaria, Finland, Germany, Moldova, Romania and Sweden.

272 It has been seen that Sweden did indeed introduce emergency scheduling laws in 1999. Although Germany reported in 1998 that it was then considering the introduction of generic legislation, at the time of writing there had been no moves towards doing so. Information supplied by Simon Roland, Institute for Therapy Research, Germany, Correspondence, 30 September 1999.
basis of public policy issues. This is the situation that exists in France and Germany. In
France where the Ministere Public has a discretion as to whether or not to bring charges
(known as la regle de l'opportunité des poursuites), the decision not to do so (classement sans
suite) may be based, for example, on an inability to identify the wrongdoer or the lack of
sufficient evidence against the accused, but not on a judgement that it is against the best
interests of the public. In Germany the prosecutor is obliged to bring the charge before the
court where sufficient evidence is available and he or she may only exercise a very limited
discretionary power to abandon the case in respect to petty crimes. By way of contrast, in
Belgium and Luxembourg the public prosecutor has full discretionary powers and may choose
not to proceed on the basis of either technical reasons or issues of public policy, regardless of
the existence of evidence that would secure a conviction. This is the same situation as
exists in common law countries such as England and Australia where prosecutors at every
level of the Crown Prosecution service have a “great scope” to exercise their discretion, based
not only on technical issues but on whether the public interest would be served by a
prosecution.

In those civil law countries where only limited prosecutorial discretion is provided for, it may
be dangerous to introduce a broad-based group definition of prohibited substances, at least in
relation to personal possession offences. Consider, for example, if Germany introduced an
‘analogue’ provision based on the model operating in the United States or in New South
Wales. In a situation in which an accused was found in possession of a small quantity of what
could be classified as an “analogue” on the basis that there was evidence to suggest that the
substance was “substantially similar” to a drug already controlled, the prosecution would be
obliged to prosecute regardless of the fact that the quantity involved was minute, and/or the
drug had not been proven to have any harmful effect and/or to proceed would involve a
lengthy and costly trial calling on disputed expert evidence. The situation would be even more
problematic if the very broad provisions in South Australia were adopted into such a civil
system. There is nothing to prevent civil law countries introducing generic or analogue
legislation, should they decide that the substance-specific model no longer allows for an
effective response to NSDs. They should be aware, however, that it would not be appropriate
to impose criminal penalties for personal possession offences where there is no discretionary
means by which to determine whether or not the public interest would be best served in
pursuing or securing a conviction.

273 For an explanation of the role of the prosecution authorities in France, see A West et al, The French
274 The nature of the discretion is set out in the Code de Procedure Penal (CPP, Article 40; TEXTS, No
12).
275 The relevant law is Opportunitat, Section 153 et seq. StPO. See the discussion by HH Kuhne,
“Germany” in C Van Den Wyngaert (ed), Criminal Procedure Systems in the European Community
(London, Butterworths, 1993), p 137 at pp 141 and 156.
276 For the situation in Belgium, see C Van Den Wyngaert, “Belgium” in C Van Den Wyngaert (ed.),
tid., p 1 at p 42, and for Luxembourg, see A and S Spielmann, “Luxembourg”, in C Van Den
Wyngaert, ibid., p 261 at p 275.
Conclusion: An appropriate national legislative response

There is little doubt that the national regulation of new synthetic drugs of abuse raises fascinating questions of a legal, socio-legal and philosophical nature that should be carefully considered before a control strategy is developed. It is necessary to weigh up the arguments for and against moving away from the substance-by-substance approach to adopt a broad based analogue or generic model designed to capture a group of synthetic compounds that may be manufactured for the illicit market. The following points could be made in favour of the group definition:

• When we recall the highly potent fentanyl analogues produced at the beginning of the 1980s and the large number of deaths for which they were responsible, it seems justified to have a mechanism in place to allow for the successful prosecution of unscrupulous manufacturers. Of the hundreds of potential compounds waiting to be synthesised, some may be among the most powerful and/or toxic substances yet to appear. Surely we could not allow the unauthorised and unregulated sale of NSDs of this nature?

• In the absence of ‘designer’ drug legislation, drug traders may be encouraged to experiment in order to produce a range of substances falling outside the list of prohibited drugs.

• Although the substance-by-substance approach may not present too many difficulties at this stage when there is still not a huge number of new non-controlled analogues appearing on the illicit market, some experts predict that synthetic drugs will replace plant-based substances to become the major drug problem of the future. In that case, substance-specific models will be constantly challenged by clandestine operators.

• If there is some potential use for synthetic analogues as valuable tools to explore the mind, they should be accessed only by highly skilled chemists who could be free to experiment on themselves provided they have obtained approval.

On the other side, there is room for very legitimate concern that stretching drug controls to encompass the widest possible group of NSDs raises practical and philosophical problems.

• While it is easier to justify the imposition of penalties for the manufacture and sale of dangerous fentanyl derivatives, it is not as easy to explain why hundreds of relatively harmless compounds caught by the generic and analogue models could be grouped in the same class. In certain of the jurisdictions discussed above, lengthy jail terms could be imposed on a person convicted of manufacturing a substance chemically related to MDA, even where it could be proven by the accused that the new compound had no ill-health effects or that it was entirely inactive.

• Analogue laws may leave it ambiguous as to which compounds are controlled and which are not. In Chapter 6 it is argued that a very broadly worded generic or analogue provision may be open to challenge for threatening the right not to be charged under ‘retrospective’ legislation, a right enshrined in numerous international human rights instruments (e.g. the European Convention on Human Rights 1950 and the International Covenant on Civil and Political Rights 1966). Even if, for the reasons discussed below, a Court would not be likely to uphold such a challenge, the very fact that the argument can be made suggests

278 See Chapter 2, supra pp 18-19.
279 Although, as Chapter 2 reveals, a range of new synthetic analogues have been seized (e.g. MDEA, MBDB, DOB, 2-CB and 4-MTA) none have yet captured a significant share of the illicit market. EMCDDA, Extended Annual Report on the State of the Drugs Problem in the European Union for 1999 (Lisbon, EMCDDA, 1999), p 51.
280 See, for example, United States Department of State Bureau for International Narcotics and Law Enforcement Affairs, International Narcotics Control Strategy Report, March 1997, p 3.
281 See Chapter 6, infra pp 172-176.
that there are convincing public policy reasons for rejecting a broadly worded analogue law, particularly since prosecution under it may result in the imposition of harsh penalties.

- It is likely that there will often be significant problems proving in court that a substance fits within the definition of a controlled analogue and cases may involve long and expensive argument between expert witnesses.

- At least at present, the substance-by-substance approach may be sufficient since it is still possible in jurisdictions with a rapid scheduling procedure to keep abreast of the limited number of new substances appearing on the illicit market.

- It should certainly not be permissible for persons to manufacture for sale or sell new compounds in the absence of a license given only to those proven to have the necessary skill and training. Since society would not condone the unauthorised sale of a new therapeutic drug or even a new food substance, there is no reason to allow for the unrestricted distribution of substances intended for the recreational market. In most jurisdictions, however, legislation preventing the unlicensed manufacture and sale of medicinal drugs could be used to prosecute those responsible for manufacture and sale of NSDs (see, for example, the UK Medicines Act 1968, the US Federal Food and Cosmetics Act, the NSW Therapeutic Goods Act or the Dutch Act on Medicines Supply). Although the penalties applicable under such Acts are relatively low compared to those applicable under the relevant legislation dealing with illicit drugs, that lower penalty may be appropriate if the compound proves to be fairly harmless. A more dangerous one could be quickly transferred to the permanent schedules of other drug control legislation, provided there is a mechanism in place to allow for rapid scheduling.

If it is determined that a group-definition should be introduced, which one is the most appropriate? From a law-enforcement perspective, it seems that the broadly worded US analogue approach provides the widest reach. It is submitted, however, that problems with the concept of “substantial similarity”, the uncertainty it creates and the potential for legal wrangles over the application of the provisions in each case, are such that this model should be rejected. The same problem exists in relation to the legislation in Australian jurisdictions to have modified their laws to cover variable chemical compounds, in that they all rely to some extent on the ambiguous concept of “substantial similarity” in relation to either chemical structure and/or pharmacological effect.

There are not these same problems under the UK Misuse of Drugs Act or under the “relative similarity” provisions suggested by the Australian Model Criminal Code Committee. Both rely on a more objective, although highly technical, definition of what will amount to a controlled substance. The advantage for the public is that it should be much clearer (at least to those with the relevant scientific background) which drugs are actually prohibited and which ones are not. For the judicial process, the benefit is that there should be reduced scope for a challenge to the laws for statutory vagueness. While there is still the possibility that some uncontrolled compounds may be synthesised by clandestine operators intent on evading drug laws, this will be relatively unproblematic if there are provisions that facilitate the rapid scheduling of these substances soon after they appear on the market. Society is best served by criminal laws that are clearly articulated and refined in scope. The latter two models appear to offer governments that are concerned by the increasing illicit manufacture of analogues an option for minimising confusion as to the meaning of controlled drugs, while at the same time capturing a broad range of potentially dangerous compounds and discouraging unqualified manufacturers from experimenting.

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282 They can certainly be scheduled in less than the six years it has taken the UK Government to schedule the FIHKAL compounds, should the urgency of a situation require it.
CHAPTER 6
POST TREATY UN INITIATIVES

These four challenges -- demand, information, supply and control system -- are now at the heart of an international Action Plan against the Manufacture, Trafficking and Abuse of ATS. ... If adopted, it will provide the nuts and bolts of a strategy to tackle the most serious drug problem of the next century.
S Chawla, UN Chronicle, 1988

There can be little doubt that the international drug control regime, structured around three operative UN Conventions, has not been well equipped to deal with a market for new synthetic drugs that has expanded rapidly since the last relevant treaty was concluded in 1988. Primarily, this can be attributed to the fact that the issue of variable NSDs manufactured for the clandestine market was not considered to be a significant one at the time the Conventions were drafted, either because NSDs had not begun to appear on the clandestine market at the time (in relation to the first two Conventions) or because they had not begun to appear in large numbers and the preoccupation was still very much with plant-based narcotic drugs (in respect of the most recent Convention concluded in 1988). It was around 1988, however, that the market for and illicit manufacture of new synthetic psychotropic drugs began to spread.

At the same time that a small number of national authorities (primarily governments of the US and the UK) were becoming increasingly concerned with the expanding popularity of NSDs, international authorities began discussing loopholes and weaknesses in the existing control regime that were being exploited by clandestine manufacturers. As a result, certain post-treaty initiatives have been implemented and still more are currently being developed, with a view to amending or strengthening international controls in order to target new synthetic drugs of abuse.

This chapter looks then at the substance of international action taken in response to the phenomenon of NSDs. How have different UN drug control bodies reacted to the problem of regulating variable chemical compounds? What is the nature of the controls that have been suggested? Do Parties appear to be in agreement as to the most appropriate response? To what extent do political and economic considerations (influential, as we have seen in Part 2, in relation to the drafting of operative international Conventions) still dictate which international controls are accepted? How effective are the strategies suggested and what other action could or should be taken in order to address the problems raised by new synthetic drugs?

The discussion ahead is divided into two parts. Part A covers initiatives designed to regulate

3 See Chapters 3 and 4.
6 See Chapters 3 and 4.
the end-product NSDs appearing on the illicit market since the 1971 Convention was signed while Part B looks at UN action aimed at strengthening control over the precursor chemicals used in their clandestine manufacture. In relation to both types of controls -- end-product and precursor -- initiatives specifically aimed at dealing with the category of new synthetic or ‘designer’ drugs have involved modifications made only to the Schedules of the relevant Convention rather than to substantive provisions. At least as significant as these Schedule changes are the most recent initiatives designed to strengthen the system of international control without amending the existing treaties.

PART A - END-PRODUCT CONTROLS

It is possible to trace the development of international control over NSDs by reviewing the publications of UN bodies charged with the task of monitoring the implementation of Convention provisions. The modern phenomenon of ‘designer drugs’ was first mentioned by a UN drug control body in the 1985 Annual Report of the International Narcotics Control Board. That Report discusses both designer narcotic drugs linked to a large number of fatalities (predominantly in the State of California) as well as the psychotropic compound MDMA, the popularity of which was growing across the United States. In its 1986 Report, the INCB again draws attention to the challenges posed by ‘designer drugs’ or ‘analogues’ and the need for action at a national and international level. It was around the same time that the World Health Organisation became more interested in investigating certain of the NSDs seized on the illicit market. In Chapter 4 the point was made that despite this early recognition of the potential dangers of uncontrolled analogues, the issue did not occupy the attention of the drafters of the 1988 Convention who appear to have been interested primarily in narcotic plant-based drugs. Since its conclusion, the increasing attention devoted to NSDs by the INCB, CND and WHO reflects the fact that these substances have continued to become increasingly popular and are now a topical concern for UN agencies given the responsibility to monitor the functioning of international controls.

The growth in new synthetic drug use throughout the 1990s has stimulated UN drug control bodies, particularly the CND and INCB, to advocate further international action. In its resolution 1995/20, the General Assembly’s Economic and Social Council (ECOSOC) issued a request for the Secretary General, assisted by the UNDCP and INCB to convene expert meetings in 1995 and 1996 in order to discuss and report on appropriate countermeasures to address the illicit manufacture of and trafficking in psychotropic substances, and the illicit use of precursors in their manufacture. In response, a thorough and very useful study entitled Amphetamine-type Stimulants: a Global Review was prepared in 1996. It presents the facts about both the diversion of licit substances and the clandestine manufacture of ATS, particularly those in the ecstasy family. That Report was used as the

10 See Chapter 4, supra p 80.
11 A fact noted by the European Commission in the Communication from the Commission to the Council and the European Parliament on the Control of New Synthetic Drugs (Designer Drugs), 23.5.97, COM (97) final, p 2. One need only look at some of the recent publications of these organisations cited in this chapter, e.g. UNDCP, "Amphetamine-Type Stimulants: A Global Review, supra n.4; Amphetamine-type Stimulants; A Report from the WHO Meeting on Amphetamines, MDMA and other Psychostimulants, Geneva, 12-15 November 1996, WHO/MSA/PSA/97.5 and the Annual Reports of the INCB from 1996 to 1998.
13 UNDCP,”Amphetamine-Type Stimulants: A Global Review, supra n.4.

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basis for two Expert Meetings\(^{14}\) convened soon afterwards to discuss measures designed to strengthen international controls in order to contain the spread of synthetic psychotropic drugs.

At its fifty-first session on 12 December 1996, the UN General Assembly resolved\(^{15}\) to convene a Special Session devoted to considering various aspects of the struggle against illicit drug trafficking. The United Nations General Assembly Special Session on the World Drug Problem (UNGASS) was held between 8-10 June 1998, appropriately marking the tenth anniversary of the 1988 Convention.\(^{16}\) Its aim was to evaluate the current state of international controls and to focus on the means by which they could be strengthened over the next decade.\(^{17}\) In March 1997, the CND determined that the following seven issues would be canvassed: synthetic drugs; chemical precursors; demand reduction; money laundering; corruption; judicial cooperation and the strengthening of UN bodies involved in drug control.\(^{18}\) It is indicative of the concern generated by the spread of synthetic drugs that ATS, and particularly NSDs and the precursors used in their manufacture, were a main focus for the Special Session, an event considered to be extremely important in setting the agenda for drug control in the new millennium.\(^{19}\) At the previous UNGASS held in February 1990, the focus was still very much on plant-based narcotic drugs.\(^{20}\) Over the eight years passing between those Special Sessions, the popularity of a number of NSDs and the possibility that a greater range of uncontrolled analogues may appear on the illicit market had provoked enough concern to make this issue a main agenda item.

**Strengthening control over licit trade in psychotropic drugs**

Before looking at recent initiatives dealing specifically with NSDs, let us first consider how successful the 1971 Convention has been in achieving its original objective of curtailing the

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\(^{15}\) General Assembly resolution 51/64.

\(^{16}\) In accordance with resolution 51/64, the CND acted as preparatory body, holding ten meetings and a number of informal working group sessions in order to develop the agenda and to draft documents to be adopted at the Special Session in June. These deliberations were open-ended so that all States Members of the UN, members of specialised agencies and observers, were invited to attend. *Report of the Commission on Narcotic Drugs Acting as Preparatory Body for the Special Session of the General Assembly Devoted to the Fight Against the Illicit Production, Sale, Demand, Traffic and Distribution of Narcotic Drugs and Psychotropic Substances and Related Activities on its Second Session, Internal Memorandum, A/S-20/4*, 17 April 1998, p 5.

\(^{17}\) “Special Session of the United Nations General Assembly devoted to the Fight Against the Illicit Production, Sale, Demand, Traffic and Distribution of Narcotic Drugs and Psychotropic Substances and Related Activities”. See [http://www.unodc.org/unodc/ga_bkgnd.htm](http://www.unodc.org/unodc/ga_bkgnd.htm).


\(^{19}\) In the lead up to the Special Session, the then Director of the UNDCP, Mr Giorgio Giacomelli, commented that the Special Session should be a “landmark in international cooperation in the field of drug control”. See “Introductory Remarks”, *First Informal Open-ended Inter-sessional Meeting of the CND acting as the preparatory body for the 1988 UNGASS*, 7 July 1997, unpublished speech recorded by the UNDCP.

\(^{20}\) See Political Declaration and Global Programme of Action, adopted by the General Assembly at its seventeenth special session, devoted to the question of international cooperation against illicit production, supply, demand, trafficking and distribution of narcotic drugs and psychotropic substances, adopted by General Assembly resolution S-17/2 of 23 February 1990. Although this Political Declaration mentions synthetic psychotropics, this is in the context of preventing diversion of pharmaceutical products. Clandestine manufacture of synthetic drugs was not an issue at the seventeenth special session.
diversion of psychotropic substances listed on Schedules I to IV. As previously noted, the time of drafting the main source for synthetic drugs traded on the black market was not clandestine manufacture but rather legitimate pharmaceutical supplies that had been diverted from the licit market. Thus, the primary aim of the 1971 Convention was to prevent the diversion and subsequent misuse of substances while at the same time ensuring that licit trade would not be adversely affected. The Convention has been only partially successful in controlling the licit trade. Although the diversion of Schedule I and II substances has for the most part been eliminated, there is still large scale diversion of Schedule III and IV drugs. Why have the substances on the first two Schedules been effectively controlled and those on the remaining two not? In relation to Schedule I substances, regarded as among the most dangerous and the least therapeutically beneficial, it is because governments have been obliged under the Treaty to prohibit all use other than for scientific and very limited medical purposes. Licit trade has been restricted to infrequent transactions involving only a few grams and no cases involving the diversion of Schedule I substances have ever been reported to the Board. The diversion of Schedule II substances has been successfully reigned in as a result of first, a decline in their legitimate use and secondly, the widespread application of relatively stringent controls, some of which are required by the Convention and others which have been initiated by the UN drug control bodies following its entry into force. By contrast, many of the substances in Schedules III and IV are widely used for legitimate purposes and have not been subjected to tight regulations by all exporting and importing countries.

Experience has shown that two prerequisite controls must be universally implemented in order to effectively prevent the diversion of substances from the licit to the illicit trade. First, all exporting countries must carry out a pre-export review of the legitimacy of each transaction, based on the requirement of a mandatory export authorisation or pre-export declaration. Secondly, competent authorities must have access to statistical estimates providing at least a basic guide as to the importing countries’ legitimate requirements for each scheduled substance. In respect of substances in Schedule II, the 1971 Convention obliges Parties to comply with the first prerequisite (Article 12 import/export authorisations) but not the second (system of estimates). In relation to Schedule III and IV substances, neither of those control measures is required by the Treaty.

Less than a decade after the conclusion of the 1971 Convention, it was recognised that the diversion of Schedule II substances was continuing and further action would have to be taken in order to strengthen the control regime. In response, the ECOSOC passed resolution 1981/7, inviting all Governments to cooperate with the INCB’s request that from time to time they assess their legitimate medical and scientific requirements for substances in Schedule II. Since 1981, an increasing number of Governments have submitted those

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21 See Chapter 1, supra p 11 and Chapter 3, supra p 49.
28 Ibid.
29 Article 12, para.1, 1971 Convention on Psychotropic Substances.
30 See the discussion in Chapter 3, supra pp 68-69.
32 INCB, Report of the International Narcotics Control Board for 1982 (E/INCB/1982/1), p 6. A General Assembly resolution is merely declaratory and is not in itself binding. It is described as a “recommendation creating prima facie but no legal obligations” (although in some cases the
estimates, thereby allowing for the almost universal application of a simplified estimates system that is reported by the INCB to be largely responsible for curtailing the large-scale diversion of Schedule II substances evident in the 1970s and early 1980s. The Board has received no report of a significant case involving the diversion of Schedule II substances from licit trade since 1990. Thus, almost all of the Schedule I and II substances now appearing on the illicit market (this includes LSD, amphetamine and methamphetamine originally scheduled in 1971 as well as MDMA and related compounds scheduled since 1986) have originated in clandestine laboratories.

In light of the continued widespread diversion of Schedule III and IV substances a further attempt was made to persuade Parties to impose the two prerequisite international controls outlined above in respect of all of the substances scheduled under the 1971 Convention. Following the recommendations of the INCB, the ECOSOC passed resolutions 1985/15 and 1987/30 requesting that all Governments voluntarily apply the system of import and export authorisations provided for in Article 12 to international trade in the remaining substances. Furthermore, in resolution 1991/44, the ECOSOC invited all Governments to extend the system of simplified estimates or assessments of annual domestic medical and scientific requirements to include substances in Schedules III and IV. Council Resolution 1996/30 authorised the Board to establish estimates for those Governments that fail to supply them, so as to provide guidance for other States and territories in determining whether or not to approve exports of psychotropic substances.

Many Parties have accepted the need for further controls and have implemented some or all of the recommendations. With the exception of five Governments, all States and territories have submitted annual estimates in respect of Schedule II substances pursuant to ECOSOC resolution 1981/7. As at November 1999, estimates for Schedules III and IV substances had been submitted by 182 States and territories pursuant to resolution 1991/44. In 1999, import and export authorisations supplied by the Board were required for all substances in Schedule III by around 150 countries and territories and for all substances in Schedule IV by 140.

Despite the introduction of certain of the additional control measures suggested by many Parties to the Convention, there are still significant quantities of Schedule III and IV substances available for diversion into the illicit trade. This is due largely to the tardy acceptance of further controls by major manufacturing countries. In 1997 and 1998, several tonnes of Schedule III and IV substances (amphetamine-type stimulants and benzodiazepines) were identified as having been diverted, enough to manufacture millions of tablets. It should
be borne in mind that those quantities detected are likely to be much smaller than what is actually diverted. In its 1997 Report the Board was critical of exporting countries that have neglected to verify the import orders for various scheduled psychotropics against the legitimate estimates of importing countries, claiming that “[L]arge quantities of psychotropic substances were approved for export by some governments in Asia and Europe in spite of the fact that those quantities were higher than the assessments of legitimate requirements of the importing countries”.

Two years later, several countries, including France, Belgium, Finland, Luxembourg and New Zealand, were congratulated for expanding their system of import/export authorisations to include Schedule III and IV substances, after several years of having been chastised for their tardy response. The Board was critical, however, of others involved in trading significant quantities, particularly Canada, Ireland, Lebanon, Singapore, Thailand and the United Kingdom, which have not yet embraced the additional control measures, despite several years of having been urged to do so. It can be seen that many of those that have long failed or continue to fail to fully comply with their international obligations, are wealthy industrialised States that can best afford to introduce them.

Article 19 of the 1971 Convention provides the INCB with limited sanctioning powers for failure to implement treaty provisions. Recall from Chapter 3 that the Board will first put out a confidential request to the Government concerned for an explanation of the inadequacy of their controls, but may later publicise the refusal to cooperate and eventually advise other Parties to halt the export or import of drugs to or from the rogue State. In 1999, Article 19 was invoked in respect of six States, one of which responded by introducing the legislative measures required under the Treaty so that all action pursuant to Article 19 was terminated, and four of which made progress in taking the action requested. With respect to the sixth State, however, no further progress in implementing the Treaty had been made by early 2000 and the Board expressed its regret that Article 19 measures would be continued. At the time of writing, the names of the States concern have not been made public and they will remain anonymous provided there is some evidence of a willingness to comply with obligations under the 1971 Convention.

In order to better monitor and enforce compliance, expert international drug control agencies, including the INCB and the CND, have suggested that Parties to the 1971 Convention propose an amendment so as to make it a treaty obligation to apply to substances in Schedules III and IV the system of import/export authorisations and simplified estimates. The procedural options available to amend the 1971 Convention are explained in Chapter 3.

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46 Ibid., pp 18 and 36. See also the INCB, Report of the International Narcotics Control Board for 1998 (E/INCB/1998/1), p 17, in which the Board singles out the industrialised countries of Belgium, Canada, Singapore and the UK as among those that were jeopardising effective international control by failing to introduce import/export controls over schedule III and IV substances.
47 See the discussion in Chapter 3, supra pp 70-71.
49 That recommendation was made at a Joint INCB/COE Conference on the Control of International Trade in Psychotropic Substances in Europe, convened in October 1995 (Report of the Internal Narcotics Control Board for 1995 (E/INCB/1995/1), p 26). It was also a recommendation of the Expert Meeting on ATS in China, 1996 (“Abuse of and Illicit Trafficking in Amphetamine-type Stimulants”, supra n.14, para.52) and of the Pan-European Ministerial Conference, organised by the Pompidou Group in Norway, May 1997 (Report of the International Narcotics Control Board for 1997 (E/INCB/1997/1), p 21. At the first Intercessional Meeting held in July 1997 to develop the agenda for UNGASS, the INCB again lamented the fact that no government had yet proposed a simplified amendment that would make such controls mandatory. See Speaking Notes for the First Intercessional Meeting, 7-9 July 1997, Section on Stimulants, document INCB/STI, Internal Memorandum.
50 See Chapter 3, supra n.74.
**Stimulants and their Precursors** adopted at the UNGASS in 1998,51 States are urged to **implement** all relevant Council resolutions and **consider** all Board recommendations aimed at strengthening provisions of the 1971 Convention.52 In effect, therefore, implementation of the Action Plan requires that States not only adopt Council resolutions but also give **consideration** to a treaty amendment that would make Schedule III and IV import/export authorisations and simplified estimates an obligation under the 1971 Convention. It is submitted that such an amendment is overdue and should be formally initiated as soon as possible. This would reinforce control measures by making countries accountable to the Board should they fail to fully accept their obligation to effectively monitor international trade. At the time of writing, however, there has been no movement to seriously debate any such amendment. It is open to suggestion that some of the industrialised countries referred to in INCB Reports that have been lax in controlling the lucrative trade in Schedule III and IV substances may be reluctant to accept the imposition of binding international controls.

**Tackling new synthetic drugs**

It has been seen that the 1971 Convention measures can and have been built upon in order to reduce the likelihood that identifiable scheduled substances, many of which are recognised to have a legitimate therapeutic use, will be **diverted** from their licit channels. What the Convention has not been able to do, however, is to prevent rapid growth in **illicit manufacture, trafficking and abuse** of both traditional ATS and new synthetic substances originating in the clandestine laboratory.53 Over the past decade, the growth in illicit manufacture of NSDs has served to highlight the inability of the 1971 Convention to control the illicit side of the equation, particularly where that involves variable chemical compounds. In response, minor amendments have been made to the Schedules of the 1971 Convention and more substantive amendments have been debated. Furthermore, non-treaty based initiatives, at least as important as the Convention provisions themselves, have been suggested as the most appropriate way to tackle the supply of and demand for new synthetic drugs.

**Scheduling**

One of the main weaknesses of the 1971 Convention in relation to the control of NSDs is its slow and inflexible scheduling system. There are two explanations for the unsuitability of the process currently in operation. The first is that it was designed to control stable substances that could be easily identified and defined by their pharmacological structure. It is not equipped, therefore, to deal with the appearance of a range of variable new chemical compounds.54 The second is that since the primary objective of the 1971 Convention was to prevent the diversion of substances with a therapeutic use from the licit trade, the scheduling process was deliberately made more complex and consequently more time-consuming than that operating under the 1961 Single Convention.55 As a result, any modification of the schedules can be expected to take two to three years, leaving a lacuna between the period when new compounds appear on the illicit market and the date that they are brought under international control.56 That period may be exploited by clandestine drug manufacturers.

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51 A/RES/S-20/4A. The Action Plan is discussed in some detail below.
52 Ibid., para.23.
54 Elsewhere in this thesis the point has been made that although a small number of different hallucinogenic compounds were manufactured in the 1960s and 1970s (including MDA, DOB and STP), those substances did not become fashionable and there was not then a large scale problem with the manufacture of variable chemical compounds. See Chapters 1 and Chapter 2.
55 See the discussion of the more cumbersome scheduling procedure under the 1971 Convention, as compared with the simple scheduling procedure provided for in the 1961 Single Convention, in Chapter 3, supra pp 60-62.
56 Communication from the Commission to the Council and the European Parliament on the Control of New Synthetic Drugs (Designer Drugs), Brussels, 23.5.1997, COM (97) 249, p 2.
aiming to produce and traffic psychotropic compounds falling outside of the schedules.

The response of the international community to the appearance of NSDs has been to add each new substance separately to the schedules of the 1971 Convention some time after it appears on the illicit market. In 1985, the compounds MDA and DOB became Schedule I drugs. In the next year, seven new synthetics -- MDMA, MMDA, PMA, DMA, TMA, DOET and Cathinone -- were placed into Schedule I in view of the fact that they were thought to have no legitimate use and had appeared in varying quantities on the illicit market. Following the procedure outlined in the Convention, the WHO Expert Committee on Drug Dependence had conducted an assessment of each compound based on the criteria set out in Article 2(4), including the extent or likelihood of abuse, seriousness of the public health and social problem and degree of usefulness, and had communicated to the CND its recommendation for appropriate controls. Ironically, it was MDMA, the psychotropic substance that went on to become most popular and to generate the most publicity for the 'designer' drug phenomenon, that was the only Schedule I substances to provoke any real debate between WHO Committee Members as to the type of controls that should be applied. Although the majority concluded that it was necessary to impose the strictest controls, they acknowledged the arguments of highly qualified psychologists who had faith in the therapeutic qualities of the drug and urged nations to "facilitate research on this interesting substance". Based on the assessment of the WHO Committee ("determinative as to medical and scientific matters"), the CND ("bearing in mind the economic, social, legal, administrative and other factors it may consider relevant") made the decision to schedule the new substances.

It was not until 1990 that other NSDs were brought under international control. In that year the three compounds MDE, N-OH-MDA and 4-methyl-aminorex were added to Schedule I. In 1995, the last time that Schedules were amended, the synthetic substances etryptamine and methcathinone were placed in Schedule I. Although very few ring-substituted amphetamines were scheduled until the middle of the 1980s, the number of controlled ATS has since increased by over 100%. This is illustrative of the fact that until the late 1970s/early 1980s the psychotropic drug problem essentially involved the growing misuse of licit pharmaceuticals, while the last two decades have seen a switch to clandestine manufacture of a more diverse range of end-products. It is still the case that the bulk of the 111 substances currently scheduled are not NSDs, but psychotopic substances recognised as having some therapeutic use. It is likely, however, that more new chemical compounds that have originated in the clandestine laboratory will need to be added in the future as a market for the analogues of controlled drugs continues to expand. In 1998, the WHO Expert Committee on Drug Dependence recommended three NSDs for critical review -- Gamma-Hydroxybutyric acid (GHB), 4-Bromo-2,5-dimethoxyphenethylamine (2C-B) and N-Methyl-1-(3,4-

57 See Appendix C showing the year that synthetic substances were added after the signing of the 1971 Convention.
58 WHO Expert Committee on Drug Dependence, "Twenty-second Report", Technical Reporting Series, No.729, (Geneva, WHO, 1985), pp 8-25. The WHO carried out an assessment of 28 phenethylamines in order to determine which should be brought under control. It was concluded that 19 of those substances (MDA and DOB scheduled in 1985 and the 17 phenethylamines scheduled in the following year) met the criteria in Article 2, para.4 of the 1971 Convention and should be placed in Schedule I or II.
59 Ibid.
60 See Appendix C.
61 In both 1990 and 1995, other psychotropic substances, not NSDs manufactured in the illicit laboratory but substances recognised as having some degree of therapeutic use, were placed in Schedules II to IV of the Convention. Ibid.
63 Ibid., p 4.
methylendioxyphenyl)-2-butanamine (MBDB). The outcome of the review, due to take place at the Committee’s next meeting in June 2000, will be sent to the CND which bears responsibility for the ultimate control decision. If these substances are eventually scheduled, it will have been at least two years from the time they were identified as being traded on the illicit market till the time they are brought under international control.

In view of the delay between the discovery of an NSD and the application of international controls, a suggestion was recently put forward for the introduction of a generic scheduling mechanism into the 1971 Convention on Psychotropic Substances. In April 1997, the Spanish Government submitted a proposal to the UN Secretary General to amend the Convention by adding to the first two Schedules the phrase:

any other modified chemical compound which produces effects on the organism similar to those produced by the original controlled substance.

The WHO Expert Committee on Drug Dependence was called upon to examine the advantages and disadvantages of such an amendment from a scientific standpoint, while the CND considered its legal implications.

Had the Spanish proposal been adopted it would have resulted in the introduction of an analogue clause comparable to, although much broader than, that introduced under the domestic drug laws in a number of jurisdictions including the United States, New South Wales and South Australia. The CND initially expressed some doubt as to the legality of this proposed amendment. It was suggested that group scheduling may be beyond the scope of Article 2 of the 1971 Convention which refers to the addition, transfer or deletion of a “substance” to or from one of the Schedules. However, a review of the history of amendments made pursuant to Article 2 indicated that a precedent for group scheduling had already been set with the addition in 1977 of “the salts of the substances listed in this schedule whenever the existence of such salts is possible”. There had been no argument then that this was precluded by a narrow interpretation of the reference to “substances” in Article 2.

Accordingly, the Treaty and Legal Affairs Branch of the UNDCP concluded that the Spanish proposal could not be excluded on narrow legal grounds and would have to be assessed on the basis of its technical merits.

The Expert Committee of the WHO gave a number of reasons for rejecting the introduction at an international level of generic control over ‘similar’ substances. First, despite the legal

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65 Information supplied by Mr Tokuo Yoshida, Psychotropic and National Drugs Division of Drug Management & Policies, World Health Organisation, Correspondence (2), 5 November 1999.

66 Letter from the Government Representative for the National Plan on Drugs, Ministry of Interior, Mr Gozalo Robles Orozco, to the Secretary-General of the UN, Mr Kofi Annan, 17 February 1997, copy supplied to author during visit to UNDCP, September 1997.

67 See Chapter 5 for a comparative analysis of the ‘group’ scheduling provisions introduced in these three jurisdictions.

68 Internal e-mail transmitted between staff of the UNDCP, 4 January 1998, copy supplied to the author during visit to UNDCP, September 1997.


70 Memorandum from the Chief of the Treaty and Legal Affairs Branch, Ms Katherine Volz, to the Secretary of the Thirty-first WHO Expert Committee on Drug Dependence, Mr Tokuo Yoshida, 19 May 1998, copy supplied to author during visit to UNDCP, September 1997.
advice given by the Treaty and Legal Affairs section and the reference therein to the scheduling of salts, it considered that the scheduling of analogues may not be in accordance with the procedure outlined in Article 2 requiring the WHO to evaluate individual substances. Secondly, the lack of specificity in group designations would undoubtedly have caused confusion amongst the international community and may have lead to disagreements between Member States as to whether or not a substance was controlled. Finally, ambiguity in relation to the scope of controls could have created an undue regulatory burden on those involved in the legitimate trade of substances which may or may not fall within the generic definition. As a result, generic international controls would have been extremely difficult to introduce from a pharmacological perspective and would not be palatable to many of the Member States. The Committee noted, however, that this would not prevent individual Governments, particularly those experiencing problems with variable chemical compounds, from introducing domestic legislation to criminalise certain activities involving the analogues of controlled substances.

The conclusions of the WHO in relation to the Spanish proposal must be accepted since it does not seem feasible, necessary or even desirable to extend international controls to cover the analogues of scheduled substances. The underlying purpose of developing an international instrument to regulate control over a category of drugs is to coordinate and to the extent possible harmonise national controls. A broad definition of ‘analogues’ in the schedules would generate both conflict and confusion since States would be left to determine for themselves what additional substances should be submitted to the control regime. While some might consider that they had an obligation to impose import/export controls over certain analogues (e.g. MDEA, MBDB), others would almost certainly dispute that those compounds came within the analogue provision added. The only way to overcome this problem would be to fund the establishment of an international committee to determine what compounds produced “effects on the organism similar to those produced by the original controlled substance”. This would, however, bypass the scheduling procedure set out in Article 3 of the 1971 Convention that is designed to guarantee a thorough investigation of the medical, scientific, economic, social and legal implications of extending the control regime. Thus, it can be concluded that adoption of the Spanish proposal would not only prove unworkable but would seem to defeat the purpose of an instrument designed to coordinate national laws so as to ensure an even and universally applicable control regime.

In addition to the chemistry based reasons for not adopting the Spanish proposal explained above, the scheduling of analogues would place undue restrictions on the policy options open to national governments aiming to pursue an overriding goal of harm minimisation in respect to NSDs. If analogues were to be added to the schedules of the 1971 Convention, national governments may be forced to criminalise all activities from manufacture, production and

72 Ibid.
73 Information supplied by Tokuo Yoshida, Psychotropic and National Drugs Division of Drug Management & Policies, WHO, Correspondence (1), 23 November 1998.
74 Paragraph 6 of the 1971 Convention on Psychotropic Substances makes it clear that taking effective measures against abuse of psychotropic substances requires “co-ordination and universal action”.
75 Although the term “harm minimisation” is not unambiguous, it has been skillfully defined by Lewis and Sherval as follows: “A harm reduction philosophy takes the view that it is of greater benefit to the common good to actively attempt to reduce the harm that drugs can cause rather than simply try to prevent drug taking. It is a pragmatic approach that recognises the difficulties inherent in attempting to prevent all forms of illicit drug taking, and emphasises maximising benefits and minimising harm”. Demand reduction activities related to ‘new synthetic drugs': MDMA (ecstasy), other amphetamines and LSD in European Union Member States, Report for the European Monitoring Centre for Drugs and Drug Addiction (Edinburgh, CHADS, 1997), p 6. Harm reduction and demand reduction are discussed further in the Conclusion to this thesis.
trafficking to possession of analogues for personal use. While the decision on regulating analogues is left to individual Member States, each is free to apply criminal controls only in relation to certain activities. They may, therefore, choose to criminalise manufacture of analogues for sale, trafficking and distribution but not manufacture or possession for personal use, an option that would be restricted by international controls.

Although it must be accepted that at an international level scheduling is best carried out on a substance-by-substance basis, it is submitted that there is a need to modify the 1971 scheduling procedure so that it is better able to cope with the appearance of NSDs. As previously mentioned, it is not adequate for controlling the illicit market primarily because it was not designed to do so. Since the main aim of the Convention was to prevent diversion of substances with a legitimate industrial or therapeutic use, the drafters abandoned the more straightforward and speedy scheduling criteria adopted for the 1961 Convention in favour of a procedure more complicated, cumbersome and time consuming.

In order to illustrate this point, let us compare the different scheduling regimes under the 1971 Convention and the 1961 Single Convention on Narcotic Drugs. Under the 1961 Single Convention, where the WHO finds that any new drug is "liable to similar abuse and productive of similar ill effects as a drug in Schedule I or II or is convertible into a drug", it shall communicate its finding to the CND which may move relatively rapidly to bring that substance under control. There need not be any evidence at all of any actual abuse of the substance. By contrast, recall from Chapter 3 that in order for a new drug to be scheduled under the 1971 Convention, the WHO must find first, that the substance has the capacity to produce both a state of dependence and central nervous stimulation or depression or similar abuse and similar ill effects as a substance in Schedule I, II, III or IV. In addition there must be evidence that the substance is being or is likely to be abused so as to constitute a public health and social problem that justifies international controls. Based on its findings, the WHO will submit a recommendation (determinative as to medical and scientific matters) to the CND which is then instructed to consider any economic, social, legal, administrative and other relevant factors before making a control decision. The simple scheduling procedure under the 1961 Convention was deliberately rejected in 1971 so as to allow for considerations other than those related to the health effects of a substance to be taken into account. In the words of the International Narcotics Control Board, commenting during a review of the effectiveness of international treaties:

Due to some commercial interests and alleged public health considerations, this 'similarity concept' was abandoned by the plenipotentiary conference that adopted the 1971 Convention. In order to avoid the international control of a great number of amphetamine - and barbiturate-type drugs, the 'similarity concept' was replaced by complex and contradictory criteria.

While the intention may have been to ensure that legitimate supplies were not interrupted, the

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76 As discussed in Chapter 3 (supra p 72), there is some ambiguity as to whether the 1971 Convention imposes an obligation on Parties to criminalise personal possession offences. There is no ambiguity, however, in respect of the 1988 Convention, Article 3 of which requires Parties to criminalise possession of substances scheduled under the 1961 and 1971 Conventions. A Party to the 1988 Convention is obliged under Article 3 to criminalise personal possession of substances scheduled under the two earlier Conventions, provided this is in accordance with its "constitutional principles and the basic concepts of its legal system". See Chapter 4, supra p 84.

77 See supra p 156.

78 See Article 3 (3)(iii) of the 1961 Single Convention on Narcotic Drugs.

79 See Article 2 (4) of the 1971 Convention on Psychotropic Substances. The scheduling procedure is set out in full in Chapter 3.

unintended effect is that the scheduling regime is not equipped to deal with the clandestine market.

It is suggested by the INCB that a number of negative consequences have resulted from the adoption of this more complicated procedure. First, in order to avoid decisions that could be argued to be arbitrary, the WHO was forced to develop a complex and lengthy ‘evaluation’ mechanism.81 This causes a delay in scheduling decisions, thereby allowing for the spread of new drugs by illicit manufacturers eager to exploit the lacuna in controls. Secondly, the ambiguous nature of the scheduling process, together with the requirement that there be evidence of likelihood of abuse constituting a serious health problem, has made individual Governments hesitant to submit notifications for the addition of a new drug.82 The overwhelming majority of changes in the scope of control have been initiated by the WHO. An INCB review of the scheduling of substances after the 1971 Convention came into force reveals that the application of the similarity concept would for the most part lead to the same result, but in a much faster time, with less energy expended and less expense.83 Accordingly, the Board has recommended that the 1971 Convention be amended so that the scheduling criteria and process are brought into line with those under the 1961 Convention.

Such is the INCB’s concern about the issue that in December 1997, the WHO was asked by the Board to provide its opinion on the current scheduling mechanisms under the Conventions, including any suggestions as to the appropriate way to streamline the process.84 In March 1998, the Director-General submitted his cautious reply.85 While acknowledging that some Governments perceive the current regime to be too time-consuming, he stressed that the role of international drug scheduling must be understood to be different from that of national scheduling. Merely because a psychotropic substance is abused in more than one country does not necessarily warrant the imposition of international controls. The Director-General did accept, however, that there may be a need for a rapid international scheduling procedure if evidence could be presented to show that the absence of timely international controls had adversely affected national control regimes. The INCB was requested to supply the WHO with any such evidence, if available.86 Since the 1971 Convention does not oblige Governments to inform the INCB of cases where their national controls have been rendered ineffective by the lack of international controls, it was suggested that the Board may wish to instruct the secretariat to specifically request such information. At the time of writing, no further action has been taken.87

Clearly there is a need for further balanced debate concerning the appropriateness of adapting the scheduling procedure to handle the relatively recent trend towards illicit manufacture of NSDs. On the one hand, it may be argued that it is not wise to impose unnecessary international controls over substances where there is no evidence that they are subject to

81 Ibid., p 14.
82 Ibid., p 15.
83 Ibid. A recommendation in favour of simplifying and harmonising the scheduling criteria for the control of ATS and their precursor chemicals in all three international drug control treaties was made by the Expert Meeting on Amphetamine-type Stimulants held in 1996, supra n.14, p 9. In 1997, the INCB made further recommendations in favour of amending the 1971 Convention so that substances would be scheduled on the basis of the ‘similarity concept’, as they are in the 1961 Convention. See “Speaking Notes for the First Intersessional Meeting”, 7-9 July 1997, Internal Memorandum, document INCB/STI.
85 Ibid.
86 Ibid.
87 Information supplied by Howard Stead, Head, Scientific Section, INCB, Correspondence, January 1999 and confirmed March 2000.
significant levels of abuse. On the other hand, even smaller levels of manufacture and misuse in certain countries (e.g. the manufacture of 4-MTA in the Netherlands\textsuperscript{88}) can indicate the beginning of a trend that will see the spread of that substance to other countries in the global market place. The absence of international controls may encourage manufacturers and distributors to seek out those markets where the new substance is not covered by domestic law. Even leaving in the requirement that there be evidence of actual abuse of the psychotropic in question, it would appear that the procedure must be streamlined in some way so as to reduce the two to three year delay between nominating a substance and seeing it scheduled, at least, that is, if the 1971 Convention is to have any relevance to the control of new synthetic substances manufactured in the clandestine sphere.

Before leaving the issue of scheduling, it should be noted that NSDs could be brought under control more speedily by efficient use of the provisional control mechanism outlined in Article 2(3) of the 1971 Convention. This provides that where there is an indication that the substance to be reviewed by the WHO may be included under Schedule I or II, Parties must “examine the possibility” of imposing the controls applicable to scheduled drugs on the substance under review. The absence of an obligation, such as there is under the 1961 Single Convention, to actually impose provisional controls was an issue that provoked some controversy during the 1971 Convention debates.\textsuperscript{89} While it is not wise to make rash or imprudent decisions at either the domestic or international level, in the event that a new compound is proven to be dangerous, all countries in which the manufacture and transport of the drug might take place should take action to bring that substance under control as soon as possible. Thought should be given to amending the Convention in order to make it compulsory for Parties to apply provisional controls over substances considered for addition to Schedule I.

\textit{Model Laws}

Although a decision has now been made not to introduce generic or group scheduling at the international level, by the drafting of Model Laws the UN Drug Control Programme (UNDCP) has encouraged national governments to introduce a generic provision into their own domestic legislation. In recent years, Expert Working Groups convened by the UNDCP have developed Model Laws intended as guides for countries wishing to update their criminal law relating to drug control.\textsuperscript{90} One formula has been created for countries with a civil law code and another for countries governed by the common law.\textsuperscript{91} Model Laws do not only encompass those controls that are obligatory under the three operative international Conventions, but go beyond treaty requirements to propose additional measures that are considered by the UNDCP to be necessary in order to address a range of law and order

\textsuperscript{88} See Chapter 2, \textit{supra} pp 35-36.

\textsuperscript{89} See Chapter 3, \textit{supra} pp 59-60. In contrast to the 1971 Convention, Article 3(3)(ii) of the 1961 Single Convention on Narcotic Drugs gives the CND the power to require that Parties apply provisional controls while an assessment is carried out to determine whether substances will be added to Schedule I.

\textsuperscript{90} Model Laws have also been developed relating to, \textit{inter alia}, the classification of narcotic drugs, psychotropic substances and precursors, mutual assistance in criminal matters, extradition and money laundering. They are made available to those countries that request assistance and are promoted to countries that the UNDCP considers do not yet have adequate domestic laws in place. Although Model Laws are advertised on the Internet (see \url{www.undcp.org/model_legislation.html}) they are not reproduced in full and can only be accessed by authorised users on restricted databases established by the UNDCP. Information supplied by Andrew Wells, Legal Advisory Group, Treaty and Legal Affairs Branch, UNDCP, \textit{Telephone Interview}, 7 July 1999.

\textsuperscript{91} A Commentary for the Civil Law Model, further explaining the operation of its provisions, was developed in 1996. A similar Commentary for the 1998 Common Law Model is currently being written and is due to be released in August 2000. Information supplied by Elizabeth Jenkinson, Legal Advisory Group, Treat and Legal Affairs Branch, UNDCP, \textit{Telephone Interview}, 2 May 2000.
problems connected with illicit drug use.\textsuperscript{92} Models recently developed for both major legal traditions include generic provisions specifically aimed at preventing the proliferation of designer drugs.

In September 1996 the \textit{Model Law on Drug Trafficking and Related Offences} was drafted for civil law jurisdictions. It specifies that certain activities involving "analogues" will be treated as a criminal offence. Under Article 2.2-1, the "illicit manufacture or distribution of analogues" is to be made liable to imprisonment for a certain period and/or a fine of a certain amount.\textsuperscript{93} As the \textit{Commentary on the Model Law} points out, the purpose of this provision is to discourage unscrupulous researchers and traders from developing and distributing 'designer drugs'.\textsuperscript{94} The very next provision purports to criminalise the manufacture, transport and distribution of \textit{precursors, equipment and materials} that are known to be used in the production or trafficking of drugs or analogues.\textsuperscript{95} Although Parties to the 1971 and 1988 Conventions would be obliged to create these criminal offences in relation to individually scheduled drugs, the Model Law goes further by requiring coverage of a broad range of variable chemical compounds. Other provisions relating to the facilitation and incitement of illicit activity also include a variant encouraging States to extend the offence to cover analogues.\textsuperscript{96}

The most important difference between the Model Law that has been developed for civil law countries and the equivalent designed for countries under the common law system is the absence in the former of any reference to analogues in two principal offences. The first is that of international trafficking. Article 2.1-2, stating that the illicit international transport, exportation or importation of a drug shall be liable to imprisonment and/or a fine, makes no mention of analogues. The Commentary on the Model Law provides no explanation of why they were excluded from this trafficking provision.\textsuperscript{97} There may have been some perception at that time that their inclusion would impinge upon legitimate commercial trade and/or would prove unpopular with commercial traders. The second offence excluding analogues, set out in Article 2.8-1, relates to illicit cultivation, purchase or possession of a drug for personal use. It may be that it was thought unwise to include analogues in personal possession offences given the limited prosecutorial discretion in some civil law countries. As outlined in Chapter 5, although prosecutors will always have some discretion in relation to whether there is sufficient evidence to proceed, in many civil law jurisdictions they are not granted a broader discretion to discontinue on public policy grounds.\textsuperscript{98} According, however, to the latest information provided by the Legal Affairs Section of the UNDCP,\textsuperscript{99} there are currently plans to revise the Model Civil Law so that analogue offences may soon be extended to cover both trafficking and personal possession, in line with the common law provisions.

In the UNDCP’s 1998 \textit{Model Drug Abuse Bill} drafted for common law countries, there are again provisions covering the ‘analogues’ of substances recognised to be drugs of abuse. One difference between the civil and common law models immediately noticeable is that the latter is far more detailed. A more extensive series of provisions relating to drug trafficking and

\textsuperscript{93} Chapter I, Section I, Article 2.2-1. It is for individual governments to determine the period of imprisonment and the amount of the fine imposed.
\textsuperscript{94} UNDCP, \textit{Commentary on the Model Law on the Suppression of the Illicit Production of and Trafficking in Controlled Substances and the Illicit Possession of Narcotic Drugs and Psychotropic Substances for Personal Use} (Vienna, UNDCP, 1996), para.6, p 36.
\textsuperscript{95} Chapter II, Section 2, Article 2.2-2.
\textsuperscript{96} See Articles 2.2-2 to 2.5-7.
\textsuperscript{97} UNDCP, supra n.94
\textsuperscript{98} See Chapter 5, supra pp 152-153.
\textsuperscript{99} Information supplied by Andrew Wells, Legal Advisory Group, Treaty and Legal Affairs Branch, UNDCP, Telephone Interview, 7 July 1999.
serious offences are set out, all of which are expressed to cover a “drug of abuse” or its “analogue”. As under the civil law model, there are provisions governing the manufacture and distribution of analogues,\(^{100}\) the manufacture, transport or distribution of precursors, equipment or materials known to be used in the production of analogues\(^ {101}\) and facilitation of use.\(^ {102}\) In addition, however, the common law Model Drug Abuse Bill provides for offences of importing and exporting analogues or acquiring them or possessing them for that purpose\(^ {103}\) and the offence of unlawful possession of an analogue for personal use.\(^ {104}\)

Having viewed the type of offences that are set out in the Model Laws, let us now look more closely at how the term “analogue” is defined, that is, what test has been used to determine whether a particular chemical compound should be considered to be illegal. In both models the drafters have opted for a version based on the ‘substantial similarity’ concept adopted first in the US Controlled Substances Act. Article 1.0-2 of the civil law model defines the term ‘Analogue’ as:

any substance which is not controlled by national law but whose chemical structure is substantially similar to that of a controlled drug\(^ {105}\) whose psychoactive effects it reproduces.\(^ {106}\)

It will be recalled that under the US Controlled Substances Analogue Act of 1996, a prosecutor must prove ‘substantial similarity’ in relation to both chemical structure and pharmacological effect.\(^ {107}\) The Model Law is similar in that it requires proof of both those elements, but is worded differently so that there must be substantially similar chemical structure as well as a ‘reproduction’ of the psychoactive effect of the controlled drug it is being compared to. In view of the ambiguity in the phrase ‘substantial similarity’ and the width of interpretation it allows, it is suggested that this was not the best approach for the UNDCP to advocate. Discussion in Chapter 5 reveals that US Courts applying the ‘substantial similarity’ test must decide in each case whether a non-controlled chemical compound falls within the definition of a controlled drug analogue, a process which can be both time-consuming and expensive.\(^ {108}\) Furthermore, the ‘substantial similarity’ concept does not provide the general public with clear guidelines as to when and why some substances are considered illegal. In respect of the Model Civil law, there may be arguments in relation to what is meant by “reproduces” the psychoactive effect of a controlled drug. How concurrent must the effects of two substances be for one to be thought to ‘reproduce’ the other? As previously discussed the majority of countries in the European Union have rejected generic models on the basis that such a lack of specificity will generate an unacceptable level of uncertainty.\(^ {109}\) The group definition adopted for this Model Law is not one that would allay the legitimate fears expressed by a number of Governments that analogue laws create considerable confusion as to the types of substances under control.

Consider the even broader definition of “analogues” set out in the Model Law for common law countries. Section 3(1)(b) thereof defines an analogue as:

\(^{100}\) UNDCP Model Drug Abuse Bill, 1988, SS 45(1) and 46(1).
\(^{101}\) Ibid., S.45(2) and 46(2).
\(^{102}\) Ibid., S.49.
\(^{103}\) Ibid., S.44.
\(^{104}\) Ibid., S.56(3)(b).
\(^{105}\) A drug is defined in Article 1.0-2 as “a plant, substance or preparation classified as such under national laws”.
\(^{106}\) Model Law on Drug Trafficking and Related Offences, September 1996, Title 1, Article 1.0-2.
\(^{107}\) See Section 32 of the Controlled Substances (Analogue Enforcement) Act, reproduced in full in Chapter 5 and at Appendix I.
\(^{108}\) See Chapter 5, supra pp 126-131.
\(^{109}\) Chapter 5, supra p 145.
any substance not listed in any Schedule of this Act whose chemical structure is substantially similar to any drug of abuse whose psychoactive effects it simulates.\textsuperscript{110}

Once again, there must be proof of a relationship between two substances as regards both chemical structure and psychoactive effect. The same arguments with respect to the suitability of the very broad ‘substantial similarity’ test are applicable here in relation to the introduction of that test into common law systems. Note that the common law definition is worded in a slightly but significantly different manner. First, the analogue in question must “simulate” (rather than “reproduce”) the effects of the comparison drug. Thus, in common law jurisdictions there would be arguments in court as to the meaning of “simulates”. How concurrent must the effects of two substances be for one to be thought to “simulate” the other? Furthermore, the common law definition is broader than that under the civil law model in that the uncontrolled compound can be compared to “any drug of abuse”\textsuperscript{111} and not only a drug already controlled under the domestic law.

