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The Forms of International Institutional Law: An Historical Analysis of the Scheduling Decisions of Narcotic Drugs and Psychotropic Substances taken by the United Nations' Commission on Narcotics Drugs

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Abstract

The objective of this study is to analyze the legal form of the drug scheduling decisions made by the United Nations' Commission on Narcotic Drugs (CND) to place a given narcotic drug or psychotropic substance under international control in accordance with the drug control treaties. In particular, this study will focus upon the historical evolution of the legal form of the decisions of the CND from the inception of the 1961 Single Convention until the latest decision on this matter in 2007. This study will also seek to show how and to explain why the form of the decisions 'evolved' from a very informal and vague way to a strict and concrete legal form. By doing so, this study will interpret these decisions, systematizing them within the general framework of UN law. This exercise will lead, ultimately, to the determination of the meaning of the decisions.

Keywords

form, substance, interpretation, customary law, institutional practice, institutional law, international organizations, UN law, narcotic drugs, psychotropic substances, decisions, resolutions, Commission on Narcotic Drugs, scheduling, drug control treaties

* The views expressed herein are those of the author and do not necessarily reflect the views of the United Nations.

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1. Introduction

The objective of this study is to analyze the legal form of the drug scheduling decisions made by the United Nations' (UN) Commission on Narcotic Drugs (CND) to place a given narcotic drug or psychotropic substance under international control, in accordance with the 1961 Single Convention of Narcotics Drugs (1961 Single Convention) and the 1971 Convention on Psychotropic Substances (1971 Convention), which set up the international drug control system. The international drug control system must deal with the very complex and, to a certain extent, paradoxical problem of drug trafficking and abuse and, at the same time, the lack of essential drugs needed for medical purposes. This means that the international control system must, on the one hand, ensure the availability of essential controlled drugs utilized for medical purposes, such as morphine. For such purposes, the international control system should establish a regime flexible enough to allow the smooth flow of essential controlled medicines. On the other hand, the system must combat drug trafficking and abuse, and, for these different yet related purposes, must set up a tight control regime. The international drug control system has been trying to achieve this dual goal since the Shanghai Conference of 1909 which led to the first international drug control treaty, the International Opium Convention of 1912, until the current treaties: the 1961 Single Convention, the 1971 Convention, and the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Convention).

The vast majority of the world's population do not have access to basic controlled medicines, such as morphine for the treatment of severe pain or codeine for treatment of ordinary coughing.[1] At the same time, drug trafficking is increasing worldwide, bringing with it such related problems as arms trafficking, money laundering, and the like. These kinds of problems may destabilize entire regions of the world, such as Afghanistan and Central America. At the same time, drug abuse and drug dependency are also threatening the very social fabric of entire communities.[2] Currently, a

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1) For the problem of availability of controlled substances, *see generally* International Narcotics Control Board (INCB), *Report of the International Narcotics Control Board for 1995: Availability of Opiates for Medical Needs* (UN, New York, 1996); INCB, *Report of the International Narcotics Control Board for 2005* (UN, New York, 2006), esp. pp. 15 and 40.

2) For analysis of drug trafficking and abuse, *see generally* UN Office on Drugs and Crime (UNODC) *World Drug Report 2009* (UN, New York, 2009).

vivid and intense debate is taking place about the legitimacy and efficiency of the drug control system. Some countries have adopted political measures and passed national legislation that may contradict the international drug control treaties. For instance, some states in the United States of America permit the consumption of marihuana for medical purposes,[3] yet the United States Supreme Court, in the case of *Gonzales* v. *Raich*, ruled against a state law, upholding the supremacy of the federal law on the matter.[4] More recently, in 2007, the new constitution of Bolivia stated that coca leaves are part of their cultural heritage and natural resources.[5] Subsequently, Bolivia, following the procedure established in the 1961 Single Convention, filed a formal request for the removal of coca leaves from international control.[6] Such other countries as Argentina, Mexico, the Netherlands, Belgium and Switzerland are debating and reviewing their policies on the matter.

Should marihuana or coca leaves remain under international control? Should the control over morphine be eased? When were these substances put under international control? Can they be removed from international control? What is the process to do so? Should new substances, such as khat, be placed under international control? Whatever the final political decision may be in this regard, the political will should be expressed in the form of a rule of law. In this particular case, the political will of the international community should be expressed in the form of a legal decision taken by the international organ with the competence to do so: the CND. In other words, the "United Nations resolutions are formal expressions of the opinion or will of United Nations organs".[7]

Within this context of translating political will into a legal text, this study will specifically analyze the formal process of placing narcotic drugs and psychotropic substances under international control and removing them from such control. Generally speaking, as shown, the analysis of this process

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3) For the status of cannabis in state legislation in the United States of America, *see generally* <www.norml.org/index>, 23 October 2009.

4) *Gonzales* v. *Raich,* 6 June 2005, United States Supreme Court, 545 U.S. 1.

5) Constitución Política del Estado de Bolivia, Article 384 (Coca).

6) UN Economic and Social Council (ECOSOC), *Proposal of Amendment by Bolivia to Article 49, Paragraphs 1 c) and 2 e)*, UN Doc. E/2009/78, 15 May 2009.

7) *United Nations Editorial Manual Online: Resolutions and Other Formal Decisions of United Nations Organs*, <69.94.137.26/editorialcontrol/ed-guidelines/types_documents/res_dec_TofC.htm>, 12 March 2009.

is important. It is especially important in the framework of the drug control system, as the decisions made by the national delegates to the CND are binding decisions, *i.e.* they create a legal obligation under international law. In particular, this study will focus upon the historical evolution of the legal form of the decisions of the CND from the inception of the 1961 Single Convention until the latest decision on this matter in 2007. This study will also seek to show how and to explain why the form of the decisions "evolved" from a very informal and vague way to a strict and concrete legal form. By doing so, this study will interpret these decisions, systematizing them within the general framework of UN law. This exercise will lead, ultimately, to the determination of the meaning of the decisions. Finally, this study will present a comprehensive systematization of all of the drug scheduling decisions related to narcotic drugs and psychotropic substances.

2. The Forms of Law

In legal science, the term 'form' has different meanings. As utilized in this study, 'form' denotes the way that rules are expressed, *i.e.* how rules are communicated.[8] The form is especially important in law, since, in this field, the link between substance and form is particularly significant. This is because it is only possible to know the content of a rule through its external appearance.[9] Therefore, to know and to recall the substantive content of a rule requires that the rule be expressed in certain ways. In the past, the law was expressed in a variety of ways, including rituals, signals, verbal formulas, gestures, and the like. Currently, these kinds of expressions of law are still employed, *e.g.*, the hand movement of a buyer accepting the offer made by the auctioneer, traffic lights, the utilization of a hammer by a judge, or such verbal formulas as the oath of affirmation of the truth, and many more. However, modern law has preferentially developed one particular

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8) On the concept, importance and function of the form in law, *see generally* R. S. Summers, *Form and Function in a Legal System: A General Study* (Cambridge University Press, Cambridge, 2006), esp. pp. 17–19. And also for a general – but 'civil law' – perspective, *see* J. J. Llambías, *Tratado de Derecho Civil Parte General: Tomo II* (Editorial Perrot, Buenos Aires, 1997), pp. 343–350.

9) For the close interplay between form and substance in law, *see* D. Kennedy, "Form and Substance in Private Law Adjudication", 89 *Harvard Law Review* (1976), p. 1685 *et seq.*, esp. pp. 1710–1713.

form: the written law. This special form has proven to be clear, easy to use and to remember, and, more importantly, a better way to provide certainty. Accordingly, if a law is written down, it should clearly state which behaviours are permitted and which are prohibited. Of course, if a law is poorly written, it will be difficult to understand, even more difficult to apply, and it may create conflicts instead of solving them.

To prevent these sorts of problems, legal science has developed certain techniques to promulgate effective written laws. These legal techniques have established criteria: for writing laws and statutes; for determining the kind of legal vocabulary, grammar and syntax that must be utilized in each law; for classifying and numbering the provisions of each law; for determining how internal and external references must be made; for establishing the internal consistency of the law; and for specifying the relationship of one law to another (*e.g.*, if a given law modifies or derogates from a previous one on the same matter) and to the rest of the legal system. In addition, legal techniques refer to the time of the entry into force of the law, its publicity, scope of application, and so on.[10] However, since laws are made by human beings, they may not be perfect. They can be ambiguous, obscure, ambivalent, and even contradictory. To solve these – usual and inherent – problems of the legal system, the whole legal theory of interpretation is devoted to providing

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[10] For an extensive discussion of legal technique, *see generally* H. Rosatti, *Fisiologia de la Ley*, Cuadernos de Extension Universitaria No. 18 (Universidad Nacional del Litoral, Santa Fe, 1987). The author discusses how political will is translated into the statutory formal law during the parliamentary law making process and the basic principles of the legal technique. In this connection, the author says: "A la Tecnica Legislativa le interesa el 'orden interno' de la ley, aquél que rige su devenir y su fisiología. Y aquí la precisión terminológica se torna insoslayable." (p. 48). The author also discusses the origins of the different systems to classify and enumerate laws. He argues that those systems, in general, are based upon the practice of the administration (pp. 48–50). Some of these institutional practices may then be formalized in a decree or in a 'manual', such as: at the national level, the Argentinean *Manual de Técnica Legislativa* developed within the framework of the project *Digesto Juridico Argentino* (*ley* 24967/1998); or, at the international level, the United Nations Editorial Manual (*United Nations Editorial Manual: A Compendium of Rules and Directives on United Nations Editorial Style, Publications, Policies, Procedures and Practice* (UN, New York, 1983)). For legal technique at the international level, *see* the seminal work of H. Kelsen *Legal Technique in International Law: A Textual Critique of the League Covenant*, Geneva Studies Volume X No. 6 (Geneva Research Centre, Geneva, 1939), pp. 7–24.

rationality to the system when necessary.[11] Yet, the form may be wrongly utilized, degenerating into extremely long, overly technical and complex laws that betray the very goal of the form, which should be to make laws understandable not only to experts but to the people who are governed by and must obey them.

From the perspective of domestic law, the paradigmatic sample of a legal form is the statutory law enacted by a parliament or legislature. One of the main particularities of statutes is that they are written. Moreover, they are written in a particular way and employing a particular legal vocabulary. They are organized internally according to certain criteria, and their provisions are sorted into titles, chapters, sections and articles that are numbered correlatively, and the like. A special sub-classification of statutory law is constituted by codified law, such as the criminal or the commercial codes. Codes try to systematize large areas of legislation into one single corpus. By replacing previously scattered pieces of legislation with one single body of law, codes seek to provide coherence and integrity to certain fields of law.[12]

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11) For the theory of interpretation, *see generally* H. Kelsen, *Teoría Pura del Derecho* (Universidad Nacional Autónoma de México, México, 1979), pp. 349–356; and W. Goldschmidt, *Introducción Filosófica al Derecho: La Teoría Trialista del Mundo Jurídico y Sus Horizontes* (Depalma, Buenos Aires, 1985). For a specific analysis of the different stages of the interpretative process and the functioning of the norm, *see* M. A. Ciuro Caldani, "La Noción de Derecho Privado desde la Perspectiva del Funcionamiento de las Normas", 24 *Revista del Centro de Investigaciones de Filosofia Juridica y Social* (2000), pp. 105–112. For the interpretation of international institutional law, *see* J. Alvarez, *International Organizations as Law-makers* (Oxford University Press, Oxford, 2005), pp. 65–108. It should be noted here that, for a number of reasons, laws can be *deliberately* drafted in a vague and ambiguous manner. *See* Kelsen, *supra* note 10, pp. 10–11.

