

Annex

Questions posed by the extended Bureau

1. The following questions have been posed by the extended Bureau of the Commission on Narcotic Drugs (hereinafter “the Commission” or “CND”):

Can the CND combine the voting on the recommendation by the World Health Organization ('WHO') to include a substance in a schedule of the Single Convention on Narcotic Drugs of 1961, as amended by the 1972 Protocol ('1961 Convention'), with the voting on the recommendation by the WHO to delete the same substance from a schedule of the Convention on Psychoactive Substances of 1971 ('1971 Convention'), so that the Commission takes at the same time the decision to add a substance to the 1961 Convention and to delete the same substance from the 1971 Convention?

Can the CND combine the voting on the WHO recommendations to include a substance in a schedule of the 1961 Convention with the voting on the WHO recommendations to include another substance in a schedule of the 1961 Convention, so that the Commission decides at the same time about the inclusion of different substances in a schedule of the 1961 Convention?

Likewise, can the CND combine the voting on the WHO recommendation to delete a substance from a schedule of the 1971 Convention with the voting on the WHO recommendation to delete another substance from a schedule of the 1971 Convention, so that the Commission decides at the same time about the deletion of two different substances from schedules of the 1971 Convention?

If the Commission could combine the voting on the inclusion of a substance to a schedule of the 1961 Convention with the deletion of that same substance from a schedule of the 1971 Convention [...] which voting requirement would apply? Would the two-thirds majority foreseen in article 17, paragraph 2, of the 1971 Convention also be applicable to the decision on the inclusion of that substance in a schedule of the 1961 Convention, even though in practice scheduling decisions under the 1961 Convention follow the majority required for decisions under Rule 58 of the Rules of Procedure of the Functional Commissions of the Economic and Social Council, i.e. a majority of the Commission members present and voting, given the absence of specific requirements in the 1961 Convention?

Competence of the Commission

2. At the outset, the Secretariat wishes to recall that it is ultimately for the Commission and its members to agree and decide on how recommendations of the World Health Organization (WHO) under the 1961 Single Convention on Narcotic

Drugs, as amended (“the 1961 Convention”) and the 1971 Convention on Psychotropic Substances (“the 1971 Convention”) should be put forward to and acted upon by the Commission in accordance with the relevant provisions of the Conventions and the applicable rules of procedure. This would include whether a single vote could be taken on multiple WHO recommendations which are inter-linked. In such a case, it would be for the Commission to consider which required majority applies for such a decision to be adopted, in particular if the Commission decides to hold a single vote on a WHO recommendation under the 1961 Convention and that under the 1971 Convention, since the required majority differs between the two Conventions, as illustrated below.

3. Rule 54 of the rules of procedure of the functional commissions of the Economic and Social Council (ECOSOC), which is applicable to the Commission, may also be of relevance. Rule 54 provides that “a motion calling for a decision on the competence of the commission to adopt a proposal submitted to it shall be put to the vote before a vote is taken on the proposal in question.”

Recommendations of the WHO which will be before the Commission at its sixty-third session

4. With respect to the present matter, the Note by the Secretariat entitled “Changes in the scope of control of substances: proposed scheduling recommendations by the World Health Organization on cannabis and cannabis-related substances” (E/CN.7/2020/14) (hereinafter “the Note by the Secretariat”) provides that “[t]he notification from the Director-General of WHO is before the Commission for its consideration, in accordance with article 3, paragraph 3 to 6 of the 1961 Convention” (paragraph 13 of the Note by the Secretariat). It further provides that “[t]he notification from the Director-General of the WHO is also before the Commission for its consideration in accordance with the provisions of article 2, paragraph 6 of the 1971 Convention” (paragraph 14 of the Note by the Secretariat).