Rather than launch immediately into drafting the analogue model, it is suggested that the UNDCP might have explored more fully other group scheduling options to present to countries. Some governments, in both civil and common law jurisdictions, may feel more comfortable introducing a generic model such as exists in the UK where analogues within a family of substances, e.g. phenethylamines, are covered if their chemical structures have been manipulated using a particular chemical process. Arguments in court would involve a strict interpretation of such provisions informed by experts, rather than semantic arguments as to the meaning of terms such as “substantial similarity”, “reproduction” or “simulation”. Alternatively, analogue legislation such as that currently considered by the Australian Model Criminal Code Committee may be favoured, under which a “related” analogue will be one that is chemically structured in one of the specific ways spelt out. At the time the Model Laws were drafted by the UNDCP, there does not appear to have been any serious discussion of the alternative models available.\textsuperscript{112} It would be useful for the UNDCP to undertake further study into the advantages and disadvantages of a number of different legislative options, providing countries with further information on analogue laws so that a decision can be made as to which would be most suitable for individual governments to introduce.

It is extremely important that countries considering implementing a ‘group’ definition of controlled substances are aware of the possible difficulties involved with the interpretation of analogue or generic laws, and are equipped with the necessary expertise to allow for the proper interpretation of those laws. Chapter 5 reveals that the interpretation of the ‘substantial similarity’ clause causes difficulties even in a developed country with a sophisticated legal system and a body of experts that can be called upon to advise the court.\textsuperscript{113} It will be even more difficult for less-developed countries which may not have access to the equipment or expertise necessary to provide for an objective analysis to determine whether a certain substance fits within the definition of a controlled drug. Since the UNDCP is actively promoting the adoption of a broad analogue approach through its drafting of Model Laws, it should accept the responsibility of providing countries that follow this path with the necessary laboratory equipment and expert opinion.\textsuperscript{114} Although the cost-implications of doing so may

\begin{itemize}
\item\textsuperscript{110} UNDCP Model Drug Abuse Bill, 1988, Part I, Section 3(1)(b).
\item\textsuperscript{111} A “drug of abuse” is defined in S.3(1)(r) as “a prohibited drug, a high-risk drug or a risk drug and includes a preparation”.
\item\textsuperscript{112} Information supplied by Andrew Wells, Legal Advisory Group, Treaty and Legal Affairs Branch, UNDCP, Telephone Interview, 7 July 1999.
\item\textsuperscript{113} See, in particular, the discussion of cases prosecuted under US analogue laws in Chapter 5.
\item\textsuperscript{114} The UNDCP insists that this is not problematic since countries will be able to contact scientific staff to request assistance. They may be able to ask for sophisticated equipment necessary for testing although there is no guarantee it would be forthcoming. Information supplied by Elizabeth Jenkinson, Legal Advisory Group, Treat and Legal Affairs Branch, UNDCP, Telephone Interview, 2 May 2000. It is submitted that the UNDCP should be pro-active about ensuring that the technical support is on hand.
\end{itemize}
be substantial, these conditions must be a prerequisite for the adoption of a broad provision aiming to capture groups of NSDs. Where the equipment and expertise cannot be made available, it is advisable that countries retain the substance-by-substance approach. The risk that there will be non-scheduled NSDs that cannot be prosecuted under the criminal law is outweighed by the need to protect the public from a law that cannot be properly and expertly interpreted.

**Could broadly worded new synthetic drug laws conflict with international instruments protecting human rights?**

When designing legislation to cover an unknown number of heterogeneous chemical compounds that might possibly be manufactured by clandestine operators, there may be the temptation to draft provisions as broadly as possible. In doing so, however, there is a risk that they will be found to conflict with the well-established principle *nullem crimen sine lege*, requiring that the law must clearly articulate what acts or omissions are subject to criminal liability. It is suggested that those legislative models relying on the amorphous concept of 'substantial similarity' are most in danger of being invalidated on this basis.

A number of international instruments adopted to protect fundamental human rights enshrine the *nullem crimen* principle. Consider, for example, the European Convention on Human Rights 1950, Article 7 of which states that:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. ...

Identical wording appears in Article 15 of the International Covenant on Civil and Political Rights (ICCPR) 1967, ratified by most States in the international community. 115 Almost identical words are used for Article 9 of the American Convention on Human Rights 1969116 and Article 7(2) of the African Charter on Human and Peoples' Rights 1981. 117 Most recently, an equivalent provision was included as one of the “General Principles of Criminal law” set out in Article 22(1) of the Rome Statute of the International Criminal Court 1998. 118

For guidance as to the interpretation of the *nullem crimen* principle it is most helpful to survey the relevant case law of the European Court of Human Rights interpreting Article 7. Admittedly there have been no instances where it has been successfully argued that vague legislation is in breach of Article 7. It has been firmly established, however, that the *nullem crimen sine lege* principle should not be read narrowly as merely guarding against retroactive criminal laws. It gives rise also to a general duty on States to draft laws that precisely define

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113 As of 27 September 1999, the ICCPR had been ratified by 144 countries. See [http://www.pch.gc.ca/ddp-hrd/english/iccpr/ccprfact.htm](http://www.pch.gc.ca/ddp-hrd/english/iccpr/ccprfact.htm).

116 Article 9 is headed “Freedom from ex post facto laws” and reads as follows: “No one shall be convicted of any act or omission that did not constitute a criminal offence, under the applicable law, at the time when it was committed.”

117 The following wording appears as Article 7(2): “No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed”.

118 See Part 3, Article 22(1). “A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court”. In a number of countries the principle is protected in national legislation. In the United Kingdom, for example, the Human Rights Act 1998 (Act No. 2882 (Chapter 71)) incorporates Article 7 of the ECHR. Article 26(1) of the New Zealand Bill of Rights Act 1990 (Act No. 109 of 1990) contains a provision similar to Article 7 preventing the application of retrospective laws.
the criminal activity to be prohibited, so as to provide for legal certainty and to preclude the extended application of criminal laws by analogy.\textsuperscript{119}

In \textit{Kokkinakis v Greece}\textsuperscript{120} the applicant was a Jehovah's witness who was convicted and fined for the offence of 'proselytism' after accepting an invitation into the home of an Orthodox Christian and attempting to convince her of the advantages of his religion. A legislative definition of the term 'proselytism' had been provided in the 1938 Act establishing the offence\textsuperscript{121} and was subsequently clarified by an amendment in 1939.\textsuperscript{122} The Court confirmed that Article 7 obliges States to draft laws precisely defining the criminal activity prohibited so as to provide certainty to the public. It was held that:

This requirement is satisfied where it is possible to determine from the relevant statutory provision what act or omission is subject to criminal liability, even if such determination derives from the courts' interpretation of the provision concerned.\textsuperscript{123}

The majority rejected the applicant's argument that the 1938 Act establishing the offence of proselytism was so vague as to breach Article 7. While the Court acknowledged that the wording of the Act was inadequate, it considered that the scope of certain terms in the definition had subsequently been clarified by case law, thereby making it possible for the applicant to predict that his activity would amount to a breach of the law.\textsuperscript{124} Five years later, another unsuccessful challenge was mounted against the same law. In \textit{Larissis and Ors v Greece},\textsuperscript{125} the applicants were members of the Pentecostal Church who had been convicted of the crime of 'proselytism' after extolling the virtues of the Church to a number of their subordinates in the Greek Air Force. The Court recalled its finding in \textit{Kokkinakis} that the definition of the offence of proselytism, taken together with the settled body of national case law interpreting it, did satisfy the conditions of certainty and foreseeability required by Article 7.\textsuperscript{126} The majority were not persuaded that Greek law had become any less clear in the years since the earlier decision had been handed down.

In two other cases recently decided involving interpretation of the principle in Article 7, the legislation at issue was not found to be in violation. In \textit{Saszmann v Austria},\textsuperscript{127} the applicant was convicted of "incitement to general disobedience of laws" and "incitement to the commission of criminal acts" under Sections 281 and 282(2) of the Penal Code. At the relevant time she had been the editor of a periodical that had published a leaflet calling for the

\textsuperscript{119} \textit{Kokkinakis v Greece} (1993) 17 EHRR 397.

\textsuperscript{120} Ibid.

\textsuperscript{121} Proselytism was made a criminal offence for the first time during the dictatorship of Metaxas in 1938 (Section 4 of Act (\textit{magastikos nomos}) 1363/1938).

\textsuperscript{122} Section 4 was amended by Section 2 of Act 1672/1939, clarifying the meaning of proselytism. ‘Proselytism’ has henceforth been defined as "any direct or indirect attempt to intrude on the religious beliefs of a person of a different religious persuasion, with the aim of undermining those beliefs, either by any kind of inducement or promise of an inducement or moral support or material assistance, or by fraudulent means or by taking advantage of his inexperience, trust, need, low intellect or naivety".

\textsuperscript{123} \textit{Kokkinakis v Greece}, supra n.119, p 397.

\textsuperscript{124} Compare the dissenting judgement of Mr JA Frowein, joined by Mr d’Almeida Ribeiro, who considered that there had been a breach since the Act left unlimited scope for interpretation. Ibid., p 416.

\textsuperscript{125} \textit{Larissis and Ors v Greece}, European Court of Human Rights, Application No. 00026378/94, 24.2.1998. Again, compare the dissenting view of Judge Repik who considered that Article 7 had been violated in this case. He agreed with the dissenting opinion of Mrs J Liddy in the Commission that the scope of Greek law interpreting the offence of proselytism had become considerably more obscure since the 1993 judgement in \textit{Kokkinakis}. See ibid., p 28. Note that in both \textit{Kokkinakis} and \textit{Larissis}, the section of the Act criminalising ‘proselytism’ was found to breach the European Convention on Human Rights on the basis that it violated Article 9 protecting “freedom of thought, conscience and religion”.

\textsuperscript{126} Ibid., p 14.

\textsuperscript{127} \textit{Saszmann v Austria}, Application No 23697/94 (27.2.97). See http://www.dhcour.coe.fr/hudoc/.

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abolition of the Federal Army, the discontinuance of proceedings against conscientious
objectors and the disobeying of military laws. The European Commission on Human Rights
re-affirmed that Article 7 is not confined to prohibiting the retrospective application of
criminal law but requires further that the offence must be clearly defined in law in order that
the individual can know what acts and omissions will make him or her liable.128 With regards
to the wording of the Penal Code it could not be seriously doubted that publishing material
advising others to disregard military laws would amount to incitement to disobey laws and
commit a criminal act. It could not be argued, therefore, that there had been a violation of the
principle in Article 7. In the 1997 case of Grigoriades v Greece,129 the European Court of
Human Rights rejected the argument that Article 74 of the Military Code of Greece
criminalising “insults to the flag or the armed forces” violated Article 7. Article 74 was
considered to be sufficiently precise that the applicant might have predicted that sending a
letter to his commanding officer denouncing military service “might” have rendered him
liable to prosecution for a criminal offence.130

It may be argued by a Government that has embraced the ‘substantial similarity’ test that the
decisions of the European Court of Human Rights in these cases suggest that there would be a
similar reluctance to find that ‘designer drug’ laws fall foul of the principle protected by
Article 7. A government could point out that the requisite certainty can be provided not only
by the legislation itself but by subsequent interpretation of the Act. It might therefore be
argued that Courts in the United States have been able to interpret the meaning of ‘substantial
similarity’ in a way that now provides a degree of certainty and foreseeability and in other
jurisdictions they should be given the chance to establish a settled body of case law to provide
guidance as to the full meaning of the term. In Larissis and Ors v Greece, it was stated that:

the need to avoid excessive rigidity and to keep pace with changing circumstances
means that many laws are inevitably couched in terms which, to a greater or lesser
extent, are vague … .131

On this basis it could be asserted that in order to keep pace with the rapidly evolving
clandestine market, analogue legislation necessarily has to be drafted in broad terms allowing
the court to interpret the meaning of ‘substantial similarity’ in each case that comes before it.
A government defending its analogue legislation may suggest that the case of Grigoriades
provides authority that analogue legislation would not be found to breach the nihilum crimen
principle merely because it does not provide a definite objective guide as to which compounds
satisfy the ‘substantial similarity’ test and which do not. Arguably it is enough if the analogue
laws provide sufficient guidance so as to allow the accused to predict that the compound in
question “might” be considered a controlled substance analogue, leaving them liable to be
prosecuted for a criminal offence.

On the other hand, it is submitted that the legislation at issue in the four cases outlined above
is not as obviously vague as that relying on the amorphous concept of ‘substantial similarity’
in order to criminalise activity relating to infinite numbers of NSDs. With respect to the first
two cases, in the 1938 Greek Act creating the offence of ‘proselytism’ the government had
made an attempt to define that activity so as to provide guidance for the courts. By contrast,
legislators in the US and in some jurisdictions of Australia have deliberately chosen not to
provide the court with any definition of ‘substantial similarity’ so as to leave the relevant
phrase as open as possible to interpretation.132 Furthermore, the nature of analogue laws is

128 Ibid.
130 Ibid., 476. It was held, however, that there had been a violation of Article 10 of the ECHR which
protects “[f]reedom of expression”.
131 Larissis and Ors v Greece, supra n.125, p 330.
132 See Chapter 5.
Jayasuriya, RK

policy compliance with human based, human known of attention. In pivotal international human rights in

prohibited? 133 The position that would be taken by 134 Switzerland cited the nullem crimen sine lege principle as one of several reasons for rejecting a group definition of controlled drugs. 136 It is submitted then there is at least a legitimate basis for concern that broad reaching analogue laws reliant upon the amorphous concept of 'substantial similarity' are not clearly consistent with a fundamental principle recognised in pivotal international human rights instruments. 137

Again, the legislation at issue in both Saszmann and Grigoriades was more confined in scope than the 'substantial similarity' laws and was more open to an interpretation by the court that could be applied in subsequent cases. In respect of Saszmann, it is clearly an incitement to breach laws if a publication urges citizens to disobey military laws and it is hardly surprising that the Commission rejected the argument that Article 7 had been violated. In Grigoriades, the word 'insults' had to be interpreted by the court. Yet there need not have been a separate interpretation in each case for the accused to predict that his conduct 'might' amount to a criminal offence since the word insult is generally understood and it would be possible to refer to other cases to learn of the type of activity that would be found to be insulting. By contrast, it is not clear that one can look to the interpretation of 'substantial similarity' with respect to a compound in one case to determine whether another distinct compound will be found to satisfy the test. 134 Each analogue case is likely to involve extended debate amongst conflicting experts trying to inform the court.

There are no cases that have tested legislation directly analogous to the analogue laws and it appears that it must wait until a conviction under domestic legislation is challenged on the basis that it breaches the right enshrined in Article 7, before any guidance is given as to the position that would be taken by the court. What minimum standard of clarity is required in order that legislation be held to provide adequate guidance as to the type of criminal activity prohibited? It is clear that the legislation need not specifically outline every type of activity that is to be caught and it is necessary for there to be some room for courts to interpret certain terms. 135 They must, however, be able to do so in a manner which is consistent and generates a body of law that will help to clarify the meaning of the vague term at issue. Recall that Switzerland cited the nullem crimen sine lege principle as one of several reasons for rejecting a group definition of controlled drugs. 136 It is submitted then there is at least a legitimate basis for concern that broad reaching analogue laws reliant upon the amorphous concept of 'substantial similarity' are not clearly consistent with a fundamental principle recognised in pivotal international human rights instruments. 137

133 See, for example, the case of USA v Damon Forbes et al, 806 F.Supp. 232 at 238 (1992), discussed in Chapter 5, supra p 127.
134 In the Forbes case, ibid, the expert chemist testifying on behalf of the DEA admitted that "reputable scientists in this field disagree even on the methodology applicable to determine structural similarity". When experts of this nature cannot agree on the meaning of 'substantial similarity', surely it cannot be argued that the general public have any clear guidance as to what laws are prohibited.
135 See Larissis and Ors v Greece, supra n.125.
136 See Chapter 5, supra p 147.
137 The idea of drug users demanding and upholding their rights is not one that has received a great deal of attention. In the application of any drug laws there are many opportunities for breaches of the rights of drug users, for example, breaches of privacy during drug searches, diminished due process, arbitrary searches, seizure, arrest or detention and interference with presumption of innocence. Yet not much is known about drug-related human rights concerns and very little is heard about infringements of the human rights of users or suspects on trial. Norbert Gilmore points out that "[I]nternational legal and policy responses to drug use, including the international drug conventions and treaties on which they are based, rarely address human rights issues. Nor do they appear to have been scrutinized for their compliance with human rights standards". See N Gilmore, "Drug use and Human Rights" in DC Jayasuriya, RK Nayak and A Wells (eds), Global Drugs Law, selected papers presented at the Indian
Regardless of whether courts will find a conflict with the principle, public policy considerations do not favour the ‘substantially similar analogue test. It is feasible that should legislation be subject to challenge, an international tribunal may find that despite the vagary of the test, it should not be disallowed on account of Article 7 or its equivalent. Nevertheless, the fact that such an argument can be seriously mounted suggests that there is a very real potential for persons to be confused over the type of conduct that will constitute a criminal offence. The general public are not well served by the amorphous similarity test. The desire to protect against dangers associated with variable NSDs does not justify disregarding the objective of designing the clearest legislation possible to guide and inform citizens. There is a further danger that the law will be brought into disrepute and subjected to ridicule if the accused can argue each time that he or she was not aware that their activity constituted a criminal offence until the moment of arrest. Such a complaint must seem legitimate to the rest of the public where the accused can call on recognised expert chemists to testify that they too were confused as to the legality of the substance at issue.

States wanting to adopt legislation aimed at deterring ‘designer’ drug manufacture and criminalising groups of compounds have other options that are more appropriate. The more circumscribed model of generic legislation such as has been adopted in the UK Misuse of Drugs Act 1971 or the 1998 “related drug” model advocated by the Australian MCCOC are not without their problems. They do, however, go further towards protecting the public policy objective that laws clearly articulate the conduct and the substances to be prohibited, since controlled analogues are defined as those manufactured according to a chemical process that can be interpreted by experts and applied consistently by the court. Clear legislation is particularly important when the criminal law sets out heavy penalties for an offence involving the possession, manufacture or distribution of a compound found to be similar enough to a scheduled substance to satisfy the definition of a controlled drug.

**UNGASS - Action Plan on ATS**

In the introduction to this discussion of post-treaty UN initiatives aimed at controlling NSDs, reference was made to the 1998 UN General Assembly Special Session on The World Drug Problem and the high priority given at UNGASS to addressing the expansion in illicit manufacture and use of amphetamine-type stimulants. For the regulation of end-product new synthetic drugs the key document produced at the UNGASS is the *Action Plan against Illicit Manufacture, Trafficking and Abuse of Amphetamine-type stimulants and their...*
Precursors.  

Five types of action are suggested as necessary: raising awareness of the problem; reducing demand, providing accurate information, limiting supply and strengthening the control system to effectively contain end-product ATS and the precursors used in their manufacture. Although there is no space to detail all the recommendations included, the following discussion focuses on those relating to supply reduction that are most relevant for our purposes.

The Action Plan begins by stating that although the illicit manufacture and consumption of ATS is spreading around the world (albeit at a different pace in different regions), global awareness is limited and the response of individual countries fragmented and inconsistent. In recognition of this fact, the international community is urged to give higher priority to combatting all aspects of the ATS problem, one way being to make it a regular agenda item for meetings of the CND. It was also suggested that other international bodies, including the UNDCP, INCB and WHO, should strengthen their work on the technical scientific dimensions of the problem of ATS and should regularly disseminate their results. Member States themselves were urged to prioritise the issue and to report fully to the CND on their efforts to implement the Action Plan.

Part III, focusing on the need to provide accurate information on the types of substances available on the illicit market, is particularly pertinent to NSDs. There is reference, first, to the fact that clandestine production and manufacture has been assisted by the use of modern technology to distribute information. As previously noted, the Internet is used to publish recipes and instruction manuals, to distribute information on how to evade controls and to promote images of ATS as harmless substances. In order to counter the use of technology to fuel the illicit market, international agencies and Member States are urged to make use of modern technology themselves so as to promote self-restraint and to disseminate accurate information on the health, social and economic consequences of abusing ATS.

Another way suggested to counter the use of Internet services to promote illicit drug related activity involves the identification and removal of illegal information. Paragraph 12 refers to the need for consultations at the national, regional and international level between authorities and the traditional media, telecommunications and software industries in order to develop frameworks, based on existing law, allowing for the removal of any "illegal drug-related information" appearing on the Internet. This could involve, for example, an open-complaint mechanism allowing users to report the publication of what is believed to be offending material. Responsibility for enforcing any publication laws would remain always with the national authorities. In early drafts of the Action Plan, this paragraph read that States "in

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140 A/RES/S-20/4 A, 8 September 1998. Mention should also be made of the Political Declaration (A/RES/S-20/2) adopted at the UNGASS in order to express the commitment of participating States. Paragraph 13 makes reference to the decision to devote particular attention to emerging trends in illicit manufacture, trafficking and consumption of synthetic drugs. In particular, it calls for the establishment or strengthening by the year 2003 of national legislation and programmes aimed at giving effect to the Action Plan against illicit Manufacture, Trafficking and Abuse of Amphetamine-type Stimulants and their Precursors. The year 2008 was set down as a target date for States to take action with a view to "eliminating or significantly reducing" manufacture, marketing and trafficking of psychotropic substances, including synthetic drugs and their precursors, guided by the principles set out in Measures for the Control of Precursors adopted at the Session.

141 Although the majority of this thesis focuses on strategies to reduce the supply of NSDs, it is submitted that the inherent limitations of supply controls, many of which are exposed in chapters of this thesis, lead to the conclusion that demand reduction is at least as important in limiting harm caused by new synthetic drugs of abuse. This is discussed further in the Conclusion to this thesis.

142 Part I, paragraph 2.

143 Part I, paragraph 4.

144 See Chapter 2, p 28.

145 Part III, paragraph 11.
accordance with their constitutional and legal systems, should ... monitor the Internet to determine violations of national laws and regulations ...".\textsuperscript{146} This more interventionist approach was, however, rejected by the Government of the United Kingdom. It was explained that while the UK supported the ‘Internet Watch Foundation’, a mechanism set up for Internet users to report suspect information which is then passed on to the police if considered by experts to be ‘illegal’, it would not support the monitoring of the Internet by police to determine whether there have been violations of the law.\textsuperscript{147} The policy of the UK Government is to regulate information on the Internet in the same way as information ‘off-line’. Since communication via the telephone or postal networks should not (and could not legally) be routinely monitored, neither should communications transmitted over the Internet. This very valid objection resulted in an amendment to the draft paragraph so that it no longer recommends that States monitor electronic communications, but rather that they develop mechanisms to allow for removal of illegal information once it has been identified and reported by Internet users themselves.

A major focus of the Action Plan is on the need for new strategies to address the ever-expanding supply of Amphetamine-type Stimulants. The principal supply control strategies for ATS are to target trafficking, prevent illicit manufacture and halt diversion of laboratory equipment and precursor chemicals needed for the manufacture of end-products. The first two controls will be looked at here, while those dealing specifically with precursor and equipment control are covered in Part B of this chapter.

First, there is a welcome recognition that the present international drug control system is not equipped to deal with the clandestine manufacture of ATS and has not been able to respond effectively to the rapidly changing nature of the market for NSDs. It is suggested in Part V that international and regional organisations, as well as States themselves should strive to develop a system for the rapid identification and analysis of ATS, the results of which could be used by States to determine whether new substances ought to be brought under control.\textsuperscript{148} Although this does not go so far as to recommend the establishment of a formal ‘early warning system’ such as exists at the EU level,\textsuperscript{149} the collection of information by UN bodies as well as by States would allow for a useful list of NSDs appearing on the market, and a description of their properties, to be constructed and made available to those involved in drug control. This is particularly important given the lengthy delay in scheduling new psychotropic substances under the 1971 Convention\textsuperscript{150} and the absence of any treaty provision enabling the CND to require States to apply provisional controls.\textsuperscript{151} International, regional and State bodies are urged to improve the collection and exchange of intelligence information based on, for example, sources of illicit supply, purity and seizure rates, epidemiology, the type of national laws adopted to deal with ATS and new arrangements for adapting law enforcement techniques.

There are very good reasons for devising a broad list of substances that countries should be aware may be subject to abuse, without actually requiring that those substances be submitted to controls set out in the 1971 Convention. First, it would have no doubt been practically impossible to get all countries to agree at UNGASS on a system for the rapid introduction of

\textsuperscript{146} CND, “Action Plan Against Manufacture, Trafficking and Abuse of Amphetamine-type Stimulants and Their Precursors”, First informal open-ended inter-sessional meeting, Vienna, 7-9 July 1997.
\textsuperscript{147} Correspondence between the Mission of the United Kingdom to the Inter-sessional meeting on UNGASS and the UNDCP, 18 September 1997, supplied to author by UNDCP, September 1998.
\textsuperscript{148} Part V, paragraph 23(a).
\textsuperscript{149} See Chapter 7, infra pp 214-222.
\textsuperscript{150} See the discussion in the Chapter 3, supra pp 60-62.
\textsuperscript{151} See Chapter 3, supra pp 59-60.
controls over a list that could be extended by an unknown number of compounds in the years to come.\(^{152}\) It has already been shown that different countries have different philosophies regarding the object and purpose of the drug control regime.\(^{153}\) While some would accept that drugs should be scheduled where there is a potential for abuse, even if they have not actually been seized in their country or region, others may argue that there is no need for action at an international level until the substance has caused problems in more than one geographic area. Some countries consider that a drug should be banned if it has no therapeutic use and appears to have some mind-altering effect, while others require that the particular compound has been proven to have serious dangerous properties.\(^{154}\) At the EU level, Member States have agreed that after an assessment has been made under the ‘Early Warning System’, the Council may unanimously adopt a decision outlining whether and how the NSD in question is to be brought under control.\(^{155}\) Since the decision requires the agreement of all States, no one need have a rapid control decision thrust upon them. This would not be the case at the international level where there will be no thorough consultation with all Parties before a substance is added to the ‘rapid identification and analysis’ list.

A further advantage in alerting countries to the existence of potentially dangerous compounds, but not requiring that Schedule I or II controls be applied, is that countries need not criminalise the personal possession of each of the compounds identified where they do not consider that this fits within a broader philosophy of ‘harm minimisation’.\(^{156}\) It is argued that more important than the imposition of criminal controls is the establishment of a ‘rapid identification and analysis list’ that will furnish countries with information to pass on to health workers, emergency services and users themselves about the more dangerous compounds on the market, hazardous patterns of consumption and appropriate methods of treatment.

Part V of the Action Plan suggests that international, regional and State bodies should ensure that instruments of control are flexible enough to encompass new substances appearing on the market. First, scheduling procedures must be made more flexible.\(^{157}\) It has already been seen that while generic or group scheduling has been ruled out at the international level, a proposal to modify the 1971 Convention in order to reduce the time it takes to have a new substance brought under control has been put forward by the INCB. During negotiations over early drafts of the Action Plan, some States considered that the UNGASS should be used to debate

\(^{152}\) Information supplied by Howard Stead, Head, Scientific Section, INCB, confirmed March 2000. Even if a Party would have the option under Article 2(7) to submit written notice to the Secretary-General that in view of “exceptional circumstances” it could not apply all Convention provisions to a particular substance or substances on the list, there would still be a reluctance to accept a system that bypassed the ordinary scheduling criteria. It may not always be easy to prove that there are “exceptional circumstances” justifying the refusal to accept a scheduling decision.

\(^{153}\) See the discussion in Chapter 5.

\(^{154}\) Evidence of the obvious disagreements that would have prevented acceptance of a binding ‘early warning system’ at the international level can be seen in the difference of opinion between the Netherlands and France as to whether MBDB should be brought under control at the EU level. The Netherlands argued that it should not, since it had not been linked to any fatalities and caused minimal harm. France, on the other hand, argued that MBDB should be added to the list of controlled drugs since it had no recognised therapeutic use and was being used for recreational purposes. See Chapter 7, infra p 218.

\(^{155}\) The Council acts pursuant to Article K.3 (2)(b) of the TEU (now Article 34(2)(b) after the TOA). Member States have undertaken to implement the Council’s decision, within the time frame specified, by adopting the necessary measures “in accordance with their national laws” to submit the drug to “control measures and criminal penalties as provided under their legislation complying with their obligations under the 1971 United Nations Convention on Psychotropic Substances with respect to substances listed in Schedules I or II thereeto”. See Chapter 7, infra p 216.

\(^{156}\) See the discussion of ‘demand reduction’ and ‘harm minimisation’ in the Conclusion, infra pp 248-253.

\(^{157}\) Part V, paragraph 23 (b).
an amendment to the 1971 Convention that would bring scheduling and reporting provisions into line with those of the 1961 Convention.\textsuperscript{158} The view of the majority, however, was that the lengthy process involved in amending a treaty required that this matter be discussed after the Special Session and there is no mention of any treaty amendment in the Action Plan.\textsuperscript{159} It is recommended that at the national level States should consider adopting one of three models that have been used in different countries to address the problem of uncontrolled analogues, i.e. -- emergency scheduling, generic scheduling based on structurally similar groups or control of substantially similar analogues for the purposes of criminal prosecution -- the relative merits of which have been explored in Chapter 5. It should be noted that although the Model Laws developed by the UNDCP and outlined above are based on the US 'substantial similarity' scheduling procedure, the Action Plan recommends that States review all three options before choosing the one most suitable.

In order to deter and punish the suppliers of ATS, the Action Plan supports the strengthening of law enforcement measures and the modification of laws in order to introduce suitable sanctions and penalties. Paragraph 23 (d) reads that States should:

Introduce appropriate sanctions and penalties for illicit manufacture of and trafficking in amphetamine-type stimulants in compliance with article 22 of the 1971 Convention and article 3 of the 1988 Convention, strengthen law enforcement efforts against offences related to amphetamine-type stimulants, and consider appropriate penalties and/or alternative measures against the abuse of amphetamine-type stimulants, consistent with national law and policies.

Due to objections raised by the Netherlands, an earlier draft of paragraph 23 urging that States introduce appropriate Article 22 penalties in relation not only to manufacture and trafficking but also use of ATS, was not accepted. The Dutch Government argued that requiring stricter penalties for personal use offences went beyond international Convention requirements and was not in accordance with Dutch legislation which did not hold the use of certain ATS to be a criminal offence.\textsuperscript{160} Accordingly, an amendment was made so that the final draft now refers to the introduction of penalties and/or “alternative measures” against the abuse of ATS. The phrase “alternative measures” is extremely broad and would presumably cover a range of possible sanctions including light fines, formal warnings or treatment referrals. A further suggestion was made by the Netherlands that sanctions and penalties for illicit manufacture and trafficking should be stated to include civil fines and administrative penalties, in line with the Dutch philosophy rejecting incarceration and heavy penalties as the only way for dealing with offences relating to supply.\textsuperscript{161} That suggested amendment was not incorporated, however, since the majority view was that criminal penalties rather than civil or

\textsuperscript{158} CND, “Draft report on debate on agenda item 2 of the intersessional meeting: Measures to counter illicit manufacture of, trafficking in and abuse of stimulants”, Internal Memorandum, 1997, supplied by UNDCP, September 1998.

\textsuperscript{159} Information supplied by Howard Stead, Head, Scientific Section, INCB, Interview, September 1998. At the time of writing there has been no further discussion of amending the scheduling procedure set out in the 1971 Convention and it seems unlikely that action will be taken in the near future. Information confirmed by Howard Stead, Correspondence, 2 March 2000.

\textsuperscript{160} Correspondence between the Mission of the Kingdom of the Netherlands and the UNDCP, 22 December 1997, supplied to the author by UNDCP staff, September 1998.

\textsuperscript{161} Ibid. In the document Communication from the Commission to the Council and the European Parliament with a View to Establishing a Common European Union Platform for the Special Session of the UN General Assembly on International Cooperation in the Fight Against Drugs. 8.1.1998, COM (97) 670 final, the Commission outlines the EU’s broad objectives for UNGASS and approves the basic framework for the draft Action Plans. However, as the objections raised by the Netherlands reveal, EU Members may agree on the broader objectives, but often have different views on the specific law and policy that should be adopted to deal with NSDs.
administrative ones would be necessary to punish and deter all offences involving the manufacture and supply of ATS.
PART B - PRECURSOR CONTROLS

It is no longer the time for Governments to simply say that they are able to, or unable to, accept one measure or another. ... The Board notes that those Governments that are taking steps are often developing countries which, like industrialized countries need to facilitate licit trade and protect the legitimate interests of their own industry; they have been able to do so without hindering licit trade. The Board appreciates the actions of those Governments, and trusts that industrialized countries that have not already done so, and in particular States Members of the European Union, will take similar, or otherwise alternative, actions that are equally effective in preventing diversion of substances in Tables I and II of the 1988 Convention.

INCB, Precursors and Chemicals Frequently Used in the Illicit Manufacture of Narcotic Drugs and Psychotropic Substances, 1997 Report.\textsuperscript{162}

Since any new synthetic drug, narcotic or psychotropic, is produced by the synthesis of one or a number of starter materials or precursor chemicals, it is clear that there can be no effective control over the clandestine production of end-products in the absence of effective control over those precursors used in their manufacture. Over the last decade, authorities have been made aware that the system of international precursor controls introduced by the 1988 Convention is not of itself sufficient to prevent the diversion of substances used in the manufacture of NSDs, particularly MDMA and its related analogues.\textsuperscript{163} The remainder of this Chapter looks at subsequent initiatives designed to bolster the precursor regime. While some are aimed at strengthening the regime as a whole, others relate specifically to those precursors used in the manufacture of NSDs. In light of these initiatives, why do clandestine operators continue to have access to large quantities of the precursors used to synthesise those substances? Part B assesses the current operation of international controls in an attempt to determine whether anything more can, or indeed should be done so as to prevent the diversion of precursors needed for the expanding manufacture of new synthetic drugs.

\textit{Chemical Action Task Force}

It was remarkably soon after the conclusion of the 1988 Convention at Vienna that it came to be recognised that further international action would be needed in order to make any serious dent in the traffic in precursor chemicals used in the production of illicit drugs. At the Houston Economic Summit of the G7 (as it then was) held in 1990, participants agreed to the formation of a Chemical Action Task Force (CATF), mandated to recommend appropriate measures to build upon what they acknowledged were insufficient international precursor controls provided for in the 1988 Convention.\textsuperscript{164} As the Chairman of the CATF points out, it was recognised at the outset that any reforms would have to take into account the interests of legitimate commerce and must not impose unnecessary financial burdens.\textsuperscript{165} Clearly, however, (although this is not specifically stated by the Chairman) those negotiating the 1988 Convention had been rather too concerned with protecting licit trade, resulting in the adoption of a relatively weak precursor control regime. CATF members included the seven major industrialised countries present at the Houston Summit (Canada, France, Italy, Germany,


\textsuperscript{163} UNDCP, Amphetamine-type Stimulants: A Global Review, supra n.4, p 57.

\textsuperscript{164} CATF, Chemical Action Task Force Final Report, June 1991, Washington, DC, p1. Participants at the 16\textsuperscript{th} annual Economic Summit were the Heads of State and Government of the seven major industrialised nations, joined by the President of the Commission of the European Communities. \textit{Ibid.}, p i.

\textsuperscript{165} \textit{Ibid.}, p 1.
Japan, UK and US), the European Commission, INCB and a number of chemical producing and trading countries invited to participate.\textsuperscript{166} Five sessions were held between 1990 and 1991 and a Final report containing recommendations for bolstering precursor control was presented in 1991.

For the purposes of this thesis, one of the most significant of the recommendations relates to the addition of ten chemicals to the Tables of substances annexed to the 1988 Convention. As noted in Chapter 4,\textsuperscript{167} not one of the precursor chemicals required for the production of MDMA and related analogues was originally scheduled under the 1988 Convention.\textsuperscript{168} Yet members of the CATF were mandated to review precursors used not only in the manufacture of the narcotic drugs, cocaine and heroin, but also five of the synthetic drugs most commonly subject to abuse; amphetamine, LSD, methaqualone, PCP and the analogues of MDA.\textsuperscript{169} Clearly then, in the three years since the international community had met to negotiate the 1988 Convention, the expanding market for ecstasy related analogues had drawn attention to the need to extend control to cover the most frequent of the precursors used in their manufacture.

In its final report the CATF divided the additional ten chemicals into three categories, recommending a sliding scale of controls with the most rigid applied to Category 1 and the least rigid to Category 3. Four of the ten additional chemicals recommended by the CATF for international control -- safrole, isosafrole, piperonal and 3,4-methylenedioxy-phenyl-2-propanone (3,4-MDP-2-P) -- are relevant for the production of analogues in the ecstasy family.\textsuperscript{170} While 3,4-MDP-2-P was classified by the CATF as Category 1, the other three were grouped in Category 2.\textsuperscript{171} At its thirty-fifth session on 9 April 1992, the CND agreed to add the ten chemicals to the existing list of substances in Table I and II of the 1988 Convention.\textsuperscript{172} From the list of ten substances divided into three Categories, the CND decided to include the five listed in Categories I and II as Table I substances under the 1988 Convention, while Category 3 substances would be placed in Table II. This was based on the fact that the characteristics of those substances listed in both Categories 1 and 2 were very similar to those in the original Table I of the 1988 Convention.\textsuperscript{173} Those CATF members represented in the CND were in full agreement as to how the Convention Tables should be organised. As a result, all four precursors relevant to the ecstasy family appear in Table I.

\textsuperscript{166} Ibid., p i.
\textsuperscript{167} See Chapter 4, supra p 90.
\textsuperscript{168} Although four of the twelve substances that first appeared in Tables I and II are used in the manufacture of amphetamine and methamphetamine (ephedrine, pseudoephedrine, 1-phenyl-2-propanone and phenylacetic acid), they are not relevant to the manufacture of substances in the ecstasy family. UNDCP, "Amphetamine-Type Stimulants: A Global Review", supra n.4, pp 52-53.
\textsuperscript{170} For an explanation of the properties of the four ATS precursors added in 1992, see Chapter 2, supra pp 43-47.
\textsuperscript{172} In July 1991, the Government of the United States, on behalf of the countries participating in the CATF, submitted a notification to the Secretary-General pursuant to Article 12(2) of the 1988 Convention proposing the addition of ten substances to the existing Tables I or II. The CND made its decision to include the substances in April 1992, but this did not become effective until 23 November that year. See INCB, Report of the International Narcotics Control Board for 1992, E/INCB/1992/1, p 15.
Figure 1 - Original Tables I and II of the 1988 Convention

<table>
<thead>
<tr>
<th>Table I</th>
<th>Table II</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ephedrine</td>
<td>Acetic anhydride</td>
</tr>
<tr>
<td>Ergotamine</td>
<td>Acetone</td>
</tr>
<tr>
<td>Ergotamine</td>
<td>Anthranilic acid</td>
</tr>
<tr>
<td>Lysergic acid</td>
<td>Ethyl ether</td>
</tr>
<tr>
<td>1-phenyl-2-propanone</td>
<td>Phenylacetic acid</td>
</tr>
<tr>
<td>Pseudoephedrine</td>
<td>Piperedine</td>
</tr>
</tbody>
</table>

* Salts of those substance (where their existence is possible)

Figure 2 - Additional chemicals recommended for control by CATF

Note that the five precursors in Categories 1 and 2 were added to Table 1 of the 1988 Convention and the five Category 3 precursors were added to Table 2.

<table>
<thead>
<tr>
<th>Category 1</th>
<th>Category 2</th>
<th>Category 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>N-acetylanthranilic acid</td>
<td>Isosafrole</td>
<td>Methylethyl ketone</td>
</tr>
<tr>
<td>3,4-Methylenedioxy-phenyl-2-propanone</td>
<td>Piperonal</td>
<td>Toluene</td>
</tr>
<tr>
<td>Lysergic acid</td>
<td>Safrole</td>
<td>Potassium permanganate</td>
</tr>
<tr>
<td>3,4-Methylenedioxyphenyl-2-propanone</td>
<td></td>
<td>Sulfuric acid</td>
</tr>
<tr>
<td>Norephedrine</td>
<td></td>
<td>Hydrochloric acid</td>
</tr>
</tbody>
</table>

Figure 3 - Revised Tables of the 1988 Convention

<table>
<thead>
<tr>
<th>Table I</th>
<th>Table II</th>
</tr>
</thead>
<tbody>
<tr>
<td>(N)-acetylanthranilic acid</td>
<td>Acetic anhydride</td>
</tr>
<tr>
<td>Ephedrine</td>
<td>Acetone</td>
</tr>
<tr>
<td>Ergometrine</td>
<td>Anthranilic acid</td>
</tr>
<tr>
<td>Ergotamine</td>
<td>Ethyl ether</td>
</tr>
<tr>
<td>Isosafrole</td>
<td>Hydrochloric acid</td>
</tr>
<tr>
<td>Lysergic acid</td>
<td>Methyl ethyl ketone</td>
</tr>
<tr>
<td>3,4-Methylenedioxyphenyl-2-propanone</td>
<td>Phenylacetic acid</td>
</tr>
<tr>
<td>1-phenyl-2-propanone</td>
<td>Piperidine</td>
</tr>
<tr>
<td>Piperonal</td>
<td>Potassium permanganate</td>
</tr>
<tr>
<td>Pseudoephedrine</td>
<td>Sulphuric acid</td>
</tr>
<tr>
<td>Safrole</td>
<td>Toluene</td>
</tr>
<tr>
<td>Norephedrine(^{174})</td>
<td>* Salts of those substance (where their existence is possible, excluding salts of hydrochloric acid and sulphuric acid)</td>
</tr>
</tbody>
</table>

* Salts of those substance (where their existence is possible)

\(^{174}\) As indicated in Chapter 4, following the CND decision of 7 March 2000, the chemical Norephedrine, frequently used in the manufacture of amphetamine, was added to Table I. CND Decision 43/1 of 7 March 2000. See Chapter 4, supra p 89.
It is interesting to consider how the CATF made the difficult decision to choose ten substances from a much larger pool of chemicals that could possibly be diverted for use by clandestine manufacturers. Certainly different countries had different views as to the number of new precursors that should be brought under control. While the delegation from the US had a list of over fifty chemicals identified as having been used in illicit manufacture that could be considered for control, the UK delegation was instructed to argue for the addition of the minimum number of new chemicals possible (preferably none), so concerned was it that further international controls would have a negative impact on licit trade. Acting on the advice of an expert group of chemists, the CATF originally composed a list of 38 of what it considered to be the most important chemicals used in the manufacture of illicit substances. Only five of those substances (the four eventually scheduled and methamphetamine which was not) related to substances in the MDMA family. The criteria for choosing the chemicals most urgently in need of control (basically a balance between their potential for abuse and their use for legitimate commercial purposes) are set out in the Final Report. The CATF acknowledged one important limitation of its work. It did not, it was admitted, address the regulation of trade in commercial mixtures and compounds from which the precursor chemicals could be extracted, a serious issue of concern. Another problem was that it had been hampered in its assessment of the precursors market by industry concerns about confidentiality and by the lack of statistics collected by governments. With these limitations in mind, it was nevertheless a significant step forward for ten additional chemicals to be suggested for scheduling.

In addition to its recommendation on the number of substances under control, the CATF suggested five measures beyond those provided for in the 1988 Convention that it regarded as “key components of an effective regime to prevent the diversion of chemicals”. First, Vigilance on the Part of Operators. Countries must develop programmes to strengthen cooperation with commercial operators so as to encourage them to alert authorities to any suspicious transactions. Secondly, Administrative Surveillance Based on Recording of Orders and Transactions. Commercial operators should be required to maintain records and documents relating to the trade in scheduled substances, and to make those available to be inspected for a period considerably longer than the two years set out in the 1988 Convention. Thirdly, Registration/Authorisation of Operators. It should be obligatory for commercial operators to obtain a license or other form of authorisation in order to trade in scheduled chemicals. Article 12(8) of the 1988 Convention suggests that Parties may choose to control operators by establishing a licensing system, but does not oblige them to do so. Fourthly, Export Authorisation. Individual transactions involving those chemicals most frequently used in clandestine manufacture should be contingent on the issuance of an export license to the operator concerned. Authorisation should be given only after the exporter has identified prior to export both the ultimate consignee in the importing country as well as any intermediaries that will be handling the goods. Again, this suggests obligations far greater than those imposed by Article 12(10) of the 1988 Convention which requires Parties to issue an export authorisation in respect of Table I substances only when a formal request has been submitted by the importing State. Furthermore, the Convention specifies that the name of the consignee is to be supplied only when available. Although, as discussed in Chapter 4, paragraph 10 was

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175 Information supplied by Howard Stead, Head, Scientific Section, INCB, Interview, September 1998.
177 Ibid., p 7.
178 Ibid., p 8. In Chapter 4 there is a discussion of the diversion of pharmaceutical products containing ephedrine, which can be broken down to extract precursor chemicals for use in the manufacture of amphetamine, methamphetamine and related analogues. It is submitted that the loose wording in Article 12(14) relating to exemptions for certain ‘preparations’ does not provide for sufficient controls. See Chapter 4, paragraph 96.
179 Ibid., supra p 96.
181 See Chapter 4, supra p 91.
one of the more contentious Article 12 provisions deliberately watered down by members of
the European Community, just three years later EC representatives at the CATF accepted
that those 1988 controls were not sufficient. The fifth measure proposed was Import
Authorisation. Importing countries were urged to accept responsibility for preventing
diversion by being diligent in checking the integrity of the importer and the legitimacy of the
transaction.

It was suggested that all five of the measures should be applied to substances that CATF had
classified as Category 1 whereas certain of the measures should suffice to control the
substances in other categories. Therefore, countries that decide to adopt all recommendations
need only apply all five control measures to one of the precursors used in the manufacture of
ecstasy-related compounds (3,4-MDP-2-P). In respect of the other three, classified as
Category 2 substances, CATF suggests that the measures of (1) vigilance, (2) surveillance, (4)
export authorisation and (5) import authorisation should be implemented to the extent
necessary to ensure efficient control. At a minimum, chemical producing countries should
establish a simple system of registration whereby exporters are required to inform competent
authorities of their activities. With regard to import and export permits, it was suggested that
countries could make use of general permits valid for a determined flow of trade. This would
still go far beyond what is required by Article 12 of the 1988 Convention.

Other recommendations aimed at bolstering precursor controls were also made. Among these
was the suggestion that international cooperation must be strengthened by the sharing of
information and police intelligence between producer, transit, transshipment and end-user
countries. Countries were also encouraged to impose sanctions (administrative, civil and/or
criminal) for the failure to comply with precursor regulations. This would involve holding
individuals and corporations responsible for breaching the regulations and imposing adequate

182 See Chapter 4, supra p 92.
183 Article 9(a) and (b) of the 1988 Convention requires that both importing and exporting countries
establish a system to monitor international trade so as to enable the identification and seizure of
substances suspected of being diverted for use in illicit manufacture.
185 Ibid., p 4.
186 It should be noted that in certain countries operating under the civil law system there is no provision
for the criminal liability of a corporate person. This is based on the traditional rule that only physical
persons can be found to have the mens rea to have committed an offence. That is, the notion of
culpability includes an element of blame which classic penal theory suggests is attributable only to
the natural person. Some civil law countries have recently modified this rule. In France, for example, it was
not possible to recognise the criminal liability of a corporation until the introduction of the New
law (New York, Oxford University Press, 1998), pp 202 and 239-241. There is not the same problem in
common law jurisdictions where the general rule that a corporate body can be found to be criminally
liable in the same way that a natural person can be is justified on the basis that directors or managers
are the corporation for legal purposes, so that their fault can be attributed to the corporation and renders
adopted by the Committee of Ministers of the Council of Europe on 20 October 1988 and explanatory
memorandum (Strasbourg, COE, 1990), p 10. In recognition of the difficulty this distinction presents in
many common law countries, the Council of Europe has set out a series of recommendations for
Members States to adopt in order to ensure that enterprises can be held fully responsible and are
sanctioned for their actions. Ibid. The recommendation leaves it for States themselves to choose the
procedure best suited to their legal system. For a comparative study of the criminal liability of
enterprises that reflects a recent legislative and juridical focus on ensuring that corporations can be
found more accountable for unlawful activity, see H de Doelder and K Tiedemann (eds), Criminal
Liability of Corporations, XIVth International Congress of Comparative Law (The Netherlands,
penalties that would discourage them from doing so. 187 This again goes far beyond what Parties to the 1988 Convention are obliged to do. Although Article 3 requires Parties to criminalise the manufacture, transport and distribution of Table I and II substances known to be intended for illicit production and the possession of substances for that purpose, 188 it does not require that sanctions be imposed on commercial operators for the failure to apply Article 12 controls.

**United Nations resolutions**

While the recommendations made by the CATF had in themselves no binding force, they were soon endorsed by the UN’s Economic and Social Council. In paragraph 1 of its Resolution 1993/40189 the ECOSOC “calls upon the Governments ... to take fully into consideration the recommendations contained in the final report of the Chemical Action Task Force”. 190 Although the ECOSOC chose a relatively weak form of words to endorse the CATF recommendations (States could have been urged to fully implement the recommendations rather than to take them “fully into consideration”) the resolution should nevertheless be seen as a statement of unambiguous support. Like other ECOSOC resolutions, resolution 1993/40 imposes no legal obligation on States to adopt any of the measures outlined in the final report, but is to be regarded as an authoritative statement of principle that should be fully respected by members of the international community. 191

There are a number of other key recommendations made in recent ECOSOC resolutions that are aimed at strengthening the precursor regime as a whole. 192 In resolution 1992/29, 193 the Council first invited all chemical manufacturing States to routinely monitor export trade in precursors so as to enable them to detect suspicious transactions and prevent diversion. No specific measures were outlined. Precursor manufacturing States were also asked to foster cooperation externally between themselves and those States manufacturing end-product narcotic and psychotropic drugs and internally between themselves and their chemical industries. 194 In order to encourage industry to identify suspicious transactions, Governments were urged to develop ‘codes of conduct’ to complement the regulatory regime. 195 The

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187 Even in legal systems where it is possible to find that a corporation has been criminally liable, countries may be reluctant to impose criminal sanctions for failure to comply with regulations for fear that they will alienate industry. In the UK, for example, it is thought that such action would threaten the good relations established with commercial operators and prove counterproductive. Information supplied by Linda Ward, National Expert, European Commission, DG Taxation Customs Union, Brussels, Interview, March 2000.

188 See Article 3(1)(a)(iv) and Article 3(1)(c)(ii) of the 1988 Convention, discussed in Chapter 4.


190 A very helpful list of the resolutions of the CND and the ECOSOC relevant to the implementation by Governments of Article 12 of the 1988 Convention and a summary of the relevant recommendations of the INCB, appear as Annexes to Precursors and Chemicals Frequently Used in the Illicit Manufacture of Narcotic Drugs and Psychotropic Substances; Report of the INCB on the implementation of article 12 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, a report that is published by the INCB each year.

191 See the discussion by I Brownlie, supra n.32.

192 Note that there is space here to cover only some of the more salient recommendations made in ECOSOC resolutions.


194 Paragraph 5.

195 Paragraph 16.

196 In a number of countries, ‘Codes of Conduct’ have been developed by industry in close cooperation with Government. In the UK, for example, the Code of Conduct to Protect Against the Diversion of Chemicals Into the Illicit Production of Drugs and Chemical Weapons was prepared by the Chemical Industries Association, with the assistance of the British Pharmaceutical Industry and the British Chemical Distributors and Traders Association. It was effective from 1 April 1991. In Australia, a national Code of Conduct to Protect Against the Diversion of Chemicals into the Illicit Production of
Council also made specific requests of the UN agencies charged with supervising international drug controls. It invited the Secretary General to develop model texts for the implementation of both Article 3 (criminal offences) and Article 12 (precursor controls). This responsibility has been accepted and model texts were subsequently drafted by legal experts at the UNDCP. The INCB was requested to publish and maintain a directory providing contact details for authorities responsible for national precursor controls. Since 1996, such a directory has been published and distributed by the Board.

**Prerequisites for adequate control - Import/export authorisation and a system of estimates**

Were all countries to fully adopt all recommendations made in ECOSOC resolution 1995/20 of 24 July 1995, international control over scheduled precursors would be considerably strengthened. It begins by urging Governments to remember to invoke Article 12(10) of the 1988 Convention so as to give importing countries that have submitted a request to the Secretary General advance notice of shipments of Schedule I substances. The very next paragraph goes well beyond the Convention obligations by requesting that exporting countries provide pre-export notifications in all cases involving transfer of a Table I precursor, even where no specific request has been submitted. Upon receipt of any form of pre-export notification, importing countries are asked to undertake a thorough investigation of the legitimacy of the transaction and to communicate their findings to the exporter. In paragraph 8, Parties are urged to regularly inform the INCB, upon the request of the Board and in the manner required, of the quantities of Table I substances that they have imported, exported or trans-shipped. Moreover, they are encouraged to provide estimates of their annual licit needs. Put together, the pre-export notifications requested in paragraph 2 and the request for information and estimates in paragraph 8 represent a significant step forward in international precursor control. Recall from Part A that the INCB has repeatedly emphasised that experience of the operation of the 1971 Convention has shown that two prerequisites -- pre-export authorisations and a system of estimates -- must be implemented globally in order for there to be any real chance of preventing the diversion of end-product psychotropics into the illicit market. Thus, post-treaty resolutions have urged all Parties to the 1971 Convention to adopt both types of control with regard to substances in all four of the schedules. The situation is no different in respect of the precursor chemicals used in their manufacture. In the absence of pre-export notifications alerting importers as to the nature of the goods transported and the operators involved there is insufficient information available for them to check the facts of each case. Without a system of estimates, exporting countries will find it very difficult to determine whether operators are making reasonable demands for what is claimed to be the licit use of chemicals concerned.

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*Drugs* was prepared in 1993 by the Plastics and Chemicals Industries Association and the Scientific Suppliers Association of Australia, in cooperation with police and Government.

197 Paragraph 3.

198 In respect of establishing criminal offences, see the 1996 *Model Law on Drug Trafficking and Related Offences* developed for civil law countries and the 1998 UNDCP *Model Drug Abuse Bill* for common law countries, discussed in some detail above. For civil law countries, the Model Law relating to precursor control is entitled *Model Law on the Classification of Narcotic Drugs, Psychotropic Substances and Precursors and on the Regulation of the Illicit Cultivation, Production, Manufacture and Trading of Drugs*, September 1996. Precursor control for common law countries is covered in Parts II and III of the 1998 UNDCP *Model Drug Abuse Bill*.