12) For a discussion of codification, *see generally* Llambias, *supra* note 8, pp. 171–181. For the process of codification in international law, *see* D. J. Harris, *Cases and Materials on International Law* (Sweet & Maxwell, London, 1998), pp. 65–67. Codification is the most comprehensive and sophisticated way to systematize legal rules. Here, it is possible to find rules compiled, and at the same time harmonized, different provisions placed together in order, following certain rationality, coherence, and integrity. Codification is, in a certain sense at least, the latest step in the development of a legal 'system' aiming to go beyond a mere grouping of single scattered laws. Originally (chronologically), norms and rules are spread out, produced by different legal organs, by different sources. One first attempt to organize (systematize) those diversity of laws is called a 'collection' or a 'compilation' – that is, just to put together all of the laws that are linked according to a certain criteria. Compilations (collections) may also have certain 'binding' force for customary reasons. Once one single corpus of law is at hand, everybody, for practical reasons, tends to utilize that corpus, granting

At the opposite end of the spectrum of domestic sources of law is custom. Customary law, as opposed to statutory law, is usually unwritten. As a result, its content may be less precise. In between these extremes, judicial decisions, presidential decrees, ministerial resolutions, administrative decisions, private contracts, and corporation statutes have their own forms.[13]

In turn, international law has its own sources, which are expressed in their own particular way.[14] One source of international law is custom, which can be vague, as it is at the national level, because, generally speaking, customs are unwritten. Treaties, at the other extreme of the formality spectrum, follow a strict form. For centuries, customary law and treaty law were the main forms of international law. But, as of the beginning of the 20th century, and more decisively since 1945 due to the creation of the UN and a number of other international organizations, the sources and forms of international law have also, like those of national law, broadly diversified. Executive officers of international organizations now make individual international administrative decisions that may be challenged before international administrative tribunals, which, in turn, can issue international judicial decisions. In addition, governing bodies of international organizations enact general directives, recommendations, declarations, resolutions and decisions. Some of these kinds of general rules are mere 'suggestions' to the Member States of these organizations, but others are legally 'binding'. Some rules are meant to have 'internal' effect only, while others create 'external' rights and duties.[15]

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it 'legal' authority. On the legal effects of compilation in the Middle Ages, *see* R. David, *Los Grandes Sistemas Jurídicos Contemporaneous* (Biblioteca Jurídica Aguilar, Madrid, 1968), pp. 38–41. From the perspective of international commercial law, in relation to the compilation of principles of international commercial law, *see* M. J. Bonell, (1988). "A 'Restatement' of Principles for International Commercial Contracts: An Academic Exercise or a Practical Need?", *Revue de Droit des Affaires Internationales / International Business Law Journal* (1988), p. 879.

13) On the sources of law, *see generally* Llambias, *supra* note 8, pp. 49–51; and, for an extensive and detailed analysis, *see* J. C. Cueto Rua, *Fuentes del Derecho* (Abeledo-Perrot, Buenos Aires, 1994).

14) *See generally* Harris, *supra* note 12, pp. 21–67.

15) Those new sources of international law have contributed to the development of a new branch within international law: the international institutional law; *see generally* Alvarez, *supra* note 11; N. D. White, *The Law of International Organizations* (Manchester University Press, Manchester, 1996), esp. pp. 86–107; C. F. Amerasinghe, *Principles of the Institutional Law of the International Organizations* (Cambridge University Press, Cambridge, 2005), esp.

This study is devoted to the analysis of the form of this last source: the form of resolutions and decisions made by the organs of international organizations and, in particular, the form of the scheduling decisions made by the UN's CND to place a given narcotic drug or psychotropic substance under international control.

3. Why 'Schedules'?

3.1. *Historical Review*

Since the beginning of the history of drug control, schedules have played a key role in the drug control system, both as tools to facilitate cooperation and compromise, as well as instruments of controversy. As put by William B. McAllister, "[s]chedules have served as a key tool for negotiating the political, economic, medical, administrative, moral, and bureaucratic interests that suffuse all determinations about licit availability of drugs".[16] Schedules appeared for the first time in the international arena during the negotiations that led to the 1931 Manufacturing Convention. This Convention, together with the 1925 Opium Convention, set up the basic drug control structure.[17] During their deliberations, the negotiators agreed on the main aspect of the proposed drug control system. However, "several key issues of contention remained, such as determining which drugs should be regulated, how strictly those substances should be controlled, what authority should be invested with the power to decide the definition of 'medicinal use,' whether an international body or national governments should exercise the key regulatory prerogatives, and how to account for the impact regulatory measures would have on trade interests … The creation of tiered control schedules provided a key element in bridging the gap between parties,

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pp. 13–21; and, M. Diez de Velasco, *Instituciones del Derecho Internacional Publico, Tomo II: Organizaciones Internacionales* (Tecnos, Madrid, 1988), esp. pp. 49–59.

16) W. B. McAllister, "The Global Political Economy of Scheduling: The International-Historical Context of the Controlled Substances Act", 76:1 *Drug and Alcohol Dependence* (2004), pp. 3–8. For a general study on the history of the drug control system, *see* I. Bayer and H. Ghodse, "Evolution of International Drug Control, 1945–1995", in UNODC, *Bulletin on Narcotics: Volume LI, Nos. 1 and 2* (UNODC, Vienna, 1999).

17) *See generally* UN, *Commentary on the Single Convention on Narcotic Drugs, 1961* (UN, New York, 1973), pp. 74–80.

thereby enabling a successful conclusion to the negotiations. The advent of schedules also engendered long-term consequences, forever altering the parameters of the drug question."[18]

At this point, it is important to place the negotiation process in its historical context. The conference that led to the 1931 Manufacturing Convention took place during the worst part of the 1929 world economic crisis. To overcome the consequences of the crisis, negotiators were more interested in promoting trade in drugs rather than in limiting it. As a result, the decisions made during those negotiations had little to do with the medical aspects of drugs, but more with economic aspects.[19] In any case, the conference tried to find a system that would make drugs available for medical purposes while preventing their diversion. The first attempt tried to set up a quota system among the main producing countries. However, those countries could not agree on how to implement such a quota system. For that reason, a less direct system of control was established, which required countries to control key issues of drug production. These issues included agricultural production, manufacturing of pharmaceutical products, wholesale and retail distribution, and estimation of domestic requirements. All of this information would be sent to the national control agencies that would investigate possible problems and diversions.[20]

On the whole, there was an agreement regarding the general drug control framework. Disagreements arose over the details. Should all drugs be subject to the same regime? Supporters of strict control believed that a unified system would be the best option. Others, led by the German delegation, had a different opinion. At that time, because Germany was the major producer of codeine, its delegation argued that placing codeine in a rigid control system would make it more difficult and more expensive to export, which would damage the pharmaceutical industry. It was also argued that subjecting all drugs to the same rigid and burdensome regime, despite their medicinal utility and addictive propensity, would discourage doctors from using new and less risky drugs. Eventually, a compromise was reached

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18) McAllister, *supra* note 16.

19) *Cf.* McAllister, *supra* note 16.

20) *Ibid. See also* J. Sinha, *The History and Development of the Leading International Drug Control Conventions*, 21 February 2001, Library of the Parliament of Canada, <www.parl.gc.ca/37/1/parlbus/commbus/senate/com-e/ille-e/library-e/history-e.htm#THE%20CONTEXT>, 10 October 2009.

and a two-level regulatory system was established: in Group I, morphine, heroin, their derivates, cocaine, and esthers of morphine (except codeine) were included; and in Group II, codeine and ethylmorphine.[21] Therefore, drugs included in the second control level (Group II) were exempted from some obligations, such as reporting requirements on retail transactions and distribution of compounds and preparations. Soon, national legislation followed the schedule scheme of the international treaties, and the same kind of disputes and machinations between the pharmacy industry, the governments, doctors, the academy, and other groups, began to push toward placing certain drugs into a certain schedule or removing them from it.[22]

4. The Drug Scheduling Process in the 1961 Single Convention

Like its predecessors, and for the same kinds of political and economic reasons, the 1961 Single Convention followed the schedule scheme, setting up four different schedules and placing different drugs into them according to various criteria. From a formal point of view, the negotiators of the 1961 Single Convention, foreseeing future changes in the scope of drug control, established an open and flexible system for scheduling. This system allows the placement of new narcotic drugs under control, their removal from the control lists, or their movement from one list to another.

According to Article 3 of the 1961 Single Convention, the initiative to start the scheduling process rests upon the World Health Organization (WHO) and the State Parties to the Convention. Thus, if the WHO or a State Party considers that a new drug has to be placed under international control, the WHO or the State Party must notify the Secretary-General of the UN (UNSG). Subsequently, the UNSG must convey this proposal to the CND, which makes the final decision.[23]

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21) *Cf.* McAllister, *supra* note 16.

22) *Ibid.*

23) "The Commission was established by the Economic and Social Council in its resolution 9(I) of 16 February, 1946, as the central policy-making body within the United Nations system dealing with drug-related matters. The Commission analyses the world drug situation and develops proposals to strengthen the international drug control system to combat the world drug problem." *Cf.* the official webpage of the CND, <www.unodc.org/unodc/commissions/CND/01-its-mandate-and-functions.html>, 10 March 2009.

4.1. *The Binding Nature of the Scheduling Decisions*

Therefore, the CND is the competent authority responsible for deciding whether to place a new drug under control, remove it from control, or change the scope of control of a given substance. The CND must make each such decision by a two-thirds majority vote of its members.[24] Article 3 expressly delegates to the CND the power to issue binding decisions. Under international law, these decisions create legal obligations for Member States; *i.e.* each Member State must comply with these decisions. There are very few cases of this kind of delegation of legislative power to international organizations, which are thereby granted a sort of supranational legislative authority over nation States. By entering such treaties, the Member States limit their national sovereignty in the matter.[25] Through this point in the process, the whole drug scheduling process is regulated in detail in the 1961 Single Convention. Beyond this point, however, the Convention is silent regarding the next steps to be taken, including matters related to the form of the decisions themselves. How are decisions expressed and in which form? How are they to be written down? Do they have to be numbered or classified? Do they have to be expressed in articles or in sections? There is no response to these kinds of questions in the text of the Convention.

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24) "Action by the Commission is taken through resolutions and decisions. Decisions and resolutions are generally adopted by consensus; however, decisions on the scope of control of substances provided for in article 2 and 3 of the 1971 Convention and article 12 of the 1988 Convention are adopted by a two-thirds majority vote of the members of the Commission. To adopt these decisions, an affirmative vote of at least 35 members of the Commission is required. Other decisions by the Commission under the Single Convention are subject to a majority requirement as provided for in the Commission's rules of procedure." *Cf.* the official webpage of the CND, <www.unodc.org/unodc/en/cnd_modalities.html>, 20 July 2007.

25) "When it comes to 'producing effects outside' the organization's legal order, since most IOs [International Organizations] have been given only recommendatory or consultative powers in this 'external' sphere, the prototypical examples of legally binding external international institutional law cited are even more sparse. [Putting aside the Security Council and the European Communities' Commission], real IO law-making … is limited to technocratic law of certain circumscribed UN specialized agencies such as the WHO's ability to issue health regulations … All other forms of standard-setting occurring within IOs or through their actions can be comfortably explained as mere variations on traditional forms for the making of treaties or (perhaps) customary international law." *Cf.* Alvarez, *supra* note 11, p. 62. On the nature of binding decisions, *see also* White, *supra* note 15, pp. 87–92. For the sources of international institutional law, *see generally* Amerasinghe, *supra* note 15, pp.20–21.

