



Advocacy for Human Rights in the Americas

International Narcotics Control Board (INCB)

Civil Society Hearing

*“Analysis of the trend to legalize the non-medical use of drugs
with an emphasis on cannabis”*

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Statement of:

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ABSTRACT: The INCB has reiterated that legalization of drugs for non-medical uses is disallowed by the UN drug control treaties as they stand. Yet national and sub-national governments are legalizing cannabis, and the trend seems likely to grow, despite entailing treaty non-compliance. Can countries legalizing non-medical cannabis (or other drugs) ensure that their new policies align with their obligations under international law? Can the INCB play a constructive role in arriving at legally valid solutions? Such solutions are possible but will take time and good-faith dialogue to achieve.

Madame President and Members of the Board, I appreciate the chance to speak with you today on behalf of the Washington Office on Latin America (WOLA), a non-profit research and advocacy organization promoting human rights and social justice in the Americas.

Drug policy reform is a core feature of WOLA’s work. We participate actively in global and regional drug policy debates, including engagement with key UN and OAS bodies. We welcome the Board’s inclusion of civil society viewpoints, and we consider today’s hearing to be especially timely.

I will focus on three related questions: whether “recreational” drug legalization fits within the UN drug treaties; if not, how countries that legalize drugs can realign their new laws with their international obligations; and how the INCB itself might play a constructive role as the trend to legalize continues. Before addressing those questions, I want to be clear about our perspective.

WOLA believes there are compelling reasons for countries to legally regulate drugs rather than to persist with costly and harmful efforts at banning them. Legalization seems to be a more sound approach than prohibition for protecting and promoting human rights, health and security. We have actively supported countries opting to shift to policies of cannabis legalization, including

engagement with civil society and government authorities in both Uruguay and Canada, two pioneers in the field.

Our support for legalization as an alternative to prohibition does not mean that we are indifferent to how legalization takes shape. Different regulatory models and their implementation affect how fully legalization's potential benefits will be realized, and how equitably such benefits will be shared, within societies and across countries. We are especially intent on ensuring that traditional farmers and small-scale producers of drugs such as cannabis will be able to fully enjoy the benefits generated by the new regulatory regimes. Not least, we believe that legalization should proceed in accord with the principles of international law and multilateralism—precious but fragile advances that are under threat today on many fronts.

As Board members know very well, the INCB has made clear its view that legalization of drugs for non-medical uses is disallowed by the UN drug control treaties as they stand. INCB interpretations of the leeway afforded by the drug treaties have often been overly restrictive, creating impediments to policies such as decriminalization of possession and cultivation of drugs for personal use and harm reduction services such as drug consumption rooms. In recent years, however, the Board has been modifying its rigid positions, even arguing that the drug treaties need to be implemented in full compliance with human rights obligations.

While mindful of the Board's history of overly restrictive treaty interpretations, the latitude afforded by the drug treaties clearly does have limits. We see no way around the fact that legalization of drugs for recreational uses contravenes certain treaty obligations, and conflicts with the explicit purpose of the drug treaty regime to ban those practices.

Most notably, the Single Convention on Narcotic Drugs obliges States under Article 4 "to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs" listed in its schedules. Despite objections raised by several Southern countries with centuries-old traditions, all non-medical uses of coca, cannabis and opium were banned.

Under Article 49 of the Single Convention, "The use of cannabis for other than medical and scientific purposes must be discontinued as soon as possible but in any case within twenty-five years from the coming into force" of the treaty. The Single Convention came into force in 1964, so the transitional period ended in 1989; only four countries availed themselves of the transitional period for cannabis.

Uruguay, which in 2013 became the first country to regulate cannabis for non-medical uses, justified its reform by maintaining that regulation is fully consistent with the drug control treaties' overarching concern for the health and welfare of humankind, and that protecting citizens' health and security through market regulation is a human rights issue.

Appealing to States' human rights obligations provides a powerful justification for legalizing drugs. But grounding legalization in human rights arguments does not, in itself, erase the problem of drug treaty non-compliance.

Canada has likewise maintained that its new cannabis law is consistent with the drug treaties' concern for human health and welfare. In 2018 Canada's Foreign Minister acknowledged that

regulation does entail “contravening certain obligations relating to cannabis under the three UN drug conventions,” and affirmed that Canada is “definitely open to working with treaty partners to identify solutions that accommodate different approaches to cannabis within the international framework.”

Since state-level recreational cannabis legalization began in the United States in 2012, the U.S. federal government has contended that the country remains in full treaty compliance, citing federalism and prosecutorial discretion in explaining the existence and spread of state-level legalization regimes. But the treaties make no distinctions regarding a country’s form of government, requiring obligations to be implemented in the entirety of a Party’s territory.