199 Paragraph 12.


203 See the discussion supra p 159.

204 Aside from those specifically set out here, the 1995 resolution contains a number of important recommendations related to precursor control. See, for example, paragraph 6 urging Governments to
Without a solid commitment from all States to accept their obligations with respect to monitoring the trade in precursor materials, formal treaties, Task Force recommendations and follow up resolutions will have but a muted effect. Thus, it is important to review the actual implementation of international precursor controls over the years since they were set out in the 1988 Convention. Many Governments, particularly in those industrialised countries reaping most profit from the trade in precursor materials, can be criticised for their failure to report to the INCB on their licit requirements. Since 1995, Form D has included a request for data on licit trade in, and legitimate need for, the substances listed on Tables I and II, in accordance with Council resolution 1995/20. The number that have done so has been steadily increasing and in 1999, 82 countries and territories had provided data on the licit trade in scheduled chemicals during 1998, while 71 had supplied information on licit uses of and requirements for those substances. Until 1999, EU countries were sharply criticised by the INCB for ignoring repeated requests to provide data on their licit trade. The only EU Member specifically identified in the Board’s 1998 Report is France, a major manufacturing and exporting country, which had submitted that it could not provide data on licit trade for reasons of commercial confidentiality. This was not accepted as a legitimate excuse since (a) other European countries had not faced similar problems or had found practical solutions where necessary and (b) commercial data could be kept confidential where this was requested by the party submitting it. Following an INCB mission to France, competent authorities supplied the required data on licit trade for the first time in 1999. A similar effort was made for the first time by the Belgian Government. There are now only four EU Member States - Italy, Portugal, Luxembourg and Austria -- that have not submitted the requested information. Query why some countries may be reluctant to do so. The explanation may lie in the fact that collecting data is a costly and time consuming business and governments do not wish to allocate resources for the task. It may also be that it is in the best interest of countries that manufacture far more of a chemical than they need for domestic or export purposes, to withhold information on the volume and nature of their licit trade.

Certainly many States have responded to calls for them to submit pre-export notifications in respect of certain of the substances appearing on Tables I and II. It has been seen that although the 1988 Convention requires all Parties to provide pre-export notifications in respect of Table I substances where they have been requested to do so by an importing State, there is no obligation to take such action with regard to routine shipments. A broader system of pre-export notifications was called for in ECOSOC resolution 1995/20 and in both resolutions S/20 4 and S/20 4 B arising out of the 1998 UNGASS. In 1999 report the INCB congratulates a number of major trading countries, including Germany, China,

exercise vigilence over the activities of brokers handling Table I substances, and paragraph 9, requesting that the INCB further develop its database so as to provide Parties with information that will assist them to prevent the diversion of those substances.


205 Ibid.


207 Ibid.

208 See the discussion of Article 12(10)(a) in Chapter 4, supra p 92.

209 See the discussion above.
Belgium, the UK and the US, for regularly providing pre-export notifications. Although France has been slow to embrace this further control, it has recently been prompted to send an increasing number of inquiries to verify the legitimacy of transactions prior to export. In order for pre-export notifications to prove effective, the importing countries concerned must respond rapidly by approving the transaction or requesting that exporting authorities act against what appears to be a suspicious dealing. In 1999, it was reported that an increasing number of importing countries are making a conscious effort to do so.

**Broadening the control regime - Special surveillance list**

In the interest of assessing the illicit trade in NSDs, the introduction of a ‘special surveillance list’ pursuant to Council resolution 1996/29 is extremely important. In Chapter 2 it was shown that there are many more precursors than those currently scheduled under the 1988 Convention that can be used for the manufacture of synthetic drugs. In particular, there are more than the four added in 1992 that can and have been used in the clandestine production of analogues related to MDMA. In view, however, of the use of those chemicals in legitimate trade, it is not considered feasible at present to schedule any more than the 23 substances currently appearing on Tables I and II. In 1996, in recognition of the need to effect some control over a wider spread of precursors, the ECOSOC called upon the UNDCP and the INCB to establish a “limited international special surveillance list of non-scheduled substances”. It would then be incumbent on the States themselves to establish arrangements (legislative, administrative or voluntary) so that the domestic importers, exporters and distributors of those substances appearing on the list would report any suspicious orders or thefts and would cooperate fully with authorities so as to prevent their diversion into the illicit trade. States were further urged to take action (civil, criminal or administrative) against suppliers who fail to cooperate with authorities to prevent diversion of scheduled substances and (“where possible”) those appearing on the special surveillance list.

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212 An interesting anecdote told by a Member of the European Commission’s Precursors Unit provides yet another example of the possibility that political interests can interfere in effective drug control. In 1999, several less developed countries (namely Macau, Ethiopia, Cayman Islands and the United Arab Emirates) requested pre-export notifications from EU countries for controlled precursors, in spite of the fact that they had neither the infrastructure, nor the inclination, to use the information to check the authenticity of the transaction. After complaints by commercial operators concerned that no quick response had been received from the importing State, the request was investigated by the European Commission which found that no explanation could be given by the importing Governments concerned for requesting the authorisation. It has been suggested that their motivation in doing so was political, since if those countries could report to the INCB that they had asked for import authorisations from a number of exporters, they would appear to be being vigilant in their implementation of the 1988 Convention. The Commission has expressed its concern that superfluous requests for authorisations will cause unnecessary trouble for the industry and jeopardise good relations with commercial operators, making it difficult for the Government to convince them of any need for further control measures to be introduced in the future. These cases have been submitted to the INCB, along with a request that the Board discuss with the countries concerned the importance of only requesting import authorisations if there is a legitimate need. Information supplied by Linda Ward, National Expert, European Commission, DG Taxation Customs Union, Brussels, Interview, March 2000.

213 Ibid.


216 Paragraph 2.

217 Although see supra n.186 for a discussion of the fact that there are some civil law systems that may not allow for the imposition of criminal penalties on corporate bodies.
The INCB began its task with a list of over five hundred substances that could be used in the clandestine manufacture of end-product narcotics and psychotropic drugs.218 In 1998 the Expert Advisory Group convened to refine that number to a much smaller list of 27 chemicals that appeared in the final draft. It was distributed to all States in 1999, accompanied by guidelines recommending action that should be taken by national authorities seeking the cooperation of industry, and proposed measures that should be introduced by the chemical industry in an effort to prevent diversion of the precursors listed therein.219 Substances were chosen based on a consideration of factors such as the number and type of end-products manufactured using the chemicals, actual reported seizures and whether controls had been introduced at a domestic or regional level.220 Although that list is restricted to authorised bodies in an effort not to alert clandestine operators to the substances under surveillance and so cannot be reproduced here, it can be revealed that 17 of the chemicals are precursors and reagents used in the illicit manufacture of amphetamine, ATS and other psychotropic substances.221 The remaining ten are chemicals and solvents frequently used in the processing of cocaine and heroin.

It may be asked whether even this extension of controls will have any significant bearing on the availability of precursor chemicals, given that there is a large natural and synthetic pool from which to chose from. Many of the precursors can be synthesised from natural oils, the availability of which are very difficult (if not impossible) to restrict. Saffrole can be obtained from the essential oil Sassafras, while Myristicin used in the manufacture of MMDA may be produced from nutmeg oil.222 The situation is complicated by the fact that some precursors can be synthesised from others (acting as pre-precursors on those occasions). Saffrole can be used as a precursor for 3,4-MDP-2-P or Isosaffrole, while Isosaffrole is a precursor for Piperonal.223 Furthermore, there is a disadvantage in selective control regimes in that forcing a manufacturer to go further back to use pre-precursors increases the risk that the final product will have greater impurities. It is also true that the application of limited controls has already encouraged clandestine chemists to shift to other precursors that are not controlled or are under less strict surveillance.224 On balance, however, there is a justification for imposing regulations that make it as difficult as possible for clandestine operators to manufacture NSDs. Although there will undoubtedly always be some precursors available, the further back that a manufacturer is forced to go, the lower the yield, the higher the cost of manufacture and the lower the profit for those involved in illicit traffic.225 This may dissuade some would-be entrepreneurs from entering the market. Even if it is admitted (as it must be) that it is impossible to completely restrict access to the large number of potential precursors available, the maintenance of an expanded special surveillance list will make it far more difficult to

218 By the time of the release of its 1997 report on the implementation of Article 12, the INCB had refined this list of 500 to 74 chemicals identified as frequently used in illicit manufacture. From those 74, a smaller group of 27 were chosen. See INCB, Precursors and Chemicals Frequently Used in the Illicit Manufacture of Narcotic Drugs and Psychotropic Substances: Report of the INCB for 1997 on the Implementation of Article 12 of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (E/INCB/1997/4), p 13.
220 Information supplied by Howard Stead, Scientific Section, INCB, Interview, September 1998. In order to keep the list up to date and to learn from the experience, countries have been requested to report to the INCB on the implementation of surveillance measures designed to prevent diversion of listed substances.
221 INCB/AEG/1998/W.7, restricted document, supplied by UNDCP. Permission to reveal the basic composition of that list has been granted by the INCB.
222 B Remberg et al, ‘‘Potential Loopholes in Present Control Strategies; Ring substituted amphetamine analogues and their natural and synthetic precursors’’, Internal Memorandum, Vienna, UNDCP, 1994, p 10. The authors list 54 substances in the natural pool of precursors for ring-substituted amphetamines. There are many more that may be manufactured synthetically.
223 Ibid. See the discussion of precursors in Chapter 2.
224 B Remberg et al, supra n 222, p 6.
obtain the chemicals most useful for clandestine manufacture and there is little point in making it easy for those involved in the illicit trade.

In the light of evidence of a sharp increase in the traffic and consumption of ATS, ECOSOC resolution 1997/41\(^{226}\) was drafted to encourage States to take action relevant to both end-products and the precursors used in their manufacture. Governments were requested to provide the INCB with all available information on chemicals used in the manufacture of ATS so that this could be used in compiling the special surveillance list discussed above.\(^{227}\) A number of other significant measures were regarded as necessary to prevent the diversion of ATS precursors not yet tabled under the 1988 Convention. Governments should consider the application of civil, criminal and administrative sanctions to persons who knowingly supply non-controlled chemicals for use in the illicit manufacture of ATS.\(^{228}\) To back up enforcement procedures, mechanisms should be established to facilitate international cooperation between law enforcement and other agencies able to support investigations into misuse of non-controlled chemicals.\(^{229}\) Further measures were requested in respect of the eight ATS precursors currently under international control.\(^{230}\) Governments were urged to improve monitoring of the domestic manufacture and distribution of the seven ATS chemicals in Table I\(^{231}\) (including the four substances used in the manufacture of ecstasy-related compounds), in particular, through a system of licensing operators and inspecting premises.\(^{232}\) Every effort should be made to verify the legitimacy of transactions involving transfer of ATS precursors appearing in Table I and where possible, Table II, using the guidelines drafted by the UNDCP.\(^{233}\) States responsible for exporting those chemicals were requested to undertake to check the legitimacy of transactions with the importing States, prior to releasing the goods, and to inform the INCB of any action taken, particularly where no response to the inquiry was received.\(^{234}\) Since governments are under no legal obligation to accept the measures recommended in ECOSOC resolutions, it is difficult to know how big an impact the 1997 resolution will have on tightening control over the many available precursors that can be utilised for the clandestine synthesis of ATS. It seems fairly certain, however, that there would be a greater chance of restricting the pool of precursors if all countries accepted their responsibility to implement the Council’s suggested reforms.

**UNGASS - Strengthening precursor control**

The most recent post-treaty resolutions have arisen out of the 1998 Special Session of the UN General Assembly devoted to the international control of illicit drugs. General Assembly resolution 5-20/4 B, adopted at the UNGASS, relates to control of the precursors for all narcotic and psychotropic drugs, plant based and synthetic, although the preamble to that document notes the “special problem” posed by synthetic drugs which can be manufactured using a variety of chemicals. Only a few of the recommendations made are new. The

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\(^{227}\) Part II, paragraph 5.

\(^{228}\) Part II, paragraph 6 (a). Under Article 3(1)(a)(iv) of the 1988 Convention, Parties are obliged to criminalise the supply of substances in Tables I and II known to be intended for use in clandestine manufacture. The resolution goes further, however, by requesting States to criminalise the supply of non-scheduled chemicals.

\(^{229}\) Part II, paragraph 6 (b).

\(^{230}\) As outlined earlier, those eight precursors are 1-phenyl-2-propanone (P2P), ephedrine, Pseudoephedrine, Phenylacetic acid, Saffrole, Isosaffrole, Piperonal and 3,4-methylenedioxy-P2P. The last four are those used in the manufacture of MDMA that were added to Schedule I of the 1988 Convention in 1992, following CATF recommendations. See further Chapter 2.

\(^{231}\) The only ATS precursor appearing in Table II is phenylacetic acid used in the manufacture of amphetamine.

\(^{232}\) Part II, paragraph 7 (a).

\(^{233}\) Part III, paragraph 1.

\(^{234}\) Part III, paragraph 2.
resolution repeats calls for governments to adopt fully the 1988 Convention provisions and restates many of the recommendations made in earlier ECOSOC resolutions outlined above.\textsuperscript{235}

One of the recommendations in resolution S 20/4 B generating most concern during early negotiations is that contained in paragraph 7(a) urging States to adopt a system of \textit{pre-export notification} in order to better monitor the trade in scheduled precursors. It has been seen that a similar recommendation had been made earlier in ECOSOC resolution 1995/20.\textsuperscript{236} Paragraph 7(a) was originally worded in a way that suggested States should require pre-export authorisation for substances in both Tables I and II of the 1988 Convention. In preparatory meetings leading up to the Special Session, the UK Government objected to pre-export authorisation for all tabled substances and would have preferred that such a procedure was restricted to “the substances listed in Table I and, where possible, Table II”.\textsuperscript{237} It was explained that a more widespread application would be a “major departure from our current procedures” since EC Regulations allow for certain transactions to be made using open export authorisations and for others using no export authorisation at all. A similar line of argument was adopted by the Canadian Government which suggested that application of the scheme to cover Table II substances would impose an unacceptable burden on both legitimate trade and the monitoring and control authorities.\textsuperscript{238} In the opinion of legal experts at the UNDCP charged with the task of reviewing the comments submitted by Governments, the Canadian and UK proposals were too weak and the concerns expressed did not justify restricting paragraph 7(a)(i) to Table I precursors.\textsuperscript{239} A compromise was formulated so that the paragraph now reads that a pre-export authorisation should be required in respect of all substances in Table I as well as the substances acetic anhydride and potassium permanganate (used for the production of heroin and cocaine). It is further specified that, in recognition of the importance and usefulness of pre-export notification, the same efforts should be made in respect of all substances in Table II. In this case, drafters convinced of the effectiveness of the pre-export authorisation scheme did not allow two of the major industrialised countries to succeed in substantially watering down the relevant recommendation.

There are fascinating stories of the political bickering that led to the finalisation of documents for the 1998 UNGASS that are further evidence that synthetic drug control cannot be fully understood in the absence of a broader understanding of the State interests involved. A UNDCP representative present at preliminary meetings reports that “the room was roughly divided in two, with Latin American countries on one side arguing for more stringent measures and EU countries on the other arguing for the minimum additional controls that could be introduced”. Although they were ultimately guided or forced towards a compromise, it was “only after days, and very long nights, of bitter argument”.\textsuperscript{240} Throughout the course of the negotiations, EU countries were convinced to shift their view and eventually expressed their willingness to introduce controls that were stronger than those they had initially suggested. For several days, however, most of the Latin American countries would not move from their original position and made demands considered by EU countries, and, as time went on, by UNDCP staff attempting to negotiate an agreement, to be unrealistic.\textsuperscript{241} Finally it was

\textsuperscript{235} Obviously there are many more reforms recommended in what is a detailed General Assembly resolution that cannot be explained in any depth here.
\textsuperscript{236} See supra p 188.
\textsuperscript{237} Memorandum sent by the Secretary of the UK Mission to the CND, September 1997, p 1, supplied to author by UNDCP September 1998.
\textsuperscript{238} “Canadian Comments on CND Documents for Second Session”, \textit{UNDCP Internal Memorandum}, Vienna, March 16-20 1998, p 1.
\textsuperscript{240} Information supplied by Howard Stead, Head, Scientific Section, INCB, \textit{Interview}, September 1998.
\textsuperscript{241} For example, Latin American countries argued in favour of a system of pre-export authorisation in respect of substances in both Tables I and II, while the majority of EU Member States did not consider
accepted by Latin American delegations that they would support precursor controls that were weaker than those they had originally proposed, but only in return for increased funds for alternative development programmes. It has been suggested that the long stalemate leading up to a compromise can be partly blamed on the stubbornness of individuals on both sides of the debate and there can be little doubt that personalities can influence the willingness to see another perspective. Yet what the negotiations also reveal is the great divide between the interests of non-producer developing countries (many of which have long been chastised for their role in the manufacture of narcotic drugs) and those of industrialised countries with a responsibility to protect their legitimate trade in the chemicals concerned.

Of major relevance to control over NSDs is Part III of resolution S 20/4 B proposing measures to deal with the increasing use of non-controlled chemicals in the clandestine manufacture of drugs. It begins with an acknowledgement that in view of recent controls exercised over the limited list of 22 chemicals (as it was then) appearing in the Tables of the 1988 Convention, traffickers have successfully sought “substitute chemicals” that can be used as alternatives to those that are now more closely monitored. New methods of processing or manufacture have been developed that allow the use of these substitutes. Furthermore, manufacture of many of the NSDs (referred to here as “uncontrolled analogues”) requires starter material not yet under international control. For these reasons, States are urged in paragraph 14(a) to cooperate with the INCB in the development and maintenance of the international special surveillance list. It has been seen that the INCB was formally requested to establish such a list in 1996 and was able to finalise and distribute it several months after the 1998 Special Session was convened. Paragraph 14(b) holds that States should apply to that list of 27 substances monitoring measures, whether voluntary, administrative or legislative, so as to prevent their diversion into the illicit trade, including measures specifically relevant at the national or regional level. In preparatory meetings the UK Government expressed its concern that application of this paragraph to a wide ranging list would cause “confusion and resentment” within the chemical industry, thereby threatening existing relations and voluntary controls. It proposed that the wording be amended to read that States should apply the suggested monitoring measures only to those substances appearing on the list that were known to be diverted at a national or regional level. It is submitted that such an amendment was rightfully rejected by the CND since it would have considerably weakened the recommendation. Inviting States to decide for themselves what substances were causing particular problems in their region would likely have generated greater ambiguity and delay.

Since 1992, UN agencies have gone a long way towards encouraging all countries to adopt measures that will give effect to the recommendations of the CATF. Four of the five “key

that pre-export authorisation was either desirable or plausible in respect of Table II substances. Information supplied by Howard Stead, Head, Scientific Section, INCB, Interview, September 1998. The difficulty of negotiations on precursor control in the lead up to the UNGASS was also discussed by Linda Ward, a representative of the Precursors Unit of the European Commission present at the meetings described in the text above. In her view, the measures demanded by Latin American countries were unreasonable since they would have served to irritate and alienate industry, which would not then be willing to cooperate with such onerous requirements. This threatened to jeopardise the good relations that had been built up with commercial operators over the past decade. Information supplied by Linda Ward, National Expert, European Commission, DG Taxation Customs Union, Brussels, Interview, March 2000.

243 See the discussion in Chapter 3.
244 See supra p 190.
245 Information supplied by Howard Stead, Head, Scientific Section, INCB, Interview, September 1998.
246 Memorandum sent by the Secretary of the UK Mission to the CND, September 1997, p 2 (supplied to author by UNDCP September 1998).
components of an effective regime to prevent the diversion of chemicals.\textsuperscript{247} set out by the Task Force have been endorsed in subsequent ECOSOC or General Assembly resolutions. The only CATF "key component" not specifically covered is the recommendation that commercial operators be obliged to maintain records for longer than the two year period set out in the 1988 Convention. If fully adopted by all States involved in the licit and illicit trade in synthetic drugs, the measures outlined above should go some way towards strengthening international controls aimed at limiting supply of precursors used in the manufacture of NSDs and the availability of the end-product itself.

**Conclusions**

The discussion in this Chapter reveals that in the years since the conclusion of the 1971 and 1988 Conventions there have been many post-treaty measures designed to strengthen control over the illicit market in NSDs and the precursors used in their manufacture. A review in Chapters 3 and 4 of the drafting of both those instruments provides proof that industrialised countries fought to weaken controls -- both end-product and precursor -- where they were concerned that the interests of legitimate industry would be adversely affected. In the years that have followed, there has been tacit acknowledgement by those countries that the controls they helped to water down were not strong enough to prevent the diversion of substances from illicit trade. In addition there has been recognition that since neither the 1971 nor the 1988 Convention was designed to deal with variable chemical compounds whose structures can be easily manipulated to avoid static regulations, existing treaties are not well-equipped to cope with a generation of popular new synthetic psychotropic drugs. As a result, international bodies have pushed for further action and countries have accepted measures aimed at both bolstering the control regime as a whole and targeting NSDs.

In respect of end-product and precursor controls, success depends not only on what measures are eventually agreed upon, but on the implementation of those measures in practice. The INCB introduced its 1997 Annual Report on the implementation of the precursor control regime with the quote that introduces this section on post-treaty measures to strengthen precursor controls. In effect, the Board was admitting that industrialised countries have for many years failed to fully accept their responsibility to monitor precursor chemicals. No doubt there are legitimate commercial interests that must be protected at the same time that drug controls are introduced. Indeed, the need to safeguard legitimate industry has been mentioned repeatedly in all major post-treaty resolutions, conferences and expert reports.\textsuperscript{248} It appears, however, that the appropriate balance between guarding legitimate interests and enforcing controls has not always been struck and certain developed countries, particularly those in Western Europe, have been reluctant initially to accept international controls and lax in adequately monitoring their industries once controls have been formally agreed to. As the Board points out, many developing countries have taken steps to build the infrastructure needed to monitor licit trade, in spite of the fact that there are economic costs in doing so. There is no excuse, therefore, for developed countries not to fully embrace the precursor control regime. "It is no longer the time to simply say that they are able to, or unable to, accept one measure or another".\textsuperscript{249} This is particularly true if developed countries do not wish to look hypocritical in demanding that narcotic drug producing States sacrifice their economic interests to control operators profiting from the illicit manufacture of plant-based drugs.

\textsuperscript{247} See supra n.185.


CHAPTER 7

THE EUROPEAN UNION IN ACTION AGAINST NEW SYNTHETIC DRUGS

The point is, in the European Union as everywhere, drug policy is never purely about drugs; it is like water, running through channels and topography carved out by larger forces.


For well over a decade, action against the expanding use of illicit drugs has occupied the attention and resources of the countries comprising the European Union. Although it is difficult to know the exact scale of the illegal drug trade in each jurisdiction, there is no doubt that large quantities of a range of illicit substances are circulated throughout every one of the fifteen Member States. Every State has reported on attendant problems experienced by drug users themselves and the broader community. It is not only the traditional narcotic drugs that have generated concern. The EU has become an important player in the ‘fight’ against new synthetic drugs of abuse, increasingly recognised as a major health and law enforcement issue that must be tackled at a regional level.

There are a number of reasons why an entire chapter of this thesis is devoted to an analysis of the European Union’s response to NSDs. First, evidence of an expanding European market for those substances has prompted the EU to take action. In 1997, the European Commission commented that:

The consumption of [new synthetic] drugs is on the rise, particularly among very young people. This development poses a serious threat to their health and lives and is a source of great distress to our citizens. They expect urgent action at all levels to reverse this trend.

Each year large quantities of NSDs are produced in Member States and consumption and trafficking levels have risen dramatically over the last decade. Since the precursor ingredients required for their manufacture are relatively cheap and easy to obtain, end-products can be produced locally to feed domestic markets and are increasingly exported beyond the EU borders. In fact, in respect of amphetamines and ecstasy-related compounds, the EU has become one of the largest production areas in the world.

5 Communication from the Commission to the Council and the European Parliament on the Control of New Synthetic Drugs (Designer Drugs) 23.5.97, Com (97) 249, p 1.
6 Ibid., p 1. See also, Resolution on the Communication from the Commission to the Council and the European Parliament on the Control of New Synthetic Drugs (Designer Drugs), A4-0157/98, 12.5.1998, C 167/29, para A.
7 Resolution on the Communication from the Commission to the Council and the European Parliament on the Control of New Synthetic Drugs (Designer Drugs), ibid., para G.
8 Ibid.
In recent years the European Commission, Council and Parliament have accepted that tackling NSDs requires coordinated EU action above and beyond international measures and superimposed upon separate national initiatives. In respect of end-products, since different Member States have adopted different systems for the classification of individual synthetic compounds, there is scope for clandestine chemists to exploit legal loopholes in those jurisdictions that do not cover a broad range of substances. Although all fifteen States are Parties to the 1971 Convention on Psychotropic Substances, designed to coordinate international control, it has been acknowledged that this instrument is not well-equipped to deal with the rapidly evolving market for NSDs. As discussed in Chapter 6, the slow scheduling process and the absence of an option for the CND to require provisional controls means that it is many years before new compounds can be added to the list of controlled drugs. By virtue of the smaller number of States involved and the common interests they share, the EU is equipped to respond far more rapidly to problems that arise in dealing with trafficking in variable new compounds traded on the illicit market. In relation to precursor chemicals used in the manufacture of NSDs all Member States have ratified the 1988 Convention setting out certain obligations for regulating illicit dealing and industry trade in those substances. In recognition, however, that the relevant provisions are not sufficient to prevent the diversion of a broad list of precursors, the EU has adopted more stringent controls.

A further reason for singling out the efforts of the European Union in this area is the significant influence that it has on the adoption of controls in neighbouring countries and at an international level. Recent years have seen a marked increase in the consumption and production of end-product NSDs in the countries of Central and Eastern Europe (CCEE). Furthermore, a number of clandestine manufacturers in EU Member States obtain the necessary precursors from contacts in CCEE that may not have established regulations (or may not enforce them) as strict as those governing trade in the EU and a regular flow of illicit traffic in those countries and Member States has been identified. As a result, the EU has

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9 Ibid., para.N. The different legislative models adopted in Member States are discussed in some detail in Chapter 5.
10 See Appendix J showing when EU Members ratified the 1971 and 1988 Conventions and any reservations they made when ratifying.
11 Communication From the Commission to the Council and the European Parliament on the Control of New Synthetic Drugs (Designer Drugs), supra n.5, p 2 and Resolution on the Communication from the Commission to the Council and the European Parliament on the Control of New Synthetic Drugs (Designer Drugs), supra n.6, para.M.
12 The lengthy delay involved in scheduling was acknowledged in Communication From the Commission to the Council and the European Parliament on the Control of New Synthetic Drugs (Designer Drugs), supra n.5, p 3. See the further discussion in Chapter 6.
13 See Appendix J showing the year that each of the fifteen Member States ratified the 1988 Convention and any significant reservations that were attached. Recall from the discussion in Chapter 4 that this was the first time that the European Community itself was signature to an international treaty dealing with drug control. The EEC signed the Convention on 8 June 1989, as did all its Member States. On 22 October 1990, the Council decision concerning the conclusion of the Convention and the instrument establishing Community competence in respect of Article 12 precursor controls was concluded. See Council Decision of 22 October 1990 concerning the conclusion, on behalf of the European Economic Community, of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 24.11.1990, OJ No L 326/56.
14 Resolution on the Communication from the Commission to the Council and the European Parliament on the Control of New Synthetic Drugs (Designer Drugs), supra n.6, para.Q. The ways in which precursor controls have been strengthened are discussed in detail below.
15 Unit Synthetische Drugs, The developments in the field of the national fight against synthetic drugs in the Netherlands and the role of the Synthetic Drugs Unit (USD) (The Netherlands, USD, 1998), p 2. The reasons for this increase are discussed in further detail later in this chapter.
16 Resolution on the Communication from the Commission to the Council and the European Parliament on the Control of New Synthetic Drugs (Designer Drugs), supra n.6, para.1.
taken action to ‘encourage’ CEECs to strengthen their domestic controls.\textsuperscript{17} The development of policy at the EU level has for some years had a considerable impact on international drug controls and it is suggested that it will continue to do so. At the Vienna Conference convened to adopt the 1988 Convention, the coordination of an EU response resulted in a powerful pressure bloc that influenced the type of precursor controls eventually adopted.\textsuperscript{18} A decade later, at the 1998 UN General Assembly Special Session on Drugs, the EU Member States met beforehand to develop a common position on the draft Action Plans in an effort to strengthen the negotiating power of individual States and to protect their collective interests.\textsuperscript{19} Thus, an appreciation of the global response to NSDs and the decision makers likely to be influential in the future requires a knowledge of both the measures adopted by the EU and the interests of its Member States.

Although none has been as pro-active as the EU in the area of new synthetic drugs, it is important to be aware that other regional organisations play a significant role in the campaign against illicit drug trafficking and are likely to become increasingly concerned with the control of NSDs. On 27 March 1980, the Committee of Ministers of the Council of Europe\textsuperscript{20} adopted Resolution (80)\textsuperscript{2}, establishing the Cooperation Group to Combat Drug Abuse and Illicit Traffic in Drugs, now known as the Pompidou Group.\textsuperscript{21} There are presently 29 member States, including all fifteen members of the European Union.\textsuperscript{22} Broadly, the aim of the Group is to examine the problems of drug abuse (demand) and illicit traffic (supply) from a multidisciplinary perspective.\textsuperscript{23} Three specific types of activity are particularly relevant for the purposes of this thesis. First, very useful reports have been published revealing the level of commitment of European countries to the 1971 Convention, and recommending areas for

\begin{quote}
\textsuperscript{17} See the further discussion in this Chapter, infra pp 232-235.
\textsuperscript{18} See Chapter 4, supra pp 92-95.
\textsuperscript{20} The Council of Europe (COE), founded by ten nations on 5 May 1949, was the first pan-European political institution. It was established with the aim of achieving “a greater unity between its members for the purposes of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress”. There are currently 41 member States. For a list of members and further information on the objectives and activities of the COE, see http://www.manhattanpublishing.com/primary/aboutcoe.html.
\textsuperscript{21} In fact, the Pompidou Group was formed earlier in 1971 following a proposal by the then French President, Georges Pompidou. The group was initially an informal body until it was decided in 1980 that a Resolution should be passed providing a legal basis for the Pompidou Group as an international body acting within the framework of the Council of Europe. See Council of Europe, Origin, Functioning and Achievements of the Pompidou Group, Unpublished paper, Strasbourg, April 1997, p 2.
\textsuperscript{22} At the time of writing, those twenty-nine members are Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, San Marino, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey and the United Kingdom. The European Commission is also a member of the Pompidou Group. Since 1991, the Group has extended technical cooperation to countries of Central and Eastern Europe which are not members (e.g. Albania, Belarus, Estonia and Russia) and other non-European countries, including Canada and the USA, have been invited to participate in certain activities. Council of Europe, Origin, Functioning and Achievements of the Pompidou Group, Unpublished paper, Strasbourg, April 1997, p 2.
\textsuperscript{23} UNDCP, World Drug Report (Oxford, Oxford University Press, 1997), p 178. The aims of the Pompidou Group have expanded and now include the promotion of global drug strategies at regional, national and local levels, the improvement of data collection in Europe, the stimulation of knowledge transfer between professional groups in Europe, enhancement of effective implementation of international drug control treaties in Europe and improvement of cross-border cooperation in respect of drug trafficking. See Council of Europe, Origin, Functioning and Achievements of the Pompidou Group, Unpublished paper, Strasbourg, April 1997, p 2.
\end{quote}
improved monitoring of licit trade.\textsuperscript{24} Secondly, the Group has worked with the INCB to develop recommendations and guidelines on strengthening control over precursors used in illicit manufacture\textsuperscript{25} and is committed to monitoring precursor control in Europe.\textsuperscript{26} Thirdly, over the last five years greater attention has been paid to the emergence of new trends in the production and consumption of synthetic drugs. In 1995, “Youth Cultures and new drug trends” was the subject of a seminar focusing on the spread of ecstasy and recommending improvement in the monitoring of trends and the development of prevention and harm reduction strategies specifically related to recreational synthetic drug users.\textsuperscript{27} Since the Pompidou Group’s \textit{Political Declaration and Work Programme 1997-2000}\textsuperscript{28} provides for the establishment of an integrated cross-sector review of issues relating to the changing drug scene, including the need to improve monitoring of new trends and promote information exchange, it is highly likely that future activities will be concentrated on the issue of NSDs and it may be that more concrete action is taken. The fact that the Pompidou Group’s activities are likely to be heavily influenced by decisions made by the fifteen EU Member States, also Members of the larger Group, provides a further justification for devoting a chapter to the study of EU activity in this area.

Outside of Europe, another important body involved in drug control is the Inter-American Drug Abuse Control Commission (CICAD), established in 1988 by the world’s oldest regional organisation, the Organisation of American States (OAS).\textsuperscript{29} CICAD objectives are similar to those of the COE’s Pompidou Group in that it focuses on improving multinational cooperation in both demand and supply reduction in an effort to combat the illicit drug trade.\textsuperscript{30} Its 34 Member countries have agreed that a regional response is appropriate in order to promote adherence to international conventions and the application and compatibility of

\textsuperscript{24} See, for example, Council of Europe, \textit{Joint Pompidou Group/INCB Follow-up Conference on the Control of International Trade in Psychotropic Substances in Europe} (Strasbourg, 18-20 October 1995), \textit{Conclusions and Recommendations}, 8 November 1995, P-PG/PSYCHOTROP (95) 7 rev and Pompidou Group/International Narcotics Control Board Conference on Control of Psychotropic Substances in Europe (Strasbourg, 7-9 December 1998), \textit{Implementation of Control Measures for Psychotropic Substances By Member States of the Council of Europe and Other Countries Participating in the Conference}, P-PG/PSYCHOTROP (98) 1. It is interesting that the Pompidou Group supported calls for the 1998 UNGASS to consider amending the 1971 Convention on Psychotropic Substances so as to establish a mandatory import/export authorisation system for Schedule III and IV substances and a simplified estimates system for substances in Schedules II-IV. As explained in Chapter 6, although the UNGASS recommended that countries take certain action in relation to both these measures, no proposal for an amendment to the treaty was put forward.

\textsuperscript{25} Joint INCB/ Pompidou Group Expert Consultation, Control of Brokers and Transit Operators Handling Psychotropic Substances and Precursors (Vienna, 3-5 May 1995), P-PG/PSYCHOTROP (95) 7.


\textsuperscript{29} The OAS Dates back to the First International Conference of American States held in Washington D.C. from October 1889 to April 1890, which approved the establishment of the International Union of American Republics. The Charter of the OAS was signed in 1948 and entered into force in 1951. There are currently 35 member States: Antigua and Barbuda, Argentina, The Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, United States, Uruguay and Venezuela. An additional 29 States, as well as the European Community, have been granted Permanent Observer status. See CICAD, \textit{Model Regulations to Control Chemical Substances, Machines and Materials}, Ixtapa-Mexico- April 1990, back cover page.

national legislation.\textsuperscript{31} Despite the fact that the proliferation of ‘designer’ drugs has been recognised as problematic, there are currently no specific CICAD initiatives relating to end-product NSDs, primarily because they have not been the major concern in the majority of member States.\textsuperscript{32} It may be, however, that if the market for NSDs continues to expand, CICAD will look at the initiatives adopted by the EU for guidance on the most appropriate regional response. Action has been taken in respect of precursor chemicals scheduled under the 1988 Convention. One of the most significant CICAD initiatives has been the development of the 1990 Model Regulations to Control Chemical Precursors and Chemical Substances, Machines and Materials,\textsuperscript{33} aiming to encourage all members to adopt the same minimum measures in order to avoid weak points in the regional enforcement of the precursor regime.\textsuperscript{34}

It is important to understand EU action on NSDs in the context of the broader, long-term campaign against illicit drugs of abuse. Accordingly, this Chapter begins with an overview of the anti-drug activities of the Union and a discussion of the role of various organisations that have become involved. It then moves on to an analysis of specific action targeted at new synthetic drugs of abuse, providing a discussion of the motivation behind EU action and the ramifications of that action for Member States and the broader international community.

\textit{Action against illicit drugs}

Although the beginnings of an organised European Community response to illicit drug use can be traced back several decades, the programme of international cooperation of the European Community in the field of drugs has been operating since 1987.\textsuperscript{35} In that year, the European Economic Community or EEC (as it was then constituted prior to the Treaty of European Union of 1992)\textsuperscript{36} was represented for the first time at an international event dealing with control over illicit drugs. One hundred and thirty-seven States participated in the June 1987 International Conference on Drug Abuse and Illicit Trafficking, at which a major declaration was adopted calling for the preparation of a new draft convention to strengthen the existing control regime.\textsuperscript{37} When the EEC became a Party to the 1988 Convention, it was the first time that the body itself acted as a separate participant alongside its Member States.\textsuperscript{38}

\begin{footnotesize}
\begin{enumerate}
\item A summary of the more important achievements of the CICAD is provided in the UNDCP’s, \textit{World Drug Report}, ibid.
\item Information supplied by Danillo Ballotta, National, Community and International Strategies, EMCDDA, \textit{Correspondence}, 12 November 1999. Although the US has experienced significant problems with the manufacture of a range of ‘designer’ drugs and the increasing popularity of ecstasy (see Chapter 2), the majority of the other member States are primarily concerned with abuse of ‘traditional’ psychotropics and plant-based narcotic drugs.
\item CICAD, \textit{Model Regulations to Control Chemical Substances, Machines and Materials}, Ixtapa-Mexico, April 1990.
\item Member States are under no legal \textit{obligation} to adopt the Model Regulations. The “Introduction” to the Model Regulations explains that the OAS recommends that they do so, “in accordance with the fundamental provisions of their domestic legislative systems”. \textit{Ibid.}
\item C Van der Vaeren, “The International Drug Control Cooperation Policy of the European Community: A Personal View”, \textit{Bulletin on Narcotic Drugs}, Vol.XLVI, No 2, 1994, p 1. The EC’s international drug control programme was established in early 1987 pursuant to directives laid down by the Council of Ministers of the European Communities on 26 June 1987. See Appendix K for a chart showing the thirteen years of action on drug control.
\item For those readers who are uninitiated with the organisational structure and functions of the European Union there are numerous texts to consult. See, for example, P.S.R.F Mathijsen, \textit{A Guide to European Union Law}, 6th edn, (London, Sweet and Maxwell, 1995) or A Duff et al (eds), \textit{Maastricht and Beyond: Building the European Union} (London, Routledge, 1994).
\item \textit{The European Union in Action Against Drugs} (Luxembourg; Office for Official Publications of the European Communities; Secretariat-General/Directorate-General X, 1997), p 6.
\end{enumerate}
\end{footnotesize}
Later that year, at the instigation of the European Parliament, a specific category for the campaign against drug abuse was created in the European budget.\(^{39}\) From that point on, States were committed to devoting both energy and resources to an expanding scheme to address the illegal trade in drugs.

In 1989, the then French President Mitterrand sent a letter to all other European Community heads of State calling for coordinated action to deal with the increasing trafficking and consumption of drugs.\(^{40}\) The response was almost immediate and in the same year a European Committee to Combat Drugs (ECCD) was set up to bring together national coordinators from each of the EEC Member States. By the end of 1990, the first ‘European Action Plan to Combat Drugs’ had been adopted by the Community.\(^{41}\) It called for intervention in four main areas:

- Demand reduction -- encompassing activity aimed at drug prevention and training, as well as a reduction in the risks for drug takers and the reintegration of addicts;
- Supply reduction -- tackling drug trafficking networks by protecting the external borders of the EU, implementing money laundering controls, preventing the diversion of chemical precursors and promoting police cooperation;
- International action -- working with individual countries, groups of countries or international organisations and
- Developing information collection and exchange between the Member States.

In the period since it was originally conceived, the Action Plan has thrice been updated and expanded, first in 1992 when a revised version of the 1990 Plan was adopted,\(^{42}\) secondly in 1994 when the Heads of State agreed on the Action Plan 1995-1999\(^{43}\) and lastly in 1999 with the finalisation of the Action Plan 2000-2004.\(^{44}\) For each version, the four basic components of the original plan have been retained and expanded upon so that the latest one covers the categories of information, action on demand reduction, reduction of illicit trafficking, action at an international level and coordination of activities.\(^{45}\)

**Control under the treaties of Europe**

1992 was a watershed year for both European integration and the campaign against drugs with the signing in Maastricht of the Treaty on European Union (the Maastricht Treaty or TEU). For the first time, action against drugs was specifically mentioned in a Treaty signed by Member States, thereby consolidating existing policies and making drug reform a central political commitment for the EU.\(^{46}\) The TEU is made up of three distinct ‘pillars’, each one of which is concerned with the fight against illicit drugs. Drugs are mentioned explicitly under the ‘First Pillar’, *The European Communities or Community Competence*,\(^{47}\) and the ‘Third

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\(^{39}\) *Ibid.* The EEC had made its first financial contribution to the international campaign against drugs in 1997, the same year that it participated in the Conference discussed above.

\(^{40}\) *Ibid.*

\(^{41}\) *European programme to combat drugs*, approved by European Council in Rome on 13 and 14 December 1990 on a proposal from CELAD (CELAD Doc.126).

\(^{42}\) *Second European plan to combat drugs*, approved by the European Council in Edinburgh on 11 and 12 December 1992, EC Secretariat Paper (SEC (92) 725.


\(^{46}\) *The European Union in Action Against Drugs*, supra n.38, p 6.

\(^{47}\) “Community Competence” has been defined as a “[t]erm used to describe the Community’s authority to undertake specific activities, usually deriving from a Treaty article”. CH Church and D Phinnemore,
Pillar’, Justice and Home Affairs. Although not specifically mentioned under the ‘Second Pillar’, The Common Foreign and Security Policy, subsequent interpretations of its scope show that they are impliedly included here as well.\(^4^8\) The TEU must now be read alongside the recently ratified Treaty of Amsterdum (TOA), which was signed by the fifteen EU Member States on 22 October 1997\(^4^9\) and entered into force on 1 May 1999.\(^5^0\) The TOA amends the provisions of the existing Treaties — the 1992 TEU and the separate Treaties that founded the three legal entities comprising the European Communities — as well as certain related Acts.\(^5^1\) While it has not radically altered the existing drug control regime, it has introduced several important reforms.\(^5^2\)

As regards the First Pillar, it is now Article 152 of the EC Treaty [amended Article 129] that deals with public health issues covered by the policies of the European Union. The second paragraph of Article 152 (1) states that:

Community action, which shall complement national policies, shall be directed towards improving public health, preventing human illness and diseases, and obviating sources of danger to human health. Such action shall cover the fight against the major health scourges, by promoting research into their causes, their transmission and their prevention, as well as health and education.

Following the ratification of the TOA, drugs are no longer singled out as a “major scourge”, as they were under Article 129 of the EC Treaty.\(^5^3\) They remain, however, a priority for Community action in the area of public health and the third paragraph of Article 152(1) stipulates that:

The Community shall complement the Member States’ actions in reducing drugs-related health damage, including information and prevention.

It is encouraging to see that the TOA has introduced the new objective of cooperation between Member States in the reduction of drug-related health damage (harm-reduction), in addition to cooperation over preventive measures, as was set out originally in Article 129. The current Action Plan 2000-2004 makes the point that “[e]xchange of information on ‘best practices’ in drug prevention and in other areas such as the alternative measures to penal

\(^4^8\) See, for example, statements made by the Lisbon European Council of 1992 and the Brussels European Council of 1993, discussed further below.

\(^4^9\) Political agreement was reached at the European Council Summit on 17 June 1997 and the TOA was signed three and a half months later on 22 October. The full official text of the TOA can be found at OJ C 340, 10 November 1997. For the Minutes of the Signing of the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, see OJ C 340/307, 10.11.1997.

\(^5^0\) The TOA entered into force on the first day of the month following the deposit of the instrument of ratification by the last signatory State to take that step. See Article 313 (ex Article 247) of the TOA. France was the last to ratify on 30 March 1999.

\(^5^1\) For further discussion of the reforms introduced by the TOA, see, for example, A Duff (ed.), The Treaty of Amsterdum; Text and Commentary (London, Federal Trust, 1997) or Treaty of Amsterdam White Paper (Dublin, Irish Government Publications, 1998).


\(^5^3\) As noted in the latest Action Plan 2000-2004, supra n.44, p 9. The former Article 129 read as follows: “Community action shall be directed towards the prevention of diseases, in particular the major health scourges, including drug dependence, by promoting research into their causes and their transmission, as well as health information and education”.

sanctions should be encouraged". There is much to be gained by States exchanging information and devoting resources in an effort to identify and implement the most effective programmes to enable drug users to lead healthier lives. A State cannot, however, be forced to adapt its individual health policies in order to bring it into line with that of other States. Paragraph 4 of Article 152 expressly excludes any harmonisation in relation to incentive measures that are designed to protect and improve human health.

Title VI of the 1992 TEU introduced an obligation on Member States to cooperate in subject matters of common interest within the fields of Justice and Home Affairs. Under the newly ratified TOA, more reforms have been made to the provisions of justice and home affairs than to any other policy area within the remit of the EU. The TOA introduced the objective stipulated in the new Article 29 (ex Article K.1) of providing citizens with a high level of

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55 It must be remembered, further, that all First Pillar community action is governed by the principle of "subsidiarity" (Article 2 of the TEU, ex Article B), as described in Article 5b of the EC Treaty (ex Article 3b of that Treaty). In the recent Action Plan of the Council and the Commission on How Best to Implement the Provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice, 23.1.99, OJ C 19/1, it is asserted that the principle of subsidiarity “which applies to all aspects of the Union’s action, is of particular relevance to the creation of an area of freedom, security and justice”. While it may be true that at a political level the subsidiarity principle applies to all aspects of EU action, strictly legally it applies only to Community action under the First Pillar. The TOA attached a Protocol to the EC Treaty (Protocol 30) intended to define precisely the criteria for the application of the principles of subsidiarity and proportionality. Among the guidelines for subsidiarity are that the Community should act only where the objectives cannot be achieved by Member States acting alone, and can therefore be better achieved by Community action (Protocol 30, para.5). Furthermore, the form of Community action shall be as simple as possible and the Community shall legislate only to the extent necessary to achieve the objective (paragraph 6).
56 Although the term “Justice and Home Affairs” has now been removed from the amended version of the TEU, it is still used as a general term to refer to areas covered by the ‘original’ Third Pillar. See, for example, J Monar, “Schengen and Flexibility in the Treaty of Amsterdam: Opportunities and Risks of Differentiated Integration in EU Justice and Home Affairs” in M den Boer, Schengen, Judicial Cooperation and Policy Cooperation (The Netherlands, European Institute of Public Administration, 1997), p 9 and also, N Walker, “Justice and Home Affairs”, International and Comparative Law Quarterly, Vol.47, 1998, p 231 at 236. After the TOA, a revised Title VI is now headed “Provisions on Police and Judicial Cooperation in Criminal Matters”. Title VII (ex Title Vla) is headed “Provisions on Closer Cooperation”.
Not only have the basic provisions of Title VI been substantially amended and limited to police and judicial cooperation in criminal matters, but also major areas of the ‘old’ Third Pillar have been moved into the EC Treaty, mostly in the form of an entirely new title of the EC Treaty on ‘Free movement, asylum and immigration’ governed by a whole range of new specific provisions. Yet there are changes which, from a constitutional perspective, are even more important than this quite considerable communautarization: the incorporation of Schengen into the Union framework and the introduction of a significant number of other actual or potential cases of ‘flexibility’ in EU justice and home affairs.

safety within "an area of freedom, security and justice". To this end, Member States must work together in "preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud ...". The placing of drug trafficking alongside terrorism and trafficking in persons and arms is a reflection of how seriously the EU views this crime. It reflects also the view that tackling illicit drugs requires wide-ranging activity in many areas within the remit of justice and home affairs.

Title VI provides for a united approach in the area of judicial cooperation in criminal matters. The new Article 31(e) (ex K.3 (e)) stipulates that measures may include the establishment of common minimum rules in relation to "the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and drug trafficking". In view of the concern expressed by a number of countries that this could lead to unnecessary interference in penal policy, a 'Declaration' was adopted providing that Article 31(e) provisions shall not oblige a Member State to adopt minimum sentences where they are not provided for under its legal system. Since the legislation defining drug offences and the minimum penalties applicable to them varies substantially between Member States, this provision appears to have the potential to significantly impact upon domestic drug laws.

The TOA introduced two new instruments into the Third Pillar, in addition to 'common positions' and 'conventions', that can be adopted by the Council to pursue the objectives of the Union. All four are set out in Article 34 (ex Article K.3). A 'framework decision' (formerly 'joint action') may be adopted for the approximation of the laws and regulations of Member States. Although binding, framework decisions leave it to national authorities to choose the form and method necessary to achieve the result. They appear to have the same legal status as the former Joint Actions so that the TOA has introduced a change in terminology here rather than substantive effect. A 'decision' may be taken by the Council in order to introduce measures for any other purpose consistent with the objectives of Title VI, excluding the approximation of laws and regulations. Decisions are binding but have no direct effect. On the vote of a qualified majority, the Council adopts measures necessary to implement decisions at the level of the Union.

58 The specific priorities and measures to be adopted in pursuance of this objective are set out in the Action Plan of the Council and the Commission on How Best to Implement the Provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice, supra n.55. Paragraph 13 identifies as a priority the mobilisation of law enforcement authorities to tackle drug traffickers and the criminal organisations that lie behind them, giving the significant threat that drugs pose to collective and individual security within Europe.

59 The coordination of EU action on drug trafficking is part of a broader mission to combat organised crime. See, in particular, the Action Plan to Combat Organised Crime, 15.8.97, OJ No C 251/1, and the Council Resolution of 21 December 1998 on the prevention of organised crime with reference to the establishment of a comprehensive strategy for combating it, 29.12.98, OJ C 408/1. There are three measures specifically cited as necessary in order to tackle those subject areas: 1) closer cooperation between police forces, customs authorities and other competent authorities, directly or through Europol in accordance with Articles 30 and 32; 2) closer cooperation between judicial and other competent authorities of the Member States, in accordance with Articles 31(a) to (d) and 32; and 3) approximation, where necessary, of rules on criminal matters in the Member States, in accordance with the provisions of Article 31(e). Paragraph 46 of the Action Plan of the Council and the Commission on How Best to Implement the Provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice, supra n.55, sets a target of two years for measures to be taken to identify those areas of organised crime, terrorism and drug trafficking which require that minimum rules be established relating to the constituent elements of the offence and the penalties to be applied.

60 Declaration 8, entitled Declaration on Article 31(e) of the Treaty on European Union.

61 This point is illustrated fully in "Updated version of the Comparative Study on Drugs Legislation in Europe", unpublished report presented by Austrian Presidency of the Council at the Vienna EU Council, December 1998 (supplied to author by the EMCDDA, July 1999).
The power sharing basis of the institutions of the EU has been slightly altered by the TOA. The new Article 34 (ex Article K.6) specifies that the European Commission now shares with Member States the right to initiate action in all areas referred to in Title VI.62 A stronger role for the European Parliament is provided for under the new Article 39 (ex Article K.11). Rather than consult Parliament only on principal activities under Title VI, the Council must now do so before adopting any decision, framework decision or convention.63 The Council may still adopt ‘common positions’ without having to consult Parliament.

Although the EU’s Common Foreign and Security Policy (CFSP) does not contain any express mention of drugs or drug abuse, this is an extremely important Pillar under which action can and has been taken in relation to illicit drug control. The CFSP allows the EU to back up its internal action against drugs with external activity aimed at reducing supply and demand in producer regions and neighbouring countries.64 It provides for joint action in areas of common interest, including in particular the formulation of common positions and the presentation of a united approach in international forums.65 On different occasions, European Heads of State or Government have made it clear that drugs are to be regarded as an important area of concern requiring action under the umbrella of the CFSP. In June 1992, the Lisbon European Council identified the fight against drug trafficking as a subject that may require a coordinated Second Pillar response.66 This reasoning was confirmed the following year by the Brussels European Council of December 1993.67 The European Commission has explained that one example of action under the CFSP would be the inclusion of drugs related issues in political dialogue between the Union and third countries, with a view to “enhancing awareness” of the drugs phenomenon at the highest political levels.68 Should the dialogue partner maintain an inflexible negative attitude towards drug control, the Union may consider it appropriate to review or suspend cooperation (clearly a little more interventionist than merely “enhancing awareness”). Thus far, EU action has consisted primarily of political dialogue with third countries, further advanced by the inclusion of drugs clauses in cooperation agreements.69 There is no doubt that the CFSP stretches the activities of the European Union in the field of drugs, authorising an interventionist approach under which third countries may be pressured to modify law and policy on illicit drug use in line with the philosophy of the fifteen Member States.

The Schengen Convention

On 14 June 1985, five European countries -- West Germany, Belgium, France, Luxembourg, and the Netherlands -- concluded the Schengen Agreement on the Gradual Abolition of Checks at their Common Borders,70 a document with far reaching consequences for the control over traffic in illicit drugs of abuse. Under the Schengen Agreement, Parties accepted that controls at their common frontiers should be abolished over a number of years so that

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62 For a further explanation of how the roles of political institutions in the remaining Third Pillar have been modified, see S Peers, supra n.57, p 43.
63 Article 39 specifies that the Parliament shall deliver its opinion within a time-limit specified by the Council, not shorter than three months. If no opinion is forthcoming within the time-limit allowed, the Council is free to act.
65 Title V, Articles 11 and 12 (ex Articles J.1 and J.2).
67 Ibid.
68 Ibid., pp 22-3.
70 Agreement, signed in Schengen on 14 June 1985, on gradual abolition of checks at their common borders, Tractatenblad, 1985, 102.
people, goods and services would move freely between the countries concerned. Recognition of the extent of the illicit drugs trade in 1985 and the importance of strengthening controls is reflected by the fact that drugs are specifically mentioned in three separate Articles in the Schengen Agreement, covering both short and longer term measures.\(^71\)

Five years later on 19 June 1990, the original five parties concluded a Convention\(^72\) implementing the earlier Agreement and providing detailed rules on the abolition of internal border checks. It was recognised that the increasing permeability of internal borders under the Schengen Convention had the potential to significantly impact upon the traffic of drugs within the European Union. Article 2, paragraph 1, providing that “[i]nternal borders may be crossed at any point without any checks on persons being carried out”, obviously reduces the opportunity for national authorities to detect illicit substances transported between European neighbours. Under paragraph 2, a Contracting Party may decide that appropriate national border checks will be carried out at internal borders “where public policy or national security so require”, but only for a limited period of time and only after consultation with other Contracting Parties.\(^73\) Other Convention provisions were designed to compensate for the removal of internal checks by strengthening control over external borders,\(^74\) enhancing

\(^{71}\) See Articles 8, 9 and 19 of the Schengen Agreement.

\(^{72}\) Convention, signed in Schengen on 19 June 1990, implementing the Agreement on the gradual abolition of checks at their common borders, Tractatenblad, 1990, 145.