There is, clearly, a legal vacuum in the system. However, the first delegates to the CND were not particularly worried about how to integrate this legal gap or how to construe the Convention in relation to the form of the scheduling decisions, which are the only *binding* decisions for State Parties under these treaties. Conversely, and to some extent paradoxically, non-binding decisions were taken following a strict legal format with regard to a number of other issues, such as demand reduction or drug abuse prevention. In any case, this vacuum was filled by the persons in charge of the implementation of the Convention. The drafters of resolutions and decisions, *i.e.* the delegates to the CND and the staff of the Secretariat of the CND, simply wrote down the first decisions on the matter as they thought to be correct, without following a proper legal format. Consequently, as will be shown, the first decisions on scheduling were, from a formal point of view, rather vague and ambiguous and, because of that, uncertain. It was just 1978 when a number of factors led to a change in the way that scheduling decisions were made. Since then, such decisions have been made using a strict legal form.

5. The Evolution of the Forms of the Scheduling Decisions

5.1. *The Original Schedule of Drugs under International Control*

As mentioned above, the plenipotentiary conference that approved the final text of the 1961 Single Convention included an Annex with four schedules, which placed different narcotic drugs under four different control regimes, yet set up a flexible system able to modify the content of the schedules (*see supra* Section 4).

5.2. *1964: 19th Session of the CND*

This flexible scheduling system was to be implemented for the very first time even before the entry into force of the 1961 Single Convention. Notable here are the format and structure of the following decision made by the CND to amend the original schedule. Despite the availability of the entire legal machinery, tools and juridical techniques developed during the centuries by the legal science (*see supra* Section 2), the next decision did not follow any kind of legal form. Rather, the actual decision was simply included, and to some extent hidden, in four paragraphs of the 1964 Annual Report of the CND. According to the Annual Report of the CND:

155. The Commission considered the changes in the Schedules of the Single Convention proposed by the WHO Expert Committee on Addiction-producing Drugs … *The representative of India expressed some reservations about the competence of the Commission to change, before the Convention came into force*, the schedules agreed upon at the time of the Plenipotentiary Conference which had adopted the Single Convention …

156. [However, according to the UN Office of Legal Affairs] … when there was a good prospect of the 1961 Convention coming into force, *the Commission could act on WHO's recommendations under article 3*, paragraph 6, of the Single Convention, by reaching a decision on those recommendations and requesting the [UNSG] to make the appropriate communication by urgent means *immediately after* the entry into force of the treaty.

157. Accordingly, the Commission considered the recommendation by WHO … and *decided that the following should be adopted*:

Schedule I
The following *items should be added* [Fentanyl, Methadone-Intermediate, Moramide-Intermediate, Noracymethadol, Norpipanone, Pethidine-Intermediate A, Pethidine-Intermediate B, and Pethidine-Intermediate C]

Schedule II
Nicocodine (6-nicotinylcodeine) should be added.
Dextropropoxypehene […] should be deleted.

Schedule III
Of the substances listed in section 1, dextropropoxypehene should be deleted.

158. It was understood that in accordance with article 3, paragraph 7, of the 1961 Convention, this decision should be communicated as soon as the Convention comes into force by the [UNSG] to all States Members of the [UN], to non-members States Parties to this Convention, to the WHO, to the PCOB and to the DSB, and that the decision would become effective with respect to each Party on the date of its receipt of such communication. The Parties would thereupon take such action as might be required under the Convention.[26]

5.2.1. *Convention Applied Before Entering into Force*

As shown, the content of the schedules of the narcotics drugs under international control were modified following the procedures established in the

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[26] CND, *Report of the 19th Session, 4–9 May 1964*, Official Records of the Economic and Social Council, 37th Session, Supplement No. 09, UN Doc. E/3893, E/CN.7/466, 1964, pp. 16–17 (emphasis added).

Convention itself but before the Convention entered into force. Despite the well-founded concerns of the Indian delegate, the Office of Legal Affairs advised that the 1961 Single Convention could be applied even though it was not yet in force. Yet, what is the legal basis to implement a convention that is not yet in force? The quick answer is that this simply could not be done. However, a decision based upon a convention not yet in force was made nevertheless, and that decision produced legal effects. The implied explanation derived from the text of the decision itself is that the decision to modify the first schedule of controlled substances was enacted to produce two different effects at two different moments. The first effect was meant to be an *immediate* effect in the *internal* sphere of the CND: the decision did modify the first schedule within the internal competences of the CND. But this decision would be communicated to the Member States only after the 1961 Single Convention had entered into force. This *external* effect was *suspended* in time, like an obligation subject to a suspensive condition. Still, this explanation is not convincing, as all the mechanisms set up in Article 3 of the 1961 Single Convention were activated and utilized simply before its entry into force. The suspension of the external effects of the decision only proves the actual implementation of the Convention.

5.2.2. *Customary Law*

A second possible explanation may be found in the theory of customary law. According to this theory, the 1961 Single Convention was applied, in this case, not as a convention, but as a norm of customary law or as a text reflecting pre-existing customary rules. Of course, in this case, one of the essential elements of the theory of customary law should be discarded: the time factor. And, subsequently, it should be presupposed that the rule of customary law was developed "instantly".[27]

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[27] This possibility was analyzed to explain the legal effect of some resolutions of the UN General Assembly that, although not formally binding, were accepted and applied by states. *See generally* B. Cheng, "United Nations Resolutions on Outer Space: 'Instant' International Customary Law?" 5 *Indian Journal of International Law* (1965), p. 23 *et seq.*, esp. 35–40. In general, this phenomenon, consisting in the application of treaties by states before their entry into force, is relatively new and also relatively common. For example, the Convention on International Sales of Goods, the United Nations Convention against Transnational Organized Crime, or treaties dealing with maritime boundaries have been applied before their formal entry into force. What is the legal explanation of this phenomenon? The opposite hypothesis of this case, that of the continued efficacy of a law (or a treaty) even after its

5.2.3. *Institutional Practice*

In this line of reasoning, a variant of the argument developed before may be tried. This second alternative explanation is that the scheduling decision *sub examine* was based (tacitly) upon the institutional (or customary) practice of the CND itself. That is, this is the way the CND had been working before, and, to the extent that decisions made in this context are generally accepted, they may certainly produce legal effects.[28]

5.2.4. *Legitimacy of Administrative Decisions*

In this connection also, two legal principles of domestic law may be considered in interpreting international institutional law.[29] One is the

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formal derogation, was analyzed by the doctrine, which called this phenomenon the 'ultra activity' of the law and classified it as a particular sort of customary law. But this case of "pre-effectiveness" has yet to be fully understood. One attempt would be, again, to frame this phenomenon as a sort of customary law. Still, there is the risk of placing everything that does not fit into the traditional sources of law under the category of customary law, with the correlative danger of distorting the concept of customary law. For the concept of customary law, *see generally* C. Gimenez Corte, "El Concepto de Costumbre Jurídica en Derecho Privado", *Revista Juridica Zeus* (2002), 2–3 May. As put by Alvarez, "[t]o the extent texts emerging from international organizations are regarded as binding, most lawyers attempt to fit them into these traditional three sources [treaties, customs or principles]. [But this conception would not be useful] ... Even if the work product of many global IOs [International Organizations] actually produces legal effects, the limited conception of what constitutes international law tends to obscure them." *Cf.* Alvarez, *supra* note 11, p. 68. This study attempts to give a different explanation based upon the theory of the administrative act, as we will see immediately.

28) "The Vienna Convention on the Law of the Treaties Between States and International Organizations or Between International Organizations seems to attempt to codify this approach. That Convention includes, in its definitional section, the *'established practice of the organization*' as part of the 'rules of the organization'. This is significant insofar as basic rules within that Convention, such as the organization's capacity to enter into treaties, are determined by the 'rules of the organization'." Alvarez, *supra* note 11, p. 81 (*emphasis added*). In this connection, *see also* R. Huesa Vinaixa, "Algunas Consideraciones sobre el Convenio de Viena de 1986 sobre Tratados Celebrados entre Estados y Organizaciones Internacionales o entre Organizaciones Internacionales", in XLI *Revista Española de Derecho Internacional* (1988), pp. 49–53.

29) The UN Charter "contains contractual as well as normative elements. To those contractual elements … the ordinary rules for the interpretation of treaties must be applied … However, for the normative side … the Charter and the organizational law derived from it (secondary law), the appropriate parallelism can only be found in domestic public law, e.g., the constitutional and administrative law of the members states." G. Ress, "Interpretation of

presumption of the legitimacy of decisions made by organs set up by national constitutions or, in this case, by the constituent instrument of an international organization. This principle is linked to the rule that establishes that only those organs set up by the constitution to control – and possibly nullify – decisions made by other organs can legitimately do so. For example, if a law is enacted by a parliament, that law, no matter how unconstitutional it may appear, is a valid law. The only way to nullify it is by a decision of the constitutional organ in charge of the control of its constitutional validity: the courts of justice.[30]

If those principles are transplanted into international institutional law, it is possible to conclude that a decision made by the CND (which is a function granted by the Convention) will be valid (no matter how flawed it may appear) until another organ, in our case the International Court of Justice (Article 48.2 of the 1961 Single Convention), nullifies it. Returning to the analysis of the form of the decision, and despite the fact that the reader must try to discover where exactly the actual resolution is, the decision made by the CND in paragraph 157 of the Annual Report seems to be clear enough. It says that the then-mentioned new 'items' 'should be added' to Schedule I and that dextropropoxypehene should be deleted from Schedules II and III. Still, the utilization of the term 'item' is quite vague, and the phrases 'should be added' and 'should be deleted', utilized instead of the more formal legal term 'shall', might have created some doubts, at least theoretically. This is because the phrase 'should be added' may signify that something else must be done by someone else to fulfil the command, while the term 'shall' means that there is (already in force) an obligation that must be followed under the law.[31]

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the Charter", *in* B. Simma (ed.) *The Charter of the United Nations: A Commentary* (Oxford University Press, Oxford, 2002), pp. 15–16, quoted by Alvarez, *supra* note 11, pp. 72–73.

30) Kelsen, *supra* note 11, pp. 283–284. On the theory of the administrative act at the national level, with special reference to the principles of legality and legitimacy, *see* J. O. Santofimio G., *Acto Administrativo. Procedimiento, Eficacia, Validez* (Universidad Nacional Autónoma de México, 1994), pp. 96–113. The only other possibility is that this law, although formally passed, never takes effect and it is never enforced, in which event the law would be abrogated by a custom *contra legem*.

31) To compare how the legal vocabulary later changes, *see* Section 5.14 below.

5.3. *Identification, Recording and Publicity Systems of Decisions and Resolutions*

The scheduling decision under analysis was published in the 1964 Report of the CND and eventually communicated to governments through official channels. However, it should be stressed again that this decision did not follow any specific format. It was not numbered, classified or published in any kind of public recording system. One might have supposed that this 'informality' in the format of the decision was due to a lack of expertise or to inexperience on the part of the delegates to the CND at the very beginning of the implementation of the new system set up by the 1961 Single Convention. However, such was not the case.

For example, in comparison with the following 'resolution' by the CND in 1963, the previously quoted scheduling 'decision' is technically very poor. The resolution, quoted below, is formally named, numbered and classified, and contains an expression of reasons. The resolution itself clearly commands (urges) State Parties to take a certain course of action. Finally, it was published independently as a law. In contrast, the above-quoted scheduling decision incorporating new narcotic drugs under international control is vague, ambiguous and written in an informal way. Moreover, it was not published independently but as a paragraph of the CND report.[32] Furthermore, the most important paradox is that, while the following CND resolution is just a recommendation without legal force, the above-mentioned informal scheduling decision is a mandatory rule under (hard) international law.