5. The Note by the Secretariat further outlines as follows on decision-making:

15. With respect to the decision-making process regarding the decisions to be taken in accordance with article 3, paragraphs 3 to 6, of the 1961 Convention, the attention of the Commission is drawn to rule 58 of the rules of procedure of the functional commissions of the Economic and Social Council, which stipulates that decisions are to be made by a majority of the members present and casting an affirmative or negative vote. Members who abstain from voting are considered as not voting.

16. With respect to the decision-making process regarding the decisions to be taken in accordance with article 2, paragraph 6, of the 1971 Convention, the attention of the Commission is drawn to article 17, paragraph 2, of the 1971 Convention, which stipulates that the decisions of the Commission provided for in articles 2 and 3 are to be taken by a two-thirds majority of the members of the

Commission. From a practical point of view, this means that, for a decision to be adopted, an affirmative vote of at least 36 members of the Commission is required.

6. The Note by the Secretariat outlines the six recommendations by the WHO which will be before the Commission at its sixty-third session. More specifically, paragraphs 17 (b) and (c) provide as follows:

17. The Commission should therefore decide:

...

(b) Whether or not it wishes to add dronabinol and its stereoisomers (delta-9-tetrahydrocannabinol) to Schedule I of the 1961 Convention, and whether or not it wishes to delete dronabinol and its stereoisomers (*delta-9-tetrahydrocannabinol*) from Schedule II of the 1971 Convention, subject to the Commission's adoption of the recommendation to add dronabinol and its stereoisomers (*delta-9-tetrahydrocannabinol*) to Schedule I of the 1961 Convention;

(c) Whether or not it wishes to add THC (isomers of *delta-9-tetrahydrocannabinol*) to Schedule I of the 1961 Convention, subject to the Commission's adoption of the recommendation to add dronabinol and its stereoisomers to Schedule I of the 1961 Convention and whether or not it wishes to delete THC (isomers of *delta-9-tetrahydrocannabinol*) from Schedule I of the 1971 Convention, subject to the adoption of the recommendation to add THC (isomers of *delta-9-tetrahydrocannabinol*) to Schedule I of the 1961 Convention.

7. The specific recommendations from the WHO read as follows (E/CN.7/2020/14, annex I):

Dronabinol (*delta-9-tetrahydrocannabinol*)

- To be added to Schedule I of the 1961 Convention
- To be deleted from Schedule II of the 1971 Convention, subject to the adoption by the Commission on Narcotic Drugs of the recommendation to add dronabinol and its stereoisomers (*delta-9-tetrahydrocannabinol*) to Schedule I of the 1961 Convention

Tetrahydrocannabinol (isomers of *delta-9-tetrahydrocannabinol*)

- To be added to Schedule I of the 1961 Convention, subject to the adoption by the Commission of the recommendation to add dronabinol and its stereoisomers (*delta-9-tetrahydrocannabinol*) to Schedule I of the 1961 Convention

- To be deleted from Schedule I of the 1971 Convention, subject to the adoption by the Commission of the recommendation to add tetrahydrocannabinol to Schedule I of the 1961 Convention

8. The recommendations, as formulated by the WHO, suggests that the WHO recommended that the Commission first take action on the recommendation to add dronabinol and its stereoisomers (*delta-9-tetrahydrocannabinol*) to Schedule I of the 1961 Convention. Depending on the outcome of the Commission's action on this recommendation, the Commission would proceed to take action on the other recommendations in a consequential manner.

Relevant provisions of the 1961 Convention and of the 1971 Convention

9. With respect to the WHO recommendations to add substances mentioned above to Schedule I of the 1961 Convention, the relevant provision is Article 3, paragraph 3, of the 1961 Convention which reads as follows (emphasis added):