\(^{74}\) See Schengen Convention, Chapter 2, Article 6. In a recent annual report on the operation of Schengen it is asserted that the ‘fight’ against drug trafficking has been strengthened rather than weakened by the agreement on the abolition of border controls. The report does note that there has been a ‘marked increase’ in the production, traffic and misuse of synthetic drugs and that the illicit trade in plant-based substances remains widespread. Nevertheless, there is no proof that the increasing permeability of borders is responsible for the expansion in illicit trade. Rather, bilateral and regional cooperation between national authorities was considered to have facilitated the identification and seizure of illicit supplies. Central Group, Schengen; Annual Report, SCH/C (98) 60 rev 4, Brussels, 22 June 1998, p 9. Other commentators would disagree. In an interesting recent article on how economic interests impinge on drug control, Raustiala suggests that the liberalisation of drug markets, not only within the EU but world-wide, contributes to the greater flow of illicit drugs. It facilitates, for example, easier transportation of end-products and precursors and creates opportunities for laundering the profits
cooperation between law enforcement authorities and targeting illicit trafficking. Only one paragraph of one Article relates to the demand side of the equation. Article 71(5) in Title III requires that parties shall "do everything in their power" to prevent and combat the negative effects of the demand for illicit drugs. While this creates a positive obligation to do something in the area of demand reduction, it is the responsibility of each Contracting Party to determine what types of measures are appropriate.

Although officially concluded in 1990, there was a considerable time lapse before the Schengen Convention came to be fully implemented. Following long delays attributable in part to disagreement over certain political issues and difficulties establishing the Schengen Information System, the Convention applying the Schengen Agreement came into force on 26 March 1995. As was originally foreseen, the number of Parties to the Convention continued to expand and thirteen of the fifteen EU Member States had ratified by the time the Schengen system was incorporated by the 1997 TOA. In December 1996, Association Protocols were agreed to by Norway and Iceland, countries which are members of the European Economic Area (EEA), but not of the EU. At this time, Ireland and the United Kingdom are the only of black market trade. K Raustiala, "Law, Liberalization and International Narcotics Trafficking", International Law and Politics, Vol.32, p 89, particularly at pp 116-123.

75 Drugs are mentioned specifically under the heading of "Police and security" in Title III, the aim of which is to improve cooperation between the law enforcement bodies of Contracting Parties by providing for police to assist each other for the purpose of preventing and detecting criminal offences and punishing those thought to be responsible. Thus, for example, under Article 41, paragraph 1, the officers of a Contracting Party in pursuit of an individual apprehended in relation to an offence outlined in paragraph 4 will be authorised to continue pursuit in the territory of another Contracting Party without obtaining prior authorisation, where the situation is particularly urgent.

76 Chapter 6 of Title III is entitled "narcotic drugs" and contains seven Articles devoted entirely to measures that must be taken by Parties in an effort to prevent and punish the illegal trade in both narcotic drugs and psychotropic substances.

77 In the conclusion to this thesis there is discussion of the fact that the term 'demand reduction' means different things to different interest groups and countries have very different ideas on what types of measures should be introduced.

78 T Bunyan (ed.), Key Texts on Justice and Home Affairs in the European Union, Vol.1 (1976-1993) From Trevi to Maastricht (London, Statewatch, 1997), p 110. Although March 26 was chosen as the date for the full implementation of Schengen's open borders policy, it has been seen that not all Parties have been willing or able to fully implement the Treaty since that time. Certain of them have been reluctant to reduce border controls for fear that the unrestricted flow of people and goods would allow for an increase in drug trafficking and illegal immigration. Nine EC States Agree to Open Borders from December, Overseas News Service, June 30, 1993, cited in ET Berkman, supra n.73.

79 The Schengen system was incorporated by the 1997 Treaty of Amsterdam which annexed to both the EC and the EU Treaties a new Protocol that brought the Schengen cooperation system and all commitments and decisions made pursuant to it within the legal and institutional framework of the EC/EU Treaties. Article 1 of the new Protocol states that the thirteen EU Members (with the exception of Ireland and the UK) that are Parties to the Schengen agreements are authorised to establish closer cooperation among themselves within the scope of the Schengen acquis (outlined in the annex to the Schengen Protocol). From the entry into force of the TOA, all decisions comprising the Schengen acquis adopted prior to that date have been allocated to either the EC (First Pillar) or EU (Third Pillar) Treaties. When Contracting Parties build further upon the Schengen system, they do so within the framework of the Treaties and subject to their provisions. It has been pointed out that one aim of incorporation was to make the Schengen cooperation system more open and accountable and more able to offer a guarantee of individual rights. See further, Treaty of Amsterdam White Paper, supra n.51, p 69.

80 The European Economic Area Agreement (EEA Agreement) was signed in 1994. See Decision of the Council and the Commission of 13 December 1993 on the Conclusion of the Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation (94/1/ECSC, EC), OJ L 1/1, 3.1.94. Article 2 of the Convention states that in order to attain the objectives of strengthening trade and economic relations (set out in full in Article 1), Parties are committed to, inter alia, the free
EU countries outside of all Schengen controls and neither have any immediate plans to join up. Their decision not to do so may be partially explained by the fact that these are island States whose Governments perceive a need to maintain customs checks on all persons entering their territories whether from other parts of Europe or further afield.

EU bodies established to monitor illicit drugs

Europol

In order to complete this overview of European action in the sphere of drug control, it is necessary to mention two further institutions that have asserted their place in European drugs discourse and will continue to impact upon decision making. In 1992, Member States agreed to the establishment of a central European criminal intelligence office to be known as Europol with a mandate to improve cooperation in the areas of drug trafficking, terrorism and other types of serious international organised crime. In view of the fact that the preparation of a Europol Convention and its subsequent entry into force would take some time, and in recognition of the urgent problems posed by international illicit drug trafficking, the first phase of Europol known as the Europol Drugs Unit (EDU) was created in June 1993. From 1 July 1993, Ministers of each Member State began to send one or more representatives to a

movement of goods, persons and services. Parties to the Schengen Convention are also committed to these freedoms and it is obvious that EU Member States Party to Schengen would want non-EU countries that are signatories to the EEA Agreement to accept the provisions set out in the Schengen Convention for removing restrictions on trade and building on other areas of cooperation.

All five Member States of the Nordic Passport Union -- Denmark, Sweden, Finland, Norway and Iceland -- agreed to participate in the Schengen Convention in December 1996, the first three EU countries by becoming Parties to the Convention and the last two non-EU countries by concluding Association Protocols. See JA Usher, “Flexibility and Enhanced Cooperation” in T Heukels et al (eds), supra n.52, p 259.

Treaty of Amsterdam White Paper, supra n.51, p 74. Although Ireland and the UK are not bound by what has already been done in the Schengen arena, both may request to “opt in” to some of the action taken in the past and to take part in any new proposals to build upon it (Article 4 of the Protocol integrating the Schengen acquis into the framework of the EU and the accompanying Declaration on Article 4). In fact, the UK has indicated already that it wishes to sign up to some of the Schengen acquis and a further decision will be taken later in the year 2000. See Commons Press Release, IP/99/550 of 20 July 1999. On the other hand, a complicated arrangement has been made to enable Denmark to “opt out” of some of the Schengen provisions. The ramifications of the “opt in” provision for the UK and Ireland and the “opt out” for Denmark are explored by AG Toth, “The Legal Effects of the Protocol Relating the United Kingdom, Ireland and Denmark” in T Heukels et al (eds), supra n.52, p 227. See further, S Peers, supra n.57, pp 56-60.

83 Information supplied by Stephen Pike and Richard Rhodes, Action Against Drugs Unit, UK Home Office, Interview, February 1998. The UK is convinced that frontier controls have proven to be effective in allowing for the seizure of large quantities of drugs, so that removing them would encourage and facilitate trafficking.


85 On 2 June 1993, the Ministerial agreement on the establishment of the Europol Drugs Unit was signed in Copenhagen. See T Bunyan, supra n.78, p 47. The legal status of the EDU was subsequently founded on the Joint Action of 10 March 1995 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning the Europol Drugs Unit, OL 1995 L 62/1, 20.3.95, which also served to expand its role to cover trafficking in nuclear and radioactive substances, clandestine immigration networks and illicit vehicle trafficking. A 1996 Joint Action further expanded its remit to cover traffic in human beings. See Joint Action of 16 December 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union extending the mandate given to the Europol Drugs Unit, OL L 342/4.
central location in the Hague, in order to constitute a cooperative multi-national body of police officers and by 1994 the EDU was ready to begin its work. Although the Europol Convention was signed by Member States on 26 July 1995, it was not until 1 October 1998 that the instrument entered into force. Europol is not a 'super police force' with the power to pursue criminals across borders from country to country, but is rather a non-operational team facilitating the exchange and analysis of intelligence on illicit drug trafficking, criminal organisations and associated money laundering activities. Its objective is to supply information that will assist law enforcement agencies within and between the Member States to carry out measures to prevent the criminal activities described above. As much as any other one act, the establishment of the EDU in advance of the Europol Convention coming into force is a reflection of the belief held by European Heads of State that drug problems within Europe present a major threat calling for a coordinated and immediate response.

The European Monitoring Centre on Drugs and Drug Addiction

In 1993, the European Council adopted a Regulation establishing the European Monitoring Centre on Drugs and Drug Addiction (EMCDDA). Based in Lisbon, Portugal, the Centre was set up in recognition of an increasing drug problem in Europe and the lack of comparable, objective and reliable information concerning drugs and drug addiction that could be used to inform decision makers. Thus, it aims not only to distribute existing information, but also to harmonise criteria and methods for data collection in an effort to improve the comparability of national data. The backbone of the operation is an interactive network of fifteen national drug centres known as Reitox Focal Points which collect, send and receive information. While intelligence policing and law enforcement is the purview of the EDU, the EMCDDA is interested in information relating to epidemiology and aetiology of drug use, current patterns of use and activities undertaken to tackle both supply and demand. From 1996, the EMCDDA has published an Annual Report on the State of the Drug Problem in the EU providing an overview of the drug scene in all Member States and a discussion of national initiatives taken to address supply and demand. The Monitoring Centre has no legislative powers. It does, however, have the opportunity to influence the creation and tailoring of drug policy by facilitating the exchange of information among States and reporting on the success or failure of control initiatives.

Targeting new synthetic drugs of abuse

There is ample evidence that the traffic in new synthetic drugs of abuse continues to expand, both within the Member States of the European Union and in the surrounding countries of

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87 The Europol Convention was ratified by all Member States in June 1998 and entered into force on 1 October 1998. See http://www.europol.eu.int/facts/en/htm. There was a further delay in Europol taking up its activities, however, since not all implementing measures had been agreed upon or were in force at that time. Activities finally commenced on 1 July 1999. See Council Communication concerning the taking up of activities of Europol (1999/C 185/01), 1.7.1999, OJ C 185/1.
92 For the first three years during which the Centre was operational, it was mandated to focus on the area of demand reduction and studies were commissioned to analyse demand reduction models in different Member States. EMCDDA, Drug Net Europe, Sept-Oct, No.1, pp 1-3.
Central and Eastern Europe. In the 1997 Annual Report of the EMCDDA, it is a whole chapter is devoted to describing the emergence of the trend towards recreational use of new synthetic psychotropic drugs and its manifestation in the European Union. While production, trafficking and consumption rates vary significantly between the fifteen Member States, each one has supplied information to suggest that there is a substantial and in most cases growth market for NSDs. A distinction must be made here between synthetic drugs traditionally the subject of abuse (amphetamines and LSD prevalent during what has been referred to in this thesis as the second generation of synthetic drug use) and new synthetic drugs (primarily MDMA and related chemical variants that make up the third generation). "Traditional" amphetamines continue to be subject to widespread abuse. After cannabis, amphetamine is the second most used illegal drug in the majority of EU Member States, having been sampled by 1 to 9% of the adult population and up to 16% of young adults. Use of LSD fluctuates but is relatively low and has declined recently following a sharp rise in 1993-94. Of the new synthetic drugs, MDMA is the one most regularly consumed by young adults in the 15 to 25 age group. Current research suggests that use may have ceased increasing in certain European countries that were first to experience the ecstasy phenomenon in the late 1980s, but continues to expand in countries where ecstasy emerged several years later. Recently a number of uncontrolled analogues chemically related to MDMA have appeared on the illicit market in Europe, drawing attention to the fact that existing drug laws are not equipped to deal rapidly with a range of variable chemical compounds. Although NSDs are not responsible for a high rate of mortality or morbidity, the rapid development of the trend has been a cause of concern for the Governments of most Member States, leading to a general consensus that there should be a coordinated EU plan to address the issues involved.

The expansion in manufacture and traffic of NSDs within the countries of the European Union challenges the traditional view that production and traffic of prohibited drugs is organised by foreigners outside of its borders. Nicholas Dorn has asserted that:

there is a tradition in Europe of describing drug traffickers in terms of foreign nationalities and, in particular, to equate organized trafficking and other criminality with nationalities outside of the EU. This tendency is rife in the internal ministries and policing agencies of the EU member states, who effectively formulate pan-European trafficking policy.

In respect of synthetic drugs, however, many clandestine operators have set up in European countries and are heavily dependent upon precursor chemicals produced and diverted from commercial operators within Europe. Furthermore, the range of ecstasy-related compounds associated with the rave scene have been promoted by clandestine operators within Europe.

96 Ibid., p 13.
97 Ibid. This may be explained in part by the declining popularity of ‘Rave’ parties in countries where the trend first began.
98 Resolution on the Communication from the Commission to the Council and the European Parliament on the Control of New Synthetic Drugs (Designer Drugs), supra n.6.
99 Ibid.
101 Communication From the Commission to the Council and the European Parliament on the Control of New Synthetic Drugs (Designer Drugs), supra n.6.
and popularised by European media. Thus, NSDs are a product of western, and particularly European design and are spread from within the EU to countries beyond its borders. This suggests that it is the responsibility of Members themselves to implement adequate controls, particularly if they are to have any legitimate basis upon which to request that developing countries guard against the trafficking of narcotic plant-based substances from their jurisdictions into Europe.

Following the pattern set in Chapter 6, two different types of action will be looked at in turn. First, there are initiatives taken by the EU to address the spread of end-product NSDs, triggered initially by the increasing popularity of MDMA in parts of Western Europe. Secondly, a series of measures have been introduced to improve controls over the manufacture and distribution of precursor and essential chemicals used in the production of both plant-based narcotic drugs and synthetic substances. It is argued that the imposition of EU led controls in these two areas will have a significant impact on the regulation of NSDs both within and outwith Europe.

**Part A - End-product controls**

The first mention of synthetic drugs in a legal document introduced by a body within what is now the European Union was in 1987. In its Resolution on action against synthetic drugs the European Parliament “notes with concern” the increasing consumption of synthetic drugs produced in Europe and the illegal export of those substances to developing countries and “deplores the fact” that illegal production and trade has increased to the extent that there are “devastating” effects within and beyond the European States. The Parliament suggested here that two measures be taken in response. First, the European Commission should press States to comply with international conventions governing illicit manufacture and trade in synthetics. Secondly, information and education campaigns should be launched by the European Community and Member States as a matter of urgency in order to curb drug abuse (recognised by the Parliament to be caused by the excessive use of therapeutic drugs). This is not a document concerned with new synthetic drugs. The Parliament was focused in this resolution on synthetic drugs that had long been the subject of chronic abuse, particularly tranquillisers and barbiturates, and was not yet cognisant of the new trend towards recreational use of amphetamine-type stimulants such as ecstasy.

Nearly a decade later, the illicit use of synthetic drugs was again mentioned in a legal instrument drafted by a body within the EU, this time in recognition of the increasing quantities of NSDs appearing on the market. On 17 December 1996, the European Council adopted a Joint Action concerning the approximation of laws and practices of Member States in an effort to combat drug addiction and trafficking. The aims of the Joint Action are outlined in the Preamble where it is stated that, in the absence of “harmonised” legislation, adopting practices that are “mutually compatible” will strengthen cooperation in combating

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102 See the discussion in Chapter 2.
103 Resolution on action against synthetic drugs, 17 December 1987, DOC. B2-1425/87, 18.1.88, OJ No C 13/111.
104 See Resolution on drugs (released by the Parliament at the same time as the 1987 Resolution relating to synthetic drugs), 17 December 1987, Doc. B2-1421/87, 18.1.88, OJ No C13/110. In paragraph C there is note of an increasing awareness of the dangers of synthetic drugs use, specifically tranquillisers and barbiturates.
both illicit drug trafficking and drug addiction. Synthetic drugs are singled out as a priority. Article 5 of the Joint Action states:

Member States shall endeavour to draft convergent legislation to the extent necessary to make up legal ground or fill legal vacuums as regards synthetic drugs. In particular they shall promote the establishment of a rapid information system to enable such drugs to be identified as substances liable to be prohibited as soon as they appear anywhere in a Member State.

In December 1996, the Heads of State and Government meeting in Dublin identified the issue of synthetic drugs as one requiring urgent attention both within the EU Member States and between the Union and third countries, particularly near neighbours in Central and Eastern Europe. In this regard, the Council specifically endorsed the Joint Action calling for the approximation of laws and practices in this area in order to close loopholes facilitating the transfer of synthetic drugs.

One must query what the term ‘approximation’ should involve in relation to new synthetic drug laws. From the review of relevant domestic laws in Chapter 5, it will be recalled that thirteen of the fifteen EU States have chosen to regulate NSDs within the structure of the traditional substance-by-substance model. At this stage, only the UK and Ireland have introduced a generic response that extends control over ‘families’ or groups of synthetic drugs. Since the majority of Member States object to the regulation of groups of non-specific analogues, it is not conceivable that in the near future all fifteen countries could be persuaded to introduce the same legislative model to regulate the range of NSDs that will become available on the illicit market. At first blush it may appear then that it is impossible in the current climate to fulfill the requirement in Article 5 that Member States “endeavour to draft convergent legislation to the extent necessary to make up legal ground or fill legal vacuums as regards synthetic drugs”. Article 5 does not, however, require that States adopt an identical legislative model. That is, they may choose between the substance-specific, generic or analogue models -- three very different legislative paradigms -- provided they agree to bring certain NSDs under control as soon as possible after they appear on the illicit market and are recognised as posing a problem. This is the idea of the ‘Early Warning System’ described below, designed to fill the legal vacuum to the extent necessary to capture dangerous compounds as soon as possible after they are discovered.

In 1996, the European Council adopted a measure aimed at improving the transfer of information on the chemical make-up of illicit drugs flowing between the Member States. The Joint Action of 29 November 1996 was intended to establish a more cohesive mechanism to facilitate the transfer and dissemination of results from the “chemical profiling” of certain drugs. Profiling is a technique involving the expert analysis of chemical compounds in

106 See ibid., Preamble, Paragraph 14. Apart from the establishment of an ‘Early Warning System’ pursuant to Article 5, which is described in some detail later in this Chapter (infra p 214), the Joint Action appears to have had very little practical impact on the approximation of other relevant laws and practices of Member States. Information supplied by Danillo Ballotta, Correspondence, 16 November 1999. Note that the TOA (see, for example, Articles 29-30, ex Articles K.1-K.3) encourages the exchange of information between professionals, magistrates and police forces in the various States in order to harmonise their conduct. It remains to be seen whether this will trigger more concrete action.

107 Communication from the Commission to the Council and the European Parliament on the Control of New Synthetic Drugs (Designer Drugs), supra n.5, p 5.

108 See Chapter 5, supra pp 108-121.

109 Indeed the term ‘approximation’ was deliberately chosen so that this point would be clear. Information supplied by Alain Wallon, National, Community and International Strategies, EMCDDA, Interview, 13 July 1999.

110 Joint Action of 29 November 1996 adopted by the Council on the basis of Article K.3 of the Treaty of European Union, concerning the exchange of information on the chemical profiling of drugs to
order to measure their synthetic impurities, with the aim being to obtain information on how the substance has been manufactured and its place of origin. Where a “chemical relation or identity” is established between seizures from different countries, it may be possible to map distribution patterns and to trace clandestine laboratories producing the drugs. Article 1 of the Joint Action specifies that there will be exchange of information in relation to what have been considered the ‘traditional’ plant-based drugs of abuse, heroin and cocaine, as well as a range of psychotropic substances such as LSD, amphetamines and the ecstasy-type derivatives MDA, MDMA and MDEA.

In March 1997, a European Council Report noted the success of the ‘Nordic Amphetamine Profiling Project’, a scheme involving a number of participants, including the Nordic countries, Germany, the Netherlands, Poland and the UK, sending samples to be profiled by the National Forensic Laboratory in Sweden. It is claimed that the project has resulted in several successful operations, providing the intelligence that has made it possible for police to raid clandestine laboratories within the EU countries and their nearest neighbours. It was therefore recommended that the programme should be expanded to include all fifteen Member States.

By 1997, the non-therapeutic use of NSDs had attracted a significant degree of media and political attention and was at that stage clearly recognised by institutions of the European Union as an issue requiring a united response. In May of that year, the Communication from the Commission to the Council and the European Parliament on the Control of New Synthetic Drugs (Designer Drugs) was published. The Commission noted the increasing popularity of synthetic drugs of abuse, particularly among young people, and described NSDs as “a serious threat to their health and lives” and “a source of great concern to our citizens”. In view of the traditional focus on plant-based narcotic drugs, current national and international laws were considered to be ill-equipped to deal with the new trend towards supply of and demand for variable synthetic compounds. As a first step the Commission called for action on three fronts: the creation of a risk-assessment mechanism and early-warning system to alert Member States to new compounds appearing on the illicit market; a commitment by Member States to criminalise production and trafficking of NSDs designated as dangerous and the strengthening of controls over precursor materials used in their manufacture. In the long term, the Commission commented, it may be appropriate to consider additional instruments at the EU level to bolster synthetic drug controls, perhaps based on a comparative review of the different legislative models adopted at a national level.

facilitate improved cooperation between Member States in combating illicit drug trafficking (96/699/JHA), 12.12.96, OJ No L 322/5.

111 A definition of ‘chemical profiling’ was provided by Dr Les King, Senior Forensic Scientist, The Forensic Science Service, London, Interview, March 2000. The technique may be used in an effort to track the manufacture and distribution of both plant-based and synthetic drugs. In respect of heroin, for example, see further, A Johnston and LA King, “Heroin Profiling: Predicting the country of origin of seized heroin”, Forensic Science International, Vol.95, 1998, p 47.


113 Ibid., p 4.

114 As of March 2000, the scheme had not yet been expanded to include all Member States. Information supplied by Mr J.J.T.M. Pieters, National Co-ordinating Public Prosecutor, Synthetic Drugs Unit, The Netherlands, Interview, March 2000.

115 Communication from the Commission to the Council and the European Parliament on the Control of New Synthetic Drugs (Designer Drugs), supra n.5.

116 Ibid., p 1. The commission suggested that some of the reasons for the increase in illicit production, traffic and use of NSDs in Europe were the availability of precursors, simple methods of preparation, low cost and association with fashion and youth culture.

117 Ibid., p 5.
On 12 May 1998, the European Parliament issued an interesting response to the Commission’s Communication of the previous year. It begins by noting that the consumption of synthetic drugs in EU Member States has increased “massively” in recent years, thereby justifying the “urgent need” to gather further information about synthetics and the “urgent need” to achieve a coherent and coordinated Community response to combating production and supply. The Parliament acknowledged that Member States had different laws regarding the classification of individual synthetic drugs as well as the penalties prescribed for possession, consumption and trafficking of those substances. As regards the different penalties for trafficking, possession and consumption, it was not considered to be practical to require all Member States to harmonise the relevant criminal law provisions at this time. They were, however, called upon to ensure that legislation banning the production of synthetic drugs is “sufficiently comprehensive” to prevent producers circumventing the law by altering the molecular structure of a compound.

Parliament expressed its opinion that “the effective threat of penalties for the consumption of NSDs can have a deterrent, and thus preventive, effect on potential consumers”. However, there is no specific mention of criminal penalties and it could be argued that administrative penalties can act as a sufficient deterrent. Other important paragraphs in the Resolution for the most part reiterate the concerns of the Commission. In particular, there are calls for the regulation of venues where substances are commonly sold, development of information exchange systems, strengthening of precursor controls and enhancement of cooperation with the countries of Central and Eastern Europe in an effort to develop an effective European response.

**The Early Warning System**

The most significant EU initiative addressing the issue of synthetic drug use was adopted by the Council in the form of the Joint Action of 16 June 1997 concerning the information exchange, risk assessment and the control of new synthetic drugs. In accordance with the 1997 Communication from the Council, the Joint Action introduced a common mechanism for the collection and dissemination of the latest information on NSDs, including patterns of use, distribution and associated risks. This ‘Early-Warning System’ (or EWS as it is now referred to), aims to provide a basis for expeditious action to permit the common application of existing measures of control to NSDs found to present a danger. In this way, Member

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118 See Resolution on the Communication from the Commission to the Council and the Parliament on the Control of New Synthetic Drugs (Designer Drugs), supra n.6.
119 Ibid., Preamble at paragraphs A, and paragraphs 2 and 4 of the main text.
120 Ibid., para.8.
121 Ibid., para.5. Parliament does not elaborate on the reasons why it would not be practical to harmonise the penalties applicable in Member States, but it seems that this would be politically impossible to do. States have shown that they will closely guard the right to determine for themselves the appropriate penalties attached to criminal offences. During negotiations for the TOA, for example, there was so much concern that the new Article 31(e) would interfere unnecessarily with penal policy that a Declaration was adopted stipulating that there is no obligation on States to introduce minimum sentences where this is not provided for under the national legal system. See the discussion of the TOA above.
122 Ibid., para.12.
123 Ibid., para.8.
124 Ibid., paras 16-19.
125 Ibid., paras 20-24.
126 Ibid., para.31.

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States hope to fulfil their obligation under Article 5 of the 1996 Joint Action concerning the approximation of laws and practices of Member States in an effort to combat drug addiction and drug trafficking, referred to above, to ‘approximate’ legislation (and particularly schedules) to the extent necessary to fill the legal vacuum regarding NSDs.

Article 2 governs the scope of the 1997 Joint Action. It specifies that any measures taken pursuant to the instrument must concern:

... new synthetic drugs which are not currently listed in any of the Schedules to the 1971 United Nations Convention on Psychotropic Substances and which pose a comparable serious threat to public health as the substances listed in Schedules I or II thereto and which have a limited therapeutic value.

Article 2 further confines action to end-products, as distinct from the precursor chemicals used in their manufacture. The remaining provisions establish the system for collection of information on NSDs and the procedure for bringing new drugs under control once they have been determined to pose an unacceptable risk. Pursuant to Article 3, each Member State is obliged to ensure that its Europol National Unit and its representative in the Reitox network\(^29\) provide information on the production, traffic and use of NSDs to both the Europol Drugs Unit and the EMCDDA, with respect to their particular mandates. The type of detailed information to be supplied includes a chemical and physical description of the new substance, analysis of the frequency, circumstances and quantities in which it has been discovered and an assessment of the possible risks that may be associated with its use.\(^30\) The EDU and the EMCDDA have been given a central role in monitoring and facilitating the future control of NSDs.\(^131\) Once information has been collected from national centres, both bodies are responsible for disseminating it to the fifteen Europol National Units and fifteen Reitox representatives, the Commission and the European Agency for the Evaluation of Medicinal Products (EMEA).\(^132\)

An integral component of new synthetic drug control is the risk assessment procedure outlined in Article 4. At the instigation of either a Member State or the European Commission, a special meeting is convened by the EMCDDA under the auspices of the Scientific Committee\(^133\) in order to assess the possible risks resulting from the use of and

\(^{129}\) The Reitox network is mentioned supra p 209.

\(^{130}\) Article 3, para.2.

\(^{131}\) The third annual meeting between the EMCDDA and Europol in the framework of the 1997 Joint Action was held in October 1999. The agencies were concerned to identify work in the field of data collection and the development of harmonised indicators. It was agreed that Europol will focus on seizures and price purity indicators while the EMCDDA develops epidemiological indicators and collects drug related indicators and statistics mapping the situation within the EU. A Memorandum of Understanding between the two agencies is currently being discussed. See A Wallon, “EMCDDA/ Europol Annual Meeting”, Drug Net Europe, No.21, Jan-Feb 2000, p 5.

\(^{132}\) The EMEA was established in 1993 pursuant to Council Regulation (EEC) No 2309/93 of 22 July 1993, laying down Community procedures for the authorization and supervision of medicinal products for human and veterinary use and establishing a European Agency for the Evaluation of Medicinal Products, 24.8.1993, OJ L 214. The tasks, objectives and composition of the Agency are set out in Title IV of the Regulation. Its major objectives include protecting public health by mobilising the best scientific resources within the European Union, promoting health care through effective regulation of new pharmaceuticals and better information for users and professionals, facilitating free circulation of pharmaceuticals within the European free market, supporting pharmaceutical research and encouraging international cooperation (see Articles 49-51). Further information on the functions and activities of the EMEA is available on line at http://www.eudra.org/emea.html.

\(^{133}\) The Scientific Committee of the EMCDDA consists of one expert representative from each of the fifteen Member States who will serve for a period of three years. EMCDDA, Report on the Risk Assessment of MBDB in the Framework of the Joint Action on New Synthetic Drugs (Luxembourg, Office for Official Publication of the European Communities, 1999), p 9.
traffic in a new synthetic drug, as well as the possible consequences of bringing that drug under control. For these purposes the Scientific Committee is extended by experts nominated by each Member State, along with representatives of the Commission, EDU and EMEA who have been invited to contribute. Article 5 provides that on the basis of the report to be drawn up at the completion of the risk assessment, the Council may, acting pursuant to Article K.3(2)(b) of the TEU (now Article 34(2)(b) after the TOA), adopt unanimously a decision outlining whether and how the NSD in question is to be brought under control. Member States have undertaken to implement the Council’s decision within the time frame specified, by adopting the necessary measures “in accordance with their national laws” to submit the drug to “control measures and criminal penalties as provided under their legislation complying with their obligations under the 1971 United Nations Convention on Psychotropic Substances with respect to substances listed in Schedules I or II thereto”.

Recall from Chapter 3 that the 1971 Convention imposes very different obligations in respect of the two Schedules; while substances in Schedule I must be subjected to the strictest Article 7 regulations prohibiting all use other than for limited medical purposes, Schedule II substances are regulated by Article 5 and are to be submitted to the licensing requirements in Article 8. The Joint Action leaves it somewhat ambiguous as to whether the Council should specify that Schedule I or II controls are required or leave it for Member States themselves to decide which are appropriate. In July 1999, the Council Legal Service suggested that in its final decision made pursuant to Article 5, the Council itself should determine whether Schedule I or II controls should be adopted in all Member States. As we shall shortly see, however, in the only Council decision made to date, States were given the option of choosing to impose the stricter controls applicable to Schedule I or the lesser ones applicable to Schedule II.

In an effort to clarify and standardise the procedure to be used, *Guidelines for the Risk Assessment of New Synthetic Drugs* were drafted by the Scientific Committee of the EMCDDA and adopted in November 1998. The five basic principles for risk assessment are as follows:

- The concept of ‘risk’ should be understood to include both the ‘probability’ that some harm will occur (‘risk’) and the degree of seriousness of such harm (‘hazard’);
- The first phase of scientific assessment should be carried out independent of considerations of the legal status of the compound at issue;
- The Committee will not be limited to considering prohibition and law enforcement in determining the appropriate response to a new synthetic drug. A wide range of options will be discussed;
- Since the available scientific evidence on an NSD will often be limited, the risks of these drugs will be evaluated by reference to similar known substances, both legal and illegal and
- The issues of reliability of information and relevance of specific risk should be separately weighed.

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134 Article K.3 (2)(b) of the TEU holds that the Council may “adopt joint actions in so far as the objectives of the Union can be attained better by joint action than by the Member States acting individually on account of the scale or effects of the action envisaged ...” The TOA replaced this with Article K.6 (2)(b) providing that the Council may “adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States ...”.
136 See the decision on 4-MTA, *infra* p 219.
It is of particular merit that principles 2 and 3 aim to allow for an objective assessment of the compound. Just because it may be controlled under the criminal laws of one or more of the Member States at the time it comes up for review does not necessarily mean that this will be the most appropriate measure to be taken by all EU countries. The Committee was aware that the criminalisation of certain drugs can have negative consequences and has drafted risk assessment guidelines that provide for the exploration of a full range of alternatives before a control decision is adopted.

The EWS introduced by the Joint Action has been operational since the beginning of 1998. On 27 February that year, a relatively new synthetic drug known as N-Methyl-1-(1,3-benzodioxol-5-yl)-2-butanamine (MBDB) was formally referred to the EMCDDA for risk assessment under the new system. All Member States were requested to report any seizures of or information on MBDB to EUROPOL and the EMCDDA in accordance with Article 3 of the 1997 Joint Action. It was decided between the two bodies that responsibilities would be distributed such that the EDU would report back on production and trafficking of MBDB while the EMCDDA would cover the patterns of use and possible health and social risks involved. This information was provided to the extended Scientific Committee of the EMCDDA convened to consider the most appropriate harmonised strategy for bringing the substance under control.

Cases involving MBDB had been reported by national authorities in fourteen of the fifteen Member States (and in some States for several years) prior to its assessment. Information suggests that it is almost always sold as ‘ecstasy’ so that users are often unaware that they have purchased this specific chemical compound. Although there is no international obligation to bring it under control since it is not listed under a Schedule of the 1971 Convention on Psychotropic Substances, immediately prior to assessment MBDB was a scheduled drug in eight of the EU Member States. In the Netherlands, where small quantities have been produced in a number of clandestine laboratories, a decision was made not to prohibit it after the National Assessment Working Party recommended against prohibition and in favour of further monitoring. It is not entirely clear whether the compound has been manufactured with a view to testing the illicit market and/or avoiding legal controls in those countries where it is not individually scheduled. As outlined in Chapter 2, current toxicology research shows that MBDB is similar to MDMA in that it increases serotonin release in the brain and inhibits serotonin and noradrenaline re-uptake. It is not, however, as potent a substance as MDMA and there have been no severe reactions recorded.

In mid-1999, the Council of the EU determined that further information was necessary before a decision about MBDB could be made and States were instructed to review the patterns of use, associated problems and (in countries where the compound was already illegal) seizure

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139 EMCDDA, Report on the risk assessment of MBDB in the framework of the joint action on new synthetic drugs, supra n.1, p 1.
140 Information supplied by Alain Wallon, National, Community and International Strategies, EMCDDA, Interview, 13 July 1999.
141 EMCDDA, Report on the risk assessment of MBDB in the framework of the joint action on new synthetic drugs, supra n.133, p 22. See also the discussion of MBDB in Chapter 2, supra p 35.
142 Ibid., p 38.
143 Austria, France, Germany, Greece, Ireland, Italy, Luxembourg and the UK. Ibid., p 19.
144 The United Kingdom Customs authorities have expressed their frustration with the Netherlands for failing to bring MBDB under control. It is supposed that most of the batches appearing on the UK market, where MBDB has been illegal since the introduction of generic controls in 1977, originate in the Netherlands, where it is not caught under the Dutch Opium Act (see the discussion of domestic control in Chapter 5, supra pp 149-151). Information supplied by Joe Onofrio, UK Customs and Excise, Interview, May 1999.
145 See Chapter 2, supra p 35.
rates over the next six months.\textsuperscript{146} On examination of an EMCDDA-EUROPOL Progress Report on the monitoring of MBDB, formally submitted on 17 November 1999, a decision was made by the Council that Member States should not be obliged to bring MBDB under control.\textsuperscript{147} At the level of Article 3 of the Joint Action, the EMCDDA and EUROPOL will continue to monitor supply and demand for the drug.

The first test of the Early Warning System reveals both the benefits of seeking cooperation and the difficulties of coordinating an EU response to NSDs. Over twelve months were spent deliberating on whether and how legislation should be amended to bring MBDB under control. Some countries, including France and the UK, argued that since it had no known therapeutic use and did have the potential to cause harm (at least in combination with other substances), strict controls were appropriate.\textsuperscript{148} Others however, and particularly the Netherlands, suggested that because the number of seizures had been relatively small and the potential effects of the drug could not be considered to be as dangerous as chemically related substances on the illicit market, they should not be obliged to criminalise MBDB.\textsuperscript{149} Several additional arguments were made against prohibition: first, that this may result in the marginalisation of users who had until now been socially integrated; secondly, that the sudden burst of publicity that would be given to the drug after it was put on a European control list may serve only to fuel a moral panic and/or illicit demand and thirdly, that prohibition may hinder or bias research into possible therapeutic use of the drug (although other experts disagreed on this point).\textsuperscript{150} Finally, there was some fear expressed that criminalising MBDB would affect the licit trade in precursor chemicals used in its manufacture.\textsuperscript{151} If prohibition resulted in an increase in illicit demand for precursors it would raise the price of those chemicals and affect the profits of legitimate dealers.

Critics may point out that the Early Warning System did not provide for rapid decision making in this instance. The case of MBDB is, however, somewhat unusual. On the one hand, it was the first NSD to be tested under the new system and the procedure for assessment was developed along the way. Moreover, there is no clear danger associated with this substance. It has been judged to pose fewer risks than MDMA and has not been linked to any serious health or social disorder. In that case, it was surely right that the European Council should not act with unnecessary haste and should place the substance on trial to determine whether it can be shown to cause any actual harm.

The second drug assessed under the 1997 Joint Action did not prove to be as contentious. On 3 February 1999, p-methylthioamphetamine, also known as 4-methylthioamphetamine (4-MTA) was formally referred for risk assessment by the German presidency.\textsuperscript{152} 4-MTA was first identified in 1997 in the Netherlands and the United Kingdom and has since been seized


\textsuperscript{147} Information supplied by Lena Westberg, National, Community and International Strategies, EMCDDA, \textit{Correspondence}, 1 February 2000.


\textsuperscript{149} \textit{Ibid.}, p 20.

\textsuperscript{150} \textit{Ibid.}, p 21.

\textsuperscript{151} \textit{Ibid.}, p 21. The extended Scientific Committee was concerned that the main precursor chemicals of BDB, used in the manufacture of MBDB, are widely available in the commercial industry. One of these is Piperonal, listed on Table I of the 1988 Convention and included under EU precursor regulations since 1992. However, 1-bromopropane and 1-nitropropane are two high-volume precursor chemicals that are not subject to international or EU controls. \textit{Ibid.}, p 23.

\textsuperscript{152} EMCDDA, \textit{Report on the Risk Assessment of 4-MTA in the Framework of the Joint Action on New Synthetic Drugs} (Lisbon, EMCDDA, 1999). The Report contains a detailed review of the pharmacological properties and health risks associated with the drug. See further the discussion of 4-MTA in Chapter 2, supra pp 35-36 and in the \textit{Index of Synthetic Psychotropic Drugs} at Appendix A.
in considerable quantities in those two countries, and in Belgium and Germany.\textsuperscript{153} Although, like MBDDB, the drug is usually sold as a form of ‘ecstasy’;\textsuperscript{154} a strong body of evidence suggests that it far more dangerous. It has been linked to five deaths in the EU and one in the Netherlands.\textsuperscript{155} Risks are exacerbated because the delayed onset of the psychotropic effect of the drug encourages users to take several tablets in close proximity. While 4-MTA itself has no industrial or therapeutic use,\textsuperscript{156} precursor chemicals required for its manufacture are commercially available.\textsuperscript{157}

In May 1999, the extended Scientific Committee met to formally assess the risks associated with use and the possible consequences of prohibition. 4-MTA is not listed in any schedule to the 1971 Convention and prior to risk assessment Sweden was the only EU country that had brought the drug under permanent control. Germany had placed 4-MTA under provisional control, the United Kingdom was taking slow steps to schedule it under the Misuse of Drugs Act 1971 and further measures were being considered in the Netherlands and France where the drug was under review.\textsuperscript{158} As a result of evidence revealing the dangers of 4-MTA and a number of fatalities for which it was responsible, the Committee concluded that the substance should be brought under control. On this occasion, in contrast to the meetings convened to debate MBDDB, Member State representatives unanimously agreed. It is interesting that the Meeting began by acknowledging the “well established and broadly accepted fact of prohibition of MDMA”. Since the “acute hazards” of 4-MTA were at least as serious as for MDMA, it was considered that there was little scope for an alternative to prohibition as the appropriate means of control.\textsuperscript{159} Thus, it looks as though MDMA will be used as the benchmark by which to compare and assess other new compounds that are referred for risk assessment in the future.

In a number of ways the Scientific Committee acknowledged that criminalising dealings in 4-MTA would not provide all the answers to protecting the community. First, it was stressed that prohibition should not obstruct any non-repressive preventive or harm reduction actions.\textsuperscript{160} To this end, the criminal law should be directed towards suppliers, i.e. producers and distributors, rather than consumers, so as to avoid the marginalisation of users. Secondly, there was concern that prohibiting 4-MTA may encourage clandestine manufacturers to search for newer synthetic drugs falling outside of existing legal controls. Thirdly, it was noted that since it is part of the larger ‘ecstasy’ market, prohibition of the drug would not be likely to have any significant impact on the availability of ecstasy. Nevertheless, after careful

\textsuperscript{153} Proposal for a Council Decision defining 4-MTA as a new synthetic drug which is to be made subject to control measures and criminal provisions, Brussels, 23.06.1999, COM (1999) 307 final, p 2. See further, EMCDDA, Report on the Risk Assessment of 4-MTA in the Framework of the Joint Action on New Synthetic Drugs, supra n.152, Technical Annex D.

\textsuperscript{154} EMCDDA, Report on the Risk Assessment of 4-MTA in the Framework of the Joint Action on New Synthetic Drugs, ibid.

\textsuperscript{155} Ibid., p 2.

\textsuperscript{156} Reports suggest that 4-MTA was originally synthesised as a potential anti-depressant but it has never had any approved therapeutic use. Ibid., p 1.

\textsuperscript{157} EMCDDA, Proposal for a Council Decision defining 4-MTA as a new synthetic drug which is to be made subject to control measures and criminal provisions, Brussels, 23.06.1999, COM (1999) 307 final, p 2. In its final report on the risk assessment of 4-MTA, the EMCDDA’s Scientific Committee recommended that the Drug Precursor’s Committee set up under Article 10 of EC Regulation 3677/90 and Directive 92/109/EEC consider the need to introduce controls over the main two precursors used in the manufacture of 4-MTA, namely methylthiobenzaldehyde and methylthiophenolacetic acid. See further, EMCDDA, Report on the Risk Assessment of 4-MTA in the Framework of the Joint Action on New Synthetic Drugs, supra n.152, pp 7 and 36. Both of those substances were subsequently added to the EU’s recently established ‘special surveillance list’ of chemicals to be monitored by Member States.

\textsuperscript{158} Ibid., p 5.

\textsuperscript{159} Ibid.

\textsuperscript{160} Ibid., pp 5-6
consideration a decision was made that prohibition in all fifteen EU Member States was the most appropriate way to regulate the latest NSD presented for assessment.

Based on the Committee report, a final decision to introduce control measures pursuant to the Joint Action was made by the Council in September 1999. Member States are required to take all necessary measures in accordance with their national laws, to submit 4-MTA to control measures and penalties as set out in legislation that complies with obligations in the 1971 Convention with respect to substances in Schedule I or II. In other words, countries must limit the use of 4-MTA to scientific and medical purposes, but they may decide for themselves whether to impose the strictest controls set out for Schedule I substances or the less restrictive applicable to Schedule II. Although the Joint Action allows for this flexibility, it is suggested that in order to promote harmonisation, it would be best for the Council to specify in the future whether it is Schedule I or II controls that should be introduced by all Member States.

At the time of writing it is only these two drugs that have been formally referred for risk assessment under the Early Warning System. However, following a request by the Horizontal Drugs Group (HDG) of the EU, reports on the substances Ketamine and GHB are

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161 See Council Decision of 13 September 1999 defining 4-MTA as a new synthetic drug which is to be made subject to control measures and criminal penalties, 16.9.1999, OJ L 244 1. The Council Legal Service advised that Article 5(1) of the Joint Action, giving the Council power to make a unanimous decision in accordance with Article K.3 (2)(b) of the TEU, continues to apply even after the entry into force of the TOA. This is despite the fact that the amended TEU no longer provides a basis for the adoption of Joint Actions. Implementation measures may continue to be taken in accordance with the procedures set out in Joint Actions adopted before the TOA entered into force, provided the Council has not replaced the Joint Action by an act adopted pursuant to the new procedures set out in Title VI of the amended TEU. See Council of the European Union, Contribution of the Council Legal Service to the Proceedings of the Horizontal Working Party on Drugs, supra n.128, p 2.

162 See Council Decision of 13 September 1999, ibid., Article 1. As specified in Article 2 of the Council's Decision, in accordance with Article 5(1) of the 1997 Joint Action, Member States had three months from the date on which the decision took effect (17.9.1999) to take the measures referred to in Article 1. In March 2000, the EMCDDA reports that all EU Member States have scheduled 4-MTA or are in the process of doing so. In a number of countries, however, the slow domestic scheduling process or lack of political will has caused delays so that 4-MTA was not scheduled within the three month time limit (In the UK, for example, 4-MTA had not been scheduled at the time of writing in March 2000, and is not caught under the generic legislation operating in that country).

163 See Chapter 3 where the different obligations in respect of substances in Schedules I and II of the 1971 Convention are set out.

164 As suggested by the Council Legal Service in July 1999, see supra p 216.


166 In most countries Ketamine is a prescription only medicine, used as a legal sedative for human and animal patients. It is a powerful anaesthetic drug with analgesic and hallucinogenic properties. Sold on the street as 'Special K', it is used illegally by persons intent on experiencing 'out of body' hallucinations and has also been discovered mixed with MDMA in ecstasy pills. Ketamine can correctly be classified as a psychotropic but does not fall within the categories of phenethylamines or tryptamines and is not profiled in Chapter 2. For further information see, EMCDDA, “New Trends in Synthetic Drugs in the European Union", Insights, EMCDDA, November 1997, p 125; PG Lawlor and Y Tarumi, “The Need for Ketamine - Three Case Reports”, Journal of Pain and Symptom Management, January 2000, Vol.19, No.1, p 1 and VJ Holloway et al, “Accident and Emergency Department Led Implementation of Ketamine Sedation in Paediatric Practice and Parental Response”, Journal of Accident and Emergency Medicine, Vol.17, No.1, January 2000, p 25.
currently being prepared by the EMCDDA and the EDU under the terms of Article 3. Many more uncontrolled analogues have appeared on the illicit market in Europe\textsuperscript{168} and the EMCDDA is informally reviewing a number of those that have generated concern.\textsuperscript{169}

As mentioned previously, Article 39 (ex Article K.11) of the TOA provides for an expanded role for the European Parliament in decision making pursuant to what are now Framework Decisions, formerly referred to as Joint Actions.\textsuperscript{170} This does not mean, however, that Parliament must now be consulted prior to the adoption of a decision on a new synthetic drug under Article 5 of the Joint Action. Since Article 5 itself does not provide for consultation with the Parliament, the Council Legal Service has advised that this is not a condition for the adoption of measures pursuant to it even after the entry into force of the TOA.\textsuperscript{171} The absence of such an obligation allows for the more effective operation of the EWS, since the time it would have taken for Parliament to return its opinion (a minimum of three months) would have resulted in a further delay before the ultimate control decision could have been made.

It can be concluded that the Early Warning System is potentially a valuable tool in the effective control of NSDs. In cases where there is a clear harm associated with a newly identified substance that in itself has no industrial or commercial use, it should be relatively easy to get all States to agree to the introduction of controls. It has been seen in respect of MBDB that complications will arise where the dangerous properties alleged are not immediately clear so that there is debate over the value of criminalising activity involving a substance of negligible risk. In that case, countries within the EU are likely to adopt a different stance based on their fundamental philosophies guiding drug control. It may be argued that this could encourage some manufacturers to set up in jurisdictions where it is legal to produce the compound in question, from which they can then export into their European neighbours (increasingly easy with the removal of border controls pursuant to the Schengen framework). In terms of protecting users, however, this is not necessarily a problem provided there really is very little harm posed by the compound under review. It is submitted that there is no need to criminalise a substance where it is not shown to cause any real harm and where a judgement is made that criminal controls would be more likely to endanger than protect the user and the broader community. In relation to 4-MTA, a compound proven to be highly toxic, the EWS was effective in approximating the schedules of relevant drug laws to the extent necessary to ensure that a newly identified dangerous compound was subjected to the same level of control in all Member States.\textsuperscript{172}

Perhaps the greatest benefit of the EWS is that it generates a significant amount of information that can be independently assessed by an expert Scientific Committee. Even if it

\textsuperscript{167} GHB is a psychotropic drug outside of the categories of phenethylamine and tryptamine. It can be classified as a homologue/analogue of N-butanol. See the \textit{Index of Synthetic Psychotropic Drugs} at Appendix A.

\textsuperscript{168} See Chapter 2 and the \textit{Index of Synthetic Psychotropic Drugs} at Appendix A.

\textsuperscript{169} Information supplied by Alain Wallon, National, Community and International Strategies, EMCDDA, Interview, 13 July, 1999. Two substances, 4-Bromo-2,5-dimethoxyphenethylamine (Nexus) and 2C-T-7, were recently highlighted by the EMCDDA as compounds that have generated concern in some Member States and will be monitored in the future. See \textit{Report on the risk assessment of MBDB in the framework of the joint action on new synthetic drugs}, supra n.133, p 33.

\textsuperscript{170} See the earlier discussion, supra p 205.

\textsuperscript{171} Council of the European Union, \textit{Contribution of the Council Legal Service to the Proceedings of the Horizontal Working Party on Drugs}, supra n.128, p 3. It has been suggested that the Presidency of the Council or Commission may nevertheless wish to inform the European Parliament of the decision made.

\textsuperscript{172} Notwithstanding the fact that Member States are left with the option of subjecting the new compound to the controls applicable to substances under either Schedule I or Schedule II of the 1971 Convention, a Council decision that control measures should be introduced will still require that all States prohibit non-therapeutic use.
is some time before a final control decision is made, all Member States are alerted to the existence of a new substance appearing on the illicit market in Europe and the effective early transfer of information between States should be helpful in informing national strategies. It is vital that the information generated through the EWS be distributed not only to enforcement bodies, but also (and arguably more importantly) to health workers and drugs agencies who are in the best position to educate users on how to protect themselves. This is where early warning could prove most effective in minimising harm caused by any new synthetic drug. It is hoped that the system for ‘rapid identification and analysis’ agreed to at the UNGASS meeting in 1998 will serve this purpose at a wider international level. Action has been taken in an effort to provide for a high degree of cooperation and coordination between the EMCDDA and UNDCP officials so that information for both types of warning list will be shared.

Although this thesis concentrates on external action imposed by authorities, it appears that the network of information available to users may have the most significant impact on the market for a particular compound. Several months after 4-MTA was seized in Member States, users themselves had circulated information that the substance was dangerous and should be avoided, thereby ensuring that there was little demand for this specific compound. Where no demand exists, suppliers will not supply. Thus, even if 4-MTA remained legal it is not likely that it would continue to appear on the illicit market in great quantities since sellers would not prosper by distributing a product not favoured by consumers. Furthermore, 4-MTA was never likely to become a popular drug of choice when MDMA, a more rapidly acting and far less dangerous NSD is easily accessible. Surely this tells us that the market forces of supply and demand are extremely important in determining the availability of illicit drugs, so that encouraging self-regulation among drug users, that is, the development of formal or informal networks through which information on minimising drug related harm can be spread, is an important way to protect them. Admittedly one problem that remains is that certain compounds may be misrepresented by sellers to be what they are not, leading users to purchase dangerous compounds when they believe they are getting more innocuous ones. A potentially fatal substance such as 4-MTA can be made to look, smell and taste identical to pure MDMA or MBDB and the point has been made that both MBDB and 4-MTA are sold as ‘ecstasy’. Although most suppliers would not choose to distribute highly toxic compounds (since they would risk losing their clients), they themselves may not be aware of the contents of their goods and users may pay for the mistake with their lives. This does not, however, nullify the argument that market forces can and should be harnessed for drug control.

In addition to participating in the EWS, there are other ways in which the Europol Drugs Unit is directly involved in the campaign against new synthetic drug abuse. The Ecstasy Logo Project launched in 1996 provides a system for the classification of ecstasy pills encountered by authorities in all fifteen of the EU Member States. As explained in Chapter 2, ecstasy tablets are almost always manufactured with a distinctive ‘logo’ or design, such as a dove,

173 See the discussion of the Special Surveillance list in Chapter 6, supra p 190.
174 Channels of communication have been established between relevant staff of the EMCDDA and UNDCP. Information supplied by Lena Westberg, National, Community and International Strategies, EMCDDA, Interview, 14 July 1999.
175 Information supplied by Gregor Burkhart, Drug Demand Reduction Section, EMCDDA, Interview, July 1999.
176 A specific example of literature designed to encourage self-regulation among users of ecstasy related compounds is provided in the Conclusion to this thesis.
177 An example of the drug profile provided by the ecstasy Logo Project, reproduced at Appendix M, shows that identical looking tablets can contain very different ingredients.
178 Europol Drugs Unit, Report on the Activities of the EUROPOL Drugs Unit in 1996 - Summary (The Hague, EUROPOL, 1997), published at www.europol.eu.int/facts/en/him. Note that the term ‘ecstasy’ is used in the broad sense here to refer to any NSDs in the ecstasy-type family, i.e., MDMA and its related analogues.
letter E, smiley face or Mitsubishi symbol. For the Logo project Member States have agreed that where they have an ecstasy seizure in excess of 100 tablets (or 25 grams in weight), a detailed description (size, weight, colour, thickness, texture and design) and photographs of the tablets seized will be sent to the EDU which then creates an alphabetical index of logos featuring the hundreds of variations encountered. The aim in doing so is to establish links between different seizures of ecstasy in the EU countries so as to facilitate the identification of ecstasy production sites and criminal organisations involved in trafficking.179 It has also served to encourage the exchange of information and intelligence and provides a basis to allow for assessment of current trends and prediction of those that will follow. Since the first one published in 1996, three updated catalogues profiling hundreds of designs have been published and distributed to law enforcement authorities within the EU.180 In 1998 the Logo Project was expanded by the introduction of ‘chemical profiling’ of synthetic drugs and a ‘drugs purity indicator system’181 intended to provide authorities with much more detailed information on the chemical composition of pills so as to facilitate the collection and exchange of intelligence that allows the linking and tracing of seizures.

**Part B - Precursor Controls**

The regulation of precursor materials used in the manufacture of illicit drugs has long been recognised by the European Union as an integral component of an effective strategy for regional drug control. It is now over a decade since the European Community introduced its first instrument committing Member States to imposing conditions on the transfer of certain scheduled substances needed for the production of narcotic and psychotropic drugs.182 During that time, the burgeoning market for new synthetic drugs has raised awareness that many of the precursors used in the manufacture of those substances are not effectively monitored under existing instruments.183 The following section outlines the Community precursor legislation currently in operation before discussing the adequacy (or inadequacy) of that legislation in relation to NSDs and the latest proposals for reform.