With the purpose of comparing these different formats, the resolution is quoted as follows:

> CND Res.2(XVIII). Illicit Traffic in the Far East [April/May 1963]
>
> The Commission on Narcotic Drugs,
>
> (a) *Having made* a special study, at its eighteenth session of the situation regarding illicit traffic in narcotic drugs in the Far East,
>
> (b) *Noting* that the opium poppy is cultivated illicitly in some parts of the area for the production of opium; that illicit laboratories exist there for the manufacture of

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32) For the principles of legal technique, *see supra* Section 2.

morphine and heroin; and that there is a highly organized traffic in the area in all these drugs;

(c) *Noting also* that, although Governments have intensified their efforts to deal with illicit production, manufacture and traffic, the problem remains very serious;

1. *Urges* that the Governments concerned take all necessary measures to deal with the situation, in particular by

(i) obtaining more precise information about the areas in which the opium poppy is illicitly cultivated and about the location of illicit laboratories for the manufacture of morphine and heroin;

(ii) registering opium smokers, where such smoking is still permitted, with a view to the eventual elimination of the practice;

(iii) strengthening wherever necessary their enforcement services and improving the training and methods of operation of those services so that they may be able to deal more effectively with the illicit cultivation of the opium poppy, the illicit manufacture of morphine and heroin, and illicit traffic in these drugs;

(iv) controlling to the extent necessary and practicable the import and internal distribution of acetic anhydride and acetyl chloride;

(v) studying the problem of eliminating the cultivation of the opium poppy by hill tribes or other less-developed groups as a means of livelihood, and taking any necessary measures to achieve that end;

(vi) co-operating closely with other countries in the area in the direct and co-ordinated exchange of information useful in countering the illicit traffic;

(vii) including in their applications for technical assistance provision for appropriate assistance which may be required with a view to facilitating the implementation of plans for countering the illicit traffic, whether by way of training personnel, obtaining expert advice or for any other purpose.

As is apparent, this CND Resolution 2(XVIII) strictly followed the format established by the usual UN administrative practices, while the decision on controlled substances inexplicably departed from that format. This administrative practice establishing a correlative numeration, a name for identification, an introduction and an operative part, sorted by articles, was then crystallized or formalized in the UN Editorial Manual.

5.3.1. *The UN Practices on Drafting Resolutions*

The UN Editorial Manual "is intended to serve as an authoritative statement of the rules to be followed in drafting, editing and reproducing United

Nations documents, publications, and other written material, particularly as regards matters on which no international standards have been set". And, "[a]lthough *based mainly on the practices and policies* that have evolved at Headquarters, the Manual is meant to provide editorial guidance for all parts of the Secretariat. The rules and policies set forth herein have been *developed on the basis of experience*. They have grown out of the need of the Organization in the course of its development."[33]

One example of this practice may be found in the development of the identification system of decisions of the Economic and Social Council (ECOSOC). The compilation of resolutions adopted by ECOSOC during its Third Session, from 11 September to 10 December 1946, indicates in a note between brackets in its table of contents: "These resolutions have been numbered for the ease of reference – III denotes the third session".[34] In 1948, this editorial note between brackets became a footnote.[35] These editorial footnotes have since been kept in the compilations of decisions of ECOSOC. In 1950, in addition to the footnotes, another note was added that states: "All United Nations Documents are designated by symbols, i.e., capital letters, combined with figures. Mention of such a symbol indicates a reference to a United Nations document."[36] Then, in 1956, another note read: "Symbols of the United Nations documents are composed of capital letters combined with figures. Mention of such symbols indicates a reference to a United Nations document. The Arabic and Roman numerals identifying each resolution indicate, respectively, the number of the resolution and the number of the session at which it was adopted."[37] In 1957, a third paragraph to the same note was added: "The resolutions of the Economic and Social Council are numbered in the order of their adoption. A check list of the resolutions adopted by the Council during its twenty-four session appears at

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33) *United Nations Editorial Manual*, *supra* note 10, p. iii (*emphasis added*).

34) *Resolutions adopted by the Economic and Social Council during its Third Session from 11 September to 10 December 1946* (UN, New York, 1947), p. iii.

35) *Resolutions adopted by the Economic and Social Council during its Seventh Session from 19 July to 19 August 1948* (UN, Geneva, 1948), p. iii.

36) ECOSOC, *Official Records, 11th Session (resumed), 12 October – 13 December 1950: Resolutions* (UN, New York, 1951).

37) ECOSOC, *Official Records, 22nd Session, 9 July – 9 August 1956: Resolutions* (UN, Geneva, 1956).

the end of the present volume."[38] In 1974, the term "decision" was included in the editorial note.[39]

Finally, as of the 31st session (1976), the UN General Assembly (UNGA) began to incorporate the session number into the symbols of its documents (*e.g.*, A/31/99). Similarly, in 1978, the ECOSOC began incorporating the year into the symbol documents (*e.g.*, E/1978/99); the Security Council began doing the same in 1994 (*e.g.*, S/1994/99), with the exception of resolutions and meeting records. As previously noted, this practice was eventually crystallized in the UN Editorial Manual. According to the latest version of this Manual, "United Nations resolutions are formal expressions of the opinion or will of United Nations organs. They generally, but not invariably, consist of two clearly defined parts: a preamble and an operative part**.** The preamble generally recites the considerations on the basis of which action is taken, an opinion expressed, or a directive given. The operative part states the opinion of the organ or the action to be taken."[40] In addition, resolutions and decisions should include a system of identifications, a particular form of issuance, and a specific drafting and editing style, including general observations, titles, order of elements, numbering and arrangement of paragraphs, internal references, wording, punctuation, and so on.[41] Yet, none of these rules were followed by the CND in the case of the scheduling decisions. Nonetheless, Member States never questioned either the form or the substance of those modifications in the schedules; they never challenged the validity of these decisions; and, more importantly, the decisions were immediately implemented.[42]

One final commentary is necessary. The CND decision analyzed here placed under international control a narcotic drug called Pethidine Intermediate C. However, this drug was already included in the original list of the 1961 plenipotentiary conference, although under its chemical name: '1-Methyl-4-phenylpiperidine-4-carboxylic acid'. This situation leads to

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38) ECOSOC, *Official Records, 24th Session, 2 July – 2 August 1950: Resolutions* (UN, Geneva, 1957).

39) ECOSOC, *Official Records, 57th Session, 3 July – 2 August 1974: Resolutions* (UN, New York, 1974).

40) *United Nations Editorial Manual Online*, *supra* note 7.

41) *Ibid*. For the principles of legal technique, *see supra* Section 2.

42) For the legal effects of this acceptance, *see supra* Section 5.2.

several questions. Why was Pethidine Intermediate C included only under its chemical name and not under its ordinary name? Why was it then re-scheduled under its ordinary name? Was this necessary? Nevertheless, this is just a laboratory exercise, since the 1961 Single Convention entered into force in 1964, by including the new amended list of narcotic drugs under international control.

5.4. *1965: 20th Session of the CND*

The CND held its twentieth session in Geneva from 29 November to 21 December 1965. That year, with the 1961 Single Convention officially and formally in force, a new narcotic drug was included in the Schedule I: piritramide. The form of the decision was similar to that of the decision taken in 1964, although even a little more informal. Paragraph 54 of the CND Report reads: "[Following the recommendation made by WHO on piritramide] the Commission unanimously decided that the substance in question should be added to Schedule I of the 1961 Convention".[43] Before, however, paragraph 35 of the Report stated that the CND had taken note of the "List of Drugs under International Control".[44] This list was published by ECOSOC for reference purposes, meaning not for specific legal purposes.

This last document, classified under the CND nomenclature E/CN.7/468/Add.2, issued on 25 September 1965, reflected the first list of narcotic drugs under international control since the entry into force of the 1961 Single Convention on 13 December 1964. But, as shown, it is not clear exactly when the narcotic drug piritramide was placed under international control. According to the CND Annual Report, this decision was made during the session of the CND in December 1965. But the report itself made a *renvoi* to the List of Drugs under International Control of 25 September 1965, which subjected piritramide to international control. Therefore, it seems that piritramide was placed under control before the session of the CND had taken place. The only possible explanation for this situation is that the decision to include piritramide in Schedule I was made by mail before the session. In any case, the text of the official communication of the decision

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43) CND, *Report of the 20th Session, 29 November – 21 December 1965*, Official Records of the Economic and Social Council, 40th Session, Supplement No. 02, UN Doc. E/4140, E/CN.7/488, pp. 16–17.

44) *Ibid.*, p. 5.

to Member States by the UNSG affirmed that this decision was made by the CND during its session. The third paragraph of this communication reads: "This amendment was adopted by the [CND] … at its twentieth session".[45] As is apparent, the interpreter of the law is forced to take different texts to determine the concrete content and meaning of this scheduling decision. Needless to say, this uncertainty could have been avoided if the decision had been made following a legal form.[46]

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45) UNSG, *Communication to the Government of Australia*, 2 February 1966, <www.austlii.edu.au/au/legis/cth/consol_act/nda1967160/sch2.html>, 12 March 2009. It should be recalled here that any decision by the CND pursuant to Article 3 of the 1961 Single Convention "shall be communicated by the [UNSG] to all States Members", and that such decision "shall become effective with respect to each Party on the date of its receipt of such communication, and the States Parties shall thereupon take such action as may be required under this Convention".

46) During this session, the CND decided that, in certain cases, decisions on scheduling of narcotic drugs may be taken by mail. The 'resolution' quoted below is framed into a perfectly legal format, and it also filled a vacuum of the 1961 Single Convention, which did not specify how votes should be expressed. In another words, the CND itself is interpreting and specifying the provisions of the Convention.

Res.1(XX). The control of new narcotic substances, November/December 1965:

The Commission on Narcotic Drugs,

Considering the importance of ensuring that new narcotic substances are brought under control as quickly as possible,

Sharing the concern of the World Health Assembly (resolution WHA 18–46) about the dangers to public health which may arise if the control of such substances is delayed,

Taking into account the provisions of the Single Convention on Narcotic Drugs, 1961, under which decisions on the control of narcotic substances are taken by the Commission on Narcotic Drugs,

Considering also that the Commission on Narcotic Drugs meets not more than once a year,

Believing that steps can be taken under the present terms of the 1961 Convention to speed up the process of placing new substances under control,

1. Resolves that if a recommendation is made by the World Health Organization for the control of a new narcotic substance, and the Commission is not, or will not within a period of three months be in session, a decision should be taken by the Commission before its next session; and

2. Requests the Secretary-General, for that purpose, to arrange in these exceptional circumstances for a decision of the Commission to be taken by a vote of the members of the Commission by mail or telegram and for a report to be made to the Commission at its next session.

5.5. *1966: 21st Session of the CND*

This Session took place in December 1966. Instead of evolving, scheduling decisions became even less clear. In paragraph 49 of the CND Report of 1966, the CND took note of the List of Drugs under International Control, saying: "Since the Commission's twentieth session, one new substance had been added to the list – nicodicodine".[47] However, just then, in paragraph 60, the Report dealt with the "extension of control to new substances", stating that, since nicodicodine "was an ester and ether of dihydormorphine, it was automatically included in Schedule I of the 1961 Convention".[48]

When analyzing this 'decision', the interpreter may have the impression that the decision to place nicodicodine under international control was made by someone other than the CND, as the text reads "one new substance had been added". The second conclusion that it is possible to draw here is that the List of Drugs under International Control, including new substances, was made before the CND decision on the matter. A careful review of the dates of these documents reveals that, while the CND Session took place in December 1966, the List of Drugs under International Control was published by ECOSOC in September 1966 (E/CN.7/490/Add.1), stating that "une substance nouvelle, la nicodicodine, a été placée sous controle". Therefore, one may legitimately ask who made this decision to include nicodicodine under international control, and when. As in the case of piritramide, the only possible explanation for this situation is that the decision to include nicodicodine in Schedule I was made by mail, before the Session, but there are no explicit statements in this regard in the records of the CND.[49]

A related issue refers to the temporal application of the decision. Should nicodicodine be considered under international control from 1966 onward? Or, since it "was an ester and ether of dihydormorphine, *it was automatically* included in Schedule I of the 1961 Convention" (*emphasis added*). In this case, the decision would have some kind of 'retroactive' effect back to 1964. Here again, the lack of a proper legal form led to legal uncertainty.