3. Where a notification relates to a substance not already in Schedule I or in Schedule II,
 - (i) The Parties shall examine in the light of the available information the possibility of the provisional application to the substance of all measures of control applicable to drugs in Schedule I;
 - (ii) Pending its decision as provided in subparagraph (iii) of this paragraph, the Commission may decide that the Parties apply provisionally to that substance all measures of control applicable to drugs in Schedule I. The Parties shall apply such measures provisionally to the substance in question;
 - (iii) If the World Health Organization finds that the substance is liable to similar abuse and productive of similar ill-effects as the drugs in Schedule I or Schedule II or is convertible into a drug, it shall communicate that finding to the Commission, which may, in accordance with the recommendation of the World Health Organization, *decide that the substance shall be added to Schedule I or Schedule II.*

10. With regard to the WHO recommendations to delete the substances mentioned above from Schedules I and II of the 1971 Convention, the relevant provisions are Article 2, paragraphs 5 and 6, of the 1971 Convention which provide as follows (emphasis added):

5. The Commission, taking into account the communication from the World Health Organization, whose assessments shall be determinative as to medical and scientific matters, and bearing in mind the economic, social, legal, administrative

and other factors it may consider relevant, *may add the substance* to Schedule I, II, III or IV. The Commission may seek further information from the World Health Organization or from other appropriate sources.

6. If a notification under paragraph 1 relates to a substance already listed in one of the Schedules, the World Health Organization shall communicate to the Commission its new findings, any new assessment of the substance it may make in accordance with paragraph 4 and any new recommendations on control measures it may find appropriate in the light of that assessment. The Commission, taking into account the communication from the World Health Organization as under paragraph 5 and bearing in mind the factors referred to in that paragraph, *may decide to transfer the substance* from one Schedule to another or to delete it from the Schedules.

11. As illustrated above, the relevant provisions of both Conventions, when referring to decision-making by the Commission, use the word “substance” in the singular form.

Relevant parts of the commentaries to the 1961 Convention and to the 1971 Convention

12. The Commentary on the Single Convention on Narcotic Drugs, 1961 (1973) provides as follows with respect to article 3, paragraph 3 (iii) (p. 90, emphasis added):

The Commission on Narcotic Drugs decides whether *a substance* is to be placed under international control. It can take a positive decision only in accordance with the recommendation of the World Health Organization. It can include the substance only in that Schedule which is recommended by the Organization. If the World Health Organization recommends Schedule I, the Commission cannot decide to add the substance to Schedule II, or vice versa. The Commission must either accept the Schedule recommended by the World Health Organization or abstain from extending control at all. *It may, however, decide to place a drug only in Schedule I and not in Schedule IV if the World Health Organization has recommended simultaneously inclusion in both these Schedules.* In no case can the Commission decide to extend control to a substance if the World Health Organization has not recommended to do it.

13. The Commentary on the Convention on Psychotropic Substances, 1971 (1976) (hereinafter “the 1971 Convention Commentary”), provides as follows with respect to Article 2, paragraphs 5 and 6 (pp. 64-65):

Only those actions of the Commission by which a Schedule is changed, i.e. those by which an uncontrolled substance is placed under control or a controlled substance is placed under a different regime or freed from control, are “decisions” within the meaning of article 17, paragraph 2 and consequently require adoption by a two-thirds majority of the members of the Commission, i.e.

by a two-thirds majority of its total membership, no matter how many members are absent, abstain, or although present, do not participate in the voting. A refusal or omission of the Commission to take such an action, i.e. to make a change in the Schedules, however formulated, whether called decision, resolution or otherwise, would not be a decision in the sense of article 17, paragraph 2. A decision of the Commission to “seek further information from the World Health Organization or from other appropriate sources” would also not be a decision in that sense; neither would other procedural decisions.

14. Furthermore, the 1971 Convention Commentary on Article 17, paragraph 2, of the Convention provides as follows (pp. 305-306):

It is submitted that only those decisions of the Commission pursuant to articles 2 and 3 are subject to the requirement of a two-thirds majority which bring about a change in any of the Schedules of the Vienna Convention [the 1971 Convention]...

...