Community legislation involves a two-pronged approach covering (a) the external trade in precursor chemicals between Member States and third countries and (b) the internal flow of chemicals within the territory of a Member State and between the Member States themselves. It is necessary at the outset to distinguish between the meaning of the concepts of external and internal trade within the EU as compared with their meaning in the context of the 1988 Convention. Under the Convention, external controls refer to those measures Parties are obliged to take with respect to any international trade in Table I and II precursors.184 Internal controls refer only to those that countries are urged to carry out in order to monitor the manufacture and distribution of scheduled precursors within their territory.185

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183 Communication From the Commission to the Council and the European Parliament on the Control of New Synthetic Drugs (Designer Drugs), supra n.5, p 13.

184 See Article 12, paras 9 and 10.

185 See Article 12, para.8. Article 12 imposes very few mandatory controls with respect to internal trade.

223
(a) External Trade

The basic EU instrument governing external trade in precursor chemicals is Council Regulation (EEC) No 3677/90 of 13 December 1990. Its primary purpose was to make it obligatory for all EU Member States to introduce the precursor controls set out in Article 12 of the 1988 Convention. This was duly done and obligations were imposed in respect of trade in the twelve precursors originally listed in Convention Tables I and II. Article 2 covers documentation, records and labelling of substances to be imported, exported and transited. In accordance with Article 12(9)(d) of the 1988 Convention it was specified that documents must contain the name and address of the exporter, importer and distributor, as well as the ultimate consignee if this was known. Documents and records were required to be kept for at least two years. In satisfaction of Article 12(9)(a) of the 1988 Convention setting out a broad requirement that Parties introduce a system to monitor international trade by closely cooperating with commercial operators, Article 3 required that measures be taken by Member States to establish “close cooperation” between competent authorities and operators so as to encourage operators to notify authorities of suspicious transactions. Article 4 of the EC Regulation introduced a system of pre-export notification for Category 1 substances, where a specific request had been made by a third country pursuant to Article 12(10) of the 1988 Convention. Note that Article 8 of the Regulation leaves each Member State to determine for itself the penalties to be applied for infringement of the Regulation, subject only to the requirement that those penalties be “sufficient to promote compliance”.

Since 1990, four subsequent Regulations have been adopted to amend and implement the original Regulation governing external trade, thereby introducing a regime that is far more stringent than the one agreed to under the 1988 Convention and incorporates many of the post-treaty recommendations made by UN bodies and the CATF. Significant changes were implemented by Council Regulation (EEC) No 900/92 of 31 March 1992. The major impetus for the amendments came from the recommendations in the Final Report of the Chemical Action Task Force (CATF) (discussed in Chapter 6), all of which were endorsed in ECOSOC Resolution 1993/40. Under the amended Regulation obligations are imposed on States trading in any of the 22 substances now under international control, that is, the twelve originally listed under the 1988 Convention and the ten additional substances that the CATF recommended should be added. The Regulation divides these 22 substances into the same

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185 Council Regulation (EEC) No 3677/90 of 13 December 1990 laying down measures to be taken to discourage the diversion of certain substances to the illicit manufacture of narcotic drugs and psychotropic substances, 20.12.90, OJ No L 357/1.
186 See Chapter 4.
187 This would appear to satisfy the obligation in Article 12 (9)(a) of the 1988 Convention.
188 As noted in Chapter 6, the CATF commented in their Final Report of 1991 that effective law enforcement requires that countries impose administrative, civil and/or criminal sanctions on operators who fail to comply with precursor controls (although it was discussed there that the imposition of criminal liability on corporations may be problematic in some civil law countries). Article 8 of EEC Regulation No 3677/90 does not specify which types of penalties or sanctions are required to be set out for infringement of the Regulation. This is subject, however, to Article 3(1) of the 1988 Convention which requires that Parties criminalise the manufacture, transport or distribution of scheduled substances known to be intended for use in illicit manufacture of drugs.
189 Council Regulation (EEC) No 900/92 of 31 March 1992 amending Regulation (EEC) No 3677/90 laying down measures to be taken to discourage the diversion of certain substances to the illicit manufacture of narcotic drugs and psychotropic substances, 10.4.92, OJ No L 96/2.
190 The establishment of the CATF and the contents of its final report are discussed in more depth in Chapter 6. Paragraph 4 of the Preamble to Council Regulation No 900/92 notes that the European Commission and seven Member States participated in the work of the CATF, thus ensuring “full Community coordination” and consultation with trade and industry representatives.
191 Seven months after the Council Regulation, in November 1992, the CND’s decision to include the ten additional substances in Tables I or II of the 1988 Convention became effective. See the Report of the International Narcotics Control Board for 1992 (E/INCB/1992/1), p 15.
three categories set out by the CATF, with the most stringent controls recommended for Category 1 substances and the least stringent for Category 3.  

Table 1 - Three Categories of Controlled Substances

<table>
<thead>
<tr>
<th>Category 1</th>
<th>Category 2</th>
<th>Category 3</th>
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<tbody>
<tr>
<td>Ephedrine</td>
<td>Acetic anhydride</td>
<td>Acetone</td>
</tr>
<tr>
<td>Ergometrine</td>
<td>Anthranilic acid</td>
<td>Ethyl ether</td>
</tr>
<tr>
<td>Ergotamine</td>
<td>Phenylacetic acid</td>
<td>Methylene ketone</td>
</tr>
<tr>
<td>Lysergic acid</td>
<td>Piperidine</td>
<td>Toluene</td>
</tr>
<tr>
<td>1-phenyl-2-propanone</td>
<td>Isosafrole</td>
<td>Potassium permanganate</td>
</tr>
<tr>
<td>Pseudoephedrine</td>
<td>Piperonal</td>
<td>Sulfuric acid</td>
</tr>
<tr>
<td>N-Acetylanthranilic acid</td>
<td>Safrole</td>
<td>Hydrochloric acid</td>
</tr>
<tr>
<td>3,4-Methylenedioxy-phenyl-Propanone</td>
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<td></td>
</tr>
</tbody>
</table>

It will be recalled from Chapters 4 and 6 that only one of the four precursors used in the manufacture of ecstasy-related substances (3,4-Methylenedioxy-phenyl-propanone) was included by CATF in Category 1, while the remaining three (Isosafrole, Piperonal and Safrole) were listed as Category 2 substances.

Further amendments made to the 1990 Regulation embrace the five measures beyond those provided for in the 1988 Convention which were considered by the CATF to be “key components of an effective regime to prevent the diversion of chemicals”. Article 2(1) was amended to provide that commercial documents must now carry information not only on the exporter, importer and distributor, but also on the ultimate consignee (key component 4 and 5). There is no longer an option not to supply details of the ultimate consignee on the basis that this is not ‘known’ to the exporting country. Article 2(4) stipulates that documents and records must now be kept for a period of three years, rather than the two years originally stipulated (key component 2). Even more significantly, a new Article 2a of the 1992 Regulation introduced an obligation on all operators (“other than custom agents, warehouse depositors and transporters when acting solely in that capacity”) who are involved in the import, export and transit of Category 1 substances to obtain a license from the Member State (key component 3). Although the 1988 Convention suggests that a system of licensing may be appropriate in order to monitor trade within a Party’s territory, there is no mention of licensing with regard to international trade. Again, in accordance with the CATF recommendations, Council Regulation 900/92 adds a second paragraph to Article 3 governing cooperation between States and their commercial operators (key component 1). Member

193 See the relevant Tables and the accompanying discussion in Chapter 6, pp 182-185.
195 The only CATF measure not specifically addressed in Regulation EEC No 900/92 is “key component” 5 recommending that importing countries be diligent in checking the integrity of the importer and the legitimacy of the transaction. Under the original Regulation 3677/90, however, there is an obligation on States to require that all operators involved in importing maintain proper documentation. In light of the 1992 Regulation this must now include information on the ultimate consignee to whom the import is to be distributed.
196 The only “key component” not specifically endorsed in a subsequent ECOSOC resolution. See Chapter 6, supra p 195.
197 Competent authorities may suspend or revoke licenses where there are “reasonable grounds” to believe that the holder is no longer “fit and proper” or that licensing conditions have been breached.
198 See Article 12(8)(b)(ii). Internal trade is governed by Article 12(8) of the Convention, while external trade is governed by Article 12(9) and (10).
States are now obliged to take measures to ensure that operators provide authorities with such information about their exporting activities as may be requested.

Perhaps the most important control introduced by the 1992 Regulation relates to the requirement of pre-export authorisation in respect of substances in Category 1 (key component 4). Under the amended Article 4, exportation of all Category 1 substances must now be subject to individual export authorisations issued by the competent authorities of countries in which the customs export declaration is to be lodged (those accepting the goods). The exporter applying for an authorisation is obliged to supply contact names and addresses for the exporter, importer and transporters, as well as the ultimate consignee. Further obligations have also been imposed with respect to Category 2 and 3 substances which, although not as stringent as those required in respect of Category 1, are significantly more onerous than initially provided for in the 1990 EC Regulation, and required by the 1988 Convention. Article 5 now provides that export of all Category 2 substances is to be subject to the issue of an open individual authorisation to be applied for by the operator concerned. The decision as to whether to issue an authorisation will be made after a judgement of the competence and integrity of the applicant and an assessment of their record of involvement with the substances. In contrast to the situation with respect to Category 1 substances, the holders of an open export authorisation do not have to obtain permission for every separate transaction involving a Category 2 precursor, but are obliged instead to furnish summary information concerning exports made pursuant to the authorisation. Separate export authorisations such as are provided for in Article 4 must be obtained for Category 2 substances in the event that goods appear to be destined for a third country identified as one concerned by the illicit manufacture of drugs using the precursor chemicals in question. Under Article 5a, provision may also be made for export authorisation in respect of Category 3 substances where they are intended for any third country either specifically requesting an export authorisation scheme or identified as a country concerned that the particular precursor may be used in the illicit manufacture of heroin or cocaine in its territory.\(^{199}\)

Council Regulation 900/92 goes a long way towards implementing other resolutions adopted by UN bodies in an effort to strengthen precursor controls set out in the 1988 Convention. The system of export authorisations provided for in respect of Category I substances is one recommendation called for first in ECOSOC Resolution 1993/40 (endorsing the CATF Report), again in Resolution 1995/20 and most recently in General Assembly Resolution S-20B adopted following the June 1998 UNGASS.\(^{200}\)

One very significant recommendation made by the UN’s ECOSOC has not been picked up on in EC Regulations and appears to be largely ignored by several EU Member States. In its Resolution 1995/20, the ECOSOC urged all countries to regularly inform the INCB of the quantities of Table I substances that have been imported, exported or trans-shipped. Furthermore, they are requested to provide estimates of annual legitimate needs so as to enable the Board to compare estimates with the actual quantities in circulation. This would alert countries themselves and the relevant international authorities to additional amounts being made available to satisfy the needs of clandestine operators. The argument was made in

\(^{199}\) Note that it is only heroin and cocaine that are mentioned here since it is those two drugs that Category 3 precursors are used to produce.

\(^{200}\) See the discussion of each of these post-1988 Convention Resolutions in Chapter 6, supra pp 192-294. It is there mentioned that the UK was one of several governments that objected to the earlier suggestion that individual export notifications be required for substances in both Tables I and II of the 1988 Convention (embracing substances in Categories 1-3 of the EC Regulation). It was explained that EC Regulations allow for open export authorisations in respect of some substances and no export authorisation at all for others. A compromise was reached so that the General Assembly Resolution S-20B calls for individual export authorisation for all Table I (Category 1) substances as well as for acetic anhydride (Category 2) and potassium permanganate (Category 3). EC countries have not yet been obliged to require individual export authorisation in respect of the latter two substances.
Chapter 6 that it is necessary for the two prerequisites -- pre-export authorisation and a system of estimates -- to be introduced by all countries involved in the trade in precursors, in order to seriously tackle diversion from the licit market. Yet the INCB has repeatedly expressed its regret that a number of EU Members who are major manufacturing countries are still not in a position to provide the Board with information on their licit trade. It is submitted that consideration should be given to amending Council Regulation (EEC) No 3677/90 so as to oblige all fifteen Member States to supply the INCB with annual estimates of licit needs and actual quantities that have been traded. This would reflect a serious commitment from those countries to ensuring that commercial operators are not profiting from the illicit use of precursor chemicals.

Commission Regulation (EEC) No 3769/92 of 21 December 1992 both implements and amends the basic Council Regulation No 3677/90. For a study of NSDs, the most significant reform introduced here is the implementation of the CND’s 1992 decision to subject three substances used in the clandestine manufacture of compounds in the ‘ecstasy’ family -- Safrole, Piperonal and Isosafrole -- to the most stringent control regime. It has been noted that at the time the ten additional substances suggested by the CATF were brought under control by Regulation No 900/92 of 31 March, only one of the four NSD precursors was placed in Category 1, while the remaining three were classified as Category 2. When in April 1992 the ten CATF substances were added to the 1988 Convention, all four ecstasy precursors were placed in Table 1, to be submitted to the most stringent controls, thus prompting the EU to revise the earlier regulations so as to subject all four NSD precursors to the stricter regime reserved for Category 1 chemicals. Although in our study of the regulation of ecstasy-related compounds it is only Category 1 controls that are relevant at present, other controls are significant since more NSD precursors may later be added to any of the three categories. Annexes II and III attached to Commission Regulation 3769/92 identify those “sensitive destinations” that will require individual export authorisations in respect of particular substances listed in Categories 2 and 3. Annex 4 of this instrument provides Parties with a model export authorisation form, clearly an effort to standardise the procedure followed by Member States.

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201 See Chapter 6, supra p 188.
202 See Chapter 6, supra pp 188-190.
204 See Preamble, Commission Regulation (EEC) No 3769/92. Paragraph 10 provides that:

Whereas the Community should implement the decision taken by the Commission on Narcotic Drugs of the United Nations in April 1992 to include the substances safrole, piperonal and isosafrole in Table I of the Annex to the 1988 UN Convention against illicit traffic in narcotic drugs and psychotropic substances, by transferring the said substances from Category 2 to Category 1 ... 

In fact, even if the three ecstasy precursors had not been transferred to Category 1, the EEC regulations set out for Category 2 substances would still have satisfied the 1988 Convention requirements for control over Table I substances.
205 Clearly there is only space here for a brief outline of certain of the controls introduced by the Regulation.
206 A ‘sensitive destination’ is defined as one where the country is concerned “either by the illicit manufacture of narcotic drugs and psychotropic substances or by other relevant factors such as geographical proximity to a country in which such drugs or substance are produced”. As an example, Argentina, Bolivia and Brazil were among those countries identified as ‘sensitive destinations’ in respect of Potassium permanganate and Sulphuric acid (used in the manufacture of cocaine).
207 See Annexes II and III and Article 2 of Commission Regulation 3769/92.
For completeness, mention should be made of the last two Commission Regulations amending the basic Regulation governing precursor controls. Both Commission Regulation (EEC) No 2959/93 of 27 October 1993 and Commission Regulation No 2093/97 of 24 October 1997 update the list of 'sensitive' countries for which special measures must be taken when exporting certain Category 2 and 3 substances.210

With respect to trading with countries outside the Member States, the European Community has now accepted much tighter precursor controls than those required of Parties to the 1988 Convention. This is particularly interesting given the fact that it was primarily responsible for watering down international precursor controls during negotiations over what became Article 12.211 In 1988 the EEC rejected the suggestion that a pre-export notification scheme should be introduced for Table 1 substances, and yet it went on to introduce a similar scheme following the CATF recommendations in 1992. There are other reforms, such as the provision of details of the ultimate consignee in all cases (and not only those where this information happens to be easily accessible) that were blocked by the EEC in 1988 but have since been introduced.212 It appears that on further assessment away from the pressure of the international negotiating table, it was soon realised that the precursor controls agreed to under the Convention were extremely weak and would not be sufficient to disrupt clandestine manufacture. Thus, the EEC could hardly ignore CATF recommendations calling not only for the addition of ten new substances, but for the strengthening of the entire control regime.

(b) Internal trade

Within the European Union, the internal trade in precursor chemicals is based on Council Directive 92/109/EEC, as amended by Commission Directive 93/46/EEC and supplemented by Commission Regulation 1485/96. One major difference between external and internal controls is the lack of any export authorisation requirements in relation to trade between States within the Union. It must be recognised that the introduction of internal trade controls coincided with the move to a single European market based on the four freedoms (free movement of persons, capital, goods and services)213 and the ratification of the 1992 TEU.214 Any obligation on Member States to obtain authorisation from each other prior to transporting

210 None of the four precursors used in the manufacture of ecstasy-related compounds are included on the list of drugs that concern 'sensitive countries'.
211 See Chapter 4, supra pp 92-93.
212 See Chapter 4.
213 Three countries outside of the EU -- Iceland, Liechtenstein and Norway -- are Parties to the European Economic Area Agreement of 1994 and participate in the Single Market. See supra n.80. However, although all Parties to that Agreement have expressed their commitment to the four freedoms (Article 2 of the EEA Agreement), trade in precursors with all non-EU Members, including Iceland, Liechtenstein and Norway, is governed by external regulations so that export authorisation requirements apply. No separate precursor agreements have been concluded with those three countries. To complete the picture of the EU market, mention should be made of the fact that four countries -- Iceland, Liechtenstein, Norway and Switzerland -- are Parties to the international organisation known as the European Free Trade Association (EFTA). Since Switzerland has chosen not to participate in the EEA, it is outside of the single market. The history and structure of the EFTA is set out in the 38th Annual Report of the European Free Trade Association (Brussels, Inspirit, 1999), pp 12-13.
their chemical products across internal borders would clearly be inconsistent with the TEU objective of creating an area without internal frontiers.

The first Council Directive governing the internal market was adopted soon after the final report of the CATF recommending the control of an additional ten precursor chemicals had been released, but just prior to the time when those substances had been scheduled by the UN. Thus, Council Directive 92/109/EEC of 14 December 1992 lists on its schedules all 22 of the substances now under international control. Commission Directive 93/46/EEC of 22 June 1993 transferred the three NSD precursors originally placed in Category 2 -- Safrole, Isosafrole and Piperonal -- to Category 1, in line with the decision of the CND and the amended Council Regulation governing external trade.

Article 1 of Council Directive 92/109 states that the purpose of this instrument is to establish intra-community monitoring of particular substances frequently used in the manufacture of controlled drugs so as to prevent their diversion from licit to illicit trade. The provisions apply regardless of whether precursors will be traded within an EU country itself or over international borders. With respect to trade within Member States themselves, obligations imposed by EC law are much stricter than those provided for by Article 12(8) of the 1988 Convention governing manufacture and distribution of substances within a Party’s own territorial boundary. Although Article 12(8) obliges Parties to “take the measures they deem appropriate” to monitor trade within their territory, it then goes on to suggest specific measures, without making any of them mandatory. Internal EU Regulations also impose more onerous obligations on trade between Member States than they are obliged to accept under the 1988 Convention.

Many of the EC provisions relating to internal trade mirror those regulating external trade discussed above. Article 2 of Council Directive 92/109 requires that in relation to all transactions leading up to the marketing of Category 1 and 2 substances, documentation is to be kept to record the name, quantity and weight of the substance, an explanation of its intended use and the contact details of supplier, distributor and consignee. Records must be retained for a period of three years and available for inspection by authorities. Under Article 4, those involved in the manufacture or placing on the market of substances listed in Category 1 must be issued with a license, whereas the manufacturers or marketers of Category 2 substances need only register the address of their premises with competent authorities. Article 5 is the cooperation provision, requiring Member States to take necessary measures to establish close relations between its competent authorities and operators involved in the trade in precursors. Once again, Article 8 requires that penalties be imposed for the infringement of the provisions set out above, but leaves it to Member States themselves to determine what sanctions are sufficient to promote compliance.

In the latest amendment, Commission Regulation (EC) No 1485/96 of 26 July 1996, a system of ‘customer declarations’ was introduced. Under Article 1, any legal person within the

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215 As discussed in Chapter 4, supra p 91.
216 Article 12(9)(d) of the 1988 Convention requires that such documentation be kept with respect to international trade and therefore trade across international borders of the EU. The EC Directive goes further in that it requires such documentation in respect of transfers within EU countries as well as between them.
217 One year longer than is required by Article 12(9)(e) the 1988 Convention.
218 Article 12(8)(b)(ii) and (iii) of the 1988 Convention suggests that parties may control the establishment and premises in which manufacture of precursors takes place by requiring operators to obtain a license and may require licensees to obtain a permit to conduct such operations.
219 The implementation of this provision means that States satisfy the requirement set out in Article 12(9)(a) of the 1988 Convention that each Party shall establish a system to monitor international trade in close cooperation with industry. There is no such requirement in respect of intra-country precursor trade.
Community supplying a Category 1 or 2 substance shall obtain a separate declaration from the customer revealing before each transaction takes place the specific use for the chemical to be supplied. In respect only of Category 2 substances, Article 2 makes it an option for a supplier who regularly deals with a particular customer to issue a single declaration covering a number of transactions over a one year period, provided certain criteria have been met. This is clearly an attempt by the Community to compromise with commercial traders so as to balance legitimate commercial interests and law enforcement concerns. In relation to the four scheduled precursor chemicals used in the manufacture of NSDs, since they are now all classified as Category 1 substances there will be no option for a supplier within the EU but to require documentation in respect of each individual transaction.

**Special Surveillance list**

Despite the existence of detailed instruments governing the trade in certain precursor chemicals, current provisions are not adequate to control the wide range of variable substances used in the manufacture of new synthetic drugs. While the present system relates to a limited list of 22 precursor substances (only four of which are used in the manufacture of ecstasy-related compounds), it has been seen that there are many more precursors that can be used to produce the variety of NSDs appearing on the illicit market. The difficulty with expanding the list of starter materials currently scheduled is the same one that has always dominated discussion of precursor controls, i.e. that most of the precursors used in illicit manufacture also have a legitimate use and EU countries are not willing to accept new measures that will place too many constraints on economic operators with a large stake in the chemical industry.

At an international level, all countries participating in the 1998 UNGASS have given their support to the creation of a voluntary monitoring or ‘surveillance’ list of 27 substances, the origins and operation of which are outlined in Chapter 6. While EU countries attended the UNGASS meetings and approved in principle the adoption of such a list, it was subsequently felt that further action at a regional level should be taken in respect of those non-scheduled precursors that present a particular problem for Member States. Early in the year 2000, an EU special surveillance list containing fifteen substances was circulated to law enforcement bodies and the chemical industry. Most of the fifteen are amongst those on the broader UN list and all but two are used in the manufacture of synthetic psychotropics. A spokesperson for the Commission insists that Member States will still respect their international commitment to monitor all 27 substances, but will give particular attention to those that have been judged most relevant to illicit manufacture in Europe. Guidelines

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220 An amendment to the instruments governing both internal and external controls will soon be made so as to add Norephedrine, the precursor scheduled by the CND on 7 March 2000. See further Chapter 4, supra p 89 and Chapter 6, supra p 184. Information supplied by Linda Ward, National Expert, European Commission, DG Taxation Customs Union, Brussels, Interview, March 2000.

221 Communication from the Commission to the Council and the European Parliament on the Control of New Synthetic Drugs (Designer Drugs), supra n.5, p 14. See further, Chapters 2 and 6.

222 Ibid. The European Commission commented that it would be neither appropriate nor possible to apply all the mechanisms provided for in current Community legislation to a long list of precursors. It is thought that broadening the scope of the legislation in this way would undermine the “close and fruitful cooperation” that has been built up between national authorities and legitimate industry.

223 See Chapter 6, supra p 190.


225 Once again, the composition of the list has not been made public so as to avoid warning clandestine operators as to the chemicals targeted by law enforcement officers.

expected to be released by the Summer of 2000 will set out the precautionary measures that should be taken by operators involved in the trade of listed precursors.

It is suggested that in order to secure the commitment of Member States, steps should be taken to formalise both the Surveillance List and the Guidelines on how operators should conduct their dealings. In January 1998, the Commission put forward two proposals to amend the existing instruments regulating production and trade in precursor substances in and outwith the European Union so as to oblige Member States to take certain action with respect to precursors on a Special Surveillance List.\(^\text{227}\) These were, however, subsequently rejected by the European Council and have since been abandoned.\(^\text{228}\) One reason suggested for the Council’s decision is that certain States did not consider it feasible to have a binding agreement that was reliant upon voluntary cooperation with the chemical industry.\(^\text{229}\) While some argued that this did not go far enough to secure the reforms, others were worried that an unfair regulatory burden would be imposed on operators. It is submitted that closer examination of the proposals reveals that there is nothing awkward about an agreement that expresses a commitment to take measures to secure the cooperation of operators with respect to substances included on a surveillance list. On the contrary, an amendment of existing instruments would have served to remind States of their obligation to discuss the special surveillance list with industry and to monitor the implementation of additional control measures. Thus, further consideration should be given to discussing an amended proposal some time in the future.

*Monitoring the implementation of precursor controls*

In its Resolution of 12 May 1998, the European Parliament called for further specific action targeting precursors used in the manufacture of NSDs. It requested from the Commission two reports — one that would discuss the implementation of existing EEC precursor controls and attempt to measure how successful they have been in curbing diversion of those substances into the illicit trade, and another on cooperation with non-Member countries.\(^\text{230}\) Both such reports would be extremely useful and it is to be hoped that the Commission will produce them, including in its analysis information on the practical difficulties involved in implementation and the differences between domestic precursor laws.\(^\text{231}\) It would also be interesting to be provided with a list of Member countries that have failed to comply with existing measures and an explanation for their reluctance to do so. This type of information is extremely well guarded and the politically sensitive nature of compliance with regional and international obligations means that the public can rarely get any insight into how any one government is performing. Is it, for example, that the laws can be criticised for imposing unnecessary constraints on legitimate business or can Member States be criticised for putting their own commercial considerations ahead of the need to curb illicit trade?


\(^{228}\) Information supplied by Sonja Van-Buggenhout, European Commission, Correspondence, 13 October 1999.

\(^{229}\) Information supplied by Linda Ward, National Expert, European Commission, DG Taxation Customs Union, Brussels, Telephone Interview, 10 November 1999.

\(^{230}\) Resolution on the Communication from the Commission to the Council and the Parliament on the Control of New Synthetic Drugs (Designer Drugs), supra n.6, paras 5 and 6.

\(^{231}\) When questioned about the reports in March 2000, a spokesperson for the Commission admitted that the request had been forgotten and there were no immediate plans to have the reports prepared. Information supplied by Linda Ward, National Expert, European Commission, DG Taxation Customs Union, Brussels, Interview, March 2000.
As revealed in Chapter 4 and alluded to in the quotation introducing this Chapter, EU controls over precursor chemicals are determined not only by a desire to limit the diversion of substances into illicit channels, but also by economic and political considerations relevant to the licit trade in those substances. Dorn points out that the EU is first and foremost an economic community, concerned on the one hand with the free movement of capital, goods, services and labour within the EU, and on the other with the formation of a trading bloc in relation to external trade. In this respect, precursor controls are important to prevent an "uneven control space" that would give one country an economic advantage over the other. Clearly economic considerations were important in determining what international controls would be accepted by the EU during negotiations for the 1988 Convention. Member countries concerned that the more stringent controls advocated by the majority of developing States would adversely interfere with legitimate trade lobbied successfully to have controls watered down. Although during the decade that has followed, EU States have come to accept tighter regulation of 22 scheduled substances, it was seen in Chapter 6 that some countries have been reluctant to fully embrace their international obligations. No doubt there are delicate and complicated issues to face in balancing the commercial interests of chemical and pharmaceutical industries with the need to suppress the use of chemical precursors in the production of illicit drugs. This thesis does not advocate the implementation of rigid controls over all potential precursor chemicals, since to do so would be practically impossible. It does, however, aim to alert the public to the need to be aware of alternate interests involved and to demand to be kept informed of the reasons for decision making in relation to both end-product and precursor controls. The criteria for making control decisions are not generally discussed in an open forum. Yet only when decision makers, researchers and the public at large are fully informed about them is it possible to determine for ourselves whether the appropriate balance between competing interests has now been struck.

Expanding its Reach: the European Union and Third Parties

In recent years, the European Union has become increasingly aware of the spread of manufacture and use of NSDs in the countries of Central and Eastern Europe. There are a number of contributing factors. First, the fall of formerly communist regimes brought a new freedom of movement and an influx of refugees that has been capitalised upon by criminal organisations. Furthermore, the collapse of communism has left many highly skilled and unemployed or poorly paid chemists looking for ways to supplement their income by involving themselves in chemical diversion schemes or in clandestine manufacture itself. Thirdly, increased contact with the West and particularly with western media has alerted young people to the existence of NSDs and their popular modes of consumption. Finally, manufacturers may be attracted to setting up clandestine laboratories in countries of Central and Eastern Europe where Governments have not had the infrastructure or resources necessary to carefully monitor illicit operations. While the lack of adequate monitoring

232 N Dorn, supra n.1.
233 Ibid., p 5.
234 Ibid., p 6.
235 Again, see Chapter 4, supra pp 92-95.
236 See Chapter 6, p 189.
238 The Phare Multi-country Programme for the Fight Against Drugs, Synthetic Drugs; A review of diversion, illicit trafficking and manufacture in Central and Eastern Europe, March 1998, Latvia, pp 6 and 22.
239 Ibid., pp 9, 12 and 13. In Hungary, for example, consumption of ecstasy is rapidly expanding. Criminal organisations are reported to have taken over 'techno' discos where there is a large trade in synthetic drugs.

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systems in those jurisdictions makes it difficult to derive an accurate picture of the drug scene, from the monitoring that does exist and anecdotal information collected over the last few years, it appears that almost all countries have experienced an increase in seizure and consumption rates and consider that the trend towards synthetic drug use is a worrying one.240 Consumptions levels vary significantly between the different countries. A 1995 survey showed that 0.8% of 16 year olds in Poland and Hungary had used ecstasy, while 1.8% of Slovenian 16 year olds had tried the drug.241 There are vast differences in the level of knowledge of synthetic drugs circulated in this region. While 87% of 16 year old Hungarians had heard of LSD, only 6% of the Lithuanian survey group had. Between 17% and 27% of students in the seven participating CCEEs had heard of ecstasy. Inevitably, however, with the expansion of communication systems and extension of trade with Western Europe, knowledge of NSDs will increase, thereby stimulating further demand and supply.

A number of CCEEs have been recognised as suppliers of both the end-product NSDs and the precursor chemicals illegally exported to EU Member States for use in their manufacture. Recent evidence suggests a “remarkable shift of production activities to Eastern European countries”.242 Poland in particular has been singled out as a significant source country for the production of synthetic drugs and an increasing number of clandestine laboratories have been discovered there in recent years.243 Often the production of NSDs in the CCEEs is coordinated and controlled by criminal organisations based in Member States. Alternatively, end-products are produced in Member States using precursors obtained from a number of countries in Central and Eastern Europe.244 As a result, the past five years has seen a steady increase in the regular traffic of synthetic drugs between the Member States and its European neighbours.

In response to an awareness of these problems and the potential impact on the region, the EU has agreed to offer financial and strategic assistance. At a meeting of the European Council’s Drugs and Organised Crime Working Group with the Countries of Central and Eastern Europe and the Baltic States in October 1996, particular attention was paid to the issue of controlling traffic in synthetic drugs.245 A number of key recommendations were made: first, that a network of law enforcement focal points to monitor synthetic drugs and drug precursors be set up between Member States, the CCEEs and the Baltic States; secondly, that the EU support the building of a “network of expertise” to facilitate the gathering of knowledge necessary to address synthetic drug abuse, particularly the rapid exchange of information between Member and non-Member States and the adoption of relevant legal provisions in all jurisdictions and thirdly, that a surveillance system be established to monitor the diversion of non-scheduled precursors used in the manufacture of illicit synthetics. To this end, voluntary agreements and Memoranda of Understanding between State authorities and their commercial traders were underlined as important initiatives. In relation to precursor control, the meeting drew attention to the existing PHARE project aimed at ensuring that applicant countries waiting for accession to the Union adapt their legislation to EU standards, that is, by incorporating the controls outlined in the precursor regulations and directives discussed.

242 Unit Synthetische Drugs, The developments in the field of the national fight against synthetic drugs in The Netherlands and the role of the Synthetic Drugs Unit (USD) (The Netherlands, USD, 1998), p 2.
244 Resolution on the Communication from the Commission to the Council and the European Parliament on the Control of New Synthetic Drugs (Designer Drugs), supra n.6, para.1.
245 Communication From the Commission to the Council and the European Parliament on the Control of New Synthetic Drugs (Designer Drugs), supra n.5, p 8.
above.\textsuperscript{246} It stressed that the precursor legislation of pre-accession countries must be made to include any amendment to EU legislation to cover the extended range of chemicals used in the manufacture of NSDs.

The need to tackle synthetic drug production and trafficking in the CEECs received further attention in the March 1998 Resolution of the European Parliament on the earlier Commission document dealing with the issue.\textsuperscript{247} The Parliament called on the Council and Commission to support the exchange of experience between prosecution authorities in Member States and their non-member European neighbours, specifically in relation to police aims and tactics in combating production and traffic in NSDs.\textsuperscript{248} It was suggested that the CEECs should be involved as far as possible in developed and developing information systems, including Europol, the EWS, contacts with chemical industries and the control of precursors. In this regard, priority should be given in accession partnerships to the building of efficient structures to target criminal organisations involved in the manufacture and traffic of synthetic drugs.\textsuperscript{249} Parliament went on to point out that at the same time as law enforcement measures were being implemented, attention should be given to the health sector and the exchange of information on preventive measures.

In 1992, the “EU Phare” programme was launched in an attempt to develop and support cooperation initiatives between Member States and their Central and Eastern European neighbours. With this objective in mind, the Phare multi-country programme for the fight against drugs was developed soon after.\textsuperscript{250} The programme establishes links with 13 partner countries: Albania, Bosnia and Herzegovina, Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, former Yugoslav Republic of Macedonia, Poland, Romania, Slovak Republic and Slovenia. There are fifteen projects (including those ongoing and in the planning stages) under the auspices of Phare, most implemented simultaneously in all thirteen partner countries. Between June 1997 and July 1998, the Project on Licit Drug Control and Illicit Synthetic Drugs was completed.\textsuperscript{251} Its three objectives were to (a) assess the situation

\textsuperscript{246} The Programme referred to is entitled “Measures Against the Diversion of Precursors” and was instigated between the period 1993-1998 in order to assist partner countries to develop EU-compatible legislation on precursor control and to provide technical equipment and training for those administrating and enforcing controls. See http://www.fad.phare.org/ecu/p_profiles/okprecoct.html.

\textsuperscript{247} See Resolution on the Communication from the Commission to the Council and the European Parliament on the Control of New Synthetic Drugs (Designer Drugs), supra n.6, para.31.

\textsuperscript{248} Ibid., paragraph 13.

\textsuperscript{249} For the countries of Central and Eastern Europe that are anxious to have their applications for admission to the EU accepted, there will be little choice but to adopt control measures as dictated by the Union in relation to both end-product drugs and precursor chemicals. In relation to the prioritising of drug control as a pre-requisite to membership, see the Pre-Accession pact on Organised Crime Between the Member States of the European Union and the Applicant Countries of Central and Eastern Europe and Cyprus (Text approved by Council on 28 May 1998), 15.7.1998, OJ C 220/1 and the Resolution on the implications of enlargement of the European Union for cooperation in the field of justice and home affairs, 3 April 1998, 15.7.1998, OJ C 138/214. Drugs are mentioned again in the March 1998 Council Decisions regarding the “principles, priorities, intermediate objectives and conditions” to be contained in the accession partnerships with all CEECs applying for membership. A separate Council Decision was concluded in relation to each of the thirteen applicant countries. See, for example, Council Decision of 30 March 1998 on the principles, priorities, intermediate objectives and conditions contained in the accession partnership with the Republic of Hungary (98/259/EC) OJ L 121/1. Parliament suggests that in the future such agreements might contain specific reference to synthetic drugs so as to coordinate the efforts of all countries eligible to apply for membership to the EU.

\textsuperscript{250} Details are provided on the Phare Programme Website at http://www.fad.phare.org. The objectives of the Programme are stated to be (a) to develop a regional approach for the fight against drugs, (b) to facilitate the gradual adoption by the CEE of the EU acquis in the field of drugs and (c) to strengthen cooperation at both the intra-regional level and within EU Member States.

\textsuperscript{251} See http://www.fad.phare.org/ecu/p_profiles/okleitoc1.html.
and determine the needs of the thirteen partner countries in relation to licit synthetics, (b) design a project on illicit synthetics that would compliment activities being carried out within the EU and (c) raise public awareness of the problems associated with abuse of licit and illicit synthetic drugs. Fact finding missions were initiated and reports were written assessing the problems in each country. Project coordinators commonly reported on the need for training of pharmaceutical industry inspectors, the implementation of effective legislation dealing with drug control and trafficking and the establishment of an adequate infrastructure to monitor the situation.\(^2\)

On the basis of the information gathered, further commitment was made to a new “Synthetic Drugs Project” designed by the European Commission. At the time of writing a contract was due to be signed between the Commission and a consortium of EU Member States’ Police Administrations driven by the Dutch Ministry of Justice.\(^3\) The new Project aims to reinforce control over both licit and illicit synthetic drugs. On the one hand, resources will be allocated to strengthening regulations to prevent the diversion of substances lawfully manufactured and on the other, experienced EU law enforcement officers will offer non-member States their expert assistance in dealing with clandestine manufacture and trafficking and early identification of drugs. Thus, the tactics adopted by a significant number of European countries will be modelled on those already implemented in the Member States of the EU.

The European Union has also been interested in strengthening action to deal with manufacture, traffic and abuse of illicit drugs in developing countries beyond Europe. On 13 October 1997, a Council Regulation “on north-south cooperation in the campaign against drugs and drug addiction” was passed, articulating the EU’s commitment to assisting developing countries to tackle the trade in illicit drugs.\(^4\) It is noted in the Preamble that certain:

cooperation, association and partnership agreements concluded by the European Community with developing countries contain clauses on cooperation to curb drug abuse and drug trafficking, the monitoring of trade in precursors, chemical products and psychotropic substances and the exchange of relevant information… \(^5\)

The Regulation seeks to support these agreements and to encourage other similar initiatives. Pursuant to Article 1, the Community agrees to carry out cooperation activities in the field of drugs and drug addiction in developing countries with priority given to those which have demonstrated their political will to “solve” the drug problem. Article 3 provides that at the request of a partner country, and with the assistance of the UNDCP, the Community will assist in the preparation of a “national drug control master plan” aiming to identify the goals, strategies and resource needs for an effective drug control campaign. Furthermore, it will provide financial and practical support for specific operations, particularly to assist with the implementation of national plans, to combat the diversion of chemical precursors and money

\(^2\) Ibid.

\(^3\) Information supplied by Jean-Michel Manzoni, Director, Phare Multi-Beneficiary Drugs Programme, Eurocustoms Precursor Project Office, Czech Republic, Correspondence, 26 April 2000.


\(^5\) In relation to precursor control, bilateral agreements have been concluded with the Andean countries, Mexico and the United States, while negotiations are continuing with the ASEAN countries, Mercosur countries and Chile (Communication From the Commission to the Council and the European Parliament on the Control of New Synthetic Drugs (Designer Drugs), COM (97) 249, p 13). See, for example, Council Decision of 18 December 1995 concerning the conclusion of an Agreement between the European Community and the Republic of Bolivia on precursors and chemical substances frequently used in the illicit manufacture of narcotic drugs or psychotropic substances (95/567/EC) 30.12.95, OJ L 324/1 (immediately followed in the OJ by similar agreements with Columbia, Ecuador, Peru and Venezuela).
laundering and to support demand reduction programmes appropriate for local conditions.\textsuperscript{256} In 1999, a \textit{Comprehensive Action Plan on Drugs between European Union and Latin America/Caribbean} was concluded.\textsuperscript{257} It stresses the intention of participants to coordinate efforts to combat both the supply of and demand for illicit drugs, specifically through the exchange of information and expertise, assistance in the development of monitoring systems and cooperation between police, customs and judicial authorities. The willingness of the EU to offer substantial resources to developing countries that agree to address drug trafficking suggests that it will have an increasing influence on the adoption of drug control measures well beyond its borders. Over the next decade it will be interesting to see how much attention 'national drug control master plans' give to the issue of controlling NSDs, both the end-products themselves and the precursor chemicals used in their manufacture.

Since the European Union is increasingly concerned to present a united response to drug control on the world stage, meetings were held to develop a common platform for the June 1998 United Nations General Assembly Special Session (UNGASS).\textsuperscript{258} The Community’s position on end-product amphetamine-type stimulants can be summarised in four main points.\textsuperscript{259} First, it asked for recognition of the fact that NSDs present an acute problem posing challenges for national authorities that are different to those posed by plant-based narcotic drugs. Secondly, it was emphasised that all States need to be encouraged to collect and distribute information on NSDs, including health effects, patterns of use and social, economic and cultural factors promoting increasing levels of consumption, in order to obtain accurate information to inform decision making. Thirdly, the control system for NSDs needs to be strengthened. Other countries in the international community could be shown the Joint Action of 16 June 1997 establishing the EWS, and the flexible scheduling mechanisms currently applicable or considered by some EU Member States. Fourthly, prevention campaigns should be specifically targeted at new synthetic drug abuse among young people most likely to be consumers. With those issues in mind, the European Community endorsed an early draft of the \textit{Action Plan against illicit manufacture, trafficking and abuse of amphetamine-type stimulants and their precursors} eventually adopted at the Special Session.

In relation to precursor controls, the Community was supportive of the draft Action Plan on chemical precursors, but was again adamant that it would not accept a law enforcement approach that impinging on legitimate trade. While the Community encouraged the formation of a Special Surveillance list, this was subject to the proviso that the list reflected national and regional needs and the principle of cooperating with industry and trade rather than imposing unacceptable burdens.\textsuperscript{260} Member States were keen to stress that responsibility for precursor diversion must be taken by importing, exporting and transit countries. To this end, importing and transit states should communicate with exporters in order to alert them to suspicious transactions.\textsuperscript{261} The Community pointed to the need to strengthen the precursor control system by entering into bilateral agreements with third countries similar to those already agreed between EU and non-EU parties.

\textsuperscript{256} \textit{Council Regulation (EC) No 2046/97 of 13 October 1997 on north-south cooperation in the campaign against drugs and drug addiction, OJ L 287/1. Ibid., Articles 4-7.}
\textsuperscript{257} \textit{Council of the European Union, \textit{Comprehensive Action Plan on Drugs between European Union and Latin America/Caribbean, 7163/99, CORDROGUE 19.}
\textsuperscript{258} \textit{See the discussion of UNGASS initiatives in Chapter 6.}
\textsuperscript{259} \textit{Communication from the Commission to the Council and the European Parliament with a View to Establishing a Common European Union Platform for the Special Session of the UN General Assembly on International Cooperation in the Fight Against Drugs, Brussels, 8 January 1998, COM (97) 670 final, p 8.}
\textsuperscript{260} \textit{Ibid., p 9.}
\textsuperscript{261} \textit{Ibid.}
Conclusions

Why have EU Member States recently devoted much energy and significant resources to developing a coordinated campaign against illicit synthetic drugs? Some of the answers are obvious. The massive increase in production, use and trafficking of illicit drugs over the past three decades has shown that the UN supervised international control regime is not of itself enough to reduce demand or supply. Members of the EU have agreed that a regional response is necessary, in addition to national and global initiatives, in order to facilitate information exchange and to enhance cooperation between States so geographically proximate. Although Member States experience drug problems differently, there are many similar patterns of use and each State will be affected by drug related activity just across its border. This is particularly true in the case of NSDs, a large percentage of which are manufactured within the European Community.

The approximation of drug legislation covering end-products and the precursors used in their manufacture would minimise the risk that clandestine operators could escape conviction by setting up laboratories in those jurisdictions that do not effectively regulate certain substances. Where one country has less comprehensive drug laws covering a more limited range of substances than in other jurisdictions, criminals may be encouraged to move their operations there in order to exploit the legal loopholes. While it may not be advisable, practical or even possible to require all Member States to adopt an identical generic or analogue model for dealing with NSDs, approximation to the extent necessary to control dangerous new compounds does not require identical legislative models, provided there is an efficient system in place to warn countries of harmful compounds marketed in the region so that they may adjust their substance-specific schedules accordingly. The Early Warning System introduced in 1997 has the potential to serve this purpose.

In terms of minimising harm to drugs users, the rapid distribution of information on dangerous new compounds to those agencies “on the ground” is arguably more important than adapting criminal controls to enable States to prosecute manufacturers and distributors. With respect to 4-MTA, recently assessed under the EWS, it may provide some protection for users to have all Member States schedule the substance as a prohibited drug, since the threat of incurring penal sanctions could dissuade clandestine manufacturers from producing it and will enable authorities to prosecute them if they persist. What has proved even more important, however, in reducing the popularity of 4-MTA, is the informal spread of information on negative effects amongst users themselves so that there is now very little demand for this compound and sellers prefer to supply other less harmful NSDs. It remains to be seen whether the EWS will, as it is hoped, be effective in providing grass-roots community organisations, as well as high-level policy and law makers, with information on the European market for new synthetic drugs.

There are other reasons for the EU coordinating drug controls that are less immediately obvious but are extremely important. Control over legitimate trade in synthetic substances has a significant impact on the commercial interests of Member States. Since many of the precursor chemicals used in the manufacture of illicit drugs, including NSDs, are also needed for legitimate industry, precursor controls are adopted not only to prevent the diversion of precursors into the black market but also to prevent an uneven control regime that would allow one Member State a competitive advantage. If certain measures intended to prevent

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262 Communication from the Commission to the Council and the European Parliament on the Control of New Synthetic Drugs (Designer Drugs), Brussels, 23.5.97, Com (97) 249, p 1
263 Chapter 5 reveals that group-type definitions are not favoured by thirteen of the fifteen EU Member States.
264 See the discussion supra p 222.
265 N Dorn, supra n.1, p 5.
diversion but regarded as expensive and/or burdensome by those with a commercial stake in the trade were set up in some Member States and not others, both criminal and legitimate operators would be likely to operate in those countries with fewer legislative controls over their synthetic products. In view of the open borders policy introduced by the Schengen Convention (now incorporated into EU law), synthetic drugs manufactured in one State may be easily transported to another. Each Member State is eager to protect its own trade and has cooperated to avoid giving any one country an unfair advantage.

The motivation to develop a common European response stems not only from a desire to coordinate internal controls, but also from the need to influence other countries and the international community so that law and policy should be modified in a way that best protects the Union. On the one hand, EU Members eager to stem the production and distribution of illicit drugs in their own jurisdictions will wish to encourage other countries to strengthen their law and policy to adequately cover dangerous end-product NSDs. The truly global market for synthetic drugs and the ease with which they are transported means that an effective supply reduction campaign requires the implementation of tighter controls in every producer or transit country. Expanding markets in the CCEEs are of particular concern. On the other side, however, EU countries do not wish to see the imposition of international controls that impinge too heavily on legitimate trade in synthetic psychotropic drugs or the precursors used in their manufacture. It is submitted that Member States are motivated in this regard not only by a desire to ensure that their citizens have access to an adequate supply of licit products, but also to protect the profit margins of commercial operators who will not be willing to accept too onerous a set of controls.

The fact that the European Union in determining its drug policy is not motivated solely by the desire to prevent ill-health effects (and it is not doubted that this is one important motivation) must be borne in mind during a thorough evaluation of the EU’s response to controlling NSDs and the precursor chemicals used in their manufacture. Drug control decisions will continue to be influenced by a range of political, economic and moral considerations, just as they have been for decades. This is yet another reason why the decision makers dictating drug law and policy (at a national, global and regional level) must be fully accountable and their decisions made open to public review.

266 As noted recently in the EU’s submission leading up to the 1998 UNGASS. See supra n.259.
267 This broad point is made in Chapters 1 and 2.
CONCLUSION

It is inevitable. Research on the type of laws we need to deal with these drugs will become more and more important. Because they are SO cheap to make and the profit margins SO huge and the precursors readily available, synthetics will be THE drug problem of the future. But it’s not just a matter of criminalising everything. There is no simple solution.
Alan Glasgow, Edinburgh and Lothian Forensic Laboratory, 1999

Summarising the results

From the middle of the 1980s, several industrialised countries began to be aware that a range of variable chemical compounds manufactured in underground laboratories specifically for the clandestine market were becoming increasingly available. This thesis argues that at a national and international level, drug controls had been designed to deal with plant-based narcotic drugs and a limited range of psychotropic compounds and were ill-equipped to respond to the phenomenon of ‘new synthetic drugs’. Discussion has concentrated on synthetic psychotropic substances (particularly in the ecstasy family), since it is compounds within this broad classification that are currently most popular with clandestine manufacturers and are most likely to occupy the attention of underground ‘chemists’ for the first part of the new century.

The major aims of the thesis are to explain the nature of the problem, the structure of synthetic psychotropic drug controls and the operation of recent reforms designed to make them more effective in dealing with variable NSDs. It has been asked first, what were the international and domestic laws originally in place at the time NSDs began to occupy the attention of law enforcement authorities; secondly, what reforms have since been implemented and thirdly, are those reforms appropriate and what more can and should be done to minimise the potential harm caused by the supply and consumption of synthetic psychotropic drugs.

Where did we start from?

International control

Chapters 3 and 4 analyse the relevant provisions of the two international treaties regulating control over psychotropic drugs. As is explained there, neither the 1971 Convention on Psychotropic Substances covering end-products, nor the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances bolstering the control regime as a whole and introducing mandatory precursor controls, were originally designed to contain the illicit traffic in NSDs. Thus, the international control regime was not well-prepared to deal with the trade in variable compounds at the time those substances first appeared on the clandestine market. In respect of end-products, substances are listed separately on the schedules to the 1971 Convention and any new compounds will not be covered until an amendment is made following the procedure set out in Article 3. Since the Convention was designed to cover licit pharmaceuticals produced in industrialised countries, the amendment procedure was deliberately drafted to be more convoluted and inevitably more time consuming than that operating under the 1961 Single Convention on Narcotic Drugs.1 Although a small number of NSDs, and large quantities of MDMA, had been seized by the time the 1988 Convention was drafted in Vienna, the major focus was still on narcotic drugs.2 None of the provisions dealt with end-product NSDs and none of the main precursors used in

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1 See Chapter 3, supra pp 49 and 60-62.
2 See Chapter 4, supra p 80.
the manufacture of compounds in the ecstasy family were initially included on the Convention Tables.

National controls

In the great majority of countries, domestic legislation was not equipped to deal with variable NSDs before the advent of the third generation of synthetic psychotropic drug use in the middle of the 1980s. Since Governments had not previously been confronted with the bulk manufacture of ‘new’ compounds falling outside of controls, it is understandable that most legislation was reliant upon the substance-by-substance approach to scheduling, usually allowing for many months between the time a new substance was identified and the time it could be brought under control. No rapid scheduling schemes existed to enable Governments to react quickly to new phenomena. Although the unlicensed manufacture and distribution of new substances may have been caught under a country’s Medicine Act or the equivalent legislation designed to regulate therapeutic substances, the penalties applicable under those Acts are generally relatively low, so that they are not considered to serve as a sufficient deterrent to clandestine operators.

Where are we now and where should we be aiming for?

International Controls

There are measures that can be taken at the international, domestic and regional levels in order to provide for more effective control over synthetic psychotropic drugs. Over almost three decades since the 1971 Convention was concluded, international controls designed to regulate end-product pharmaceuticals, some of which may be broken down for use in clandestine manufacture, have been effectively strengthened. It has been possible to severely limit the diversion of Schedule I and II substances from the licit to the illicit market, due partly to a decrease in therapeutic use of those drugs and partly to the implementation of import/export notifications and a system of estimates, now recognised to be two pre-requisites for effective control of the licit trade. There has not been the same success in limiting diversion of licit trade in Schedule III and IV substances, in spite of the fact that General Assembly resolutions have been passed urging that the same two pre-requisites be applied. It appears that since there are a greater number of recognised therapeutic uses for substances in Schedules III and IV, several States have been reluctant to fully implement the additional controls. It is submitted that it would be useful to seek an amendment to the 1971 Convention so as to make import/export controls and a system of estimates a treaty obligation. This would reflect a clear commitment from industrialised countries to put safety before profit by accepting more onerous controls that would improve the monitoring of scheduled substances and help to restrict the movement of excess quantities that then become available to be diverted to clandestine operators.

Although it has been possible to limit the diversion of certain substances from the licit trade, the 1971 Convention has been wholly unsuccessful in preventing an increase in the manufacture, supply and consumption of substances originating in the clandestine laboratory. These include quantities of amphetamines and LSD that have long been the subject of misuse, as well as a range of NSDs, particularly the extremely popular ecstasy family. A number of options for strengthening international control over NSDs were explored in Chapter 6. While

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3 The one exception here is the UK which modified its drug laws to introduce generic scheduling in 1977. See Chapter 6, supra p 108.
4 See Chapter 6, supra p 108.
5 See Chapter 6, supra p 159.
6 See Chapter 6, supra pp 160-161.
7 See Chapter 6, supra p 162.
it would be neither possible nor prudent to introduce group scheduling under the 1971 Convention,\(^8\) there must be reform of the cumbersome and time-consuming procedure set out for scheduling psychotropics. At the latest UNGASS meeting in 1998, attention was focused on a range of newer amphetamine-type stimulants and countries acknowledged that the slow scheduling process resulted in a long delay between the time substances were discovered on the illicit market and the time they were brought under control.\(^9\) Yet despite earlier suggestions that an amendment to the scheduling provisions of the 1971 Convention should be given further consideration,\(^10\) this was not discussed at UNGASS and countries were merely urged to review domestic controls. It is submitted that an amendment of the permanent scheduling criteria should be put back on the agenda of the UNDCP and debated in the immediate future. Furthermore, consideration should be given to amending the 1971 Convention in order to give the CND the power to oblige countries to apply provisional controls over psychotropic substances being considered for addition to Schedules I or II, just as it is empowered to do in respect of narcotic drugs.\(^11\) Where there is evidence that a new compound is extremely dangerous and without a recognised therapeutic use, provisional controls would fill the vacuum between the time the compound is identified and the time that it is brought under international control.

One very useful initiative is the development of a system for the “rapid identification and analysis of ATS”, the results of which can be used by governments to determine whether new substances ought to be brought under control.\(^12\) Although this does not go so far as to establish a formal ‘Early Warning System’ such as has been set up at the level of the EU, it could prove to be extremely useful, particularly if information is passed on not only to national law enforcement agencies, but to local health officers and drug workers who will be in the best position to assist and advise users likely to consume the compounds in question.

There can be no hope of containing the illicit supply of end-product NSDs in the absence of effective control over the precursor chemicals used in their manufacture. For the first time, the 1988 Convention established a mechanism enabling the control over precursors used in the manufacture of NSDs. Although none of the twelve included in the original Tables were relevant to the manufacture of NSDs in the ecstasy family, recommendations made in the final report of the CATF led to the addition of ten chemicals, four of them the direct precursors for MDMA and its related compounds.\(^13\) It is regrettable that bargaining, primarily by European countries, resulted in the watering down of some important precursor controls introduced by Article 12 of the 1988 Convention.\(^14\) Since it quickly became obvious that Article 12 allows for the continued diversion of precursors from the licit to the illicit trade,\(^15\) subsequent General Assembly resolutions have urged States to voluntarily accept additional controls.