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47) CND, *Report of the 21st Session, 5–21 December 1966*, *Official Records of the Economic and Social Council, 42nd Session, Supplement No. 02*, p. 7.

48) *Ibid.*, pp. 7–8.

49) The same interpretative problems are found in the case of piritramide – *see supra* Section 5.4.

Regarding acetorphine and etorphine, the 1966 Report says:

> 61. In accordance with resolution 1 (XX) of the … [CND] the members of the Commission had been consulted by mail regarding WHO's recommendation … to add acetorphine and ethorphine to Schedule I of the 1961 Convention … The Commission noted that its members had decided in favor of the above recommendation.[50]

This was the first time that resolution 1 (XX) was expressly utilized.[51] Still, the phrase "[t]he Commission noted that its members *had decided in favor* of the above recommendation" leaves a certain degree of ambiguity. Were these drugs placed under international control or not? Taking into account only the text of the decision does not clarify the situation. This information must be contrasted with other sources. In this case, the official Commentary on the 1961 Single Convention confirms that acetorphine and etorphine "have at the date of this writing [1973] been added to Schedule I" and refers to the 1966 CND Report.[52] Furthermore, it seems that the mere positive vote by mail by the State Parties was enough to express the collective will of the CND. That is why the expression "noted that its members had decided in favor" only recognizes or formalizes a kind of tacit decision already made before the official meeting of the CND. This interpretation would be in accordance with the text of resolution 1 (XX), which provides for the "decision of the Commission to be taken by a vote of the members of the Commission by mail". However, common sense indicates that the mere receipt of votes by mail is not enough to express the will of an organ. It is still required that someone counts the votes and then determines if the majority required to validly express the will of the organ is met. Those formal, but necessary, steps should have been taken, most probably by the Secretariat of the CND, but again in an informal way, leaving no records of such activity. Therefore, the exact date of the decision remains unclear. The text of the official communication of the decision to Member States by the UNSG adds nothing to the interpretation. It said only that "[t]he decision of the Commission was taken … in accordance with the procedure

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50) CND, *Report of the 21st Session, 5–21 December 1966*, *Official Records of the Economic and Social Council, 42nd Session, Supplement No. 02*, p. 8.

51) For the text of CND Resolution 1 (XX), *see supra* note 46.

52) UN, *supra* note 17, p. 482.

adopted by the Commission at its twentieth session", making a reference to the vote by mail.[53]

In 1967, the CND did not meet. Nevertheless, the List of Drugs under International Control was published, stating that "[t]hree new substances (acertorphine, codoxine and etorphine) have been added to the list since the previous edition was published".[54]

5.6. *1968: 22nd Session of the CND*

However, it was not until the CND Report of 1968 when it was possible to read:

> 39. … WHO notified the [UNSG] that codoxime was liable to … abuse … This notification was transmitted for vote by mail to all members of the [CND] in accordance with resolution 1 (XX) of the Commission.
>
> 40. The Commission was informed by the Director of the Division that all members of the Commission approved the recommendation of WHO and that that decision of the Commission had been duly transmitted to the governments.[55]

Apparently, through the vote by mail, governments agreed to include codoxime in 1967, but there is no absolute certainty about the date of the decision. The same criticism made in the case of the scheduling of acetorphine and ethorphine may be made here.[56]

Even more vague is the case for the inclusion of acetorphine and etorphine in schedule IV. The CND report just read: "43. The Commission resumed consideration of the proposal made by WHO in 1966, that the drugs acetorphine and etorphine …. should be placed in Schedule IV of the 1961 Convention."[57] Were those drugs placed in schedule IV control in 1968? The interpreter, again, has to take various sources of information and combine them to have an idea when this occurred, thereby re-building

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53) UNSG, *Communication to the Government of Australia*, 19 October 1966, <www.austlii.edu.au/au/legis/cth/consol_act/nda1967160/sch2.html>, 12 March 2009.

54) ECOSOC and CND, *22nd Session*, UN Doc. E/CN.7/503/Add.1, 15 August 1967, p. 1.

55) CND, *Report of the 22nd Session, 8–26 January 1968*, *Official Records of the Economic and Social Council, 44th Session, Supplement No. 02*, p. 5.

56) *See supra* Section 5.5.

57) CND, *supra* note 55, p. 5.

the decision-making process and the outcome of that process. Here, once more, one has to utilize the official Commentary on the Single Convention and the practice of the States to determine that 1968 was the year in which these decisions were made.[58]

5.7. *1969: 23rd Session of the CND*

The form of decisions started to change somewhat in 1969, gaining some clarity. Thus, the CDN Report reads: "36. The Commission, by virtue of the powers vested in it by article 3, paragraph 3 (iii), of the 1961 Convention, decided that bezitramide and its salts should be included in Schedule I of the 1961 Convention."[59]

5.8. *1971: 24th Session of the CND*

The form of decisions continued to change, acquiring more legal precision. The 1971 CND report reads: "57. … the Commission considered the matter … approved the WHO recommendation, and decided to add propiram to Schedule II of the 1961 Convention."[60] As shown, the form of these decisions is much better than in the previous session. As a result, it is clear that propiran was placed under control, since the CND "*decided to add* propiram to Schedule II". In contrast, the previous term usually employed by the CND was "*should be added*", with the inherent ambiguity of that term.[61]

5.9. *1973: 25th Session of the CND*

The improvement made in 1971 was repeated in 1973, with the inclusion of drotebanol in Schedule I, the inclusion of preparations of diphenoxylate in Schedule III, the transfer of Nicodicodine from Schedule I to Schedule II,

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58) UN, *supra* note 17, p. 485. For the same sort of interpretative problems, *see supra* Section 5.

59) CND, *Report of the 23rd Session, 13–31 January 1969*, Official Records of the Economic and Social Council, 46th Session, UN Doc. E/4606/Rev.1, E/CN.7/523/Rev.1, 1969, p. 9. It should be noted, however, that the chemical name in all these decisions was not included.

60) CND, *Report of the 24th Session, 27 September – 21 October 1971*, Official Records of the Economic and Social Council, 52nd Session, Supplement No. 02, UN Doc. E/5082, E/CN.7/544, 1971, p. 15.

61) To compare with previous decisions, *see supra* Section 5.4.

and the inclusion of nicodicodine in Schedule III of the 1961 Convention.[62] It should be noted, however, that the first Schedule III approved in 1961, together with the 1961 Single Convention, included diphenoxylate as "solid dose preparations of diphenoxylate". Apparently, this decision in 1973 amended only the name to "preparations of diphenoxylate".

This year also, "it should be decided that, from 1973 onwards, only the 'Yellow List' [published by the International Narcotics Control Board (INCB)] should be considered as the 'single list' of narcotics drugs under international control". Thus, the List of Drugs under International Control prepared by the CND was discontinued.[63] This avoidance of duplication of the records of drugs under international control provided some clarity to the recording system. In addition, from the administrative law point of view, it is interesting to recognize this delegation of authority between two international organs. That is, the Convention delegated the power to schedule decisions to the CND, and then the CND delegated the power to keep a record of these decisions to the INCB.[64]

5.10. *1974: III Special Session of the CND*

These formal improvements continued with the inclusion of difenoxin in Schedule I and the inclusion of preparations of difenoxin in Schedule III of the 1961 Convention.[65]

5.11. *1975: 26th Session of the CND*

These formal improvements continued in 1975 with the inclusion of propiran preparations in Schedule III of the 1961 Convention. Nonetheless, this

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62) CND, *Report of the 25th Session, 22 January – 9 February 1973*, Official Records of the Economic and Social Council, 54th Session, Supplement No. 03, UN Doc. E/5248, E/CN.7/555, 1973, pp. 19–24.

63) *Ibid.*, p. 35.

64) For the role of the INCB in the scheduling process, *see* Section 6 below. As a general comment, it should be noted also that, although the decisions did not include the chemical names of drug under international control, but only their Non-Proprietary Name (NPN), they usually refers to the recommendations by WHO, which, in turn, usually include the chemical names.

65) CND, *Report of the Third Special Session, 18 February – 1 March 1974*, Official Records of the Economic and Social Council, 56th Session, Supplement No. 06, UN Doc. E/5458, E/CN.7/565, 1974, p. 75.

CND decision is not self-contained, but made a reference to the WHO recommendation. By doing so, the CND decision incorporated this WHO recommendation by reference. Although this technique is perfectly legitimate, it is not always convenient, since two different legal texts must be reviewed to obtain the whole content of the norm. Thus, the CND Report reads: "71. The Commission decided by consensus to amend Schedule III … by adding to that Schedule the text recommended by the World Health Organization and quoted in the preceding paragraph."[66]

5.12. *1976 Special Session of the CND*

In 1976, the CND did not make any decisions regarding the scheduling of controlled substances.[67]

5.13. *1977: 27th Session of the CND*

In 1977, the CND, by Decision 6 (XXVII), decided to send communications to the Member States to initiate a vote by correspondence on the inclusion "in the respective Schedules of the salts of the substances listed in Schedule I to IV" of the 1971 Convention.[68] The following year, in 1978, the Annual Report of the CND Report stated:

> 185. The Commission took note of the result of the vote by correspondence, conducted pursuant to Commission decision 6 (XXVII) [1977], which had led to the inclusion in Schedules I-IV annexed to the 1971 Convention, at the end of each Schedule, of the following wording: 'The salts of the substances listed in this Schedule whenever the existence of such salts is possible'.[69]

As in the case of codoxine and all decisions made by mail, it is unclear whether the decision should be considered to have been made upon the

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66) CND, *Report of the 26th Session, 17–28 February 1975*, Official Records of the Economic and Social Council, 58th Session, Supplement No. 05, UN Doc. E/5639, E/CN.7/577, 1975, p. 21.

67) The 1971 Convention on Psychotropic Substances entered into force on 16 August 1976.

68) The decision is available at <www.unodc.org/documents/commissions/CND-Res-1970to1979/CND-1977-Session27_XXVII/CND-Decision-27-06.pdf>, 30 March 2009.

69) CND, *Report of the 5th Special Session, 13–24 February 1978*, Official Records of the Economic and Social Council, 1978, Supplement No. 05, UN Doc. E/1978/35, E/CN.7/621, 1978, pp. 36–37.

receipt by the CND of the last affirmative vote or in the following session of the CND. The date of the subsequent session should be preferred, as it may provide a greater degree of certainty.[70]

5.14. *1978: 5th Special Session of the CND*

Suddenly, in 1978, everything changed, and a new scheduling decision was made, following a completely renovated format:

> CND Dec. 3(S-V). Amendment to No. 10 of the List of Substances in Schedule I annexed to the 1971 Convention on Psychotropic Substances.
>
> At its 844th meeting on 16 February 1978, the Commission on Narcotic Drugs decided that No. 10 of the List of Substances in Schedule I annexed to the 1971 Convention on Psychotropic Substances be amended as follows:
>
> (a) The text of No. 10 in the second column ("Other non-proprietary or trivial names") shall read: "tetrahydrocannabinol, the following isomers:\Delta\ 6a(10a), \Delta\ 6a(7), \Delta\ 7, \Delta\ 8, \Delta\ 9, \Delta\ 10, \Delta\ 9(11), and their stereochemical variants";
>
> (b) The chemical formula in the third column ("Chemical Name") of No. 10 shall be deleted.[71]

As is apparent, the format of the decision had completely changed. Now, the decision was made in accordance with a truly formal and legal style. The decision had a name, a number, a date, and it was published independently, not as a lost paragraph in the CND Annual Report.[72] Why did the CND eventually decide to modify the form of the scheduling decisions after having followed an informal style for more than twenty-five years? This change and improvement in the form of the decision was surely influenced by the changes that occurred in the UNGA and in the ECOSOC. As of the 31st session (1976), the UNGA modified the system of identification of resolutions by incorporating the session number into the symbols of its documents (*e.g.*, A/31/99). Similarly, in 1978, the ECOSOC began incorporating the

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70) *See supra* Sections 5.5 and 6.