The existing instances of recreational cannabis legalization are out of compliance with provisions of the UN drug treaties. Countries intending to shift toward legalization and those that have already done so should explore options that would allow them to reconcile their policy changes with their obligations under international law.

There are six possible routes to achieve this, but four of the options are either unlikely to be considered, or unlikely to succeed if actually attempted.

- **Complete withdrawal from the UN drug treaties** is an essentially unilateral decision and would be achievable in procedural terms. But a complete exit from the drug treaties would appear to be virtually unthinkable for most countries.
- **Removing cannabis from the treaty control schedules entirely**, or even rescheduling to a more lenient list, appears unlikely if not impossible, as was underscored by the polarized debate at the CND around the WHO recommendation to remove cannabis from Schedule IV of the Single Convention, acknowledging its medical and therapeutic value.
- **Amending the treaties**, while possible in theory, would easily be blocked by staunch opponents of legalization, such as Russia, China and many other countries.
- **Convening a Conference of Parties** to revise the treaties to allow for recreational cannabis legalization is possible in theory. But this option is unlikely to be pursued because starkly different views among countries would make agreement essentially impossible.

This leaves two approaches to be considered, either alone or in combination: treaty withdrawal and re-accession with reservations, and *inter se* modification agreements.

These procedures are rarely used and can be expected to be controversial, so recourse to either of them would need to be clearly justified by the extraordinary circumstances that prevail: namely, countries finding their current cannabis-related treaty obligations impossible to keep, and a polarized international situation that makes consensus solutions impossible to achieve for the foreseeable future.

- **Treaty withdrawal and re-accession with reservations**

Registering reservations regarding specific treaty provisions upon signing, ratifying or acceding to

an international treaty is common practice. Submitting new reservations is more controversial, and often requires first withdrawing and then re-acceding to a treaty in order to provide other Parties the opportunity to object to the new reservations.

The only precedent for this procedure regarding the drug treaties occurred when Bolivia withdrew from the Single Convention in 2012 and successfully re-acceded a year later, with a reservation clarifying that Bolivia no longer accepts the Single Convention's control provisions for coca leaf in its natural state.

At least one-third of treaty parties (more than 60 countries) would have had to object to block Bolivia's re-accession. Mexico—the only Latin American country among the 17 countries that objected to Bolivia's re-accession—formally withdrew its objection in 2018.

While treaty withdrawal and re-accession is a unilateral procedure, it could be used in a coordinated manner with other like-minded countries. Countries could draft comparable reservations and coordinate the timing with which they set in motion their separate processes for withdrawal and re-accession.

- ***Inter se* treaty modification**

Inter se treaty modification—provided under Article 41 of the 1969 Vienna Convention on the Law of Treaties—was specifically designed to find a balance between treaty regime stability and the need for change in the absence of consensus.

Inter se modification entails a collective approach involving at least two countries and would require a commitment to the Single Convention's aim to promote the health and welfare of humankind, as well as a commitment to the original treaty obligations *vis-à-vis* countries not becoming party to the new agreement.

A collective *inter se* agreement would open the possibility of international trade between regulated markets, enabling the participation of small farmers in traditional Southern producing countries that enter the new agreement.

Unlike withdrawal and re-accession, *inter se* modification agreements cannot be procedurally blocked by formal objections exceeding a certain threshold. However, an *inter se* agreement would need to be assembled in a manner that could withstand the political pressures that opponents would be sure to bring.

Implementing treaty withdrawal and re-accession or the *inter se* mechanism will require careful consultations during a temporary period of non-compliance. Entering such a period of transitional “respectful non-compliance” is justifiable in combination with the explicit goal of formally altering the relationship to the treaty obligations that States can no longer meet.

Finally, allow me to make an observation on the role that the INCB itself could play in the midst of these increasing treaty tensions. The Board has consistently pointed out that recreational cannabis legalization contravenes certain obligations that State parties have agreed upon when ratifying these conventions, a position that we share.

It is time, however, for the Board to accept the reality that more and more countries are moving away from the strict control regime for cannabis established by the Single Convention, and to acknowledge the need for the treaty regime to adapt. Repeated calls by the INCB on those countries to fall back in line with their treaty obligations are an illusionary scenario as countries will not or cannot reverse democratic decisions or Constitutional Court rulings.

Instead, the Board should engage in a constructive dialogue to facilitate viable legal pathways for countries to re-align their treaty obligations with their new cannabis policies. Failing to do so risks further increasing tensions that are already difficult to manage, and could ultimately lead to weakening and discrediting the drug control treaty system as a whole.