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\(^8\) See Chapter 6, supra p 164, and the reasons given there for rejecting the Spanish Government’s proposal to introduce generic scheduling.


\(^10\) See the discussion in Chapter 6, supra p 180 of suggestions by the INCB that the deliberately complex procedure for scheduling substances under the 1971 Convention has resulted in confusion and unnecessary delay. A decision was taken, however, not to push for an amendment of the scheduling procedure under the 1971 Convention at the UNGASS since it was thought by the INCB to be too difficult and too time consuming to get States to agree to such a change. Information supplied by Howard Stead, Head, Scientific Section, INCB, Interview, September 1998.


\(^12\) See Chapter 6, supra p 178.

\(^13\) See Chapter 6, supra p 183.

\(^14\) See Chapter 4, supra pp 92-94.

\(^15\) Indeed, the EU Member States have themselves recognised that Article 12 does not provide for control measures that are strong enough to prevent diversion and have now accepted EU regulations that impose precursor controls that are far more onerous than those introduced in the 1988 Convention. See Chapter 7, Part B.
controls including import/export authorisation and a system of estimates.\textsuperscript{16} It has been seen that although many have introduced further regulatory measures as requested, there are still some major manufacturing countries that are reluctant to do so.\textsuperscript{17}

Many more than the list of 23 chemicals now under international control may be used in the manufacture of illicit drugs. As some of those are readily available and have important licit uses it is considered to be impossible to oblige countries to submit all relevant starter materials to the full precursor control regime. Instead, a 'Special Surveillance list' consisting of certain chemicals most frequently diverted from the licit trade has been created and Member States have been urged to voluntarily apply precursor controls set out in the 1988 Treaty.\textsuperscript{18} It remains to be seen whether there will be a serious and widespread commitment to voluntary controls so that this recent initiative can have some real impact on diversion.

It must be accepted that the widespread distribution of precursors used in licit trade, the small amounts needed to manufacture large quantities of illicit drugs, the ability to substitute one precursor for another and the option of, if necessary, going right back to plants to synthesise the starter materials required,\textsuperscript{19} suggests that it will be practically impossible to limit the availability of sufficient precursors to supply the illicit market. Full implementation of the international controls suggested, however, including post-treaty reforms recommended by the General Assembly, may be able to contain the spread of the precursors most commonly subject to misuse and there is little point in encouraging clandestine operators by making it easy for them. It is submitted that if those countries heavily involved in licit trade now opt to fully embrace additional controls, the international community should be better positioned than previously to address the next wave of chemical innovations in the clandestine market.

\textit{National reforms}

While group-scheduling is not viable at the international level, a number of different scheduling options are available for national governments faced with the increasing manufacture of variable NSDs. The discussion in Chapter 5 reveals that a majority of countries have retained the substance-by-substance approach to scheduling. In some instances, this traditional legislative model has been accompanied by emergency scheduling legislation designed to provide for rapid scheduling of substances recently identified on the illicit market and found to pose a serious enough danger to warrant their addition to a list of controlled drugs.\textsuperscript{20} It has been suggested that provided a mechanism for objective assessment and rapid scheduling of dangerous substances is in place, and provided that only a small number of NSDs appear each year (as is presently the case in the majority of countries) the substance-specific scheduling regime should be sufficient.\textsuperscript{21} Indeed, there are undoubtedly some advantages. Substance-specific scheduling removes the risk of confusion as to which substances are controlled under the criminal law, allows no basis for protracted and costly court debate over whether some substances are controlled and avoids inadvertent coverage of compounds which are in reality, harmless. Furthermore, most countries have in place legislation designed to restrict the manufacture and distribution of therapeutic drugs to those that have obtained the necessary qualifications and approval and it has been argued that this can be used to prosecute those responsible for the supply and manufacture of NSDs. Legislation could be amended so as to provide for more serious penalties in the event that

\textsuperscript{16} See Chapter 6, Part B.
\textsuperscript{17} See Chapter 6, supra p 190.
\textsuperscript{18} See Council resolution 1996/29 of 24 July 1996, discussed in Chapter 6, supra p 175. Paragraph 14 of Resolution S 20/4B adopted at the 1998 UNGASS urges States to cooperate in the development of a Special Surveillance List and the application of effective control measures over the substances within it.
\textsuperscript{19} See Chapter 2, supra pp 43-46.
\textsuperscript{20} See Chapter 5, supra pp 145-152.
\textsuperscript{21} See Chapter 5, supra p 154.
there is evidence that a dangerous substance has been manufactured by clandestine operators for the illicit market.

There are some countries, however, that have responded to the emergence of a new generation of synthetic psychotopic drug use by introducing a legislative model designed to cover broad categories or groups of drugs. The options available have been discussed in Chapter 5, with emphasis on three distinct models adopted in the United Kingdom, the United States and Australia. There are two main advantages of group-scheduling. First, it may act as a deterrent to would-be designer drug manufacturers who will no longer have as much incentive or opportunity to exploit loopholes in the domestic criminal law by manufacturing compounds several molecules removed from those specifically scheduled. Secondly, it allows for more severe penalties to be imposed on persons found to be manufacturing dangerous chemical compounds destined for the illicit market (e.g. 4-MTA), with little regard for the human subjects they will be tested upon. In the event that the market for NSDs expands so that an increasingly large number of new analogues designed to fall outside of existing controls appear on the illicit market, more countries may be prompted to consider group scheduling. Yet there are dangers involved in doing so and it is suggested that governments that decide on this option should restrict themselves to the least problematic generic model classifying families of controlled drugs that have been modified in a particular way. That is, they should reject the broad ‘substantially similar’ analogue provisions operating in the US and subsequently promoted by the UNDCP in its Model Laws, in favour of the legislative model adopted by the UK Government or that suggested by the Australian Model Criminal Code Committee. Although those generic scheduling schemes are still very broad and capture a wide range of chemical compounds, they can at least be interpreted objectively by the Court with the assistance of expert chemists.

Control in Europe

Recognition of the burgeoning trade in NSDs has prompted the European Union to take action in an effort to coordinate the response of its Member States. Both external and internal considerations are at issue. On the one hand, it is appreciated that since the bulk of new synthetic psychotopics are manufactured in several European countries, those countries have an obligation to others to make an effort to control supply. On the other hand, with the increasing permeability of internal borders, control over particular compounds cannot be effective in the absence of a coordinated Union response. Perhaps the most significant of the EU initiatives discussed in Chapter 7 is the movement towards the harmonisation of laws to the extent necessary to close legislative loopholes allowing for the sale of dangerous NSDs, and the development of a formal Early Warning System to achieve this objective. Where the Council votes unanimously that certain controls should be applied with respect to an individual compound, Member States are obliged to take the action recommended. The control over a uniform list of drugs in all fifteen Member States will mean that manufacturers and distributors can be prosecuted in any jurisdiction in which they carry out their activities, thus removing the incentive for clandestine operators to set up in countries which have not scheduled the particular compound. In addition to facilitating law enforcement measures, the EWS aims to alert organisations at a ground level to the existence of dangerous new compounds so that they are better positioned to provide treatment and advice to drug users. It is submitted that this second function of collecting information and filtering it down to those working on the ground is at least equally as important as coordinating criminal laws.

Despite the fact that EU countries were largely responsible for watering down Article 12 precursor controls during negotiations for the 1988 Convention, all Member States are now

22 See Chapter 5, supra p 155 and Chapter 6 supra p 176.
23 See Chapter 7, supra p 196.
24 See Chapter 7, supra p 214.
committed to tighter internal and external controls subsequently introduced by amendments to the EC law. No doubt there is a genuine concern to limit the availability of chemicals used in the manufacture of illicit drugs and the EU is to be commended for its achievements to date. It is still the case, however, that several States have not been fully committed to all precursor controls they have agreed upon and it is hoped that they will continue to improve actual implementation of reforms.

**The Interests involved**

In respect of both end-products and the precursor chemicals used in their manufacture a brief review of the history of psychotropic drug control reveals that decision makers at both the international and domestic levels have not been influenced solely by a desire to minimise access to harmful drugs. Other factors — moral concerns, political interests and commercial considerations — have always influenced the decisions as to which controls should be imposed. This was true during the first and second generations of psychotropic drug misuse and remains true in this third generation involving the misuse of NSDs.

Throughout history, Governments have introduced tighter controls and have reacted more harshly towards users, where they are seen to be consuming purely for recreational or hedonistic purposes. Thus, although amphetamine had been the subject of chronic abuse since the 1940s, use was not made a criminal offence until a generation of highly visible youth began taking the drug for entertainment purposes in the mid-1960s. Similarly, although certain amphetamines continued to be abused throughout the 1980s by large numbers of people heavily addicted to them, this pattern of misuse did not attract the attention that ecstasy did when it burst upon the drugs scene. It is submitted that the moral panic generated and the swift and urgent moves to criminalise MDMA can be at least partly explained by the fact that it was used by young people in a very blatant and confronting manner. Although it is certainly not a harmless substance, the reaction of law enforcement agencies and the classification of the drug as a substance to be subject to the heaviest penalties cannot be explained solely by the physical dangers associated with use.

Views on the morality of drug taking still influence decision making on drug control. This point is well illustrated by the different scheduling philosophy of the Dutch Government, as compared with their UK, US and Australian counterparts. In the Netherlands, a substance cannot be scheduled unless there is evidence that it is, first, actually harmful and secondly, subject to abuse. Since authorities see no justification for criminalising substances that may have mind-altering effects, but will not cause users any harm, they have rejected proposals for the group scheduling of ATS. By contrast, the Governments of Australia, Britain and the US do not appear concerned that some substances caught under their generic or analogue models may be relatively harmless, seeming to suggest that all activity (supply, manufacture and possession) involving non-therapeutic or recreational drug use, should be made punishable.

The fascinating politicking that lies behind the introduction of drug controls is normally well hidden from the general public. We are largely informed by carefully crafted press releases and government documents, or the stylised reports of international or regional bodies, that for

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25 See Chapter 7, Part B.
26 See Chapter 2, supra p 10.
27 See Chapter 3, supra p 27.
28 See Chapter 5, supra p 150.
29 When, for example, MBDB was assessed under the EU’s Early Warning System, the Dutch Government disagreed with Governments of other EU countries that the compound should be brought under control. In its view, there was no justification for doing so since MBDB had not been proven to be harmful and was rarely seized in the Netherlands. See Chapter 7, supra p 218.
the most part present a picture of international cooperation in the ‘war’ on drugs.\textsuperscript{30} In reality the picture is far more complex and there are State interests and agendas that must be teased out by pursuing information on behind the scenes negotiations. A review of the official conference records detailing the background to the adoption of the 1971 and 1988 Conventions provides an insight into the types of political interests then at stake in the designing of regulations to cover end-product psychotropics and the precursor chemicals used in their manufacture.\textsuperscript{31} Well over a decade since the last international drugs treaty was concluded the clash of interests between developed and developing States continues to affect negotiation over psychotropic drug controls so that the end decision is a result of tense discussion and ultimately compromise.\textsuperscript{32}

There are numerous examples throughout this thesis of the power imbalance between industrialised States and the less developed States that are brought to the negotiating table. This is in part due to the fact that international drug controls have traditionally been promulgated and proselytised by the governments of large industrialised countries,\textsuperscript{33} and partly to the economic imbalance between the developing and developed world that means the latter is still far more powerful today. In a recent article on the economics of international drug trafficking, Raustiala notes that:

The industrialized states wield disproportionate influence within the drug control system because much of the budget of the UNDCP comes from voluntary annual contributions. The annual donor’s meeting – which is unofficial – is one of the major events within the U.N. drug bureaucracy.\textsuperscript{34}

In evaluating drug controls, one should be ever mindful of the enormous power that this gives to a small number of Governments, particularly those of the US and EU Member States.\textsuperscript{35}

\textsuperscript{30} In drug control discourse, the efforts of Governments and the international community to tackle the illicit use of drugs have often been referred to as a ‘war’ on drugs. See, for example, EA Nadelmann, “Global prohibition regimes: the evolution of norms in international society”, \textit{International Organisation}, Vol.44, 1990, p 503; AW McCoy and AA Block (eds), \textit{War on Drugs: Studies in the Failure of US Narcotics Policy} (Bolder, Westview Press, 1992); JA Inciardi, \textit{The War on Drugs; heroin, cocaine, crime and public policy} (California, Mayfield Publishing Co, 1986); P Webster, “Rethinking drug prohibition: Don’t Look for US Government Leadership”, \textit{International Journal of Drug Policy}, Vol.9, 1998, p 297 and RC Stevenson, \textit{Winning The War on Drugs; to Legalise or Not?}, Hobart Paper, No.124 (London, Institute of Economic Affairs, 1994). It is suggested that this terminology is generally unhelpful and results in rhetoric about the need to ‘attack’ drug users and suppliers, classified as the ‘enemy’, rather than address underlying problems and consider alternative solutions aimed at minimising harm to the broader community and the drug users themselves.

\textsuperscript{31} See Chapter 3 and 4.

\textsuperscript{32} See Chapter 6.


\textsuperscript{34} \textit{Ibid.}, p 103.

\textsuperscript{35} Examples of the influence of these States in determining controls over the licit supply of end-product pharmaceuticals and precursor chemicals are provided in Chapters 3, 4 and 6. One further example of the influence wielded by large donor countries is the effect this has on the types of demand reduction strategies that will be accepted by the UNDCP. In recent years, the US has threatened to withdraw funding unless the UNDCP condemns some of the more liberal demand or harm reduction techniques attempted in several countries, including the distribution of clean needles to intravenous drug users and the use of safe injection rooms. This caused major disagreement during the drafting of an Action Plan on demand reduction to be adopted at the 1998 UNGASS (information supplied by confidential source, UNDCP, \textit{Interview}, September 1998). In the latest INCB report, the Board directly reflects the views of this major donor, chastising those countries that have allegedly “facilitated” the use of drugs and drug trafficking by condoning injection rooms. See \textit{Report of the International Narcotics Control Board for 1999} (E/INCB/1999/1), p 26.
With respect to commercial considerations, it must be accepted that both pharmaceutical drugs and the precursors used to manufacture NSDs have legitimate uses and it would be foolish to design laws that prevent access to vital therapeutic drugs or chemicals with an important industrial or domestic use. It is argued, however, that there are occasions, such as during negotiations leading to the adoption of the 1971 Convention on Psychotropic Substances\textsuperscript{36} and the drafting of Article 12 precursor controls for the 1988 Convention,\textsuperscript{37} where disproportionate weight was given to commercial interests. It may be that tighter control over licit pharmaceuticals from the 1970s would have reduced the overflow of those drugs into developing countries. Tighter control over preparations containing psychotropic drugs and their precursor chemicals may have made it more difficult for clandestine operators to have access to the starter materials necessary to manufacture NSDs. We will never know. Regardless, a historical review reveals that the anxiety of industrialised countries to protect their economic interests resulted in a serious weakening of the psychotropic drug controls to be imposed upon them.

Commercial considerations continue to have a significant impact on the introduction and acceptance of regulatory measures. This is illustrated, for example, by the reluctance of certain developed countries to effectively monitor substances listed in Schedules III and IV of the 1971 Convention,\textsuperscript{38} protracted negotiations over the number of new precursors to be recommended for scheduling\textsuperscript{39} and disagreement over what additional precursor controls should be adopted at the 1998 UNGASS.\textsuperscript{40} This thesis does not suggest a conspiracy theory and there must necessarily be a balancing of some interests against others. It is essential, however, that those interests should be openly acknowledged and that decisions makers and their reasoning should be subjected to public scrutiny. Raustiala makes a very valid point that while it is regarded as entirely legitimate to discuss the economic trade-offs that come into environmental regulation, the moral and criminal framework in which drug control is debated means that it is difficult to openly explore the economic interests involved.\textsuperscript{41} In his words:

"the framing of the drug trade as a moral battle displaces the rationalistic analysis that increasingly is deployed in most areas of policy... . The very framing of the narcotics problem as an issue of morality and criminality rather than as a problem of public health makes the use of standard regulatory tools like cost-benefit analysis extremely difficult".

It is submitted that only by acknowledging the moral, political and commercial interests involved, can drug law and policy be objectively evaluated. Only then can there be informed and energetic debate over the most effective way to minimise harm caused by the increasing misuse of new synthetic drugs.

\textsuperscript{36} See, for example, negotiations over scheduling criteria, the power to refuse scheduling decisions and exemption for preparations, discussed in Chapter 3.
\textsuperscript{37} See the discussion of the efforts of EC countries to water down Article 12 precursor controls in Chapter 4, supra pp 92-95.
\textsuperscript{38} See the discussion in Chapter 6, supra pp 160-161.
\textsuperscript{39} See Chapter 6, supra p 185.
\textsuperscript{40} See Chapter 6, supra p 193.
\textsuperscript{41} K Raustiala, supra n.33, p 139. Raustiala attempts to go some way towards addressing the absence of a discussion of the economics involved in drug control. The thrust of his article is that on the one hand, international economic law frustrates and undermines international drug controls. It is suggested that liberalisation of economic markets lowers the price of legal inputs in drug production (precursors), facilitates transportation of end-products and ingredients and increases the volume of goods traded, thereby allowing for more hiding places, overtaxing customs officials and facilitating money laundering (ibid., p 116). On the other hand, albeit to a lesser extent, international drug controls can infringe on the liberalisation of markets, interfering with legitimate trade and increasing transaction costs (ibid., p 127).
Limitations of the control regime

Even assuming, however, that all initiatives discussed in this thesis (national, international and regional) were adopted so as to better tune the drug control regime to deal with new synthetic psychotropics, it is not likely that any controls, even if fully implemented, could effectively prevent the clandestine manufacture and supply of sufficient quantities of NSDs to meet the demand. One thing that is clear from a study of the relevant UN Conventions is that it must be acknowledged that there will always be limitations to the international control system. Put simply, while it has proved possible under certain circumstances to control the licit side of the equation (and industrialised countries reaping profit from licit trade have a responsibility to make controls as effective as they can be), it has never been possible to fully control the illicit side.42 This is true in relation to both narcotic and psychotropic drugs.43 In Chapter 2 it was pointed out that the nature of NSDs -- e.g. the small quantity of starter materials required for their manufacture, difficulty of detection and massive profit margins -- makes them even more difficult to control than narcotics.44 A rapid international scheduling system would impose obligations on States, first to control any licit trade in the newly scheduled substances and secondly, to criminalise illicit manufacture, trade and possession of those drugs. Yet this will not solve the problem since in respect of the first obligation, NSDs are manufactured and sold by clandestine operators and in respect of the second, criminal laws have never been a completely effective deterrent to the manufacture, sale, transport or possession of illegal synthetic drugs.45 Harmonising national criminal laws to the extent that

42 In the Introduction to this thesis, reference was made to Nadelmann’s analysis of “global prohibition regimes”. See Introduction, supra n.21. He argues that certain “global prohibition regimes”, such as those directed against slavery, ivory trading, counterfeiting and piracy, can successfully limit the illegal activity by providing for the universal application of norms. There are, however, other transnational activities such as drug trafficking and prostitution that have flourished despite the imposition of complex international controls. This is because it is not possible to contain those international activities which “require limited and readily available resources and no particular expertise to commit, those which are easily concealed, those which are unlikely to be reported to the authorities, and those for which consumer demand is substantial, resilient, and not readily substituted for by alternative activities or products”. See EA Nadelmann, “Global Prohibition Regimes: the evolution of norms in international Society”, International Organisation, Vol.44, 1990, pp 525-526.

43 See, for example, UNDCP, World Drug Report (New York, Oxford University Press, 1997), p 189. The case of America is exemplary of the failure to contain the illicit importation and supply of drugs, despite expenditure of vast sums of money on law enforcement. In 1980 the US Government spent approximately $1 billion on drug control. By 1998, the spending of federal, state and local governments had exceeded $30 billion. Yet increased funding, drug controls, customs checks and the threat of heavy penalties have not prevented vast quantities entering the country and it is estimated that American consumers spend £60 billion on illegal drugs each year. See “Ending the War on Drugs”, The Economist, 2 January 1999, p 79 and further, E Nadelmann, “Drug Prohibition in the United States: Costs, Consequences and Alternatives”, Science, No.245, 1989, p 939. Moreover, the price of illegal drugs has fallen and purity levels have increased. Cocaine can now be bought for half or less of the price it cost in the early 1980s and heroin sells for three-fifths of the price it sold for a decade ago. While street heroin was so adulterated in the 1980s that users were forced to inject straight into the blood to achieve a high, it is now usual to find fixes more than 50% pure, enabling users to smoke or snort the drug. “Ending the War on Drugs”, The Economist, 2 January 1999, p 79. A similar situation exists in Britain. In the UK Government’s 1998 Comprehensive Spending Review, it is commented that “[t]hough £1.4 billion a year is spent by Government on tackling the drugs problem, drugs have become more readily available, the number of addicts has risen, and the consequences of drug-related crime for communities and local economies is getting worse”. See “Modern Public Services for Britain: Investing in Reform”, Comprehensive Spending Review: New Public Spending Plans 1999-2002, Presented to Parliament July 1998, CM 4011, para.13.3.

44 See Chapter 3, supra p 42.

45 In the UK, for example, illegal use of amphetamine and LSD has continued despite the fact that those substances were criminalised in 1964 and 1966 respectively. See EMCDDA, “New Trends in Synthetic Drugs in the European Union”, Insights, Series No 1 (Lisbon, EMCDDA, 1997), particularly at pp 28 and 38. Although MDMA has been illegal since the introduction of the generic model in 1977, the
the same list of more dangerous NSDs is controlled is still a worthy goal because this will enable all States to prosecute persons who are involved in the illicit sale and manufacture of those drugs and will facilitate law enforcement and other relevant forms of international cooperation between countries. It will not, however, in and of itself prevent supply and manufacture of a particular compound, should it prove to be popular with drug takers.

Similarly, although the introduction of group scheduling at a national level should allow for the prosecution of those involved in clandestine manufacture and distribution, this is not likely to effectively limit the quantities of NSDs available on the illicit market. Experience has shown that the illegality of certain substances does not prevent them being manufactured in significant quantities and does not deter widespread consumption of compounds with properties appealing to consumers. Thus, for example, the fact that MDMA was a controlled Class A drug in the UK when it first appeared in large quantities in the mid-1980s, did not prevent it from becoming massively popular but merely facilitated prosecution.46 Where the compound concerned has properties favoured by consumers and where there are ample resources available to manufacture it, it seems almost certain that suppliers will be able to meet demand.

**Demand reduction - adapting policy to minimise the harm caused by NSDs**

It is submitted, therefore, that the overwhelming preponderance of evidence suggests that even with a perfectly functioning criminal justice system, we can never hope to achieve the (illusory?) goal of eliminating NSDs or even affecting supply to a degree that will restrict the amounts necessary to meet demand. This leads inexorably to the conclusion that the political goal of eradicating the illicit drugs trade is less important than what should be the over-riding practical goal of demand reduction and harm minimisation.47

Despite the greater emphasis on supply reduction strategy, Parties to the international drug control Conventions are obliged to take at least some action to tackle the demand side of the equation. Article 20(1) of the 1971 Convention on Psychotropic Substances imposes an obligation on Parties to:

> take all practicable measures for the prevention of abuse of psychotropic substances and for the early identification, treatment, education, after-care, rehabilitation and social reintegration of the persons involved....

threat of criminal sanctions did not prevent a massive increase in supply of and demand for MDMA from the middle of the 1980s. *Ibid.*, p 18.

46 In fact, in the years since MDMA was scheduled under the 1971 Convention and subsequently controlled under the national law of those countries that are Party to that treaty, the price of the drug has fallen, while demand and availability have increased. In the UK, for example, the price of an ecstasy tablet fell from approximately £25 in 1987, to as little as £5 or £10 in 1997. EMCDDA, ibid., p 18.

47 In some senses it is possible for the two goals -- i.e. the broad political goal of eliminating illicit drug use and the practical present-term goal of eliminating harm caused by illicit drug use -- to co-exist. The former seems to be a rhetorical tool used by politicians. At the same time, a number of governments allow harm reduction schemes that can only be implemented if one accepts that some illicit drug use is inevitable and the immediate aim is to ensure that it happens as safely as possible. Examples of harm reduction schemes that accept the inevitability of some drug use are, in respect of NSDs, pill testing at rave events and published guidelines on how to use drugs safely (discussed further below). In relation to narcotic drugs, such harm reduction schemes include the provision of safe injection rooms for heroin users and the distribution of clean hypodermic needles. See EMCDDA, *Extended Annual Report on the State of the Drugs Problem in the European Union for 1999* (Lisbon, EMCDDA, 1999), pp 15-16. It has already been seen that the INCB has strongly criticised Governments that have allowed safe injection rooms, suggesting that they are thereby condoning trafficking and threatening the campaign against illicit drugs. See *supra* n.35.
In Chapter 3, it is argued that use of the qualifying term “all practicable measures” means that there is no clear obligation imposed and States are consequently under no real pressure to adopt the measures described.48 The inclusion of such an Article is, however, encouraging and does reflect a concern for the protection of the health of drug users. This was repeated in the 1988 Convention. Although that Treaty is devoted primarily to supply reduction and law enforcement, Article 14(4) stipulates that:

Parties shall adopt appropriate measures aimed at eliminating or reducing illicit demand for narcotic drugs and psychotropic substances, with a view to reducing human suffering and eliminating financial incentives for illicit traffic. These measures may be based, inter alia, on recommendations of the United Nations, specialized agencies of the United Nations such as the World Health Organization and any other competent international organizations, and on the Comprehensive Multidisciplinary Outline adopted by the International Conference on Drug Abuse and Illicit Trafficking, held in 1987, as it pertains to government and non-government agencies and private efforts in the fields of prevention, treatment and rehabilitation.

In the years since the 1988 Convention was ratified, the importance of ‘demand reduction’ has been repeatedly emphasised by national governments, regional bodies concerned with drug control and international organisations. In the United Kingdom, for example, the ten year strategy for tackling drugs released in 1998 aims to combine law enforcement with prevention and treatment.49 Demand reduction has been one of the target areas for intervention in all four of the EU’s Action Plans against illicit drugs50 and for the first three years of its existence, the European Monitoring Centre for Drugs and Drug Addiction prioritised the collection of data relating to drug demand and demand reduction strategies throughout the EU.51 At the 1998 UN General Assembly Special Session on Drugs, demand reduction was one of five types of action suggested as necessary in the Action Plan against Illicit Manufacture, Trafficking and Abuse of Amphetamine-type stimulants and their Precursors52 and a separate Declaration on the Guiding Principles of Drug Demand Reduction was concluded in order to encourage all governments to express their commitment.53

There can be little doubt that the term ‘demand reduction’ is not self explanatory and, although it has been clarified in later documents, can still be interpreted to cover a wide range of activities that are both permissive and repressive. In the Multidisciplinary Outline adopted by the International Conference on Drug Abuse and Illicit Trafficking referred to in Article 14(4) of the 1988 Convention, the types of ‘demand reduction’ initiatives suggested, e.g. data collection and evaluation, education to discourage use and targeting media to reinforce the

48 See Chapter 3, supra p 71. In 1994, the INCB published a very useful report on the effectiveness of the existing international drug control treaties. It was noted there that there had been some discussion as to whether it would be wise to draft a specific convention on demand reduction or alternatively, whether existing conventions should be amended, in order to secure a greater commitment from Governments to demand reduction strategies. The Board was not convinced, however, that Governments could ever agree on specific and universally binding treaty provisions on demand reduction, or that such a treaty would be appropriate. The design and development of demand reduction was considered to be a national task that must take into account the local cultural, political, economic and legal environment. See INCB, Effectiveness of the International Drug Control Treaties; Supplement the Report of the International Narcotics Control Board for 1994 (E/INCB/1994/1/Supp.1), p 6.
50 See the discussion of the Action Plans in Chapter 7, Part A.
anti-drugs message,\textsuperscript{54} although themselves important, would still fit within an inflexible and repressive drug control regime. Over the last decade, however, demand reduction has come to be interpreted more broadly so as to include not only prevention strategies, but also programmes to minimise the harm caused by drug abuse. Paragraph IV(B) of the Declaration on the Guiding Principles of Drug Demand Reduction referred to above indicates that the term should “cover all areas of prevention, from discouraging initial use to reducing the negative health and social consequences of drug abuse”. An identical statement appears in the European Union Action Plan to Combat Drugs (2000-2004).\textsuperscript{55} It is suggested here that this broader concept of ‘demand reduction’, including both primary prevention and ‘harm reduction’ or ‘harm minimisation’, must be focused on as a central objective of a balanced drug control strategy developed at a national, regional and international level.\textsuperscript{56} That is, demand reduction should include those measures which aim to avoid the most serious consequences of drug use, but do not necessarily seek to do so by preventing or even reducing the actual consumption level.\textsuperscript{57}

In respect of new synthetic drugs, measures aiming at demand and harm reduction must be specifically targeted to reach the relevant user group and to deal with the specific compound or family of drugs involved. A number of different strategies have been adopted in several countries. These include the traditional education programmes aiming to dissuade young people from ever taking drugs by highlighting the dangers involved, as well as the more practical approach to educating users on the safest way to consume.\textsuperscript{58} In recognition that


\textsuperscript{56} The EMCDDA have published an excellent “working definition” of demand reduction that embraces this broader vision. “Demand reduction” is said to be “inclusive, encompassing interventions aimed at decreasing the demand for drugs or the harmful consequences of drug use at an individual or collective level, from work with children to prevent the onset of demand for drugs to programmes which prescribe drugs to established drug users”. It is acknowledged, however, that some would exclude harm reduction initiatives given that these “accept continuing drug use and drugs users lifestyles while seeking to modify both to reduce drug-related social and health problems”. See Annual Report on the State of the Drugs Problem in the European Union for 1997 (Lisbon, EMCDDA, 1997), p 44.

\textsuperscript{57} It has been pointed out that ‘harm reduction’ itself is not an unambiguous concept. Although a number of countries, including France, Canada and Australia, have adopted harm reduction as their national drug policy over the last decade, the term means different things to different decision makers. To one government, harm reduction may require devoting further resources to absolute prohibition so as to ensure that no one uses illicit drugs and no one experiences any ill-effects. To another, a harm reduction strategy accepts that some drug use is inevitable and seeks to minimise the dangers that result. See A Wodak and B Saunders, “Harm reduction means what I choose it to mean”, Editorial, Drug and Alcohol Review, Vol.14, 1995, pp 269-271. Lewis and Sherval state that, “[a] harm reduction philosophy takes the view that it is of greater benefit to the common good to actively attempt to reduce the harm that drugs cause rather than simply try to prevent drug taking. It is a pragmatic approach that recognises the difficulties inherent in attempting to prevent all forms of illicit drug taking, and emphasises maximising benefits and minimising harm”. R Lewis and J Sherval, Demand reduction activities related to ‘new synthetic drugs’: MDMA (ecstasy), other amphetamines and LSD in European Union Member States, Report for the European Monitoring Centre for Drugs and Drug Addiction (Edinburgh, CHADS, 1997), p 6. It is this broader concept of harm reduction that is envisaged here.

\textsuperscript{58} Ibid., p 25. These projects have rejected the ‘just say no’ campaigns imported from the United States, in favour of a more sophisticated, non-judgemental and practical approach educating users and non-users on how best to protect themselves. One example is the DROBS project in Hanover, Germany. Users are advised that while the safest way to live is to avoid taking drugs altogether, those who insist on doing so should follow the ‘five golden rules’ of synthetic drug use:

No drug makes you happy if you are unhappy
many of the fatalities associated with synthetic drugs have occurred as a result of unsafe dance practice, some countries have developed dance guidelines to be followed by event organisers. In the Netherlands, for example, the Dutch Ministry of Health, Welfare and Sports distributes a publication entitled ‘City Hall and House’ offering advice for the regulation of large recreational events. 59 A more controversial measure aimed at minimising drugs related harm involves the testing of drugs submitted by users so as to collect and disseminate information on the contents of pills sold on the illicit market. In 1992, the Dutch Drugs Information Monitoring System (DIMS) began to collect information on the composition (dose and ingredients) of synthetic drug preparations. 60 Drug samples may either be sent in by users or collected during fieldwork at dance events. After testing takes place, booklets warning users to avoid more dangerous compounds identified during testing are prepared and distributed. 61 The Safe House Campaign coordinated by the Amsterdam Drugs Advisory Bureau cooperates closely with the DIMS project, also providing on-the-spot pill testing and information on drugs at most large events. 62 Following this lead the project ‘Check it!’ was initiated in Vienna in May 1997. Ravers may hand in tablets to be tested by on-site workers and users are offered drug-related information, counselling, drinking water and a zone for relaxing or ‘chilling out’. 63

Although there is no necessary conflict between laws criminalising or regulating certain dealings in NSDs and policy measures aiming to minimise harm, there is the potential for conflict between drug laws and some of the more liberal strategies discussed above. For on-site pill testing to be carried out, for example, authorities need to agree that possession of a small number of tablets will not be subject to criminal prosecution. This may be done in a number of ways, most radically by legalising personal possession 64 but also by

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Less is more
Mixing is crap
Don’t push yourself into continuous drug taking
Don’t take anything about which you know nothing or have anxieties.

These guidelines or ‘golden rules’ are written on stylised leaflets and posters distributed at dance events and other venues likely to attract young drug users. Evaluation of the DROBS project shows that the target group is receptive to such an open and non-threatening approach. Ibid., pp 25-26.

59 EMCDDA, Annual Report on the State of the Drugs Problem in the European Union (Luxembourg, Office for Official Publications of the European Commission, 1998), p 47. Organisers are required to check entrants for drugs and weapons. They must also provide users with free drinking water, experienced first aid staff, adequate ventilation, relaxation or ‘chill out’ rooms and access to emergency services. Similar guidelines have been developed in the United Kingdom, first in Manchester in the early 1990s, then by a central government working group in 1993 and most recently by the London Drug Policy Forum. See R Lewis and J Sherval, ibid., p 29.


61 The value of the pill-testing scheme was demonstrated recently when a tablet containing MDMA mixed with the poison strychnine was handed in for analysis by a drug user in early 2000. This information was immediately passed on to the Synthetic Drugs Unit (including representatives from Customs, Police and the Public Prosecution service) and health authorities. Dutch authorities also warned their counterparts in other EU countries to be aware of the new risk. Information supplied by Mr J.J.T.M. Pieters, National Co-ordinating Public Prosecutor, Synthetic Drugs Unit, The Netherlands, Interview, March 2000.

62 R Lewis and J Sherval, supra n 57, p 53.


64 This may, however, conflict with obligations set out in Article 3(2) of the 1988 Convention, unless it could be argued that criminalising personal possession offences was not in accordance with a country’s
decriminalising personal possession offences or putting in place prosecution guidelines specifying in what circumstances possession should be subject to criminal sanction. Critics have suggested that providing on-site testing facilities requires police and organisers to ‘turn a blind-eye’ to violations of the law and in effect amounts to condoning and encouraging drug use. Proponents of the schemes defend them by arguing that users who send in or present pills for testing are determined to take drugs and must be provided with information on the safest compounds on the market.

A complete analysis of the various demand reduction strategies in place is beyond the scope of this thesis. In 1997, the EMCDDA commissioned the first comprehensive review of demand reduction activities related to NSDs in EU Member States and a follow-up study was completed in September 1999. The reader is advised to consult these sources for further information and contact details of the relevant organisations involved.

Despite the obligation imposed on Parties to the 1988 Convention to commit resources to demand reduction (defined broadly by UN agencies to include prevention and treatment facilities), and despite increasing emphasis on demand reduction in the available literature, the bulk of attention and resources devoted to addressing problems with illicit drugs are still focused on tackling supply. Taking the United Kingdom as an example, it was recently calculated that over two-thirds of the annual funding devoted to drug control is spent on reacting to the consequences of misuse, mainly in administering the criminal justice system. No more than one-third of the funds relates to prevention activities such as education, health promotion, rehabilitation and treatment. The situation is similar in the United States, where only a third of the Federal Government’s spending on drug control goes towards drugs education or treatment. Regardless of the acceptability of some demand reduction strategies, it is still not politically expedient to redirect resources from supply reduction policies and a

“constitutional principles and the basic concepts of its legal system”. See the further discussion in Chapter 4.

65 As has been done in Spain and Italy. See further Chapter 4, supra p 85.
67 Dr Les King, “Drug Market Testing Meetings, Vienna, 27-29 November 1999”, unpublished memorandum, 6 December 1999, supplied by Dr Les King, Forensic Science Service, London. In Germany, a group known as the ‘Adam and Rave e.V.’ were recently forced to stop their pill testing initiative following a Berlin court ruling that had cast doubt on its legality.
68 Information supplied by Mr J.J.T.M. Pieters, National Co-ordinating Public Prosecutor, Synthetic Drugs Unit, The Netherlands, Interview, March 2000. In February 2000, the EMCDDA launched a project entitled ‘On site pill-testing interventions in the European Union’, to be carried out by contractors Verein Wiener Sozialprojekte and Check-it, based in Vienna. The aim is to produce an inventory of existing on-site pill-testing programmes and to record their objectives, target groups, methods, potential and problems. The results are expected to be published in Autumn 2000. See G Burkart, “On Site Pill Testing”, DrugNet Europe, No.22, March-April 2000, p 2.
70 On this occasion, the study was coordinated for EMCDDA by the Sozialpadagogisches Institut (SPI) based in Berlin. Copies are available from the EMCDDA. See G Burkart, “New Study on Synthetic Drugs”, Drug Net Europe, No.20, November-December, p 2.
72 The 1998 Spending Review does suggest that the UK Government will commit itself in the future to more effective preventative action, but only in conjunction with firm enforcement. Ibid.
73 See “Ending the War on Drugs”, The Economist, 2 January 1999, p 79.
criminal justice response to a focus on addressing the demand for illicit drugs and protection of users.74

It is submitted that there is a need to introduce additional specificity and enhanced accountability for countries in respect of their obligations to implement appropriate demand reduction measures.

As the authors of the 1998 World Drugs Report point out:

Countries party to the Conventions may be criticised for a lack of commitment to supply reduction strategies, but are rarely held accountable to the international community for inadequate endeavours to prevent and treat drug abuse.75

As a first step, an ECOSOC resolution could be passed requesting countries to submit to the Commission on Narcotic Drugs information on activities that they have funded in pursuance of their obligations under Article 14(4). This could be followed by an amendment to Article 20 of the 1988 Convention that would require Parties to furnish information on the type of demand reduction strategies they have implemented and the amount of resources committed (in addition to information on the laws and regulations promulgated to give effect to the Convention, and statistics on illicit traffic). Although States would still have very different interpretations of the meaning of ‘demand reduction’, it would be useful for the CND to be provided with information on how they consider that their international obligations are being met. The activities described could then be objectively assessed by the CND and the results presented in a report for the information of other governments.76

Future drugs of abuse

On a number of occasions over the past decade, experts have prophesied that the major drug control problem of the new millennium will involve the clandestine manufacture and consumption of new synthetic drugs.77 In 1997, for example, the US Department of State Bureau for International Narcotics and Law Enforcement Affairs claimed that:

These synthetic drugs, which have been gaining popularity over the last half decade, are well on their way to becoming the drug control nightmare of the next century.78

Since the mid-1980s, it is synthetic psychotropics, primarily phenethylamines such as MDMA and related compounds, that have become extremely popular with large numbers of young people interested in them as a recreational stimulant. What of the next century of illicit synthetic drug use?

It is highly possible that in the near future, in addition to synthetic psychotropics such as ecstasy, other new compounds in different categories, e.g. synthetic narcotics, hallucinogens or synthetic stimulants, will appear in greater quantities. Chapter 3 provides a discussion of the clandestine manufacture of synthetic narcotics in the United States in the mid-1980s and

74 K Raustiala, supra n.33, pp 97-99.
76 Although it is questionable how ‘objective’ such a report could be, given the enormous influence wielded by major donor countries, particularly the United States, and the strong opinion of the US as to the suitability of certain demand reduction measures. See supra n.35.
77 A recent UNDCP Report on ATS states that, “in the ever-widening discourse on substance abuse, it is frequently asserted that the key problem of the future will be associated with what are commonly known as synthetic drugs”. UNDCP, “Amphetamine-type Stimulants: A Global Review, Technical Reporting Series, No 3 (Vienna, UNDCP, 1996), p 1.
suggests why those drugs soon disappeared from the illicit market. The explanation appears to lie in the fact that first, the narcotic compounds then available were too dangerous and the spread of information that hundreds of people had consumed lethal doses meant that users did not want to buy the drugs responsible and distributors did not want to sell drugs that would kill off their clients.\(^79\) Secondly, plant-based heroin and cocaine remained so cheap that it was not necessary to rely on the synthetic alternative.\(^80\) Thirdly, the chemical structure of narcotics makes it much more difficult to produce related compounds that are similar in pharmacological effect and safe enough to consume.\(^81\)

The nature of the drugs market in the future may change all that. It may be that the well-intended campaign to prevent manufacture and supply of plant-based narcotics affects the price and availability of those traditional drugs so as to provide more incentive for the sale of synthetics.\(^82\) Designer chemists are becoming increasingly sophisticated. They may soon perfect a technique to manufacture narcotic analogues not as immediately life threatening as those that appeared in the mid-1980s, but with the same narcotic properties that attract certain users.\(^83\) In that case, the high potency of narcotic analogues means that a single chemist could produce enough for hundreds of thousands of street doses using small quantities of precursors at minimum cost.

The popularity of new synthetic compounds will depend largely upon how they are marketed by clandestine manufacturers and received by the group of consumers targeted. Alistair Forsyth has commented that respondents he interviewed for a study of ecstasy users were buying a ‘concept’ when they purchased, rather than a single pharmacology.\(^84\) It is noted in Chapter 2 that the name ‘ecstasy’ was specifically designed to appeal to consumers and it does indeed appear that the ‘concept’ of ecstasy was expertly marketed.\(^85\) It is conceivable that future categories of drugs may similarly be effectively marketed.\(^86\) A study of the second and third generations of synthetic psychotrophic drug use suggests that new concepts are likely to be caught up in the fashions, trends, music and media of the times, thereby contributing to the popularity of the new drugs and the transfer of patterns of use from country to country. In dealing with supply, national governments and the international community will be better prepared if some of the initiatives discussed in the preceding Chapters are introduced. At least as important, however, are demand reduction and harm minimisation strategies specifically targeted towards the new compounds involved and the types of users attracted to them.

\(^79\) See Chapter 2, supra p 19.
\(^82\) As was suggested by JW Langston and DJ Rosner, supra n.80, p 16.
\(^83\) Forensic scientist Les King, an expert on drug analysis working for the UK Forensic Science Services, confirms that techniques involved in the manufacture of illicit drugs are becoming far more sophisticated. It is certainly possible that a popular narcotic analogue could be designed and marketed. Interview, 7 May 1999.
\(^85\) See Chapter 2, supra p 20.
\(^86\) Perhaps the ‘concept’ of ‘discovery’ for synthetic hallucinogens or ‘escape’ for synthetic narcotics???
A ‘war’ on new synthetic drugs?

What has this thesis contributed to the study of new synthetic drugs? It does not show governments how to stop the illegal trade in variable chemical compounds. It provides no solution to the present ‘war’ on synthetic psychotropics or the coming ‘war’ on future drugs of abuse. In a recent interview, the National Coordinating Public Prosecutor of the Dutch Synthetic Drugs Unit commented that:

A war on synthetic drugs doesn’t work. We have to use the law, but the criminals don’t. So a war on new synthetic drugs is unwinnable — stupid.87

Unfortunately, as this quote and the comment of Alan Glasgow cited in the introduction to this conclusion suggests, there is no easy solution and none is put forward in any of the chapters above. What the thesis does aim to do is to make a contribution to the study of national and supranational laws currently regulating NSDs and proposals for reform, in an effort to identify which options are likely to be both suitable and successful. Despite the massive amount of publicity given to the ‘designer drug’ scare and the emergence of ecstasy, very little academic debate has focused on the adequacy or appropriateness of the legal response to NSDs. It may be that further discussion will be forthcoming, particularly if future predictions of the spread of NSDs prove accurate. On a number of occasions throughout the thesis it has been stressed that there are limitations to a drug control regime (at a national, international and regional level) that is fixated with supply reduction and the goal of eliminating illicit drugs. Dealing, or rather coping as best we can, with future generations of drug use, requires a calm, concerted and practical response to supply and demand reduction. Law and policy must be modified to deal with NSDs, with the overriding objective being to minimise harm related to drugs of abuse. Only then can we hope to prevent being ambushed by the nightmare scenario predicted by the United States Department of State Bureau for International Narcotics and Law Enforcement Affairs in 1997.88 The ‘war’ on new synthetic drugs is unwinnable. We can, however, position ourselves to take as few casualties as possible.

88 See supra n.78.
APPENDIX A

Index of Synthetic Psychotropic Drugs

This Index of synthetic psychotropics is intended to provide a useful guide for those who want or need to have a better grasp on the range of psychotropic compounds appearing on the illicit market. Two principle sources have been used to put together a list of analogues within the classes or families of phenethylamines and tryptamines. Pharmacologists working in the area of drug control will be familiar with the two texts entitled PIHKAL (Phenethylamines I Have Known and Loved); A chemical love story (USA, Transform Press, 1993) and TIHKAL (Tryptamines I Have Known and Loved); The Continuation (Berkeley, Transform Press, 1997), written by Dr Alexander Shulgin and his wife Ann. Most of the compounds described below were synthesised and tested by the authors of those texts.

A further smaller category covers homologues/analogues of n-Butanol. Although little is known about this class of drugs, a discussion of their properties is necessary in view of the fact that several compounds have become extremely popular, one of which is currently being assessed by the WHO to determine whether it should be scheduled under the 1971 Convention.

It should not be assumed that each of these substances could be classified as “new synthetic drugs”. Indeed, many were synthesised and popularised much earlier (e.g. LSD and STP used widely in the 1960s) and some were synthesised earlier but have only recently become popular recreational drugs (e.g. MDMA and MBDB). The majority, however, have not yet appeared on the illicit market. Based on a description of the effects on users in the test group, I have in many cases suggested whether the particular compound would be likely to be popular with clandestine manufacturers and their customers in the years to come.

There are a number of other helpful sources that have been drawn upon to create this Index that would be of significant interest to anybody researching the illicit manufacture of synthetic drugs. See further, for example:

- K Valter and P Arrizabalaga, Designer Drugs Directory (Switzerland, Elsevier Science S.A., 1998) (abbreviated below as DDD). In this text substances are divided into ten categories including designer narcotics, designer CNS and designer LSD analogues.

Other relevant references are included in the bibliography. Information has also been obtained by consulting Dr Les King, Drugs Intelligence Unit, Forensic Science Service, 109 Lambeth Rd, London.
**PHENETHYLAMINES**

++ - Indicates that the compound is scheduled under the 1971 UN Convention on Psychotropic Substances.