71) *See* UN Doc. E/1978/35-E/CN.7/621, para. 187.

72) For the principles of legal technique, *see supra* Section 2.

year into the symbols of its documents (*e.g.*, E/1978/99).[73] This new format in the resolution of the UNGA and the ECOSOC also led the CND to modify and improve its own system of identification of decisions.

This change and improvement in style was accompanied by a methodological attempt to collect all of the scheduling decisions. The CND decided to compile and classify all of the decisions on the subject, although, so far, this has not yet been accomplished in an official way.[74] The improvement in the format may well have been based upon this decision also, which reads:

> CND Dec.5 (S-V): Compilation – with classification according to subject – of resolutions and decisions of the United Nations drug control organs (from 1946 to date).
>
> At its 855th meeting on 23 February 1978, the Commission on Narcotic Drugs decided that the Division of Narcotic Drugs, with financial assistance from the United Nations Fund for Drug Abuse Control, should publish as soon as possible the compilation – with classification according to subject – of resolutions and decisions of the United Nations drug control organs (from 1946 to date), as outlined in the note by the Secretary-General on the implementation of the international treaties on the control of narcotic drugs and psychotropic substances (E/CN.7/617, paras. 45–49).[75]

In this connection, it should also be emphasized here that, until 1975, the CND reports published a list with the resolutions made during a given session, although this list included only 'resolutions' and not 'decisions'. In 1976, the CND report also included a list with the 'decisions' made during that session. Yet, surprisingly, the list did not include decisions regarding scheduling. Finally, in 1978, the scheduling decisions were incorporated into these lists published by the reports.

5.15. *1979 (28th session) until 2007 (50th session) of the CND*

These changes in the form of the scheduling decisions have continued since 1978. The following decision is an example that follows a proper legal form.

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73) For a full explanation of the identification system of the UN, *see* <www.un.org/Depts/dhl/resguide/symbol.htm>, 2 February 2009.

74) For the concept of compilation, *see supra* note 12.

75) Available at <www.unodc.org/documents/commissions/CND-Res-1970to1979/CND-1978-SessionSpecial05_S-V/CND-Decision-S05-05.pdf>, 30 March 2009.

> CND Dec. 4 (XXVIII). Transfer of methaqualone from Schedule CND IV to Schedule II annexed to the 1971 Convention on Psychotropic Substances.
>
> At its 874th meeting on 22 February 1979, the Commission on Narcotic Drugs decided in accordance with paragraphs 6 and 5 of article 2 of the 1971 Convention on Psychotropic Substances, that methaqualone, originally appearing under number 6 in the list of substances in Schedule IV, be transferred to Schedule II annexed to that Convention and be included in the list of substances in Schedule II at the appropriate place in the alphabetical order of the respective languages in which the text of the Convention is officially published.[76]

In 1979, the CND also decided to include nicocodine in paragraph 1 of Schedule III annexed to the 1961 Single Convention, and to that Convention as amended by the 1972 Protocol. During the following year, a number of decisions on this matter were made following a proper legal format in each instance.

In 1981, the CND decided to include certain preparations containing dextropropoxyphene 'salts' in Schedule III annexed to the 1961 Single Convention, and to that Convention as amended by the 1972 Protocol (Decision 1 (XXIX)).

In 1982, the CND enacted a Procedure to be followed by the CND in matters regarding the scheduling of narcotic drugs and psychotropic substances.[77]

In 1983, the CND issued a Procedure to be followed by the CND in matters of scheduling benzodiazepines.[78]

In 1984, the CND decided to include lorazepam in Schedule IV of the 1971 Convention (Decision 25 (S-VIII)).

In 1991, the CND decided to transfer delta-9-THC and its stereochemical variants from Schedule I to Schedule II of the 1971 Convention (Decision 2 (XXXIV)).[79] It should be noted that it is very difficult for a layman to interpret this decision to transfer delta-9-THC from one schedule to another,

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76) Available at <www.unodc.org/documents/commissions/CND-Res-1970to1979/CND-1979-Session28_XXVIII/CND-Decision-28-04.pdf>, 30 March 2009.

77) CND, *Res. 2 (S-VII). Procedure to be followed by the Commission on Narcotic Drugs in matters of scheduling of narcotic drugs and psychotropic substances*, 7th Special Session, 1982.

78) CND, *Res. 1 (XXX): Procedures to be followed by the CND in matters of scheduling benzodiazepines*, 30th Session, 1983.

79) For a more detailed analysis of this decision, *see* entry 'Dronabinol' in the Annex.

since 'delta-9-THC' was never previously mentioned. That is, this substance was, *per se*, never placed under international control. Only a pharmacist, chemist, of other person with specialized knowledge would be able to notice that 'delta-9-THC' is included as a component part of "Tetrahydrocannabinols, all isomers". Also, the current inclusion of Dronabinol in the INCB's 'Green' List of psychotropic substances under international control, as only one of the stereochemical variants of *delta*-9-tetrahydrocannabinol, namely (-)-*trans-delta*-9-tetrahydrocannabinol, is not expressly stated in any official decision of the CND, but only in an "interpretation" by the INCB.[80]

In 2003, the CND decided to include Amineptine under Schedule II of the 1971 Convention (Decision 46/1).

Finally, in 2007, the CND decided to include oripavine under Schedule I of the 1961 Single Convention (Decision 50/1).[81]

6. Chemical Brothers: The Interpretative Role of the INCB[82]

In the previous chapter, the 'evolution' and development of the legal form of the scheduling decisions made by the CND was analyzed. Once a decision, or more generally, a law, is made, it is set in stone; a law can be modified only by another law, like a decision can be modified only by another decision. However, a number of substances that were scheduled by a decision of the CND under certain specific denominations were modified afterwards. For example, one may compare the following decision by the CND to place a psychotropic substance under international control against the current name of the substance as published in the Green List of the INCB.

> CND Dec. 1 (XXXI), Inclusion of dimethoxybromoamphetamine (DOB) in Schedule I of the 1971 Convention on Psychotropic Substances.

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80) For the role of the INCB, *see infra* Section 6, and also *supra* Section 5.9.

81) Note that the numbering of the decisions changed in 1999. Since then, decisions are number first with the number of the session in Arabic numbers followed by the number of the decision.

82) The INCB is the organ established by Article 5 of the 1961 Single Convention. Article 9.4 defines its functions as follows: "The Board, in co-operation with Governments, and subject to the terms of this Convention, shall endeavour to limit the cultivation, production, manufacture and use of drugs to an adequate amount required for medical and scientific purposes, to ensure their availability for such purposes and to prevent illicit cultivation, production and manufacture of, and illicit trafficking in and use of, drugs."

> At its 951st meeting, on 12 February 1985, the Commission on Narcotic Drugs, in accordance with article 2, paragraph 5, of the 1971 Convention on Psychotropic Substances, decided that 2,5-dimethoxy-4-bromoamphetamine (also referred as to DOB) should be included in Schedule I of that Convention.[83]

However, this substance appears in the Green List of the INCB as:

> BROLAMFETAMINE [INPN], DOB [trivial name], (±)-4-bromo-2,5-dimethoxy-*α*-methylphenethylamine [chemical name].[84]

As another example, while the original list of the 1971 Convention included in its List IV:

> SPA, (-)-1-dimethylamino-1,2-diphenyl-ethane.

In the Green List it appears as:

> LEFETAMINE, SPA, (–)-*N,N*-dimethyl-1,2-diphenylethylamine.

Or, the original list of the 1971 Convention included in its List I:

> (+)-Lysergide, LSD, LSD-25, (+)-N,N- diethyllysergamide (d-lysegic acid diethlylamine).

While in the Green List it appears as:

> (+)-LYSERGIDE LSD, LSD-25 9,10-didehydro-*N,N*-diethyl-6-methylergoline-8*β*-carboxamide.

The following decision is another example:

> CND Dec. 5 (S-VI). Inclusion of TCP, PHP or PCPY and PCE in Schedule I annexed to the 1971 Convention on Psychotropic Substances.

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83) Available at <www.unodc.org/documents/commissions/CND-Res-1980to1989/CND-1985-Session31-XXXI/CND-Decision-31-01.pdf>, 30 June 2010.

84) The Green List is available at <www.incb.org/incb/green_list.html>, 12 February 2009.

> At its 885th meeting, on 14 February 1980, the Commission on Narcotic Drugs, in accordance with article 2, paragraph 5, of the 1971 Convention on Psychotropic Substances, decided that 1-[1-(2-thienyl) cyclohexyl] piperidine, the trivial name of which is TCP, 1-(1-phenylcyclohexyl) pyrrolidine, the trivial name of which is either PHP or PCPY, and N-ethyl-1-phenylcyclohexylamine, the trivial name of which is PCE, should be included in Schedule I annexed to the 1971 Convention on Psychotropic Substances.[85]

But, in the Green List, it appears as:

> ROLICYCLIDINE, PHP, PCPY, 1-(1-phenylcyclohexyl) pyrrolidine.

Who made these changes? Was the author of the changes authorized to do so? What are the legal and chemical meanings of those changes? These changes were made by the INCB. As noted before, the CND formally delegated to the INCB the function of collecting and keeping records of the scheduling decisions.[86] However, in the above-mentioned cases, the INCB went further and modified in some cases the very names of the substances placed under international control. Is the INCB authorized to do so? In principle, no. According to Article 8(a) and (c) of the Single Convention, the CND is the competent organ to "amend schedules", and to "make recommendations for the implementation of the aims and provisions" of the Convention. While, in accordance with Article 9.4, the INCB shall (only) implement the provisions of the Convention.

Still, at this point, it is necessary to make a parallelism between the law-making process in international organizations with the law-making process at the national State level. From the point of view of civil law countries with presidential constitutional systems, once a law is passed by the parliament or legislature, it should be sent to the executive branch. The president may veto this law or may accept it. In this case the president promulgates and publishes the law completing the whole law-making process. The executive branch may also introduce minor, typically editorial amendments to the text, which must not imply a substantive modification of text of the law,

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85) Available at <www.unodc.org/documents/commissions/CND-Res-1980to1989/CND-1980-SessionSpecial06_S-VI/CND-Decision-S06-05.pdf>, 30 June 2010.

86) *See supra* Section 5.9.

but instead constitute a mere clarification of some grammatical or numeral mistakes. This final edited text of the law is called '*textos ordenados*'.[87]

The drafting of '*textos ordenados*' (edited texts) brings into consideration serious legal questions. Among them is the determination of the authority entitled to edit the text of the law; second is the determination of the degree of discretion that this authority should have. Regarding the first question, it is advisable for the president to proclaim a special decree for each law, nominating the authority entitled to perform the official editing. Regarding the second question, it should be kept in mind that the 'editor' must not become the 'interpreter' of a law.[88]

In the cases under analysis, the INCB has undertaken this task itself. What is the legal basis for this? Again, the legal basis for this self-empowerment may be found in the same theories explained when the decision to amend the 1961 Convention was made before it entered into force (*see supra* Section 5.2). Specifically, it is the customary (institutional) practice of the INCB on the matter that explains this phenomenon.[89] Those modifications in the texts of the decision were not challenged by Member States, but rather were accepted by them.[90]

7. Conclusions

This study analyzed the legal form of the scheduling decisions made by the CND. As shown (Sections 5.1 and 5.2), the early decisions on the matter

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87) *Cf.* Rossatti, *supra* note 10, pp. 47–51. For the law-making process in Argentina, *see* Articles 77 to 84 of the National Constitution.

