

Int'l Treaties May Limit US Cannabis Scheduling Changes

By **Lauren Mendelsohn and Omar Figueroa** (November 7, 2022)

Recently, President Joe Biden directed federal agencies to review whether cannabis is appropriately classified in the Controlled Substances Act according to the scientific data available.

Currently, cannabis is listed as a Schedule I drug — the most restrictive class, which is, in theory, reserved for the most dangerous drugs with no perceived medical benefit. Some other drugs on Schedule I include heroin and MDMA.

In contrast, fentanyl, cocaine and methamphetamine are listed in Schedule II, a less restrictive category, despite these substances being widely acknowledged as more harmful than cannabis.

The federal government's current justification for placing and keeping cannabis in Schedule I is based on Title 21 of the U.S. Code, Section 812(b)(1)(B), part of the CSA that states that Schedule I is reserved for substances with a high potential for abuse, no current accepted medical use in the U.S., and a lack of accepted safety for use of the substances under medical supervision.

The fact that 37 states have adopted laws recognizing cannabis's medical value has not been given much weight by the U.S. Drug Enforcement Administration and U.S. Food and Drug Administration when evaluating whether there is currently accepted medical use.

The U.S. is a party to a number of international treaties dealing with drug control. These include the 1961 Single Convention on Narcotic Drugs, as amended by the 1972 Protocol; the 1971 Convention on Psychotropic Substances, which added synthetic, prescription and hallucinogenic drugs to the list; and the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which required party nations to criminalize personal consumption of listed drugs.

International scheduling decisions are made by the Commission on Narcotic Drugs, which is the U.N.'s drug control body. Such scheduling decisions by the CND are guided by recommendations and determinations of the World Health Organization.

Cannabis and cannabis resin are currently classified in Schedule I under the 1961 Convention, which means that according to the CND, they should be highly controlled.[1]

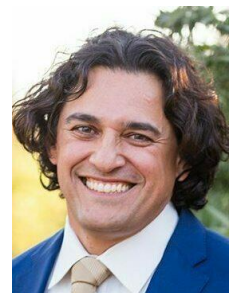
Previously, cannabis and cannabis resin were listed in both Schedule I and Schedule IV of the 1961 Convention, meaning that they were considered to have "particularly dangerous properties" and that party nations should consider imposing additional controls beyond what is required for Schedule I substances.[2] All substances in Schedule IV of the 1961 Convention are also listed in Schedule I, which is the most restrictive schedule.[3]

In December 2020, the CND voted to remove cannabis and cannabis resin from Schedule IV of the 1961 Convention, following a recommendation from the WHO to do so.[4]

Although this was a historic vote, it was largely symbolic in nature since cannabis and



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cannabis resin were not also removed from Schedule I, which is what forms the basis of their stringent control regime.[5][6]

According to the WHO:

Reclassification of cannabis and cannabis resin will remove some international procedural barriers to research and development of cannabis-based medical products according to national regulatory frameworks. The change in status of cannabis will not affect its non-medical use or promote legalization, as it remains under strict international control. Cannabis and cannabis resin will now be classified as having a similar degree of abuse and dependence potential as medicines such as morphine and oxycodone.[7]

At that same December 2020 meeting, the CND rejected a handful of other WHO recommendations related to cannabis, all of which resulted from a multiyear review assessing potential health risks and therapeutic benefits.[8]

While the international drug control treaties, such as the 1961 Convention discussed above, are binding on party nations pursuant to the 1969 Vienna Convention on the Law of Treaties, enforcement is essentially nonexistent. There is no international police force making sure that national parties to treaties are fulfilling their controlled substances enforcement obligations.

There is an International Narcotics Control Board, but its powers are largely limited to shaming violators.

That being said, the U.S. — in theory — cannot simply ignore international law. One reason is that the Controlled Substances Act essentially incorporates the international drug control treaties into domestic law.

Title 21 of the U.S. Code, Section 811(d) — part of the CSA — says that the attorney general is required to list substances in at least a restrictive category domestically as they are internationally:

If control is required by United States obligations under international treaties, conventions, or protocols in effect on October 27, 1970, the Attorney General shall issue an order controlling such drug under the schedule he deems most appropriate to carry out such obligations, without regard to the findings required by subsection (a) of this section or section 812(b) of this title and without regard to the procedures prescribed by subsections (a) and (b) of this section.[9]

The rest of Section 811(d) goes on to discuss the attorney general's other obligations related to international drug control conventions and decisions made by the WHO and CND.