**---** - Indicates that this compound is not covered by the generic definition in the UK Misuse of Drugs Act 1971.

<table>
<thead>
<tr>
<th>Common/code name</th>
<th>Chemical name</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. AEM</td>
<td>α-Ethyl-3,4,5-trimethoxy-PEA</td>
<td>220 mg produced no activity (<em>PIHKAL</em>, p 458).</td>
</tr>
<tr>
<td>2. AL</td>
<td>4-Allyloxy-3,5-dimethoxy-PEA</td>
<td>A relatively potent compound at 20-30 mg. Shulgin describes positive experiences with the drug (<em>PIHKAL</em>, p 460). Serves to increase energy and acts as a social lubricant. Abuse is rare at present but AL may generate more interest on the illicit market in the future since a key precursor is readily available (<em>DDD</em>, p 41).</td>
</tr>
<tr>
<td>3. ALEPH (DOT)</td>
<td>4-Methylthio-2,5-dimethoxy-A</td>
<td>At 5mg compound reportedly works to increase intellectual stimulation. At 10mg it begins to interfere with the senses so as to make simple mechanical tasks difficult. Shulgin describes ALEPH as erratic, meaning that it is difficult to predict the likely effect of different doses (<em>PIHKAL</em>, p 462). The DDD suggests that this is a powerful euphoriant causing visual illusions and distortions. Quantities have been seized in Canada (<em>DDD</em>, p 71).</td>
</tr>
<tr>
<td>4. ALEPH-2</td>
<td>E-Ethylthio-2,5-dimethoxy-A</td>
<td>5mg results in visual distortions and illusions. Higher doses cause more intense hallucinations (<em>PIHKAL</em>, p 464). As with ALEPH itself, it is not possible to predict the relationship between dose and response. Abuse is rare (<em>DDD</em>, p 72).</td>
</tr>
<tr>
<td>5. ALEPH-4</td>
<td>4-Isopropylthio-2,5-dimethoxy-A</td>
<td>Shulgin reports both positive and negative effects of ALEPH-4 ingested at doses of between 7 and 12 mg. Ill-effects include physical discomfort, difficulty breathing and a sense of physical and emotional suffocation. On the other hand, there are long periods of euphoria (<em>PIHKAL</em>, p 468). Although it may interest some types of users, since the compound is volatile it would be worrying if it appeared on the illicit market.</td>
</tr>
<tr>
<td>6. ALEPH-6</td>
<td>4-Phenylthio-2,5-dimethoxy-A</td>
<td>Not a potent compound. 30-40 mg produces limited activity and Shulgin mixed it with other drugs before describing most of his experiences (<em>PIHKAL</em>, p 469).</td>
</tr>
<tr>
<td>7. ALEPH-7</td>
<td>4-Propylthio-2,5-dimethoxy-A</td>
<td>Shulgin ingested the drug at 4-7mg (<em>PIHKAL</em>, p 472). Ill-effects include depression, anxiety and a feeling of not caring. Although the experience is not all bad, based on this assessment it is unlikely to become popular.</td>
</tr>
<tr>
<td>8. ALPHA</td>
<td>α-Ethyl-(3,4-methylenedioxyphenyl)-1-propanamine</td>
<td>Abuse is relatively limited thus far but quantities have been seized by Dutch authorities. Can be easily prepared from precursors not subject to controls. Has similar effect to MDMA but lacks strong anorectic properties (<em>DDD</em>, p 33). Not synthesised by Shulgin in <em>PIHKAL</em>.</td>
</tr>
<tr>
<td>9. ARIADNE</td>
<td>2,5-Dimethoxy-α-ethyl-4-methyl-PEA</td>
<td>Shulgin began exploring this class of compounds as a possible anti-depressant. Analogues of ARIADNE have been created for different purposes, some to serve</td>
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<td>No.</td>
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<td>10.</td>
<td>ASB</td>
<td>3,4-Diethoxy-5-methoxy-PEA</td>
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<tr>
<td>11.</td>
<td>B</td>
<td>4-Butoxy-3,5-dimethoxy-PEA</td>
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<tr>
<td>12.</td>
<td>BEATRICE</td>
<td>2,5-Dimethoxy-4,N-dimethyl-A</td>
</tr>
<tr>
<td>13.</td>
<td>BIS-TOM</td>
<td>2,5-Bismethylthio-4-methyl-A</td>
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<tr>
<td>14.</td>
<td>BOB</td>
<td>4-Bromo-2,5,β-trimethoxy-PEA</td>
</tr>
<tr>
<td>15.</td>
<td>BOD</td>
<td>2,5,β-Trimethoxy-4-methyl-PEA</td>
</tr>
<tr>
<td>16.</td>
<td>BOH</td>
<td>β-Methoxy-3,4-methylenedioxyl-PEA</td>
</tr>
<tr>
<td>17.</td>
<td>BOHD</td>
<td>2,5-Dimethoxy-β-hydroxy-4-methyl-PEA</td>
</tr>
<tr>
<td>18.</td>
<td>BOM</td>
<td>3,4,5,β-Tetramethoxy-PEA</td>
</tr>
<tr>
<td>19.</td>
<td>4-Br-3,5-DMA</td>
<td>4-Bromo-3,5-dimethoxy-A</td>
</tr>
<tr>
<td>20.</td>
<td>2-Br-4,5-MDA</td>
<td>2-Bromo-4,5-methoxy-PEA</td>
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<tr>
<td>21. 2C-B (Nexus)</td>
<td>4-Bromo-2,5-dimethoxy-PEA</td>
<td>This is one of the compounds Shulgin praises loudly. Active at 12-24 mg. It is a psychedelic that induces visual imagery and operates as a sexual stimulant. It is acknowledged, however, that there are several reports of overdoses that should warn users of the dangers associated with the drug (PIHKAL, p 503). 2C-B first appeared on the illicit market in the US in 1979. Abuse is now frequent and has become particularly popular in Germany and Switzerland (DDD, p 76). This was the substance at issue in the NSW case of McEwen (see Chapter 5, p 139) where it was found to come within the generic definition covering certain hallucinogens. An assessment currently being carried out by the WHO to determine whether 2C-B should be added to the 1971 Convention is due to be completed in June 2000.</td>
</tr>
<tr>
<td>22. 3C-BZ</td>
<td>4-Benzyl-3,5-dimethoxy-A</td>
<td>Operates as a powerful hallucinogen when trialed with 25-200 mg. Reported ill-effects include a feeling of discomfort and bad dreams. Impossible to predict the relationship between dose and effect (PIHKAL, p 507).</td>
</tr>
<tr>
<td>23. 2C-C</td>
<td>4-Chloro-2,5-dimethoxy-PEA</td>
<td>Active when tested with 20-40 mg (PIHKAL, p 509). Drug enhances visual and auditory perception and heightens the senses of taste and touch. Like its bromo analogue 2C-B, 2C-C operates as a sexual stimulant (DDD, p 75).</td>
</tr>
<tr>
<td>24. 2C-D</td>
<td>4-Methyl-2,5-dimethoxy-PEA</td>
<td>Has very little effect until taken at a dosage size of 150 mg when the psychedelic impact kicks in prompting colourful visual distortions. Shulgin suggests that it may be a useful therapeutic tool at lower levels since it encourages openness and interaction (PIHKAL, p 511).</td>
</tr>
<tr>
<td>25. 2C-E</td>
<td>4-Ethyl-2,5-dimethoxy-PEA</td>
<td>A very powerful hallucinogen. Major problem is the steep dose/response curve, i.e. small additional amount is needed to push user into toxic psychosis. Shulgin reports ‘enjoyable’ mind-altering experiences at a dosage of between 10 and 20 mg but 25 mg prompted a 20 minute psychosis characterised by sweating and a sense of chaos and fear (PIHKAL, p 518).</td>
</tr>
<tr>
<td>26. 3C-B</td>
<td>4-Ethoxy-3,5-dimethoxy-A</td>
<td>A powerful hallucinogen inducing strong visuals at 30-60 mg. One ill-effect is a strong feeling of bodily discomfort. Shulgin suggests that it would be too “heavy” on the body for most users (PIHKAL, p 519). Not likely to become a popular drug of abuse.</td>
</tr>
<tr>
<td>27. 2C-F</td>
<td>4-Fluro-2,5-dimethoxy-PEA</td>
<td>Not considered to be an active compound. Even at 250 mg, the effects are described as “slight and uncertain” (PIHKAL, p 522).</td>
</tr>
<tr>
<td>28. 2C-G</td>
<td>3,4-Dimethyl-2,5-dimethoxy-PEA</td>
<td>A potent psychedelic that is praised by Shulgin. He suggests that the main drawback is the long period of time (several days) for the mind to become completely clear of the drug (PIHKAL, p 525). Active dosage is between 20-35 mg. Not likely to become popular on the illicit market.</td>
</tr>
<tr>
<td>29. 2C-G-3</td>
<td>3,4-Trimethylene-2,5-dimethoxy-PEA</td>
<td>*** At 16-25 mg, this compound induces a completely altered and intoxicated state and what is described as a feeling of “merry nuttiness”. There is an ease of communication but only in familiar surroundings. Shulgin warns that it might be a very frightening experience in an unfamiliar or unstructured environment. Not likely to become popular on the illicit market.</td>
</tr>
<tr>
<td>30. 2C-G-4</td>
<td>3,4-Tetramethylene-2,5-dimethoxy-PEA</td>
<td>*** Shulgin was convinced that this would be an active compound but had not finished experimenting at the time <em>PIHKAL</em> was published (<em>PIHKAL</em>, p 529).</td>
</tr>
<tr>
<td>31. 2C-G-5</td>
<td>3,4-Norbornyl-2,5-dimethoxy-PEA</td>
<td>*** Among the most potent and long-lasting of the phenethylamines. Produces colourful visual effects at dosage of 10-16 mg. As a result of the duration of the intoxication, users are left feeling exhausted and sleep-deprived after coming down (<em>PIHKAL</em>, p 532).</td>
</tr>
<tr>
<td>32. 2C-G-N</td>
<td>1,4-Dimethoxynaphthyl-2-ethylamine</td>
<td>*** The experience of the user is not entirely negative although there is a general uneasiness and irritability with a dosage of 20-40 mg (<em>PIHKAL</em>, p 535). Not likely to become popular on the illicit market.</td>
</tr>
<tr>
<td>33. 2C-H</td>
<td>2,5-Dimethoxy-PEA</td>
<td>Assumed to be inactive in man. Not yet fully tested (<em>PIHKAL</em>, p 537).</td>
</tr>
<tr>
<td>34. 2C-I</td>
<td>4-Iodo-2,5-dimethoxy-PEA</td>
<td>Causes colourful visual distortion at 15 mg. Subjects report feeling confident and energetic (<em>PIHKAL</em>, p 539). Like 2C-B, it heightens all senses and stimulates sexual desire (DDD, p 78). Abuse is rare but 2C-I may later generate more interest on the illicit market. Seizures were made in Sweden in 1999 (Dr Les King, Forensic Science Service, London, 2000).</td>
</tr>
<tr>
<td>35. 2C-N</td>
<td>4-Nitro-2,5-dimethoxy-PEA</td>
<td>Described as similar to MDMA. Trialed with dosage of 100-150 mg. Operates as a social lubricant and mood enhancer. Nevertheless, there is very little excitement about it (<em>PIHKAL</em>, p 542). Reported abuse is rare (DDD, p 39) and 2C-N is not likely to become popular on the illicit market.</td>
</tr>
<tr>
<td>36. 2C-0-4</td>
<td>4-Isopropoxy-2,5-dimethoxy-PEA</td>
<td>At 60 mg it is reported to prompt a general level of exhilaration and excitement which lasts a few hours. Very little is known about this compound and its full activity is yet to be discovered (<em>PIHKAL</em>, p 543).</td>
</tr>
<tr>
<td>37. 2C-P</td>
<td>4-Propyl-2,5-dimethoxy-PEA</td>
<td>With between 6-10 mg users report a mixture of positive and negative experiences using 2C-P. Difficult to predict the dosage that will push user over the edge and become extremely unpleasant (<em>PIHKAL</em>, p 545). Not likely to become popular.</td>
</tr>
<tr>
<td>38. CPM</td>
<td>4-Cyclopropylmethoxy-3,5-dimethoxy-PEA</td>
<td>60-80 mg provokes fantasising but with some sense of discomfort and vulnerability (<em>PIHKAL</em>, p 548).</td>
</tr>
<tr>
<td>39. 2C-SE</td>
<td>4-Methylseleeno-2,5-dimethoxy-PEA</td>
<td>Shulgin conducted experiments with up to 70 mg which resulted in very little activity (<em>PIHKAL</em>, p 551).</td>
</tr>
<tr>
<td>40. 2C-T</td>
<td>4-Methylthio-2,5-dimethoxy-PEA</td>
<td>Shulgin is half-hearted about the virtues of this compound. Trialed with 60-100 mg. Similar to MDMA in that it is not reported to result in visual distortion but rather a “tactile sensitivity”. Most serious negative is a sense of “emotional removal” (<em>PIHKAL</em>, p 554). Abuse is rare and substance may not become a popular drug on the illicit market since there are more interesting drugs available. It may appear, however, given that it can be easily prepared from an uncontrolled precursor (DDD, p 40).</td>
</tr>
<tr>
<td>41. 2C-T-2</td>
<td>4-Ethylthio-2,5-dimethoxy-PEA</td>
<td>Described by Shulgin as “an excellent tool for introspection”, 22 mg caused one user to remark that there were very vivid fantasy images with one’s eyes shut but that there was no blurring between fantasy and reality. The only negative reported in <em>PIHKAL</em> is acute diarrhoea (<em>PIHKAL</em>, p 557). Seizures of the drug have...</td>
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<tr>
<td>42. 2C-T-4</td>
<td>4-Isopropylthio-2,5-dimethoxy-PEA</td>
<td>Trialed with 8-20 mg. Some users experience overwhelming perception of colours and visual distortions. Induces an inner calm and clarity although sleep is made uncomfortable (<em>PIHKAL</em>, p 561).</td>
</tr>
<tr>
<td>43. Ψ-2C-T-4</td>
<td>4-Isopropylthio-2,6-dimethoxy-PEA</td>
<td>An effective level has not yet been determined. (<em>PIHKAL</em>, p 564).</td>
</tr>
<tr>
<td>44. 2C-T-7</td>
<td>4-Propylthio-2,5-dimethoxy-PEA</td>
<td>Compound received praise from Shulgin and other experimenters when trialed with 10-30 mg (<em>PIHKAL</em>, p 567). Ranked by him as one of the most favourable phenethylamines in terms of acceptability and intrinsic richness. In some cases, it produces hallucinations and visual imagery similar to LSD, and in others introspection. Quantities have recently been seized in Sweden and Germany (Dr Les King, Forensic Science Service, London, March 2000) and the compound may become more popular on the illicit market in the future.</td>
</tr>
<tr>
<td>45. 2C-T-8</td>
<td>4-Cyclopropylmethylthio-2,5-dimethoxy-PEA</td>
<td>2C-T-8 brings on as many negative experiences as positive ones. Although one user reported that 40 mg provoked a “tremendous opening of insight and understanding”, for another the same dosage resulted in “extreme and prolonged discomfort”, characterised by over-sensitivity to light, noise and motion and nausea without vomiting. A certain unbalance and head-buzzing lasted three days and was faintly present after one week (<em>PIHKAL</em>, p 571). Probably too volatile to become a popular drug of abuse.</td>
</tr>
<tr>
<td>46. 2C-T-9</td>
<td>4-(t)-Butylthio-2,5-dimethoxy-PEA</td>
<td>Compound causes long-lasting body discomfort when trialed with 60-100 mg (<em>PIHKAL</em>, p 575). Not likely to become popular.</td>
</tr>
<tr>
<td>47. 2C-T-13</td>
<td>4-(2-Methoxyethylthio)-2,5-dimethoxy-PEA</td>
<td>In general this compound seems to have more negatives than positives. Trialed with 25-40 mg. Caused changes in colour visuals and some introspection. Negative effects included stomach upset and diarrhoea (<em>PIHKAL</em>, p 576). Not likely to become popular.</td>
</tr>
<tr>
<td>48. 2C-T-15</td>
<td>4-Cyclopropylthio-2,5-dimethoxy-PEA</td>
<td>Very little has been written about the effect of 2C-T-15 on the body (<em>PIHKAL</em>, p 579). At 30 mg it prompted user to be talkative and so may act as a social lubricant.</td>
</tr>
<tr>
<td>49. 2C-T-17</td>
<td>4-(s)-Butylthio-2,5-dimethoxy-PEA</td>
<td>Slow to act. When trialed with between 60-100 mg it did not produce visuals and was described in <em>PIHKAL</em> as “totally benign”. Although no negative effects are reported, it doesn’t appear to be exciting enough to become popular (<em>PIHKAL</em>, p 583).</td>
</tr>
<tr>
<td>50. 2C-T-21</td>
<td>4-(2-Flouroethylthio)-2,5-dimethoxy-PEA</td>
<td>One of the most potent phenethylamines available. Active at 8-12 mg. Described by one user as a “very pleasant material, enhancing communication, clear thinking and good feeling”. Resulted in feelings of relaxation and lethargy (<em>PIHKAL</em>, p 586). Possible that it would become popular on the illicit market if the experiences described above were desired by users.</td>
</tr>
<tr>
<td>51. 4-D</td>
<td>4-Trideuteromethyl-3,5-dimethoxy-PEA</td>
<td>Compound brought on colourful visuals. Higher dose of 350-400 mg resulted in short lived negative effects of quasiness, cold hands and feet and later more severe nausea (<em>PIHKAL</em>, p 590). Probably not interesting enough to become popular.</td>
</tr>
</tbody>
</table>

been reported in France and Belgium (Dr Les King, Forensic Science Service, December 1998).
<p>| 52. β-D | β,β-Dideutero-3,4,5-trimethoxy-PEA | A large dosage is necessary for this compound to be effective in man. Provokes a mixed response. 225 mg is reported to lead to introspection, feelings of grandeur and empowerment. Another user suggests he had a quasi-religious experience and claims to have been in touch with himself and god. One user suffered from severe nausea and vomiting with 300 mg (PIHKAL, p 592). |
| 53. DESOXY | 4-Me-3,5-Dimethoxy-PEA | Trialed with 40-120 mg compound does not produce any colourful visuals. A relatively neutral experience (PIHKAL, p 596). On this basis, it is not likely to become popular. |
| 54. 2,4-DMA | 2,4-Dimethoxy-A | Amount needed for active dose not yet known (PIHKAL, p 599). |
| 55. 2,5-DMA | 2,5-Dimethoxy-A | Very little qualitative information is known. Shulgin experimented with 80 mg which resulted in a physical trip characterised by tremors and a cardiovascular push (PIHKAL, p 601). Since there was no mental trip the experiment was discontinued. Abuse is limited but 2,5-DMA has occasionally been used as a poor substitute for MDMA (DDD, p 66). Main use in area of psychedelics is as a precursor to compounds such as DOB, DOI and DON. |
| 56. 3,4-DMA | 3,4-Dimethoxy-A | In the 1960s, this compound was one of many fed to non-consenting psychiatric patients as part of a series of experiments carried out by the US military interested in developing agents for mind-control (PIHKAL, p 604). Patients injected with several hundred milligrams of the drug describe visual distortions, feelings of unreality and paranoid ideas. Not likely to become popular on the illicit market. |
| 57. DMCPA | 2-(2,5-Dimethoxy-4-methylphenyl)cyclopropylamine | *** Trialed with 15-20 mg. Positive experiences noted were lightheadedness, easy fantasy and erotic feelings. One negative was the uncomfortable feeling of temporarily losing control (PIHKAL, p 607). |
| 58. DME | 3,4-Dimethoxy-β-hydroxy-PEA | *** 115 mg produced no substantial mental effects. Induced mild nausea (PIHKAL, p 609). |
| 59. DMDMA | 2,5-Dimethoxy-3,4-methylenedioxy-A | Effects on humans first explored in 1962. Smaller doses of up to 75 mg prompted very little psychedelic activity. 75 mg produced an LSD-like experience (PIHKAL, p 610). |
| 60. DMDMA-2 | 2,3-Dimethoxy-4,5-methylenedioxy-A | Little is known or has been written about the effects of this compound (PIHKAL, p 613). |
| 61. DMPEA | 3,4-Dimethoxy-PEA | No activity with 1000 mg dose (PIHKAL, p 614). |
| 62. DOAM | 4-Amyl-2,5-dimethoxy-A | At 10 mg compound appears to operate as a mood enhancer. Shulgin not very enthusiastic and DOAM not likely to generate enough interest to become popular (PIHKAL, p 617). |
| 63. DOB | 4-Bromo-2,5-dimethoxy-A | ++ - Scheduled since 1985. A potent, long-lasting psychedelic active at 1-3 mg that has been sold in significant quantities on the illicit market. Users describe a certain rapture and LSD like experience. Reported ill-effects included severe cramps, depersonalisation and a disturbing feeling that consciousness may be lost. A number of overdose cases have been linked to DOB (although in some instances the exact compound may not have been identified). In one case where it was positively... |</p>
<table>
<thead>
<tr>
<th>Name</th>
<th>Chemical Formula</th>
<th>Description</th>
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</thead>
<tbody>
<tr>
<td>64. DOBU</td>
<td>4-Butyl-2,5-dimethoxy-A</td>
<td>Not a particularly pleasant compound. Effects take a long time to come on and then a long time to wear off. One user reported no loss of mental clarity but an irritability and shortness of temper (PIHKAL, p 622). Would not become popular on the illicit market.</td>
</tr>
<tr>
<td>65. DOC</td>
<td>4-Chloro-2,5-dimethoxy-A</td>
<td>A long-lasting psychedelic trialed with 1.5-3 mg. Results in powerful visuals and distortion of reality. Lasts approx. 24 hours (PIHKAL, p 626). Abuse is currently rare (DDD, p 61).</td>
</tr>
<tr>
<td>66. DOEF</td>
<td>4-(2-Fluroethyl)-2,5-dimethoxy-A</td>
<td>2-3.5 mg is reported to produce a general state of “humerousness” with very little discomfort. Imagery is complex with eyes closed but barely noticeable with eyes open (PIHKAL, p 628).</td>
</tr>
<tr>
<td>67. DOET</td>
<td>4-Ethyl-2,5-dimethoxy-A</td>
<td>++ - Scheduled since 1986. At modest levels, DOET is thought of as a cognitive enhancer and does not result in sensory distortions (PIHKAL, p 631). When higher doses of between 1 and 7 mg were experimented with it produced a mixture of positive and negative experiences. Abuse is limited (DDD, p 59) and the unpredictable nature of this compound suggests that it is not likely to become popular on the illicit market.</td>
</tr>
<tr>
<td>68. DOI</td>
<td>4-Iodo-2,5-dimethoxy-A</td>
<td>Users have shown mixed enthusiasm. Trialed with 1.5-3 mg. One considered that it produced interesting eyes-closed imagery and would have been helpful for an artist. Most reported a slightly depressing experience (PIHKAL, p 633). Abuse is rare (DDD, p 64) and DOI is not likely to become popular.</td>
</tr>
<tr>
<td>69. DOM (or STP)</td>
<td>4-Methyl-2,5-dimethoxy-A</td>
<td>++ - Scheduled since 1971. Operates as a powerful hallucinogen (PIHKAL, p 637). Trialed with between 3-10 mg, positive effects include euphoria and the types of illusions provoked by hallucinogens. Like LSD there is risk of a bad trip that may be characterised by body tremors and trauma. DOM, or STP as it was otherwise known, was widely used by certain sub-groups in the 1960s, particularly in San Francisco. There were a number of overdose emergencies as a result. Abuse has since become less frequent (DDD, p 57).</td>
</tr>
<tr>
<td>70. Ψ-DOM</td>
<td>4-Methyl-2,6-dimethoxy-A</td>
<td>Trialed with 15-25 mg. The compound produces a state of altered consciousness, light-headedness and some visual distortion (PIHKAL, p 643). One reported ill-effect is constant diarrhoea. Not likely to generate much interest on the illicit market.</td>
</tr>
<tr>
<td>71. DON</td>
<td>4-Nitro-2,5-dimethoxy-A</td>
<td>Users report an amphetamine-like stimulation at 3.0 mg. With 4.5 mg it has the effect of a light hallucinogen prompting enhanced colour perception and some auditory distortion. Others have suggested that the stimulant properties of this compound may make it likely to appear on the market as an illicit recreational drug (PIHKAL, p 646).</td>
</tr>
<tr>
<td>72. DOPR</td>
<td>4-Propyl-2,5-dimethoxy-A</td>
<td>DOPR is described as “hypnogenic” inducing a state that is somewhere in between waking and sleep. It produces feelings of being slightly out-of-body but</td>
</tr>
<tr>
<td>73. E</td>
<td>4-Ethoxy-3,5-dimethoxy-PEA</td>
<td>At 40 mg it is described as a &quot;powerful and complex intoxicant&quot; resulting in an inability to coordinate muscular activity (<em>PIHKAL</em>, p 652). Subjects tend to think that bodily tensions outweigh any psychological reward. At 60 mg it provokes some feeling of rational analysis and insight. However, this is clouded by tachycardia (irregular heart beat) and muscular tension. Not likely to become popular on the illicit market.</td>
</tr>
<tr>
<td>74. EEE</td>
<td>2,4,5-Triethoxy-A</td>
<td>This compound was synthesised by Shulgin but at the time <em>PIHKAL</em> was written had not been consumed by humans. Effects are unknown (<em>PIHKAL</em>, p 654).</td>
</tr>
<tr>
<td>75. EEM</td>
<td>2,4-Diethoxy-5-methoxy-A</td>
<td>Again, the compound was synthesised but not ingested by Shulgin (<em>PIHKAL</em>, p 656). It was assumed that EEM would be of low potency but it is unexplored.</td>
</tr>
<tr>
<td>76. EMA</td>
<td>4-Ethoxy-3-methoxyamphetamine</td>
<td>Although there is very little evidence of abuse at this time, 4EMA is likely to appear on the illicit market in greater quantities in view of the easy access to commercially available precursors. Other closely related compounds have become popular drugs of abuse (DDD, p 36).</td>
</tr>
<tr>
<td>77. EME</td>
<td>2,5-Diethoxy-4-methoxy-A</td>
<td>Synthesised but not ingested. Shulgin guessed that it would be of low potency, with hints to toxicity if ingested at higher levels. Unlikely to generate much interest for consumption by humans (<em>PIHKAL</em>, p 658).</td>
</tr>
<tr>
<td>78. EMM</td>
<td>2-Ethoxy-4,5-dimethoxy-A</td>
<td>No activity with 50 mg dose (<em>PIHKAL</em>, p 659).</td>
</tr>
<tr>
<td>79. ETHYL-J</td>
<td>N,α-diethyl-3,4-methylenedioxy-PEA</td>
<td>At 90 mg very little effect is noted. It is suspected that it may be an interesting intoxicant at higher levels of around 200 mg but this dose may be too much for the body to handle. Shulgin has not experimented further (<em>PIHKAL</em>, p 662).</td>
</tr>
<tr>
<td>80. ETHYL-K</td>
<td>N-Ethyl-α-propyl-3,4-methylenedioxy-PEA</td>
<td>*** 40 mg produces very little effect. No further experiments have been done (<em>PIHKAL</em>, p 663).</td>
</tr>
<tr>
<td>81. 4-EA</td>
<td>4-Ethoxyamphetamine</td>
<td>Abuse is limited but 4-EA has appeared on the illicit market. Compound is extremely dangerous and many cases of lethal intoxication have been reported in the US and Canada (DDD, p 52). Not synthesised by Shulgin in <em>PIHKAL</em>.</td>
</tr>
<tr>
<td>80. F-22</td>
<td>Benzo[\text{c}][\text{d}]-2,2-dimethyl-5-methoxy-6-(2-aminopropane)</td>
<td>*** Compound is of low potency, if indeed it is active in humans at all (<em>PIHKAL</em>, p 667). Trialed with 15 mg. Not likely to be of interest for the illicit market.</td>
</tr>
<tr>
<td>81. FLEA</td>
<td>N-Hydroxy-N-methyl-3,4-methylenedioxy-A</td>
<td>*** Trialed with 100-160 mg, users found FLEA similar to MDMA in that it was seen as &quot;pleasant&quot; and served to facilitate communication, without interfering with reality. It does not produce the emotional bond that users report with MDMA but is suggested by some to provoke more contemplation or self-evaluation (<em>PIHKAL</em>, p 671). Compound is easy to prepare and quantities have been seized on the illicit market. Attempts at large scale production in the Netherlands have been reported (DDD, p 31).</td>
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<td>Synthesised but not ingested. Shulgin guessed that it would be of low potency, with hints to toxicity if ingested at higher levels. Unlikely to generate much interest for consumption by humans (<em>PIHKAL</em>, p 658).</td>
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</tr>
<tr>
<td><strong>82. GAMMA</strong></td>
<td>N-Methyl-(3,4-methylenedioxyphenyl)-3-propanamine</td>
<td>Abuse is rare but compound has been found in street samples of ecstasy (DDD, p 47). Not synthesised by Shulgin in <em>PIHKAL</em>.</td>
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<tr>
<td><strong>83. G-3</strong></td>
<td>3,4-Trimethylecne-2,5-dimethoxy-A</td>
<td>*** (PIHKAL, p 674) The compound is certainly a psychedelic but effects did not appear to be profound when trialed between 12-18 mg. No body disturbance but no intense visuals either. Probably not interesting enough to generate any enthusiasm on the illicit market.</td>
</tr>
<tr>
<td><strong>84. G-4</strong></td>
<td>3,4-Tetramethylecne-2,5-dimethoxy-A</td>
<td>*** Synthesis had not been completed by the time <em>PIHKAL</em> was written and effect on humans is unknown (PIHKAL, p 676).</td>
</tr>
<tr>
<td><strong>85. G-5</strong></td>
<td>3,4-Norbornyl-2,5-dimethoxy-A</td>
<td>*** 14-20 mg does not affect mental activity. No visual or related sensory changes (PIHKAL, p 676). Shulgin appears ambivalent about this compound and it is unlikely to generate interest on the illicit market.</td>
</tr>
<tr>
<td><strong>86. GANESHA</strong></td>
<td>3,4-Dimethylecne-2,5-dimethoxy-A</td>
<td>A fairly potent psychotropic. Users report a feeling of tranquillity at 24 mg and eyes-closed visual imagery at 32 mg (PIHKAL, p 678). May later be of some interest for the illicit market.</td>
</tr>
<tr>
<td><strong>87. G-N</strong></td>
<td>1,4-Dimethoxynaphthyl-2-isopropylamine</td>
<td>*** Experiments with this compound had not been completed by the time <em>PIHKAL</em> was written and effect on humans is unknown (PIHKAL, p 681).</td>
</tr>
<tr>
<td><strong>88. HMDA</strong></td>
<td>1-(3,4-Methylenedioxyphenyl)-3-butanamine</td>
<td>Not synthesised by Shulgin in <em>PIHKAL</em>. Abuse is rare but this compound has appeared on the illicit market because of the use of ‘false’ precursors in MDMA synthesis. HMDA is only a poor substitute for MDMA and so would be rejected by users who knew its contents (DDD, p 44).</td>
</tr>
<tr>
<td><strong>89. HMDMA</strong></td>
<td>N-Methyl-1-(3,4-Methylenedioxyphenyl)-3-butanamine</td>
<td>Again, drug is only a poor substitute for MDMA and has appeared on the illicit market because of the use of false precursors to manufacture ecstasy (DDD, p 46).</td>
</tr>
<tr>
<td><strong>90. HOT-2</strong></td>
<td>2,5-Dimethoxy-N-hydroxy-4-ethylthio-PEA</td>
<td>*** Described as a “generally pleasant material” when trialed with 10-18 mg (PIHKAL, p 682). Users report some visuals and a feeling of insight. Several tablets containing the drug were seized by customs officers in London in January 1999, but were returned to the holder (Dr Les King, Forensic Science Service, London). HOT-2 may later generate more interest on the illicit market.</td>
</tr>
<tr>
<td><strong>91. HOT-7</strong></td>
<td>2,5-Dimethoxy-N-hydroxy-4-(n) propylthio-PEA</td>
<td>*** This compound was trialed with 15-25 mg and is praised in <em>PIHKAL</em> (PIHKAL, p 683). Users report lightheadedness (feeling “tipsy”), visual imagery and insights.</td>
</tr>
<tr>
<td><strong>92. HOT-17</strong></td>
<td>2,5-Dimethoxy-N-hydroxy-4-ethylthio-PEA</td>
<td>*** Trialed with 7-120 mg. Users report positive experiences. No distortion of the senses but a good humoured light feeling useful for self exploration. One experienced user comments, however, that although they had felt in control, it may be a frightening, ego-disintegrating experiment for the novice (PIHKAL, p 685). The same would be true for many of the compounds profiled.</td>
</tr>
<tr>
<td><strong>93. IDNNA</strong></td>
<td>2,5-Dimethoxy-N,N-dimethyl-4-iodo-A</td>
<td>*** 2.6 mg ingested orally resulted in no activity. Further amounts were not consumed but Shulgin warns that it is probable only a small additional amount is required to produce activity (PIHKAL, p 687).</td>
</tr>
<tr>
<td><strong>94. IM</strong></td>
<td>2,3,4-Trimethoxy-PEA</td>
<td>No activity with 400 mg dose (PIHKAL, p 690).</td>
</tr>
<tr>
<td><strong>95. IP</strong></td>
<td>3,5-Dimethoxy-4-</td>
<td>Trialed at 40-80 mg. Users report mostly positive</td>
</tr>
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<td></td>
<td>105. MBDB</td>
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<tr>
<td></td>
<td>α-Ethyl-N-methyl-3,4-</td>
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<tr>
<td></td>
<td>methylenedioxy-phenethylamine</td>
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<td></td>
<td>Frequently sold as a</td>
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<td></td>
<td>recreational drug and</td>
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<td>often as ecstasy.</td>
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<td>Seems to be a less</td>
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<td></td>
<td>powerful CNS stimulant</td>
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<td></td>
<td>than MDMA and is less</td>
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<tr>
<td></td>
<td>neurotoxic (DDD, p 29).</td>
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<td></td>
<td>In 1998, MBDB was the</td>
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<td>first compound to be</td>
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<td>assessed under the EU’s</td>
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<td>Early Warning System.</td>
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<td>In late 1999,</td>
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<tr>
<td>104.</td>
<td>MAL</td>
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<td></td>
<td>3,5-Dimethoxy-4-methallyloxy-PEA</td>
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<td></td>
<td>A powerful psychedelic</td>
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<td>producing a mixture of</td>
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<td></td>
<td>reactions when trialed</td>
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<td></td>
<td>between 40-65 mg. Some</td>
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<td></td>
<td>users reported experiencing</td>
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<tr>
<td></td>
<td>frightening hallucinations,</td>
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<tr>
<td></td>
<td>discomfort and shades of</td>
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<tr>
<td></td>
<td>amnesia. Others were</td>
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<tr>
<td></td>
<td>impressed with the</td>
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<tr>
<td></td>
<td>kaleidoscope of fantasy</td>
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<tr>
<td></td>
<td>and imagery (PIHKAL, p 712)</td>
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<td></td>
<td>Probably too unpredictable</td>
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<td>to become popular on the</td>
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<tr>
<td></td>
<td>illicit market.</td>
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<tr>
<td>103.</td>
<td>MADAM-6</td>
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<tr>
<td></td>
<td>2,4-Dimethyl-4,5-methylenedioxy-A</td>
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<tr>
<td></td>
<td>No activity with 280 mg</td>
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<td></td>
<td>dose (PIHKAL, p 709).</td>
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<tr>
<td>102.</td>
<td>4-MMA (PMA)</td>
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<tr>
<td></td>
<td>4-Methoxy-</td>
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<tr>
<td></td>
<td>+ - Scheduled since 1986.</td>
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<tr>
<td></td>
<td>PMA is a potent hallucinogen</td>
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<tr>
<td></td>
<td>that has proved lethal for</td>
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<tr>
<td></td>
<td>a number of users. It</td>
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<td></td>
<td>appeared on the illicit</td>
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<td></td>
<td>market in the US and Canada</td>
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<td></td>
<td>as early as the 1960s,</td>
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<td>soon after which the first</td>
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<td></td>
<td>overdose deaths were</td>
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<td></td>
<td>reported. Quantities were</td>
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<td>seized in Europe and</td>
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<td></td>
<td>Australia in the first half</td>
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<td></td>
<td>of the 1990s. At lower</td>
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<td>doses of 60 to 70 mg it</td>
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<td>results in an alcohol-like</td>
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<td></td>
<td>intoxication (PIHKAL, p 707).</td>
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<td></td>
<td>However, the potency of the</td>
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<td></td>
<td>compound makes it easy for</td>
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<td></td>
<td>users to overdose,</td>
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<td>particularly if they</td>
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<td>believe they are purchasing</td>
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<td></td>
<td>a different compound of</td>
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<td></td>
<td>lesser strength (DDD, p 50).</td>
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<tr>
<td>101.</td>
<td>3,4,5-Trimethoxy-PEA</td>
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<td>++ - Scheduled since 1971. M</td>
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<td></td>
<td>escaline is one of the</td>
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<td></td>
<td>oldest psychedelics known to</td>
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<td></td>
<td>humans. Although it can</td>
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<td></td>
<td>be synthesised in the</td>
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<td></td>
<td>laboratory, it was</td>
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<td></td>
<td>originally recovered from</td>
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<td></td>
<td>the cactus known as</td>
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<tr>
<td></td>
<td>Peyote growing wild in the</td>
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<tr>
<td></td>
<td>Southwest United States and</td>
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<td></td>
<td>Northern Mexico (PIHKAL, p 702).</td>
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<tr>
<td></td>
<td>Peyote plays an important</td>
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<td></td>
<td>role in religious ceremonies</td>
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<td></td>
<td>for native Indians in these</td>
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<td></td>
<td>areas. When trialed with</td>
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<td></td>
<td>between 200-400 mg, users</td>
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<td>99.</td>
<td>MALPHA</td>
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<tr>
<td></td>
<td>N-Methyl-1-(3,4-methylenedioxyphenyl)-1-propanamine</td>
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<tr>
<td></td>
<td>Abuse is limited, although</td>
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<td>substance has been seized</td>
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<td>on the illicit market. As</td>
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<td>with ALPHA, effects are</td>
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<td>similar to those</td>
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<td>experienced with MDMA but</td>
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<td></td>
<td>it lacks powerful</td>
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<td></td>
<td>anorectic activity. Also</td>
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<td>simple to prepare</td>
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<td>from precursors readily</td>
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<td></td>
<td>available (DDD, p 34).</td>
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<tr>
<td>98.</td>
<td>LOPHOPHINE</td>
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<tr>
<td></td>
<td>3-Methoxy-4,5-methylenedioxy-PEA</td>
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<td></td>
<td>No tangible activity with</td>
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<td>250 mg dose (PIHKAL, p 701).</td>
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<td>97.</td>
<td>J</td>
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<tr>
<td></td>
<td>α-Ethyl-3,4-</td>
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<td></td>
<td>methylenedioxy-PEA</td>
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<td>Appears to be a relatively</td>
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<td></td>
<td>tranquil compound, described</td>
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<td>as “benign”, “pleasant”, “peaceful” and “more stoning than MDMA”. Trialed with 150-230 mg. Relatively minor ill-effects include dry mouth and dizziness (PIHKAL, p 698).</td>
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</tr>
<tr>
<td>96.</td>
<td>IRIS</td>
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<tr>
<td></td>
<td>5-Ethoxy-2-methoxy-4-methyl-A</td>
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<tr>
<td></td>
<td>No activity with 9 mg dose (PIHKAL, p 694).</td>
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<tr>
<td>No.</td>
<td>Substance</td>
<td>Synthesis and Activity</td>
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</tr>
<tr>
<td>106. MDA</td>
<td>3,4-Methylenedioxy-A</td>
<td>++ - Scheduled since 1985. MDA was first synthesised by two German chemists in 1910 but was largely forgotten until 1939 when it was tested on animals for research into adrenaline. In 1941 it was tested but rejected as a treatment for Parkinson’s disease. Around the same time, the US pharmaceutical company Smith, Kline and French dropped their plans to market the drug as an appetite suppressant after noticing dangerous side effects. MDA was ignored again until 1957 when an American researcher, Gorden Alles, reported to a scientific meeting that he had experienced heightened perception and visual imagery while testing the drug on himself. MDA was then coded by scientists at the Chemical Warfare Service in Maryland, USA, and was one of many substances tested by the military for use in chemical warfare, as an agent to extract information and immobilise armies (H Shapiro, 1992, p 5). It was common to experiment with little regard for the safety of the subject. In 1953, a psychiatric patient died after having been injected with a lethal dose of 500 mg. MDA was an extremely popular psychedelic on the illicit market of the 1960s and was dubbed the ‘love drug’ or ‘hug drug’ by a counterculture of young people who appreciated its hallucinogenic properties. At 80-160 mg, users report euphoria, light hallucinations and time distortions. Ill-effects include nausea, muscular spasm and teeth clenching (PIHKAL, p 714).</td>
</tr>
<tr>
<td>107. MDAL</td>
<td>N-Allyl-3,4-methylenedioxy-A</td>
<td>*** No activity with 180 mg dose (PIHKAL, p 719).</td>
</tr>
<tr>
<td>108. MDBA</td>
<td>α-Ethyl-3,4-methylenedioxy-phenethylamine</td>
<td>Not synthesised by Shulgin in PIHKAL. Appeared on the clandestine market in the US in 1986. Has almost the same effect in man as MDMA, but is a less powerful CNS stimulant and is believed to be less neurotoxic. Often sold as ecstasy (DDD, p 27).</td>
</tr>
<tr>
<td>109. MDBU</td>
<td>N-Butyl-3,4-methylenedioxy-A</td>
<td>No activity with 40 mg dose (PIHKAL, p 720).</td>
</tr>
<tr>
<td>110. MDBZ</td>
<td>N-Benzyl-3,4-methylenedioxy-A</td>
<td>*** No activity with 150 mg dose (PIHKAL, p 721)</td>
</tr>
<tr>
<td>111. MDCPM</td>
<td>N-Cyclopropylmethyl-3,4-methylenedioxy-A</td>
<td>*** No activity with 10 mg dose (PIHKAL, p 724).</td>
</tr>
<tr>
<td>112. MDDM</td>
<td>N,N-Dimethyl-3,4-methylenedioxy-A</td>
<td>*** Shulgin suggests that compound has not been proven to be active and if it did prove to be active a very large dose would be required. There is one unconfirmed report of activity at 550 mg resulting in a bad trip (PIHKAL, p 726). DDD suggests that although abuse is rare, this compound is an occasional poor substitute for MDMA (DDD, p 49).</td>
</tr>
<tr>
<td>113. MDE (or MDEA)</td>
<td>N-Ethyl-3,4-methylenedioxy-A</td>
<td>++ - Scheduled since 1990. 100-200 mg produces feelings of intoxication that were described as “almost alcohol-like” (PIHKAL, p 728). Users report some tranquilisation and motor-incoordination. Ill-effects include nausea and jaw-clenching. MDE appeared on</td>
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<tr>
<td>No.</td>
<td>Compound</td>
<td>Chemical Name</td>
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<tr>
<td>114.</td>
<td>MDHOET</td>
<td>N-(2-Hydroxyethyl)-3,4-methylenedioxy-A</td>
</tr>
<tr>
<td>115.</td>
<td>MDIP</td>
<td>N-Isopropyl-3,4-methylenedioxy-A</td>
</tr>
<tr>
<td>116.</td>
<td>MDMA (Ecstasy)</td>
<td>N-Methyl-3,4-methylenedioxy-A</td>
</tr>
<tr>
<td>117.</td>
<td>MDMC</td>
<td>N-Methyl-3,4-ethylenedioxy-A</td>
</tr>
<tr>
<td>118.</td>
<td>MDMEO</td>
<td>N-Methoxy-3,4-methylenedioxy-A</td>
</tr>
<tr>
<td>119.</td>
<td>MDMEOET</td>
<td>N-(2-Methoxyethyl)-3,4-methylenedioxy-A</td>
</tr>
<tr>
<td>120.</td>
<td>MDMP</td>
<td>α,α-N-Trimethyl-3,4-methylenedioxy-PEA</td>
</tr>
<tr>
<td>121.</td>
<td>MDOH</td>
<td>N-Hydroxy-3,4-methylenedioxy-A</td>
</tr>
<tr>
<td>122.</td>
<td>MDPEA</td>
<td>3,4-Methylenedioxy-A</td>
</tr>
<tr>
<td>123.</td>
<td>MDPH</td>
<td>α,α-Dimethyl-3,4-methylenedioxy-PEA</td>
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<tr>
<td>Compound</td>
<td>Formula</td>
<td>Notes</td>
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<tr>
<td>124. MDPL</td>
<td>N-Propargyl-3,4-methylenedioxy-A</td>
<td>No activity with 150 mg dose (PIHKAL, p 752).</td>
</tr>
<tr>
<td>125. MDPR</td>
<td>N-Propyl-3,4-methylenedioxy-A</td>
<td>Very little activity with 200 mg dose (PIHKAL, p 753). Used in conjunction with a drug such as LSD, MDPR enhances and exaggerates the psychedelic.</td>
</tr>
<tr>
<td>126. ME</td>
<td>3,4-Dimethoxy-5-ethoxy-PEA</td>
<td>Users report positive experiences when trialed with 200-350 mg. Slightly heightened visual awareness but no imagery (PIHKAL, p 755). A mood elevator and social lubricant, facilitating communication, bonding and insight. Based on this assessment, ME may later appear on the illicit market.</td>
</tr>
<tr>
<td>127. MEDA</td>
<td>3,4-Ethylendioxy-5-methoxy-A</td>
<td>No activity with 200 mg dose (PIHKAL, p 759).</td>
</tr>
<tr>
<td>128. MEE</td>
<td>2-Methoxy-4,5-dioxyo-A</td>
<td>No activity with 4.6 mg dose (PIHKAL, p 761).</td>
</tr>
<tr>
<td>129. MEM</td>
<td>2,5-Dimethoxy-4-ethoxy-A</td>
<td>30 mg brought on visuals with some colour enhancement (PIHKAL, p 764). Rapid onset. Reported to induce feelings of pleasantness and some euphoria. Abuse is limited but has been reported in Canada. Since a key precursor is commercially available its appearance on the illicit market may become more common in the future (DDD, p 68).</td>
</tr>
<tr>
<td>130. MEPEA</td>
<td>3-Methoxy-4-ethoxy-PEA</td>
<td>With 300 mg, users report no psychedelic activity but what was described as a &quot;gentle lifting of spirits&quot; (PIHKAL, p 769). Abuse is rare at this time but the fact that MEPEA may be easily prepared from vanilina, a precursor widely available, may mean that it will later appear on the illicit market in greater quantities (DDD, p 35).</td>
</tr>
<tr>
<td>131. META-DOB</td>
<td>5-Bromo-2,4-dimethoxy-A</td>
<td>Any psychedelic effects appear to be blurred by the toxic actions of the drug (PIHKAL, p 771). At doses of between 60 to 90 mg it produced feelings of anxiety and paranoia, flushing, palpitations, nausea, vomiting and diarrhoea. Would not be of interest on the illicit market.</td>
</tr>
<tr>
<td>132. META-DOT</td>
<td>5-Bromo-2,4-dimethoxy-A</td>
<td>No activity with 35 mg dose (PIHKAL, p 772).</td>
</tr>
<tr>
<td>133. METHYL-DMA</td>
<td>N-Methyl-2,5-dimethoxy-A</td>
<td>Users have had different experiences with the compound. One felt no activity with 60 mg, another described a &quot;complete experience&quot; with 50 mg (PIHKAL, p 774). Likely to be too unpredictable to generate interest on the illicit market.</td>
</tr>
<tr>
<td>134. METHYL-DOB</td>
<td>4-Bromo-2,5-dimethoxy-N-methyl-A</td>
<td>At 8 mg, compound stimulated very little psychedelic activity but was very hard on the body (PIHKAL, p 777). Subjects describe tightening of teeth, exaggerated reflexes and general physical tenseness. There was no desire to experiment at higher doses. Not likely to become popular on the illicit market.</td>
</tr>
<tr>
<td>135. METHYL-J</td>
<td>N-Methyl-α-ethyl-3,4-methylenedioxy-PEA</td>
<td>At 210 mg it was described as a relaxant, with a quiet, friendly effect (PIHKAL, p 778). One subject who ingested 210 mg and had a 70 mg supplement experienced a more intense intoxication and euphoria. There is some possibility it may appear on the illicit market, although its properties are probably not as desirable for users as the properties of MDMA.</td>
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<td>No.</td>
<td>Compound</td>
<td>Description</td>
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<tr>
<td>136.</td>
<td>METHYL-K</td>
<td>N-Methyl-α-propyl-3,4-methylenedioxy-PEA</td>
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<td>No activity with 100 mg (PIHKAL, p 781).</td>
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<tr>
<td>137.</td>
<td>METHYL-MA</td>
<td>N-Methyl-4-methoxy-A</td>
</tr>
<tr>
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<td>*** 110 mg produced no psychedelic effect but increased pulse and caused eye muscle disturbance. Scientists have concluded that its tendency to produce catatonia (schizophrenia characterised by periods of stupor) in animals and the possibility that it effects neurochemicals mean that human experimentation should be discouraged (PIHKAL, p 783). Not likely to be seen on the illicit market.</td>
</tr>
<tr>
<td>138.</td>
<td>METHYL-MMDA-2</td>
<td>N-Methyl-2-methoxy-4,5-methylenedioxy-A</td>
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<td></td>
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<td>No activity with 70 mg dose (PIHKAL, p 785).</td>
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<tr>
<td>139.</td>
<td>MMDA</td>
<td>3-Methoxy-4,5-methylenedioxy-A</td>
</tr>
<tr>
<td></td>
<td></td>
<td>++ - Scheduled since 1986. First synthesised and experimented with by Shulgin in 1962 (PIHKAL, p 787). When trialed with 100-250 mg, users report hallucinations that are most intense with eyes closed. These are combined with a sense of empathy and passivity. Appeared on the illicit market in relatively small quantities in the 1980s. Although abuse is limited, MMDA is synthesised in clandestine laboratories from myristicine contained in nutmeg oil which is very easy to obtain (DDD, p 70).</td>
</tr>
<tr>
<td>140.</td>
<td>MMDA-2</td>
<td>2-Methoxy-4,5-methylenedioxy-A</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(PIHKAL, p 792) 25-50 mg has the effect of enhancing rather than distorting visuals. Reported to facilitate emphatic communication. Possible ill-effects include muscular stiffness and abdominal distress. Abuse is limited but it was seized in a clandestine laboratory in Canada in the 1980s (DDD, p 69).</td>
</tr>
<tr>
<td>141.</td>
<td>MMDA-3a</td>
<td>2-Methoxy-3,4-methylenedioxy-A</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Users ingesting between 20-60 mg report light hallucinations and fantasia (PIHKAL, p 795). Not likely to generate significant interest on the illicit market since there are other more powerful hallucinogens.</td>
</tr>
<tr>
<td>142.</td>
<td>MMDA-3b</td>
<td>4-Methoxy-2,3-methylenedioxy-A</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Very little is known about this compound and few human trials have been carried out (PIHKAL, p 798). Known to be active but less so that MMDA-3a. Not likely to generate much interest on the illicit market.</td>
</tr>
<tr>
<td>143.</td>
<td>MME</td>
<td>2,4-Dimethoxy-5-ethoxy-A</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Very few human trials have been carried out. Known to be active in humans at 40 mg. Ill-effects include diarrhoea (PIHKAL, p 800). Proved highly toxic in laboratory animals. Not likely to be of interest on the illicit market.</td>
</tr>
<tr>
<td>144.</td>
<td>MP</td>
<td>3,4-Dimethoxy-5-propoxy-PEA</td>
</tr>
<tr>
<td></td>
<td></td>
<td>No activity with 240 mg (PIHKAL, p 803).</td>
</tr>
<tr>
<td>145.</td>
<td>MPM</td>
<td>2,5-Dimethoxy-4-propoxy-A</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Not a particularly potent compound. 30 mg produces slight activity but no higher dosage has been tried (PIHKAL, p 806).</td>
</tr>
<tr>
<td>146.</td>
<td>ORTHO-DOT</td>
<td>2-Methylthio-4,5-dimethoxy-A</td>
</tr>
<tr>
<td></td>
<td></td>
<td>25 mg results in little or no activity. Compound has not generated much interest and few human trials have been undertaken (PIHKAL, p 809).</td>
</tr>
<tr>
<td>147.</td>
<td>P</td>
<td>3,5-Dimethoxy-4-propoxy-PEA</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Drug operates as a relaxant and can produce a sense of euphoria (PIHKAL, p 811). One user reported feeling irritable after a dose of 60 mg.</td>
</tr>
<tr>
<td>148.</td>
<td>PE</td>
<td>3,5-Dimethoxy-4-phenethylamino-PEA</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Little or no activity with 150 mg (PIHKAL, p 813).</td>
</tr>
<tr>
<td>149.</td>
<td>PEA</td>
<td>Phenethylamine</td>
</tr>
<tr>
<td></td>
<td></td>
<td>This is the central chemical from which other compounds in PIHKAL are bred. Yet it is inactive in the illicit market.</td>
</tr>
</tbody>
</table>
humans, even at 1600 mg (PIHKAL, p 815). Phenethylamine is found in nature, in both animals and plants. It is present naturally in a number of human fluids and tissues.

<p>| 150. PROPYNYL | 4-Propynoxy-3,5-dimethoxy-PEA | This compound affects the body more than the mind. (PIHKAL, p 819). Early experiments did not encourage chemists to test with more than 80 mg, at which point the drug was not fully active. Not likely to appear on the illicit market. |
| 151. SB | 3,5-Diethoxy-4-methoxy-PEA | No activity with 240 mg (PIHKAL, p 820). |
| 152. TA | 2,3,4,5-Tetramethoxy-PEA | With 30 mg users report some eye dilation and a distinctive feeling of intoxication. Ill-effects included gastric upset and a headache the day following (PIHKAL, p 822). Not likely to appear on the illicit market. |
| 153. 3-TASB | 4-Ethoxy-3-ethylthio-5-methoxy-PEA | Operates as a powerful stimulant with 160 mg. Ill-effects include nausea and diarrhoea (PIHKAL, p 826). |
| 154. 4-TASB | 3-Ethoxy-4-ethylthio-5-methoxy-PEA | Described as having more physical problems than psychic virtue. When trialed with 60-100 mg, subjects felt disturbed and did not wish to repeat the experience (PIHKAL, p 829). |
| 155. 5-TASB | 3,4-Diethoxy-5-methylthio-PEA | Again, more agitating physical effects than mental qualities (PIHKAL, p 832). Trialed with 120-160 mg. Feelings of light-headedness were accompanied by diarrhoea and physical discomfort. |
| 156. TB | 4-Thiobutoxy-3,5-dimethoxy-PEA | At 35 mg compound stimulates feelings of euphoria (PIHKAL, p 834). With 80 mg users report feeling in touch with their spirituality but experiencing body discomfort and “some dark edges”. |
| 157. 3-TE | 4-Ethoxy-5-methoxy-3-methylthio-PEA | Described as touching on the psychedelic rather than just intoxicating when trialed with 8-12 mg (PIHKAL, p 837). Appears to make some users introspective and conversation difficult. |
| 158. 4-TE | 3,5-Dimethoxy-4-ethylthio-PEA | Operates to elevate mood and facilitate conversation (PIHKAL, p 840). Users trialing the drug at 20-30 mg describe visuals, eyes closed imagery and erotic fantasy. Based on the descriptions in PIHKAL, it is possible that this compound will appear on the illicit market. |
| 159. 2-TIM | 2-Methylthio-3,4-dimethoxy-PEA | No activity with 240 mg dose (PIHKAL, p 843). |
| 160. 3-TIM | 3-Methylthio-2,4-dimethoxy-PEA | No activity with 240 mg dose (PIHKAL, p 846). |
| 161. 4-TIM | 4-Methylthio-2,3-dimethoxy-PEA | No activity with 150 mg dose (PIHKAL, p 848). |
| 162. 3-TM | 3-Methylthio-4,5-dimethoxy-PEA | With 80 mg, users describe a mild intoxication, eyes-closed images and fantasy. With 100 mg, one user reported rich imagery but ill-effect was occasional defensiveness, paranoia and irritability (PIHKAL, p 849). |
| 163. 4-TM | 4-Methylthio-3,5-dimethoxy-PEA | Compound is a powerful hallucinogen producing a mixture of responses (PIHKAL, p 852). Trialed with 20-40 mg. Some users enjoyed the fantasia and others were disturbed. Ill-effects included mild nausea, body tremors and intestinal cramping. Reactions are probably too severe to make this drug a popular hallucinogen. |</p>
<table>
<thead>
<tr>
<th>No.</th>
<th>Compound</th>
<th>Formula</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>164.</td>
<td>TMA</td>
<td>3,4,5-Trimethoxy-A</td>
<td>++ - Scheduled since 1986. First synthesised and reported in 1955 (PIHKAL, p 857). TMA is a powerful and potentially dangerous psychedelic. At 140 mg, it stimulates general good-humour. At 225 mg it induces hallucinations that can be disturbing and may result in violence. May appear on the illicit market more often because its key precursor is readily available (DDD, p 38).</td>
</tr>
<tr>
<td>165.</td>
<td>TMA-2</td>
<td>2,4,5-Trimethoxy-A</td>
<td>Compound acts as a euphoriant and hallucinogen. At 40 mg, one user reported eyes-closed imagery, fantasy and feelings of peace and contentment. Ill-effects included light diarrhoea and brief intestinal cramps (PIHKAL, p 864). Abuse is rare but compound recently seized on the 'Rave' scene in Germany (DDD, p 67).</td>
</tr>
<tr>
<td>166.</td>
<td>TMA-3</td>
<td>2,3,4-Trimethoxy-A</td>
<td>No activity with 100 mg dose (PIHKAL, p 868).</td>
</tr>
<tr>
<td>167.</td>
<td>TMA-4</td>
<td>2,4,5-Trimethoxy-A</td>
<td>Very little is known about the effect of the compound on humans (PIHKAL, p 869). With one human trial conducted with 80 mg, user reported introspection similar to LSD.</td>
</tr>
<tr>
<td>168.</td>
<td>TMA-5</td>
<td>2,3,6-Trimethoxy-A</td>
<td>30 mg produced “intense introspection” comparable to LSD experience (PIHKAL, p 873). As with the compound above, activity in humans has only been superficially explored.</td>
</tr>
<tr>
<td>169.</td>
<td>TMA-6</td>
<td>2,4,6-Trimethoxy-A</td>
<td>TMA-6 is a potent psychedelic. When trialed with 25-50 mg, users report long periods of intoxication, altered consciousness and visual effect. Ill-effects included slight diarrhoea, queasiness and negative feelings, but overall the experience has been judged to be enjoyable (PIHKAL, p 876). Based on the assessment in PIHKAL, the compound may later appear on the illicit market.</td>
</tr>
<tr>
<td>170.</td>
<td>3-TME</td>
<td>4,5-Dimethoxy-3-ethylenedioxy-PEA</td>
<td>When trialed with 60-100 mg, users report introspection, self-revelation and generally good humour (PIHKAL, p 880). May later appear on the illicit market.</td>
</tr>
<tr>
<td>171.</td>
<td>4-TME</td>
<td>3-Ethoxy-5-methoxy-4-methylenedioxy-PEA</td>
<td>Dosage of between 60-100 mg. Compound was more toxic than pleasurable for users. There were reports of a mild mental disturbance that was not considered interesting. Ill-effects included gastric upset during the experience and an uneasiness for days after (PIHKAL, p 882). Not likely to appear on the illicit market.</td>
</tr>
<tr>
<td>172.</td>
<td>5-TME</td>
<td>3-Ethoxy-4-methoxy-5-methylthio-PEA</td>
<td>No activity with 200 mg dose (PIHKAL, p 884).</td>
</tr>
<tr>
<td>173.</td>
<td>2-T-MMDA-3a</td>
<td>2-Methylthio-3,4-methylenedioxy-A</td>
<td>No activity with 12 mg dose (PIHKAL, p 886).</td>
</tr>
<tr>
<td>174.</td>
<td>4-T-MMDA-2</td>
<td>4,5-Thiomethyleneoxy-2-methylthio-A</td>
<td>No activity with 25 mg dose (PIHKAL, p 888).</td>
</tr>
<tr>
<td>175.</td>
<td>TMPEA</td>
<td>2,4,5-Trimethoxy-PEA</td>
<td>This is definitely an active compound but did not result in any euphoria and had unpleasant secondary effects, including nausea (PIHKAL, p 891). Trialed with 300 mg. Not likely to appear on the illicit market.</td>
</tr>
<tr>
<td>176.</td>
<td>2-TOET</td>
<td>4-Ethyl-5-methoxy-2-methylthio-A</td>
<td>65 mg produced only minor activity (light-headedness) but some physical discomfort. Testing at higher doses abandoned (PIHKAL, p 893).</td>
</tr>
<tr>
<td>177.</td>
<td>5-TOET</td>
<td>4-Ethyl-2-methoxy-5-methylthio-A</td>
<td>A powerful hallucinogen that produces different responses in users (PIHKAL, p 896). 18 mg was too much for one user who writes of a frightening trip from</td>
</tr>
</tbody>
</table>
which they could not escape. Another took 20 mg and describes a “superb, extraordinary material” which prompted eyes-closed fantasy, eroticism, euphoria and serenity. May later appear on the illicit market. The main danger involved is the inability to predict the effect of this hallucinogen on individual users.

| 178. 2-TOM | 5-Methoxy-4-methyl-2-methylthio-A | Trialed with 60-80 mg. Compound acts as a euphoriant and is described as “friendly” (PIHKAL, p. 900). May later appear on the illicit market. |
| 179. 5-TOM | 2-Methoxy-4-methyl-5-methylthio-A | 5-TOM is described as a “pretty heavy-duty experience, with more negative reports than positive ones” (PIHKAL, p. 906). Ill-effects of dosage between 30-50 mg included some cramping, nausea, general discomfort and in one case a cataleptic response. Although abuse is rare, a quantity was seized on the illicit market in Canada (DDD, p. 74). |
| 180. TOMSO | 2-Methoxy-4-methyl-5-methylsulfinyl-A | 150 mg produced no effect on its own. 100 mg mixed with alcohol resulted in intoxication (PIHKAL, p. 907). |
| 181. TP | 4-Propylthio-3,5-dimethoxy-PEA | Toxicity levels have been judged to outweigh the ‘beneficial’ mental effect when trialed with 10-16 mg (PIHKAL, p. 909). Produces rich imagery and visuals. Ill-effects include pressure at the back of the neck and fragile nervous system. |
| 182. TRIS | 3,4,5-Triethoxy-PEA | No activity with 240 mg dose (PIHKAL, p. 912). |
| 183. 3-TSB | 3-Ethoxy-5-ethylthio-4-methoxy-PEA | No activity with 200 mg dose (PIHKAL, p. 913). |
| 184. 4-TSB | 3,5-Diethoxy-4-methylthio-PEA | No activity with 240 mg dose (PIHKAL, p. 916). |
| 185. 3-T-TRIS | 4,5-Diethoxy-3-ethylthio-PEA | No activity with 160 mg dose (PIHKAL, p. 918). |
| 186. 4-T-TRIS | 3,5-Diethoxy-4-ethylthio-PEA | No significant activity with 200 mg dose (PIHKAL, p. 921). |
| 187. 4-MTA | α-methyl-4-(methylthio)phenethylamine | *** This substance is not listed in PIHKAL but will be added to Schedule 2 of the 1971 Misuse of Drugs Act following evidence of abuse. In 1999, 4-MTA became the second substance to be assessed under the EU’s Early Warning System. That same year the European Council determined that all Member States should be obliged to bring the compound under control. |
| 188. N-hydroxy-amphetamine | α-methylphenethylhydroxylamine | *** Again, this compound is not listed in PIHKAL but was found to be subject to abuse in the United Kingdom. It will shortly be listed as a Class B drug under the UK Misuse of Drugs Act 1971. |
**TRYPTAMINES**

++ - Indicates that the compound is scheduled under the 1971 UN Convention on Psychotropic Substances.