88) *Cf.* Rossatti, *supra* note 10, pp. 52–53.

89) As put by Sohn, "[i]n the course of the operation from day to day of the various organs of the Organization, it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions". L. B. Sohn, "Interpreting the Law", *in* O. Schachter and C. C. Joyner (eds.), *United Nations Legal Order* (Harvard University Press, Cambridge, 1995), pp. 172–3, quoted in Alvarez, *supra* note 11, p. 79.

90) "[T]he most important aspect of this approach is its implicit support for the proposition that 'an interpretation made by an organ of the Organization which is generally acceptable is binding' (or 'authoritative')". Alvarez, *supra* note 11, p. 79. The question whether those changes in the names of the substances also implies a change in the chemical nature of the substances themselves or whether those different names refer to a completely new chemical substance, and therefore completely modifying the CND decisions, falls out of the reach of this study.

made between 1961 and 1977 were made in a very informal manner, without following any kind of legal style. They were not published, identified, or recorded under any kind of recording system. This situation created two major problems. First, the need to determine the actual decisions and to determine their date of issue; and second, the need to interpret these decisions, meaning providing them sense and meaning.

The solution to the first problem required an historical, *quasi*-archaeological, approach, since it was necessary to search for and dig out the text of the decisions in a variety of sources and documents, kept in a diversity of archives, collections and libraries. From a very practical point of view, the material difficulty of finding the decisions, *i.e.* the law, has reinforced the importance of one of the basic general principles of law: the publicity of the law, which implies its identification and publication. This basic principle of modern (national) law seems still to be in a developing stage in the 'international drug law', as a specific branch of international institutional law.

One of the main outcomes of this study consists in the *determination* of the law. Now, all of the scheduling decisions made by the CND are available; their texts have been harmonized and clarified, their dates of issue have been specified, and a compilation of the decisions is publicly and easily accessible.[91] Once the law was determined (even from a very material perspective), it was necessary to interpret it and to integrate the vacuums of the system. This process of interpretation and integration was both textual and contextual, as it was directed to the text of each decision itself and to the related documents required to complete the will of the legislator, when the texts of the decisions were incomplete or imprecise (see, *e.g.*, Section 5.6). As said before, the early decisions were not written in a formal legal style, and, because of this, it was difficult to determine the actual decision made by the CND. The lack of proper legal language, again, reinforces the need to utilize precise legal terminology to specify the content of the law.

Throughout the process of determining and interpreting the decisions, it was necessary to review the sources of law in general and, in particular, the sources of classic public international law and modern international institutional law. As this branch of law is relatively new and is a branch of law in the making, there are comparably few written norms. Consequently, the

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[91] For a specific analysis of the different stages of the interpretative process, *see* Ciuro Caldani, *supra* note 11, pp. 105–112.

role of customary law, and particularly the role of the institutional practice of the organization, becomes extremely significant (Sections 5.2 and 6). Yet, sometimes, the recourse to these customary rules is not enough, in which event it is necessary to recur and to transplant institutions from national law and, in particular, from administrative law (Section 5.2) and from constitutional law (Section 6). Only by referring to the methodological tools from different branches, and from the general theory of law, is it possible to *construe* (in the double sense of 'understand' and 'build') the system of international institutional law. In this regard, it was also necessary to review the competences, the possible conflicts of competences, and the relationships between international organs in a context in which the delimitation of these competences is not precise and the way to solve conflicts is not clearly set up. Here again, resort to the constitutional law theory was unavoidable (Section 6).

Furthermore, this study witnessed the evolution and development of the 'international drug law' as a branch of international institutional law. This evolution paralleled, in fast motion, the evolution of general international law, and also law in general. This international institutional law started from a very informal, partial, decentralized and incomplete set of norms, and evolved to a more formal, complete, centralized structure, passing from scattered norms through attempts at compilations, and will surely move to an incipient systematization,[92] and all this in fewer than fifty years (Section 2).

In this connection, the other main outcome of this study was to show clearly this evolution of the legal form of decisions and resolutions. It was demonstrated how the mere informal practices of the organization more or less rapidly developed into institutional customary practices, which were then crystallized into formal decisions. This is paradigmatically verified in the evolution of the form of the scheduling decisions by the CND,[93] but also in the evolution of the form and identification system of the ECOSOC resolutions (Section 5.3). Moreover, these practices were then formally crystallized in the UN Editorial Manual.

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92) *See supra* note 12.

93) This evolution may also be presented visually, by putting all of the scheduling decisions one after the other and just observing how the early decisions made in the 1960s slowly change, decade after decade, to eventually reach a proper legal format (*see supra* Sections 5.1–15).

The study of the decisions made by the CND is of particular importance, since these are among those few decisions made by international organizations that are *binding* under international law. Still, the problems discussed here and the findings proposed by this study are easily transferable to all kinds of resolutions adopted by the organs of international organizations. Needles to say, this is not merely a matter of style, because, in legal matters, the *form* definitely contributes to the meaning of the *substance* of the law. Yet, if it were only a matter of manners, we could also have said, with Oscar Wilde: "In matters of grave importance, style, not sincerity, is the vital thing".

Annex

History of the Scheduling Decisions concerning the Single Convention on Narcotic Drugs, 1961, and that Convention as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961 (1961–2007), and the Convention on Psychotropic Substances, 1971, (1971–2003).

Narcotic Drug / Psychotropic Substance (Principal names and remarks to the scheduling history)	*Year of initial Scheduling Decision*	*Schedule Convention (status 2009)*	
- A -			
Acetorphine	1966	I	1961
	1968	IV	1961
Acetyl-*alpha*-methylfentanyl	1988	I, IV	1961
Acetyldihydrocodeine	1961/Original List	II	1961
Acetyldihydrocodeine preparations	1961/Original List	III	1961
Acetylmethadol	1961/Original List	I	1961
Alfentanil	1984	I	1961
Allobarbital	1987	IV	1971
Allylprodine	1961/Original List	I	1961
Alphacetylmethadol	1961/Original List	I	1961
Alphameprodine	1961/Original List	I	1961
Alphamethadol	1961/Original List	I	1961
Alpha-methylfentanyl	1988	I, IV	1961
Alpha-methylthiofentanyl	1990	I, IV	1961
Alphaprodine	1961/Original List	I	1961
Alprazolam	1984	IV	1971
Amfepramone	1971/Original List	IV	1971
Amfetamine	1971/Original List	II	1971
Amineptine	2003	II	1971
Aminorex	1995	IV	1971
Amobarbital	1971/Original List	III	1971
Anileridine	1961/Original List	I	1961

Narcotic Drug / Psychotropic Substance (Principal names and remarks to the scheduling history)	*Year of initial Scheduling Decision*	*Schedule Convention (status 2009)*	
- B -			
Barbital	1971/Original List	IV	1971
Benzethidine	1961/Original List	I	1961
Benzfetamine	1981	IV	1971
Benzylmorphine	1961/Original List	I	1961
Betacetylmethadol	1961/Original List	I	1961
Beta-hydroxyfentanyl	1990	I, IV	1961
Beta-hydroxy-3-methylfentanyl	1990	I, IV	1961
Betameprodine	1961/Original List	I	1961
Betamethadol	1961/Original List	I	1961
Betaprodine	1961/Original List	I	1961
Bezitramide	1969	I	1961
Brolamfetamine (DOB) - included as "Dimethoxybromoamphetamine (DOB)"	1985	I	1971
Bromazepam	1984	IV	1971
Brotizolam	1995	IV	1971
Buprenorphine	1989	III	1971
Butalbital	1987	III	1971
Butobarbital	1987	IV	1971
- C -			
Camazepam	1984	IV	1971
Cannabis and cannabis resin and extracts and tinctures of cannabis	1961/Original List	I	1961
Cannabis and cannabis resin	1961/Original List	IV	1961
Cathine	1986	III	1971
Cathinone	1986	I	1971
2C-B	2001	II	1971
Chlordiazepoxide	1984	IV	1971
Clobazam	1984	IV	1971
Clonazepam	1984	IV	1971
Clonitazene	1961/Original List	I	1961
Clorazepate	1984	IV	1971

Narcotic Drug / Psychotropic Substance (Principal names and remarks to the scheduling history)	*Year of initial Scheduling Decision*	*Schedule Convention (status 2009)*	
Clotiazepam	1984	IV	1971
Cloxazolam	1984	IV	1971
Coca leaf	1961/Original List	I	1961
Cocaine	1961/Original List	I	1961
Cocaine preparations	1961/Original List	III	1961
Codeine	1961/Original List	II	1961
Codeine preparations	1961/Original List	III	1961
Codoxime	1968	I	1961
Concentrate of poppy straw	1961/Original List	I	1961
Cyclobarbital	1971/Original List	III	1971
- D -			
Delorazepam	1984	IV	1971
Desomorphine	1961/Original List	I, IV	1961
DET	1971/Original List	I	1971
Dexamfetamine	1971/Original List	II	1971
Dextromoramide	1961/Original List	I	1961
Dextropropoxyphene - originally included in Schedule II of the 1961 Convention; - deleted in 1964; - re-scheduled to Schedule II in 1980.	1961/Original List	II	1961
Dextropropoxyphene preparations - originally included in Schedule III of the 1961 Convention; - deleted in 1964; - re-scheduled to Schedule III as "certain preparations containing dextropropoxyphene 'salts'" in 1981.	1961/Original List	III	1961
Diampromide	1961/Original List	I	1961
Diazepam	1984	IV	1971
Diethylthiambutene	1961/Original List	I	1961
Difenoxin	1974	I	1961
Difenoxin preparations	1974	III	1961
Dihydrocodeine	1961/Original List	II	1961
Dihydrocodeine preparations	1961/Original List	III	1961

Narcotic Drug / Psychotropic Substance (Principal names and remarks to the scheduling history)	*Year of initial Scheduling Decision*	*Schedule Convention (status 2009)*	
Dihydroetorphine	1999	I	1961
Dihydromorphine	1961/Original List	I	1961
Dimenoxadol	1961/Original List	I	1961
Dimepheptanol	1961/Original List	I	1961
2,5-dimethoxyamfetamine (DMA)	1986	I	1971
2,5-dimethoxy-4-ethylamfetamine (DOET)	1986	I	1971
Dimethylthiambutene	1961/Original List	I	1961
Dioxaphetyl butyrate	1961/Original List	I	1961
Diphenoxylate	1961/Original List	I	1961
Diphenoxylate preparations - included as "solid dose preparations of diphenoxylate" in 1961; - amended to the current name in 1973.	1961/Original List	III	1961
Dipipanone	1961/Original List	I	1961
DMHP	1971/Original List	I	1971
DMT	1971/Original List	I	1971
Dronabinol - originally included with "Tetrahydrocannabinols, all isomers" in Schedule I of the 1971 Conv. [see also tetrahydrocannabinol]; - transferred with "*delta*-9-tetrahydrocannabinol (*delta*-9-THC) and its stereochemical variants" to Schedule II in 1991. The INN "Dronabinol" refers to only one of the stereochemical variants of *delta*-9-tetrahydrocannabinol, namely (-)-*trans-delta*-9-tetrahydrocannabinol.	1971/Original List	II	1971
Drotebanol	1973	I	1961
- E -			
Ecgonine (its esters and derivatives which are convertible to ecgonine and cocaine)	1961/Original List	I	1961
Estazolam	1984	IV	1971
Ethchlorvynol	1971/Original List	IV	1971
Ethinamate	1971/Original List	IV	1971
Ethyl loflazepate	1984	IV	1971
N-ethyl MDA (MDE)	1990	I	1971