Furthermore, Title 21 of the Code of Federal Regulations, Section 1308.46, requires the DEA administrator to schedule drugs in the manner he "deems most appropriate to carry out [the U.S.'s] obligations" according to international law.[10]

Pursuant to section 201(d) of the Act (21 U.S.C. 811(d)), where control of a substance is required by U.S. obligations under international treaties, conventions, or protocols in effect on May 1, 1971, the Administrator shall issue and publish in the Federal Register an order controlling such substance under the schedule he deems most appropriate to carry out obligations.

Thus, since cannabis has not been removed entirely from the international drug control treaties, the U.S. cannot, in theory, fully legalize cannabis for adult use nationwide and simultaneously be in strict compliance with its treaty obligations.

This would rule out descheduling of cannabis entirely. However, the U.S. could lower the classification from Schedule I to a less-restrictive schedule, and could legalize medical cannabis nationwide, as the treaties are not a bar to medical use.

There is also the option of forging ahead without regard to the treaties. For example, Canada and Uruguay are both parties to the same treaties, yet those nations legalized cannabis in the past few years without facing any major consequences. The U.N. has not sent troops to Ottawa or Montevideo to enforce the drug control conventions, nor does anyone expect that to happen.

Moreover, the U.N.'s International Narcotics Control Board has already indicated that the U.S. is in violation of the conventions by allowing states to legalize the adult use of cannabis, yet no real consequence has followed.[11]

Another option is for the U.S. to withdraw from the drug control treaties, though that would have additional repercussions and is not likely, at least not based simply on a desire to reschedule cannabis.

There is also the possibility of renegotiating the treaties; however, such a complex process is unlikely to be undertaken for one or a few parties to make changes to how a single drug is scheduled without undertaking a larger-scale review.

It does not make much sense to restrict U.S.-based cannabis companies from participating in a global cannabis marketplace if other nations that are parties to the same treaties are flouting their obligations and reaping all of the economic rewards.

As such, a determination of how to proceed with classifying cannabis here in the U.S. will likely entail a balancing of our international obligations against potential domestic benefits of legalization.

Despite the points made above regarding international treaty obligations, one can find some hope in how the current leaders of the U.S. Department of Justice and the U.S. Department of Health and Human Services responded to Biden's recent directive to reassess the domestic treatment of cannabis.

Both issued positive statements in response to the announcement. HHS Secretary Xavier Becerra, former attorney general of California, said on Twitter — serendipitously released at 4:20 p.m. — that he is "[l]ooking forward to working with Attorney General Garland to answer [Biden's] call to action to review how marijuana is scheduled under federal law." [12] And the DOJ stated in a press release that it "will work with [its] colleagues at [HHS] as they launch a scientific review of how marijuana is scheduled under federal law." [13]

As some final food for thought, how the U.S. chooses to handle the potential rescheduling or descheduling of cannabis will likely affect how other substances, such as psilocybin and MDMA — about which researchers worldwide are discovering possess potentially therapeutic properties — are scheduled as well.

Thus, much is hinging on this decision to revisit the classification of cannabis. We look

forward to reporting on the consequences of this important development, which has the potential to bring about major changes to the legal cannabis industry as we know it.

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[1] 1961 Convention, Art. 2(1).

[2] 1961 Convention, Art. 2(5).

[3] https://www.unodc.org/documents/commissions/CND/Scheduling_Resource_Material/19-11955_Drug_Conventions_eBook.pdf.

[4] https://www.unodc.org/unodc/en/commissions/CND/Mandate_Functions/current-scheduling-recommendations.html.

[5] <https://news.un.org/en/story/2020/12/1079132>.

[6] <https://mjbizdaily.com/united-nations-approves-who-recommendation-to-reschedule-cannabis-in-historic-vote/>.

[7] <https://www.who.int/news/item/04-12-2020-un-commission-on-narcotic-drugs-reclassifies-cannabis-to-recognize-its-therapeutic-uses>.

[8] https://www.unodc.org/documents/commissions/CND/Scheduling_Resource_Material/Cannabis/Recommendations_backdrop.pdf.

[9] 21 U.S.C. §811(d).

[10] 21 C.F.R. §1308.46.

[11] See, for example, https://www.incb.org/documents/Publications/AnnualReports/AR2013/English/AR_2013_E_Chapter_III_Americas.pdf.

[12] <https://twitter.com/SecBecerra/status/1578117950816616458?s=20&t=UuN2le7181TZHp8I5x-t8A>.

[13] <https://www.justice.gov/opa/pr/justice-department-statement-president-s-announcements-regarding-simple-possession-marijuana>.