All other decisions by the Commission under the Vienna Convention, the Single Convention, earlier drug treaties or under its terms of reference as a functional Commission of the Council are subject to a majority requirement determined by the Council in the Commission's rules of procedure. That requirement is at present normally a majority of the Commission's “members present and voting”. The phrase “members present and voting” means members casting an affirmative or negative vote. Members who abstain from voting are considered not voting.

Past practice

15. The Secretariat wishes to note that it has been the practice of the Commission to vote separately on each substance (or preparation).

16. In this connection, it may be useful to refer to the following examples which appears to depart from that practice.

- 1) The report of the tenth special session of the Commission held from 8 to 19 February 1988 (E/1988/13-E-CN.7/1988/14) states as follows:

170. The Commission had before it in document E/CN.7/1988/5 five notifications from the Director-General of WHO recommending that acetyl-alpha-methylfentanyl (N-[1(α-methylphenethyl)-4-piperidyl] acetanilide), alpha-methylfentanyl (N-[1(α-methylphenethyl)-4-piperidyl] propionanilide), 3-methylfentanyl (N-(3-methyl-1-phenethyl-4-piperidyl) propionanilide) in its two isomeric forms cis-

N-[3-methyl-1-(2-phenylethyl)-4-piperidyl] propionanilide and trans-N-[3-methyl-1-(2-phenylethyl)-4-piperidyl] propionanilide, PEPAP (1-phenethyl-4-phenyl-4-piperidinol acetate (ester)) and MPPP (1-methyl-4-phenyl-4-piperidinol propionate (ester)) should be included in Schedules I and IV of the Single Convention.

...

173. By a vote of 38 in favour, none against and no abstentions, the Commission decided to include acetyl-alpha-methylfentanyl, alpha-methylfentanyl, 3-methylfentanyl, PEPAP and MPPP in Schedules I and IV of the Single Convention. (For the text of the formal decisions drafted by the Secretariat at the request of the Commission to reflect the results of the vote on the five substances, see chapter X, section B, decisions 1 (S-X)-5 (S-X)).

- 2) The report of the eleventh special session of the Commission held from 29 January to 2 February 1990 (E/1990/24-E/CN.7/1990/16) provides as follows:

43. The Commission had before it, in document E/CN.7/1990/4, six notifications from the Director-General of the World Health Organization (WHO) recommending that six substances, alpha-methylthiofentanyl (N-[1-[1-methyl-2-(2-thienyl) ethyl]-4-piperidyl]propionanilide), para-fluorofentanyl (4'-fluoro-N-(1-phenethyl-4-piperidyl)propionanilide), beta-hydroxy-3-methylfentanyl (N-[1-(beta-hydroxyphenethyl)-3-methyl-4-piperidyl]propionanilide), thiofentanyl (N-[1-2[2-(2-thienyl)ethyl]-4-piperidyl]propionanilide) and 3-methylthiofentanyl (N-[3-methyl-1-[2-(2-thienyl) ethyl]-4-piperidyl]propionanilide), should be included in Schedules I and IV of the Single Convention.

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50. The Commission, by a vote of 36 in favour, none against and 2 abstentions, decided to include alpha-methylthiofentanyl, para-fluorofentanyl, beta-hydroxyfentanyl, beta-hydroxy-3-methylfentanyl, thiofentanyl and 3-methylthiofentanyl in Schedules I and IV of the Single Convention. For the text of the formal decisions drafted by the Secretariat at the request of the Commission to reflect the results of the vote on the six substances, see chapter X, section B, decisions 1 (S-XI)-6 (S-XI).

17. The Secretariat has not been able to find an instance where the Commission might have held a single vote on a WHO recommendation to delete a substance from a

schedule of the 1971 Convention and a WHO recommendation to delete a another substance from a schedule of the 1971 Convention, or a single vote on a WHO recommendation to include a substance in a schedule of the 1961 Convention and a WHO recommendation to delete the same substance from a schedule of the 1971 Convention.