Narcotic Drug / Psychotropic Substance (Principal names and remarks to the scheduling history)	*Year of initial Scheduling Decision*	*Schedule Convention (status 2009)*	
Ethylmethylthiambutene	1961/Original List	I	1961
Ethylmorphine	1961/Original List	II	1961
Ethylmorphine preparations	1961/Original List	III	1961
Eticyclidine - included as "PCE"	1980	I	1971
Etilamfetamine - included as "*N*-Ethylamphetamine"	1986	IV	1971
Etonitazene	1961/Original List	I	1961
Etorphine	1966	I	1961
	1968	IV	1961
Etoxeridine	1961/Original List	I	1961
Etryptamine	1995	I	1971
- F -			
Fencamfamin	1986	IV	1971
Fenetylline	1986	II	1971
Fenproporex	1986	IV	1971
Fentanyl	1964	I	1961
Fludiazepam	1984	IV	1971
Flunitrazepam - originally included in Schedule IV of the 1971 Convention in 1984; - transferred to Schedule III in 1995.	1984	III	1971
Flurazepam	1984	IV	1971
Furethidine	1961/Original List	I	1961
- G -			
GHB	2001	IV	1971
Glutethimide	1971/Original List	III	1971
- H -			
Halazepam	1984	IV	1971
Haloxazolam	1984	IV	1971
Heroin	1961/Original List	I, IV	1961
Hydrocodone	1961/Original List	I	1961
Hydromorphinol	1961/Original List	I	1961
Hydromorphone	1961/Original List	I	1961

Narcotic Drug / Psychotropic Substance (Principal names and remarks to the scheduling history)	*Year of initial Scheduling Decision*	*Schedule Convention (status 2009)*	
N-hydroxy MDA	1990	I	1971
Hydroxypethidine	1961/Original List	I	1961
- I -			
Isomethadone	1961/Original List	I	1961
- K -			
Ketazolam	1984	IV	1971
Ketobemidone	1961/Original List	I, IV	1961
- L -			
Lefetamine - included as "SPA"	1971/Original List	IV	1971
Levamfetamine	1986	II	1971
Levometamfetamine	1986	II	1971
Levomethorphan[1*]	1961/Original List	I	1961
Levomoramide	1961/Original List	I	1961
Levophenacylmorphan	1961/Original List	I	1961
Levorphanol[*]	1961/Original List	I	1961
Loprazolam	1984	IV	1971
Lorazepam	1984	IV	1971
Lormetazepam	1984	IV	1971
(+)-Lysergide - included as "(+)-Lysergide (LSD, LSD-25)"	1971/Original List	I	1971
- M -			
Mazindol	1981	IV	1971
Mecloqualone	1980	II	1971
Medazepam	1984	IV	1971
Mefenorex	1986	IV	1971
Meprobamate	1971/Original List	IV	1971
Mescaline	1971/Original List	I	1971
Mesocarb	1995	IV	1971
Metamfetamine	1971/Original List	II	1971
Metamfetamine racemate	1988	II	1971
Metazocine	1961/Original List	I	1961
Methadone	1961/Original List	I	1961

Narcotic Drug / Psychotropic Substance (Principal names and remarks to the scheduling history)	*Year of initial Scheduling Decision*	*Schedule Convention (status 2009)*	
Methadone intermediate	1964	I	1961
Methaqualone -originally included in Schedule IV of the 1971 Convention; -transferred to Schedule II in 1979.	1971/Original List	II	1971
Methcathinone	1995	I	1971
5-methoxy-3,4-methylenedioxyamfetamine (MMDA)	1986	I	1971
4-methylaminorex	1990	I	1971
Methyldesorphine	1961/Original List	I	1961
Methyldihydromorphine	1961/Original List	I	1961
3,4-methylenedioxymetamfetamine (MDMA)	1986	I	1971
3-methylfentanyl	1988	I, IV	1961
Methylphenidate	1971/Original List	II	1971
Methylphenobarbital	1971/Original List	IV	1971
3-methylthiofentanyl	1990	I, IV	1961
Methyprylon	1971/Original List	IV	1971
Metopon	1961/Original List	I	1961
Midazolam	1990	IV	1971
Moramide intermediate	1964	I	1961
Morpheridine	1961/Original List	I	1961
Morphine	1961/Original List	I	1961
Morphine preparations	1961/Original List	III	1961
Morphine methobromide and other pentavalent nitrogen morphine derivatives	1961/Original List	I	1961
Morphine-*N*-oxide	1961/Original List	I	1961
MPPP	1988	I, IV	1961
4-MTA	2001	I	1971
Myrophine	1961/Original List	I	1961
- N -			
Nicocodine	1964	II	1961
Nicocodine preparations	1979	III	1961

Narcotic Drug / Psychotropic Substance (Principal names and remarks to the scheduling history)	*Year of initial Scheduling Decision*	*Schedule Convention (status 2009)*	
Nicodicodine -originally included in Schedule I in 1966; -transferred to Schedule II in 1973.	1966	II	1961
Nicodicodine preparations	1973	III	1961
Nicomorphine	1961/Original List	I	1961
Nimetazepam	1984	IV	1971
Nitrazepam	1984	IV	1971
Noracymethadol	1964	I	1961
Norcodeine	1961/Original List	II	1961
Norcodeine preparations	1961/Original List	III	1961
Nordazepam	1984	IV	1971
Norlevorphanol	1961/Original List	I	1961
Normethadone	1961/Original List	I	1961
Normorphine	1961/Original List	I	1961
Norpipanone	1964	I	1961
- O -			
Opium	1961/Original List	I	1961
Opium preparations	1961/Original List	III	1961
Oripavine	2007	I	1961
Oxazepam	1984	IV	1971
Oxazolam	1984	IV	1971
Oxycodone	1961/Original List	I	1961
Oxymorphone	1961/Original List	I	1961
- P -			
Para-fluorofentanyl	1990	I, IV	1961
Parahexyl	1971/Original List	I	1971
Para-methoxyamfetamine (PMA)	1986	I	1971
Pemoline	1989	IV	1971
Pentazocine	1984	III	1971
Pentobarbital	1971/Original List	III	1971
PEPAP	1988	I, IV	1961
Pethidine	1961/Original List	I	1961
Pethidine intermediate A	1964	I	1961

Narcotic Drug / Psychotropic Substance (Principal names and remarks to the scheduling history)	*Year of initial Scheduling Decision*	*Schedule Convention (status 2009)*	
Pethidine intermediate B	1964	I	1961
Pethidine intermediate C -included as "1-Methyl-4-phenylpiperidine-4-carboxylic acid" (chemical name) in 1961; -current name since 1964.	1961/Original List	I	1961
Phenadoxone	1961/Original List	I	1961
Phenampromide	1961/Original List	I	1961
Phenazocine	1961/Original List	I	1961
Phencyclidine	1971/Original List	II	1971
Phendimetrazine	1981	IV	1971
Phenmetrazine	1971/Original List	II	1971
Phenobarbital	1971/Original List	IV	1971
Phenomorphan	1961/Original List	I	1961
Phenoperidine	1961/Original List	I	1961
Phentermine	1981	IV	1971
Pholcodine	1961/Original List	II	1961
Pholcodine preparations	1961/Original List	III	1961
Piminodine	1961/Original List	I	1961
Pinazepam	1984	IV	1971
Pipradrol	1971/Original List	IV	1971
Piritramide	1965	I	1961
Prazepam	1984	IV	1971
Proheptazine	1961/Original List	I	1961
Properidine	1961/Original List	I	1961
Propiram	1971	II	1961
Propiram preparations	1975	III	1961
Propylhexedrine -originally included in Schedule IV of the 1971 Convention in 1986; deleted in 1991.	1986	—	1971
Psilocine, psilotsin	1971/Original List	I	1971
Psilocybine	1971/Original List	I	1971
Pulvis ipecacuanhae et opii compositus	1961/Original List	III	1961
Pyrovalerone	1986	IV	1971

Narcotic Drug / Psychotropic Substance (Principal names and remarks to the scheduling history)	*Year of initial Scheduling Decision*	*Schedule Convention (status 2009)*	
- R -			
Racemethorphan	1961/Original List	I	1961
Racemoramide	1961/Original List	I	1961
Racemorphan	1961/Original List	I	1961
Remifentanil	1999	I	1961
Rolicyclidine -included as "PHP, PCPY"	1980	I	1971
- S -			
Secbutabarbital	1987	IV	1971
Secobarbital -originally included in Schedule III of the 1971 Convention; -transferred to Schedule II in 1988.	1971/Original List	II	1971
STP, DOM	1971/Original List	I	1971
Sufentanil	1980	I	1961
- T -			
Temazepam	1984	IV	1971
Tenamfetamine -included as "methylenedioxyamphetamine MDA"	1985	I	1971
Tenocyclidine -included as "TCP"	1980	I	1971
Tetrahydrocannabinol - originally included as "Tetrahydrocannabinols, all isomers" in Schedule I of the 1971 Convention [see also Dronabinol]; - amended to "tetrahydrocannabinol, the following isomers: Δ6a(10a), Δ6a(7), Δ7, Δ8, Δ9, Δ10, Δ9(11), and their stereochemical variants" in 1978.	1971/Original List	I	1971
Tetrazepam	1984	IV	1971
Thebacon	1961/Original List	I	1961
Thebaine	1961/Original List	I	1961
Thiofentanyl	1990	I, IV	1961
Tilidine	1980	I	1961
Triazolam	1984	IV	1971

Narcotic Drug / Psychotropic Substance (Principal names and remarks to the scheduling history)	*Year of initial Scheduling Decision*	*Schedule Convention (status 2009)*	
Trimeperidine	1961/Original List	I	1961
3,4,5-trimethoxyamfetamine (TMA)	1986	I	1971
- V -			
Vinylbital	1987	IV	1971
- Z -			
Zipeprol	1995	II	1971
Zolpidem	2001	IV	1971

History of the Scheduling Decisions concerning the Tables annexed to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, (1988–2001)

Substances frequently used in the illicit manufacture of narcotic drugs and psychotropic substances. (Principal names and remarks to the scheduling history)	*Year of initial Scheduling Decision*	*Table (status 2009)*
- A -		
Acetic anhydride Transferred from Table II to Table I in 2001	1988 (Original Table)	Table I
Acetone	1988 (Original Table)	Table II
Anthranilic acid	1988 (Original Table)	Table II
- E -		
Ephedrine	1988 (Original Table)	Table I
Ergometrine	1988 (Original Table)	Table I
Ergotamine	1988 (Original Table)	Table I
Ethyl ether	1988 (Original Table)	Table II
- H -		
Hydrochloric acid, excluding its salts	1992	Table II
- I -		
Isosafrole	1992	Table I
- L -		
Lysergic acid	1988 (Original Table)	Table I
- M -		
Methyl ethyl ketone (2-Butanone; MEK)	1992	Table II
3,4-methylenedioxyphenyl-2-propanone	1992	Table I
- N -		
Norephedrine	2000	Table I
N-Acetyl-anthranilic acid	1992	Table I
- P -		
Pseudoephedrine	1988 (Original Table)	Table I
Potassium permanganate Transferred from Table II to Table I in 2001	1992	Table I
Piperonal	1992	Table I
Phenylacetic acid	1988 (Original Table)	Table II
Piperidine	1988 (Original Table)	Table II
1-phenyl-2-propane	1988 (Original Table)	Table I

Substances frequently used in the illicit manufacture of narcotic drugs and psychotropic substances. (Principal names and remarks to the scheduling history)	*Year of initial Scheduling Decision*	*Table (status 2009)*
- S -		
Safrole	1992	Table I
Sulphuric acid, excluding its salts	1992	Table II
- T -		
Toluene	1992	Table II

* Dextrometorphan ((+)-3-methoxy-N-methylmorphinan) and dextrorphan ((+)-3-Hydroxy-N-methylmorphinan) are specifically excluded from this Schedule.