*** - Indicates that this compound is not covered by the generic definition in the UK Misuse of Drugs Act 1971.

<table>
<thead>
<tr>
<th>Common/code name</th>
<th>Chemical name</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. AL-LAD</td>
<td>6-Allyl-N,N,diethyl-NL</td>
<td>*** - Shulgin records positive experiences and described compound as highly potent (<em>TIHKAL</em>, p 391). Trialed with 80-160 mg.</td>
</tr>
<tr>
<td>2. AMT</td>
<td>α-Methyl-T</td>
<td>AMT is a potent tryptamine with hallucinogenic properties. In the past it has been used as an antidepressant, particularly in Russia. Therapeutic use has been discontinued and appearance on the illicit market is rare at present (DDD, p 97).</td>
</tr>
<tr>
<td>3. DAT</td>
<td>N,N-Diallyl-T</td>
<td>Abuse of this hallucinogen is rare but may become more common since precursors are commercially available (DDD, p 93).</td>
</tr>
<tr>
<td>4. DBT</td>
<td>N,N-Dibutyl-T</td>
<td>Very few humans trials have been carried out and little was documented about the effects of DBT (<em>TIHKAL</em>, p 393).</td>
</tr>
<tr>
<td>5. DET</td>
<td>N,N-Diethyl-T</td>
<td>++ - Scheduled since 1971. A potent compound trialed with between 50-100 mg. Users report illusions and hallucinations with some ill-effects (<em>TIHKAL</em>, p 396). Although abuse is currently rare, clandestine operators have mastered the synthesis of DET from commercially available precursors (DDD, p 90).</td>
</tr>
<tr>
<td>6. DIPT</td>
<td>N,N-Diisopropyl-T</td>
<td>Between 25-100 mg affects auditory rather than visual senses, i.e. distorts the pitch and interpretation of sound (<em>TIHKAL</em>, p 403). Like DET, abuse is rare but DIPT has been synthesised for the illicit market from commercially available precursors (DDD, p 92).</td>
</tr>
<tr>
<td>7. α,О-DMS</td>
<td>5-Methoxy-alpha-methyl-T</td>
<td>*** - Trialed with 2.5-4.5 mg. Drug is extremely potent. Ill-effects include vomiting, diarrhoea and bad dreams. Nevertheless, Shulgin suggests that it should be of significant interest to neuropharmacologists (<em>TIHKAL</em>, p 406).</td>
</tr>
<tr>
<td>8. DMT</td>
<td>N,N-Dimethyl-T</td>
<td>++ - Scheduled since 1971. First synthesised in Canada in the early 1930s. Discovered to be a natural product in the plant world in the 1950s and then proven to be a natural component of human metabolism. Clinical studies carried out in the US in the 1960s involved administering DMT to schizophrenics. Active when trialed with 20-100 mg taken intramuscularly or 60-100 mg smoked. Produces hallucinations and visual distortions (<em>TIHKAL</em>, p 412). DMT must be smoked or injected to show any activity in humans and drug appearing on the illicit market is almost always smoked. Abuse is frequent (DDD, p 87).</td>
</tr>
<tr>
<td>9. 2,α-DMT</td>
<td>2,α-Dimethyl-T</td>
<td>*** - At 300-500 mg, users report peaceful experiences with enhancement of visual perception but not hallucinations. One side effect was dehydration the next day (<em>TIHKAL</em>, p 422).</td>
</tr>
<tr>
<td>10. α,N-DMT</td>
<td>α,N-Dimethyl-T</td>
<td>*** - Users report fairly unpleasant experiences after oral ingestion of 50-100 mg. Very little psychedelic effect. Ill-effects included physical discomfort, sneezing and teeth clenching (<em>TIHKAL</em>, p 423).</td>
</tr>
<tr>
<td>11. DPT</td>
<td>N,N-Dipropyl-T</td>
<td>Trialed with 100-250 mg. Some users report quasi-religious</td>
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<tr>
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</tr>
<tr>
<td>14. ETH-LAD</td>
<td>6,N,N-Triethyl-(\alpha)-NL</td>
<td>*** - SHULGIN DESCRIBES ETH-LAD AS A &quot;REMARKABLE COMPOUND&quot;, MORE POTENT THAN LSD BUT LESS AGGRESSIVE IN NATURE (TIHKAL, P 444). TRIALED WITH 40-150 MG. ON THE BASIS OF HIS ASSESSMENT IT MAY LATER APPEAR ON THE ILLICIT MARKET.</td>
</tr>
<tr>
<td>15. Harmaline</td>
<td>3,4-Dihydro-7-methoxy-1-methyl-C</td>
<td>SHULGIN DESCRIBES UNPLEASANT EXPERIENCE WITH 150-300 MG. ILL-EFFECTS WERE NAUSEA AND DIARRHOEA (TIHKAL, P 446). HE TRIES HARMALINE IN COMBINATION WITH A NUMBER OF OTHER COMPOUNDS SUCH AS DMT AND MESCALINE.</td>
</tr>
<tr>
<td>16. Harmine</td>
<td>7-Methoxy-1-methyl-C</td>
<td>SMALLER DOSE OF 40 MG RESULTS IN FEELINGS OF EXCITEMENT, LIGHTHEADEDNESS AND VISUAL HALLUCINATIONS. LARGER DOSES OF 300 MG CAUSE PSYCHOTIC SYMPTOMS (TIHKAL, P 456). SHULGIN SUGGESTS THAT ALTHOUGH HARMINE CAN SERVE AS A TREATMENT FOR PARKINSON'S DISEASE, A DIMETHYLATED HARMINE HAS THE POTENTIAL TO CAUSE PARKINSON'S DISEASE OR A LIKE STATE. THUS, INEXPERIENCED BACKYARD CHEMISTS COULD MAKE A MISTAKE AND PRODUCE AN EXTREMELY DANGEROUS COMPOUND. THERE ARE PARALLELS HERE WITH THE BOTTCHED SYNTHESIS OF A MEPERIDINE (PETHEDINE) ANALOGUE IN THE EARLY 1980'S. A CLANDESTINE MANUFACTURER ATTEMPTING TO PRODUCE MPPP PRODUCED THE BI-PHOSPHATE MPTP, WHICH CAUSED AN IRREVERSIBLE PARALYSIS LIKENED TO PARKINSON'S DISEASE. ALTHOUGH IT HAS NOT APPEARED OFTEN IN ILLICIT SEIZURES, IN THE LATE 1990'S, A CLANDESTINE LABORATORY IN SCOTLAND WAS FOUND TO BE PRODUCING HARMINE (DR LES KING, INTERVIEW, MARCH 2000).</td>
</tr>
<tr>
<td>17. 4-HO-DBT</td>
<td>N,N-Dibutyl-4-hydroxy-T</td>
<td>NO ACTIVITY WITH 20 MG DOSE (TIHKAL, P 458).</td>
</tr>
<tr>
<td>18. 4-HO-DET</td>
<td>N,N-Diethyl-4-hydroxy-T</td>
<td>LOWER DOSES OF 15 MG RESULTS IN EUPHORIA AND A QUASI-RELIGIOUS EXPERIENCE BUT HIGHER DOSES CAUSE NAUSEA, JAW-TIGHTENING, BODY TREMOR AND MENTAL INCOORDINATION (TIHKAL, P 461).</td>
</tr>
<tr>
<td>19. 4-HO-DIPT</td>
<td>N,N-Diisopropyl-4-hydroxy-T</td>
<td>TRIALED WITH 15-20 MG. FAST AND INTENSE ONSET OF PSYCHEDELIC EXPERIENCE. SHORT DURATION OF EFFECT (TIHKAL, P 465).</td>
</tr>
<tr>
<td>20. 4-HO-DMT</td>
<td>N,N-Dimethyl-4-hydroxy-T</td>
<td>INTENSE VISUAL DISTORTIONS ARE PRODUCED WHEN TRIALED WITH 10-25 MG. SHULGIN DESCRIBES A VIVID TRIP BUT SIDE-EFFECTS INCLUDE</td>
</tr>
<tr>
<td>21.</td>
<td>5-HO-DMT</td>
<td>N,N-Dimethyl-5-hydroxy-T</td>
</tr>
<tr>
<td>22.</td>
<td>4-HO-DPT</td>
<td>N,N-Dipropyl-4-hydroxy-T</td>
</tr>
<tr>
<td>23.</td>
<td>4-HO-MET</td>
<td>N-Ethyl-4-hydroxy-N-methyl-T</td>
</tr>
<tr>
<td>24.</td>
<td>4-HO-MIPT</td>
<td>4-Hydroxy-N-isopropyl-N-methyl-T</td>
</tr>
<tr>
<td>25.</td>
<td>4-HO-MPT</td>
<td>4-Hydroxy-N-methyl-N-propyl-T</td>
</tr>
<tr>
<td>26.</td>
<td>4-HO-pyr-T</td>
<td>4-Hydroxy-N,N-tetramethylene-T</td>
</tr>
<tr>
<td>27.</td>
<td>Ibogaine</td>
<td>A completely substituted Tryptamine</td>
</tr>
<tr>
<td>28.</td>
<td>LSD</td>
<td>N,N-Diethyl-D-Lysergamide(or D-Lysergic acid Diethylamide)</td>
</tr>
<tr>
<td>29.</td>
<td>LSM</td>
<td>D-Lysergic acid morpholine</td>
</tr>
<tr>
<td>30.</td>
<td>MBT</td>
<td>N-Butyl-N-methyl-T</td>
</tr>
<tr>
<td>31.</td>
<td>4,5-MDO-DIPT</td>
<td>N,N-Diisopropyl-4,5-methylenedioxy-T</td>
</tr>
<tr>
<td>32.</td>
<td>5,6-MDO-DIPT</td>
<td>N,N-Diisopropyl-5,6-methylenedioxy-T</td>
</tr>
<tr>
<td>33.</td>
<td>4,5-MDO-DMT</td>
<td>N,N-Dimethyl-4,5-methylenedioxy-T</td>
</tr>
<tr>
<td>34.</td>
<td>5,6-MDO-DMT</td>
<td>N,N-Dimethyl-5,6-methylenedioxy-T</td>
</tr>
<tr>
<td>35.</td>
<td>5,6-MDO-</td>
<td>N-Isopropyl-N-</td>
</tr>
<tr>
<td>MIPT</td>
<td>methyl-5,6-methylenedioxy-T</td>
<td>administering 75mg orally (TIHKAL, p 508). Not likely to become popular on illicit drugs market.</td>
</tr>
<tr>
<td>-------------</td>
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<td>------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>36. 2-Me-DET</td>
<td>N,N-Diethyl-2-methyl-T</td>
<td>*** - Results in auditory rather than visual distortion when trialed with 80-120 mg. Shulgin reports unsatisfactory and rather unpleasant effects (TIHKAL, p 512). Not likely to become popular on illicit drugs market.</td>
</tr>
<tr>
<td>37. 2-Me-DMT</td>
<td>2,N,N-Trimethyl-T</td>
<td>*** - Shulgin does not describe the drug as psychedelic although it did bring about auditory distortion. Trialed with 5-100 mg. Operates as a sexual stimulant (TIHKAL, p 514). In view of its ability to augment and enhance sexual pleasure there is some possibility that illicit manufacture and use will become more popular.</td>
</tr>
<tr>
<td>38. Melatonin</td>
<td>N-Acetyl-5-methoxy-T</td>
<td>*** - Trialed with 1-10 mg. Has the effect of a sedative. Sold legally in some countries as a cure for jet lag.</td>
</tr>
<tr>
<td>39. 5-MeO-DET</td>
<td>N,N-Diethyl-5-methoxy-T</td>
<td>*** - A simple compound to manufacture. Trialed with 1-3 mg. 5-MeO-DET operates as a sexual stimulant, but the ill-effects of ingesting the later compound are disturbing. Users report intense dizziness and depression with oral ingestion, and dizziness, trembling, anxiety, cold sweating and belly cramps when the compound is smoked. As a result, it is unlikely to appear on the illicit market (TIHKAL, p 524).</td>
</tr>
<tr>
<td>40. 5-MeO-DIPT</td>
<td>N,N-Diisopropyl-5-methoxy-T</td>
<td>*** - Trialed with 6-12 mg. Shulgin lauds the compound as a short term aphrodisiac, more effective that 2C-B (TIHKAL, p 527). Other factors that would make it popular include high potency, ease of manufacture and short period of intoxication. It causes auditory but not visual distortions. Some users have reported negative aspects in that they felt “uncomfortable” on the drug. The positive aspects described by Shulgin may, however, be sufficient to create a market for the compound in the future.</td>
</tr>
<tr>
<td>41. 5-MeO-DMT</td>
<td>5-Methoxy-N,N-dimethyl-T</td>
<td>*** - This is a very powerful hallucinogen causing visual and auditory distortions when trialed with 6-20 mg (TIHKAL, p 531). The drug is smoked and is not at all active when taken orally. A quantity of 5-MeO-DMT was seized by police in Oregon in 1998, although it has not yet appeared in large amounts on the illicit market. Easy access to commercially available precursors makes it more likely that illicit manufacture and use will increase (DDD, p 89).</td>
</tr>
<tr>
<td>42. 4-MeO-MIPT</td>
<td>N-Isopropyl-4-methoxy-N-methyl-Tryptamine</td>
<td>*** - Operates as an aphrodisiac. When trialed with 2-30 mg, users report no intense visuals but no ill-effects either (TIHKAL, p 538). Qualities as an aphrodisiac may make it popular in the future.</td>
</tr>
<tr>
<td>43. 5-MeO-MIPT</td>
<td>N-Isopropyl-5-methoxy-N-methyl-T</td>
<td>*** - The compound is more potent when taken orally, but can also be smoked. When trialed with 4-6 mg (orally) and 12-20 mg (smoked) one user experienced a sense of depersonalisation and a loss of immediate contact with surroundings. No serious ill-effects recorded (TIHKAL, p 541). Has some potential to become a popular drug on the illicit market.</td>
</tr>
<tr>
<td>44. 5,6-MeO-MIPT</td>
<td>5,6-Dimethoxy-N-isopropyl-N-methyl-T</td>
<td>*** - No activity with 75 mg dose (TIHKAL, p 546).</td>
</tr>
<tr>
<td>45. 5-MeONMT</td>
<td>5-Methoxy-N-methyl-T</td>
<td>*** - Shulgin set out a recipe for this compound but wrote that little is known about its effect on humans (TIHKAL, p 547).</td>
</tr>
<tr>
<td>46. 5-MeO-pyr-T</td>
<td>5-Methoxy-N,N-tetramethylene-T</td>
<td>*** - Described by Shulgin as “an absolute poison” (TIHKAL, p 548). When trialed with 0.5-2 mg (orally) and 2-3 mg (smoked), ill-effects included tinnitus (ringing in the ears), nausea and vomiting. Smoking slightly higher doses led to</td>
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</table>
unconsciousness and memory loss. On the basis of this discouraging report it is unlikely that the compound would ever become popular on the illicit market.

47. 6-MeO-THH 6-Methoxy-1-methyl-1,2,3,4-tetrahydro-C

*** - Virtually nothing is known about the psychopharmacology of this compound or others classified as 'harman analogues'. What is known is discussed by Shulgin (THIKAL, pp 551).

48. 5-MeOTMT 5-Methoxy-2,N,N-trimethyl-T

*** - At lower doses of 65 mg, the compound acts as a relaxant and a sexual stimulant. A powerful hallucinogen at higher doses of 120-150 mg, but there is a toxic component (THIKAL, p 557). Based on Shulgin's assessment, 5-MeO-TMT does have properties that may make it popular on the illicit market in the future.

49. 5-MeSDMT N,N-Dimethyl-5-methylthio-T

*** - Smoked at lower doses of 15-30 mg, compound produced a state described by the user as "pointlessly stoned" (THIKAL, p 561). Very few experiments have been conducted and little is known about its effect on humans.

50. MIPT N-Isopropyl-N-methyl-T

A psychedelic that triggered minor sensory changes when trialed with 10-25mg. Relatively mild muscular tension was recorded (THIKAL, p 562).

51. α-MT alpha-Methyl-T

*** - Available as an anti-depressant in the Soviet Union in the 1960s. The effects of the drug are largely dependent on the individual consuming. While some have found it a useful psychedelic, others have been disturbed by negative side-effects that include jaw clenching and vomiting. Shulgin's description of his experiences with α-MT are not likely to encourage users to experiment. 15mg ingested orally resulted in a strong psychedelic trip that lasted 12 hours. 20mg produced an uncomfortable reaction and a hangover. 30mg produced a general numbness and a loss of motor coordination (THIKAL, p 566). Nevertheless, at a laboratory raided near Cambridgeshire in 1999, police discovered plans for the manufacture of α-MT and other tryptamines (Dr Les King, Interview, March 2000).

52. NET N-Ethyl-T

Only modest human trials have been carried out and researchers are yet to discover any active level in humans. However, Shulgin describes this and a like compound as having "staggering potential" (THIKAL, p 572). Not likely to become a drug of abuse in the near future.

53. NMT N-Methyl-T

NMT is an alkaloid that is found naturally in the bark, shoots and leaves of several species of Virola, Acacia and Mimosa trees. It can also be synthesised in the laboratory. There are very few reports of oral ingestion. Shulgin had information that smoking 50-100 mg resulted in visuals lasting approx. 15 seconds (THIKAL, p 574). There is little to suggest that it is likely to become popular on the illicit market.

54. PRO-LAD 6-Propyl-NL

*** - Compound was given a half-hearted 'review' after being trialed with 100-200 mg. It was described as pleasant and good for humour, although not "cosmic" (THIKAL, p 576). There is a possibility that it may become popular if advertised and sold for the illicit market.

55. pyr-Tryptamine N,N-Tetramethylene-T

*** - With 50 mg ingested orally or 70 mg smoked, the compound proved to be almost inactive. Ill-effects included muscle and joint pains, dizziness and nausea (THIKAL, p 578). Not likely to become popular on the illicit market.

56. Tryptamine

The nucleus of all drugs contained in this list (THIKAL, p 579). 250 mg taken intravenously may provide for an experience similar to LSD. However it has stronger ill-effects
which include nausea, vomiting, dizziness, sweating, acute or dulled hearing, metallic taste and heaviness of body. Thus, the nucleus itself is not likely to become popular on the illicit market.

<table>
<thead>
<tr>
<th>57. Tetrahydroharmine</th>
<th>Can be obtained from a number of plant sources or synthesised in the laboratory. Very few studies have been conducted and nothing was known about its activity in humans at the time <em>TIHKAL</em> was published (<em>TIHKAL</em>, p 584).</th>
</tr>
</thead>
<tbody>
<tr>
<td>58. α,Ν,O-TMS</td>
<td>*** - Operated as a sexual stimulant when trialed with 10-20 mg. Properties as an aphrodisiac may make it popular on the clandestine market (<em>TIHKAL</em>, p 586).</td>
</tr>
</tbody>
</table>
### HOMOLOGUES/ANALOGUES OF N-BUTANOL

<table>
<thead>
<tr>
<th>Common/code name</th>
<th>Chemical name</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. GHB</td>
<td>Gamma Hydroxybutyrate</td>
<td>GHB is a natural constituent present in mammalian brains but can be manufactured synthetically. Abuse of synthetic forms has increased over the last decade, due largely to its simple synthesis and the availability of low cost precursor chemicals for use in manufacture. Although it is not currently scheduled under the United States Controlled Substances Act 1986, GHB has been brought under control in 11 US States (V Sanguineti et al, 1997, p 637). It has not yet been scheduled under the UK Misuse of Drugs Act 1971. GHB is one of three compounds currently being assessed by the WHO, to determine whether it should be brought under international control.</td>
</tr>
<tr>
<td>2. GBL</td>
<td>Gamma butyrolactone</td>
<td>US authorities have been concerned by the recent promotion and sale of GBL, an analogue of GHB. According to intelligence reports, it has been sold illegally as a new dietary supplement touted by promoters as a euphoric elixir that can burn fat, boost mood, improve sexual performance and, paradoxically, aid sleep (“Blue Nitro' Hits San Fransisco”, Microgram, Vol.XXXII, No.3, March 1999, p 93). It is not under international control and is not scheduled under the US Controlled Substances Act or the UK Misuse of Drugs Act.</td>
</tr>
<tr>
<td>3. HMB</td>
<td>Hydroxy butyric acid</td>
<td>A homologue of GHB recently discussed on an Internet site as a GHB-like product that may be worth manufacturing for illicit use. Quantities have not yet been seized on the clandestine market (Dr Les King, Interview, March 2000). HMB is not controlled internationally or under the domestic drug laws of most States.</td>
</tr>
</tbody>
</table>
### UN Drug Control Treaties concluded to date

<table>
<thead>
<tr>
<th>Date and place signed</th>
<th>Title</th>
<th>Entry into force</th>
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</thead>
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# APPENDIX C

## Scheduling of individual Substances Under the 1971 Convention

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<tbody>
<tr>
<td>I</td>
<td>DET</td>
<td>eticyclidine</td>
<td>DOB</td>
<td>Cathinone</td>
<td>MDE</td>
<td>etryptamine</td>
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<tr>
<td></td>
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<td>rolicyclidine</td>
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<td>DMA</td>
<td>N-OH-MDA</td>
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<tbody>
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<td>III</td>
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<tbody>
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</tbody>
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### APPENDIX D

**Bodies Involved in International Drug Control**

**MEMBER STATES OF THE UNITED NATIONS**

<table>
<thead>
<tr>
<th>UN GENERAL ASSEMBLY</th>
</tr>
</thead>
<tbody>
<tr>
<td>United Nations body that acts as a forum enabling individual governments to express their views. Through the General Assembly the UN adopts treaties and resolutions and approves funding allocation.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>ECOSOC</th>
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</thead>
<tbody>
<tr>
<td>The ECOSOC comprises 54 member States. It is charged with the responsibility of developing UN policies related to drug control, coordinating drug control activities with the UN’s broader economic and social programmes and making recommendations to individual governments.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>INCB</th>
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<tbody>
<tr>
<td>The INCB, established under the 1961 Single Convention on Narcotic Drugs, is responsible for monitoring implementation of the UN drug control Conventions. The INCB aims on the one hand, to ensure that adequate supplies of drugs are available for legitimate scientific and medical needs, and on the other, to reduce the opportunities for diversion of substances from licit trade to the illicit market. The INCB publishes an annual report submitted to the ECOSOC through the CND, detailing the state of compliance with international drug controls. It is largely informed by national reports that countries are obliged under the operative Conventions to provide. The Board is not only concerned with reprimanding countries which fail to implement controls but also offers practical and technical assistance. Thirteen member experts serve the INCB in their personal capacity.</td>
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<thead>
<tr>
<th>CND</th>
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<tbody>
<tr>
<td>The CND, one of six functional Commissions of the ECOSOC, is the UN’s central drug control policy making body. As provided for in the Conventions themselves, the CND considers any changes that may be needed to the existing treaties. It may be required to prepare new Conventions or other international instruments. Government representatives of fifty-three member States serve on the CND.</td>
</tr>
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<thead>
<tr>
<th>WHO</th>
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<tbody>
<tr>
<td>Under the 1961 and 1971 Conventions, the WHO has the responsibility of making a recommendation to the CND on the appropriate level of control over substances under assessment. The WHO’s decision is determinative as to medical and scientific matters, although the final control decision is made by the CND. The WHO is assisted by the Expert Committee on Drug Dependence.</td>
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<tr>
<th>UNDCP</th>
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<tbody>
<tr>
<td>The UNDCP both advises and assists Governments and specialised agencies in implementing international drug controls. It was established in 1991, integrating into a single programme the three former UN drugs Units, i.e. Division of Narcotic Drugs, UN Fund for Drug Abuse Control and INCB Secretariat. The Programme’s primary objectives include: 1. co-ordinating and providing effective leadership for all UN drug control initiatives. 2. anticipating the development of phenomena which could create or aggravate illicit drug production, trafficking and abuse and mobilising and supporting timely remedial measures. 3. acting as a world-wide centre for expertise and a repository of information by collecting, analysing and disseminating data, information and experience in all fields of drug control. 4. assisting the CND and INCB in implementing their treaty-based functions and in promoting new instruments as required. 5. providing technical assistance to governments to enable them to set up adequate drug control structures.</td>
</tr>
</tbody>
</table>

## APPENDIX E

### Significant Differences Between the 1961 Single Convention on Narcotic Drugs and the 1971 Convention on Psychotropic Substances

- The 1961 Convention attempts to regulate the production of narcotic drug producing plants (Art. 2(7)). The 1971 Convention does not attempt to control the growth of plants from which psychotropic drugs may be derived.

- Controls over the therapeutic and experimental use of drugs in Schedule I are more restrictive under the 1971 Convention (Art’s 5 and 7) than controls over the therapeutic and experimental use of narcotic drugs in Schedule I of the 1961 Convention (Art. 2(1)).

- Under the 1971 Convention, control decisions require a two-thirds majority vote of the CND (Art. 17). Under the 1961 Convention control decisions require only a simple majority vote of the CND.

- The 1971 Convention provides that Parties may make exceptions to the scheduling decisions of the CND, provided they adopt certain minimum controls (Art. 2(7)). There is no similar clause allowing Parties to avoid scheduling decisions made pursuant to the 1961 Convention.

- The 1971 Convention does not provide for a system of estimates. The 1961 Convention does (Art’s 12, 19 and 21).

- Provisions regulating import and export under the 1971 Convention are weaker than those under the 1961 Convention. Under the latter instrument, Parties must obtain a government authorisation for any individual transaction involving the import and export of a narcotic drug, a preparation containing a narcotic drug or poppy straw (Art’s 31 and 25(2)). The 1971 Convention requires government authorisation only in respect of Schedule I and II substances (Art. 12).

- The 1961 Convention requires States to control substances that may be convertible into dangerous drugs (Art. (3)(3)(iii)). There is no such requirement under the 1971 Convention.

- The 1971 Convention allows for the exemption of preparations containing psychotropic substances in certain circumstances (Art. 3(2)). The 1961 Convention requires that preparations containing narcotic drugs must be subject to the same controls, unless preparations are placed on a separate Schedule (Art. 2(3)).

- The 1961 Convention requires Parties to control not only the salts of drugs listed in Schedule I, but also their isomers, esters and ethers. Originally, the 1971 Convention did not require Parties to regulate any of these generic groupings. Salts were subsequently added in 1977 and stereoisomers were added in 1999, in recognition of the confusion caused by their absence. There are no plans to add esters and ethers to the Schedules of the 1971 Convention.

- The criteria for scheduling drugs under the 1971 Convention (Art. 2(4)) are more complex than the straightforward criteria used in the 1961 Convention (Art. 3(3)(iii)).

- Under the 1971 Convention, the powers of the CND are enhanced at the expense of the powers of the WHO. Both Conventions provide that the CND is to have the final say on whether or not a substance is controlled. However, whereas under the 1961 Convention that decision is based solely upon the recommendations of the WHO (Art. 3(3)(iii)), the 1971 Convention provides that the WHO is to make a preliminary assessment of the substance (determinative as to medical and scientific matters) but the CND is to make the final control decision after considering the WHO’s recommendation, along with any relevant “economic, social, legal, administrative and other factors” (Art. 2(5)).
### APPENDIX F

*Parties to the 1971 Convention (As of November 1999)*

<table>
<thead>
<tr>
<th>Africa</th>
<th>The Americas</th>
<th>Asia</th>
<th>Europe</th>
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<td><strong>Antigua and Barbuda</strong></td>
<td><strong>Afghanistan</strong></td>
<td><strong>Austria</strong></td>
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<td><strong>Bahrain</strong></td>
<td><strong>Bosnia and Herzegovina</strong></td>
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<td><strong>Sri Lanka</strong></td>
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<td><strong>Seychelles</strong></td>
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<td><strong>Sierra Leone</strong></td>
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<td><strong>Russian Federation</strong></td>
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<td><strong>Former Yugoslav Rep. Of</strong></td>
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<td><strong>Zimbabwe</strong></td>
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<td><strong>Yemen</strong></td>
<td><strong>Ukraine</strong></td>
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*Note: Part of the table is not visible in the image.*
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<thead>
<tr>
<th>Oceana</th>
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</thead>
<tbody>
<tr>
<td>Australia (19.5.1982)</td>
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<tr>
<td>Federated States of Micronesia (29.4.1991)</td>
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<td>Fiji (25.3.1993)</td>
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<td>Marshall Islands (9.8.19910)</td>
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<td>New Zealand (7.6.1990)</td>
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<tr>
<td>Palau (19.8.1998)</td>
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<tr>
<td>Papua New Guinea (28.10.1980)</td>
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<tr>
<td>Tonga (24.10.1975)</td>
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Total Parties: 159
### Non-parties to the 1971 Convention (As of November 1999)

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<thead>
<tr>
<th>Africa</th>
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<th>Asia</th>
<th>Europe</th>
<th>Oceana</th>
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<td>Albania</td>
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<td>Republic</td>
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<td>Comoros</td>
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<td>Saint Vincent</td>
<td>Maldives</td>
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<td>Tuvalu</td>
</tr>
<tr>
<td></td>
<td>and the</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Grenadines</td>
<td></td>
<td></td>
<td></td>
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<td>Equatorial</td>
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<td></td>
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<td>United Republic</td>
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<tr>
<td>of Tanzania</td>
<td></td>
<td></td>
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</tr>
</tbody>
</table>

| Total Non-parties | 32 |

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* A list of those countries that are Party to the 1971 Convention is printed in *Psychotropic Substances: Statistics for 1998; Assessments for Medical and Scientific Requirements for Substances in Schedules II, III and IV (E/INCB/1999/3)*, and is updated each year. For monthly updates on the number of countries that have become Parties to the 1971 Convention, see “Monthly Status of Treaty Adherence”, [http://www.un treaty.un.org](http://www.un treaty.un.org) or visit the UNDCP website at [http://www.un dcp.org](http://www.un dcp.org), click on “documentation and data” and then on “Monthly Status of Treaty Adherence”.

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**APPENDIX G**

*Clandestine use of the 23 Chemicals appearing on the Tables of the 1988 Convention*

<table>
<thead>
<tr>
<th>Chemical</th>
<th>Substances Produced</th>
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<td><strong>Table I</strong></td>
<td></td>
</tr>
<tr>
<td>N-acetylanthranalic acid</td>
<td>Methaqualone</td>
</tr>
<tr>
<td>Ephedrine</td>
<td>Methamphetamine</td>
</tr>
<tr>
<td>Ergometrine</td>
<td>LSD</td>
</tr>
<tr>
<td>Ergotamine</td>
<td>LSD</td>
</tr>
<tr>
<td>Isosafrole</td>
<td>MDA/MDMA/MDE</td>
</tr>
<tr>
<td>Lysergic acid</td>
<td>LSD</td>
</tr>
<tr>
<td>3,4-methylenedioxyphenyl-2-propanone</td>
<td>MDA/MDMA/MDE</td>
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<tr>
<td>Norephedrine</td>
<td>Amphetamine</td>
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<td>1-phenyl-2-propanone</td>
<td>Amphetamine/Methamphetamine</td>
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<tr>
<td>Piperonal</td>
<td>MDA/MDMA/MDE</td>
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<tr>
<td>Pseudoephedrine</td>
<td>Methamphetamine</td>
</tr>
<tr>
<td>Safrole</td>
<td>MDA/MDMA/MDE</td>
</tr>
<tr>
<td><strong>Table II</strong></td>
<td></td>
</tr>
<tr>
<td>Acetic anhydride</td>
<td>Heroin/P-2-P/Methaqualone</td>
</tr>
<tr>
<td>Acetone</td>
<td>Cocaine/Heroin</td>
</tr>
<tr>
<td>Anthranilic acid</td>
<td>Methaqualone</td>
</tr>
<tr>
<td>Ethyl ether</td>
<td>Cocaine/Heroin</td>
</tr>
<tr>
<td>Hydrochloric acid</td>
<td>Cocaine/Heroin</td>
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<tr>
<td>Methyl ethyl ketone</td>
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<tr>
<td>Phenylacetic acid</td>
<td>Phenyl-2-propanone</td>
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<tr>
<td>Piperidine</td>
<td>Phencyclidine (PCP)</td>
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<td>Potassium permanganate</td>
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<td>Sulphuric acid</td>
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<td>Toluene</td>
<td>Cocaine</td>
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### APPENDIX H

**Parties to the 1988 Convention (as of November 1998)**

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**Parties to the 1988 Convention (continued)**

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<td><strong>Total Parties</strong></td>
<td><strong>154</strong></td>
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Non-parties to the 1988 Convention (as of November 1998)

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Total non-parties 38

APPENDIX I

A Comparison of ‘Group’ Scheduling Provisions in the United Kingdom, United States and Australia

The United Kingdom

The Misuse of Drugs Act 1971

Schedule 2, Part 1 (Class A Drugs)

1. The following substances and products, namely:

(a) ... [there follows an alphabetical list of specifically named chemical compounds]

(b) any compound (not being a compound for the time being specified in sub-par (a) above) structurally derived from tryptamine or from a ring-hydroxy tryptamine by substitution at the nitrogen atom of the sidechain with one or more alkyl substituents but no other substituent;

(c) any compound (not being methoxyphenamine or a compound for the time being specified in sub-par (a) above) structurally derived from phenethylamine, an N-alkylphenethylamine, α-methylphenethylamine, an N-alkyl-α-methylphenethylamine, α-ethylphenethylamine, or an N-alkyl-α-ethylphenethylamine by substitution in the ring to any extent with alkyl, alkoxy, alkylenedioxy or halide substituents, whether or not further substituted in the ring by one or more other univalent substituents.

(d) any compound (not being a compound for the time being specified in sub-paragraph (a) above) structurally derived from fentanyl by modification in any of the following ways, that is to say,

(i) by replacement of the phenyl portion of the phenylethyl group by any heteromonocycle whether or not further substituted in the heterocycle;
(ii) by substitution in the phenyl group with alkyl, alkenyl, alkoxy, hydroxy, halogeno, haloalkyl, amino or nitro groups;
(iii) by substitution in the piperidine ring with alkyl or alkenyl groups;
(iv) by substitution in the aniline ring with alkyl, alkoxy, alkylenedioxy, halogeno or haloalkyl groups;
(v) by substitution at the 4-position of the piperidine ring with any alkoxy carbonyl or alkoxyalkyl or acyloxy group;
(vi) by replacement of the N-propionyl group by another acyl group.

(e) any compound (not being a compound for the time being specified in sub-paragraph (a) above) structurally derived from pethedine by modification in any of the following ways, that is to say,

(i) by replacement of the 1-methyl group by an acyl, alkyl whether or not unsaturated, benzyl or phenethyl group, whether or not further substituted;
(ii) by substitution in the piperidine ring with alkyl or alkenyl groups or with a propano bridge, whether or not further substituted;
(iii) by substitution in the 4-phenyl ring with alkyl, alkoxy, aryloxy, halogeno or haloalkyl groups;
(iv) by replacement of the 4-ethoxycarbonyl by any other alkoxycarbonyl or any alkoxyalkyl or acyloxy group;
(v) by formation of an N-oxide or of a quarternary base.

2. Any stereoisomeric form of a substance for the time being specified in paragraph 1 above not being dextromethorphan or dextrorphan.
3. Any ester or ether of a substance for the time being specified in paragraph 1 or 2 above not being a substance for the time being specified in Part II of this Schedule.
4. Any salt of a substance for the time being specified in any of paragraphs 1 to 3 above.
5. Any preparation or other product containing a substance or product for the time being specified in any of paragraphs 1 to 4 above.
6. Any preparation designed for administration by injection which includes a substance or product for the time being specified in any of paragraphs 1 to 3 of Part II of this Schedule.

Part II, Class B Drugs

1. The following substances and products, namely: -

(a) ... [there follows an alphabetical list of specifically named chemical compounds].

(b) any 5,5 disubstituted barbituric acid.

2. Any stereoisomeric form of a substance for the time being specified in paragraph 1 of this Part of this Schedule.
3. Any salt of a substance for the time being specified in paragraph 1 or 2 of this Part of this Schedule.
4. Any preparation or other product containing a substance or product for the time being specified in any of paragraphs 1 to 3 of this Part of this Schedule, not being a preparation falling within paragraph 6 of Part 1 of this Schedule.

Part III, Class C Drugs

1. The following substances, namely: -

(a) ... [there follows an alphabetical list of specifically named chemical compounds].

(b) ... [there follows a second list of specifically named chemical compounds].

(c) any compound (not being Trilostane or a compound for the time being specified in sub-paragraph (b) above) structurally derived from 17-hydroxyandrostane-3-one or from 17-hydroxyestran-3-one by modification in any one of the following ways, that is to say,

(i) by further substitution at position 17 by a methyl or ethyl group;
(ii) by substitution to any extent at one or more of positions 1, 2, 4, 6, 7, 9, 11 or 16, but at no other position;
(iii) by unsaturation in the carbocyclic ring system to any extent, provided that there are no more than two ethylenic bonds in any one carbocyclic ring;
(iv) by fusion of ring A with a heterocyclic system.

(d) any substance which is an ester or ether (or where more than one hydroxyl function is available, both an ester and an ether) of a substance specified in sub-paragraph (b) or described in sub-paragraph (c) above.
(e) Chorionic Gonadotrophin (HCG)
Clenbuterol
Non-human chorionin gonadotrophin
Somatotropin
Somatrem
Somatropin

2. Any stereoisomeric form of a substance for the time being specified in paragraph 1 of this Part of this Schedule, not being phenylpropanolamine.

3. Any salt of a substance for the time being specified in paragraph 1 or 2 of this Part of this Schedule.

4. Any preparation or other product containing a substance for the time being specified in any of paragraphs 1 to 3 of this Part of this Schedule.
United States

Controlled Substances Act of 1986

Section 1202. Treatment of Controlled Substance Analogues

Part B of the Controlled Substances Act is amended by adding at the end the following new section:

Section 203 - A controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of this title and title III as a controlled substance in Schedule I.

Section 1203. Definition

Section 102 of the Controlled Substances Act (21 U.S.C 802) is amended by adding in at the end thereof the following:

Section 32 (A) Except as provided in subparagraph (B), the term 'controlled substance analogue' means a substance --
(i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II;
(ii) which has a stimulant, depressant or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or
(iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.

(B) Such term does not include --
(i) a controlled substance;
(ii) any substance for which there is an approved new drug application;
(iii) with respect to a particular person any substance, if an exemption is in effect for investigational use, for that person, under section 505 of the Federal Food, Drug and Cosmetic Act (21 U.S.C 355) to the extent conduct with respect to such substance is pursuant to such exemption; or
(iv) any substance to the extent not intended for human consumption before such an exemption takes effect with respect to that substance.
Australia

Customs Act 1901 (Cth)

Schedule VI

... [there follows an alphabetical list of specifically named chemical compounds, to which is added]

A substance ("drug analogue") which is, in relation to another substance (being a substance specified elsewhere in this Schedule, or a stereoisomer, a structural isomer (with the same constituent groups) or an alkaloid of such a substance): -
(a) a stereoisomer; or
(b) a structural isomer having the same constituent groups; or
(c) an alkaloid; or
(d) a structural modification obtained in 1 or more of the following ways:

(i) by the replacement of up to 2 carbocyclic or heterocyclic ring structures with different carbocyclic or heterocyclic ring structures;
(ii) by the addition of hydrogen atoms to 1 or more unsaturated bonds;
(iii) by the addition of 1 or more of the following groups, namely alkoxy, cyclic diether, acyl, acyloxy, mono-amino and dialkylamino groups with up to 6 carbon atoms in any alkyl residue; alkyl, alkenyl and alkynyl groups with up to 6 carbon atoms in the group, where the group is attached to oxygen (for example, an ester or an ether group), nitrogen, sulphur or carbon; and halogen, hydroxy, nitro and amino groups;
(iv) by the replacement of 1 or more of the groups specified in subparagraph (iii) with another such group or groups;
(v) by the conversion of a carboxyl or an ester group into an amide group; or
(c) otherwise an homologue, analogue, chemical derivative or substance substantially similar in chemical structure;

however obtained, except where the drug analogue is separately specified in this Schedule.

Drug Misuse and Trafficking Act 1985 (New South Wales)

[At the end of Schedule 1 of the 1985 Act listing separately those substances subject to control, there is inserted the following definition of "[p]rohibited plant or prohibited drug"]

....

Any substance that is an analogue of a drug prescribed in this Schedule, being a substance that has psychotropic properties, is not separately specified in this Schedule and is, in relation to the drug, any of the following:

(a) a structural isomer having the same constituent groups as the drug,
(b) a structural modification obtained in one or more of the following ways:

(i) the replacement of up to 2 carbolic or heterocyclic ring structures with different carbocyclic or heterocyclic ring structures,
(ii) the addition of hydrogen atoms to 1 or more unsaturated bonds,
(iii) the addition of 1 or more of the following groups having up to 6 carbon atoms in any alkyl residue, namely, alkoxy, cyclic diether, acyl, acyloxy, monoalkyamino and dialkylamino groups,
(iv) the addition of 1 or more of the following groups having up to 6 carbon atoms in the groups and being attached to oxygen, namely, alkyl, alkenyl and alkynyl groups (for example, ester groups and ether groups),
(v) the addition of 1 or more of the following groups having up to 6 carbon atoms in the group and being attached to nitrogen, sulphur or carbon, namely, alkyl, alkenyl and alkynyl groups,
(vi) the addition of 1 or more of the following groups, namely, halogen, hydroxy, nitro and amino groups,
(vii) the replacement of 1 or more groups specified in subparagraphs (iii)-(vi) with 1 or more other groups so specified,
(viii) the conversion of a carboxyl or an ester group into an amide group.

Controlled Substances Act 1984 (South Australia)

Section 4 of that Act reads:

(2) A substance is an analogue of another for the purposes of this Act if

(a) they both have substantially similar chemical structures; or
(b) they both have substantially similar pharmacological effects.

(3) An analogue of a drug of dependence or a prohibited substance (not being an analogue that is itself declared by regulation to be a drug of dependence or a prohibited substance) is by virtue of this subsection a prohibited substance.

Model schedule suggested by the Australian Model Criminal Code Officers Committee

Regulation 5

Substances that are controlled drugs

(1) For the purposes of the Criminal Code, the following substances are controlled drugs:

(a) a substance specified in Table 1;
(b) a related drug.

(2) A related drug is any of the following:
(a) a sterioisomer of a substance specified in Table 1;
(b) a positional isomer of a substance specified in Table 1 or referred to in paragraph (a);
(c) an ether of a substance specified in Table 1 or referred to in paragraph (a) or (b);
(d) an ester of a substance specified in Table 1 or referred to in paragraph (a), (b) or (c);
(e) a structural modification of any substance specified in Table 1 or referred to in paragraph (a), (b), (c) or (d) obtained in any of the following ways:

(i) by the replacement of up to 2 carbolic or heterocyclic ring structures with different
carbocyclic or heterocyclic ring structures;
(ii) by the addition of hydrogen atoms to one or more unsaturated bonds;
(iii) by the conversion of a carboxyl or an ester group into an amide group;
(iv) by the addition of, or the replacement of a hydrogen atom with, one or more of the
    following defined functional groups:

    + an alkoxy, cyclic diether, acyl, acyloxy, mono-alkyl amino or dialkyl amino group
      with up to 6 carbon atoms in any alkyl residue;
    + an alkyl, alkenyl or alkynyl group with up to 6 carbon atoms in the group and where the
      group is attached to oxygen (for example forming an ester or an ether group), nitrogen,
      sulphur or carbon; and
    + a halogen, hydroxy, nitro or amino group.
## APPENDIX J

*Ratification by EU Member States of the 1971 Convention on Psychotropic Substances*

<table>
<thead>
<tr>
<th>Country</th>
<th>Date of ratification/accession</th>
<th>Important reservations*</th>
</tr>
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<td>Austria</td>
<td>23 June 1997</td>
<td>Austria interprets Art. 22 (penal provisions) as allowing for administrative penalties in cases of a minor nature.</td>
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<td>Belgium</td>
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<td>Finland</td>
<td>20 November 1972</td>
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<td>France</td>
<td>28 January 1975</td>
<td>France does not consider itself bound by Art. 31 (2) and considers that disputes can only be sent to International Court of Justice with the consent of all parties to dispute.</td>
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<td>Germany</td>
<td>2 December 1977</td>
<td>Germany does not except all record keeping requirements in Art. 11(2), in respect of Schedule III substances.</td>
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* Note that this is not a comprehensive list of reservations, but a summary of the more significant ones. Each year, the INCB publishes an update on the status of adherence to the UN drug control treaties in its Annual Report. For a monthly update, see [http://www.unodp.org](http://www.unodp.org) (click on ‘documentation and data’ and then ‘Conventions’).
### Ratification by EU Member States of the 1988 Convention Against Traffic in Illicit Drugs and Psychotropic Substances*

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<td>Austria interprets Art. 3 (1) and (2) as allowing administrative penalties in cases of a minor nature.</td>
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<td>France</td>
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<td>Germany</td>
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<td>Germany understands that 'basic concepts' of a legal system referred to in Art. 3 may be subject to change.</td>
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<td>The Netherlands understands that 'illicit traffic' is to be interpreted in a limited sense for the purposes of certain obligations imposed. The Netherlands understands that discretion of public prosecutors may be wider with respect to offences established in accordance with Art. 3 (2) than Art. 3(1).</td>
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<tr>
<td>European Union*</td>
<td>31 December 1990</td>
<td>Extent of competence: Article 12</td>
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* The decision of the European Council concerning the conclusion of the 1988 Convention was made on 22 October 1990. December 31 is the date on which the instrument of ratification was formally deposited with the Secretary-General.
APPENDIX K

Thirteen years of EC Action Against Illicit Drugs

1987
- The European Economic Community (EEC) participates in the Vienna Conference on the illicit trade in narcotic drugs and psychotropic substances.
- EEC makes its first financial contribution to the international campaign against illicit drugs.

1988
- EEC becomes a signatory to the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.
- European Parliament takes initiative to include the subject of combating drugs in the European budget.

1989
- Establishment of a European Committee to Combat Drugs (ECCD) comprised of the national co-ordinators from each of the EEC Member States.

1990
- First Community instrument designed to prevent the diversion of precursor and essential chemicals used in illicit manufacture (Regulation EEC/3677/90).
- European Council adopts first European Action Plan to Combat Drugs during its Rome session.

1992
- Treaty of European Union signed in Maastricht. First time drugs mentioned specifically in Treaty signed by Member States.
- Adoption of Directive on manufacture and marketing of certain substances used in the illicit manufacture of narcotic drugs and psychotropic substances (92/109 EEC).
- Much revised and updated version of first European Plan to Combat Drugs adopted in Edinburgh.

1993
- Establishment of EMCDDA.

1994
- EUROPOL Drugs Unit (EDU) established.

1996
- Joint Action of 17 Dec. concerning approximation of laws and practices of Member States in field of drugs specifically mentions need for convergent legislation and early warning system to fill the vacuum created by NSDs.
- European Council report on drugs remarking on need to take action against NSDs is sent to Heads of State and Government meeting in Dublin. Dublin meeting identifies issue of NSDs as needing priority attention within EU and between EU and third countries. Fight against drugs is top priority of EU’s Irish presidency.
- EUROPOL Convention ratified. Agreement made on better coordination of police and customs. New funding agreed for action on drugs in areas of health and criminal justice.

1997
- Joint Action of 16 June concerning information exchange, risk assessment and control of NSDs.
- Communication from the Commission to Council and the European Parliament on the Control of NSDs (Designer Drugs) COM (97) 249 final.
- Treaty of Amsterdam signed by Member States.

1998
- EU Member States work together to develop common stance on priority areas to be discussed at 1998 UNGASS.
- MBDB formally referred for risk assessment in February.

1999
- Council decision in November that Member States are not obliged to control MBDB.
- 4-MTA formally referred for risk assessment in February. Council decision in September requires all Member States to bring the compound under control.
- Treaty of Amsterdam enters into force.
APPENDIX L


THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the European Union, in particular Article K.3 (2)(b) thereof,

Having regard to the initiative of the Netherlands,

NOTING that the Dublin European Council welcomed the progress report on drugs on 13 and 14 December 1996 and endorsed the action proposed in that report, including the proposal to tackle the problem of synthetic drugs at three levels, namely through legislation, practical cooperation against production and trafficking and international cooperation,

REFERRING to Joint Action 96/750/JHA of 17 December, adopted by the Council on the basis of Article K.3 of the Treaty on the European Union, concerning the approximation of the laws and practices of the Member States of the European Union to combat drug addiction and to prevent and combat illegal drug trafficking,

REFERRING in particular to Article 5 of the said Joint Action, which provides that the Member States shall endeavour to draft convergent legislation to the extent necessary to make up legal ground or fill legal vacuums as regards synthetic drugs. In particular they shall promote the establishment of a rapid information system to enable such drugs to be identified as substances liable to be prohibited as soon as they appear anywhere in a Member State,

CONSIDERING that the particular dangers inherent in the development of synthetic drugs require rapid action by the Member States,

CONSIDERING that when new synthetic drugs are not brought within the scope of criminal law in all Member States, problems may arise in the international cooperation between the judicial authorities and law-enforcement agencies of the Member States owing to the fact that the offence or offences in question are not punishable under the laws of both the requesting and the requested State,

CONSIDERING that from an inventory drawn up since the adoption of the said Joint Action it can be concluded that new synthetic drugs have appeared within the Member States,

CONSIDERING that common action can be taken only on the basis of reliable information on the emergence of new synthetic drugs and the results of expert assessment of the risks caused by the use of the new synthetic drugs and implications of submitting such drugs under control,

CONSIDERING that it is therefore necessary to set up a common mechanism permitting expeditious action, in taking necessary measures or introducing controls on new synthetic drugs, on the basis of a rapid exchange of information on new synthetic drugs emerging in the Member States and the common assessment of the risks thereof,

WITHOUT PREJUDICE to the powers of the European Community,

HAS ADOPTED THIS JOINT ACTION:

Article 1: Purpose

This Joint Action aims at the creation of a mechanism for rapid exchange of information on new synthetic drugs and the assessment of their risks in order to permit the application of the measures of control on psychotropic substances, applicable in the Member States, equally to new synthetic drugs. This mechanism will be jointly implemented in accordance with the procedures established hereunder.
Article 2: Scope

This Joint Action concerns new synthetic drugs which are not currently listed in any of the Schedules to the 1971 United Nations Convention on Psychotropic Substances, and which pose a comparable serious threat to public health as the substances listed in Schedules I or I thereto and which have a limited therapeutic value. It relates to end-products, as distinct from precursors in respect of which Council Regulation (EEC) No 3677/90 of 13 December 1990 laying down measures to be taken to discourage the diversion of certain substances to the illicit manufacture of narcotic drugs and psychotropic substances and Council Directive 92/109/EEC of 14 December 1992 on the manufacture and placing on the market of certain substances used in the illicit manufacture of narcotic drugs and psychotropic substances provide for a Community regime.

Article 3: Exchange of information

1. Each Member State shall ensure that its Europol national unit and its representative in the Reitox network provide information on the production, traffic and use of new synthetic drugs to the Europol Drugs Unit (EDU) or the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), taking into account the respective mandates of these two bodies. The EDU and the EMCDDA shall collect the information received and communicate this information in an appropriate manner immediately to each other and to the Europol national units and the representatives of the Reitox network of the Member States, to the Commission and the European Agency for the Evaluation of Medicinal Products.

2. The information referred to in paragraph 1 shall include:

(a) - a chemical and physical description, including the name under which a new synthetic drug is known;
- information on the frequency, circumstances and/or quantities in which a new synthetic drug is encountered;
- a first indication of the possible risks associated with the new synthetic drug;

and as far as possible:

(b) - information on the chemical precursors;
- information on the mode and scope of the established or expected use of the new synthetic drug as a psychotropic substance;
- information on other uses of the new synthetic drug and the extent of such use;
- further information on the risks of use of the new synthetic drug including the health and the social risks.

Article 4: Risk Assessment

1. At the request of one of the Member States or the Commission, the EMCDDA shall convene a special meeting under the auspices of the Scientific Committee extended with experts nominated by the Member States and to which representatives of the Commission, the EDU and the European Agency for the Evaluation of Medicinal Products shall be invited.

This committee shall assess the possible risks, including the health and social risks, caused by the use of, and traffic in, new synthetic drugs, and possible consequences of prohibition.

2. The risk assessment shall be carried out on the basis of information provided by the Member States, the Commission, the EMCDDA, the EDU and the European Agency for the Evaluation of Medicinal Products and taking into account all factors which, according to the 1971 United Nations Convention on Psychotropic Substances, would warrant the placing of a substance under international control.

3. On completion of the risk assessment, a report will be drawn up on the findings. In the report all aspects shall be addressed. All opinions on the aspects shall be reflected in the report.
Article 5: Procedure for bringing specific new synthetic drugs under control

1. The Council may, on the basis of an initiative to be presented within a month from the date on which the report of the results of the risk assessment pursuant to Article 4(1) is established and acting in accordance with Article K.3(2)(b) of the Treaty, adopt unanimously a decision defining the new synthetic drug or drugs which are to be made subject to necessary measures of control.

If the Commission deems it not to be necessary to present an initiative to have the new synthetic drug or drugs submitted to control measures, it shall present a report to the Council explaining its views.

The Member States undertake, in accordance with the decision taken by the Council, within such delay as that decision may specify, to take the necessary measures in accordance with their national law to submit these new synthetic drugs to control measures and criminal penalties as provided under their legislation complying with their obligations under the 1971 United Nations Convention on Psychotropic Substances with respect to substances listed in Schedules I or II thereto.

2. Nothing in this Joint Action shall prevent a Member State from maintaining or introducing on its territory any national control measure it deems appropriate once a new synthetic drug has been identified by a Member State.

3. The Presidency shall each year submit a report to the Council on the implementation of the decisions adopted by the Council on the basis of paragraph 1.

Article 6: Publication and entry into force

This Joint Action shall be published in the Official Journal.
It shall enter into force on the day of its publication

Done at Luxembourg, 16 June 1997

For the Council
The President
H. VAN MIERLO
Appendix M
Example of Illicit Designs profiled in the European Logo Project

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