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SHOULD I STAY OR SHOULD I GO?: WHY BOLIVIAN TACTICS AND U.S. “FLEXIBILITY” UNDERMINE THE SINGLE CONVENTION ON NARCOTIC DRUGS

INTRODUCTION

Just short of twelve thousand feet above sea level,¹ La Paz, Bolivia has one of the highest elevations of any major city in the world.² In July of 2015,³ Pope Francis, the highly influential leader of the Catholic Church, traveled to a variety of cities in South America.⁴ One of those cities, La Paz,⁵ encouraged his public request to chew coca leaves during his stay in Bolivia,⁶ as it is “widely used in Bolivia and other Andean countries as a remedy for altitude sickness.”⁷ Coca leaves have been grown and produced for a variety of purposes in Bolivia, ranging from medicinal to ritualistic.⁸ During his tour across South America, Pope Francis initiated his visit to La Paz by drinking a special type of tea known as “trimate,” a chamomile tea that contains anise and coca, which is said to help one adjust to the high altitude of this particular city.⁹ Although coca serves a form of medical purpose, such as remedying altitude sickness, the Pope’s spokesman noted that the pope was interested in sampling coca

1. Conor Gaffey, *Pope to Chew Coca Leaves in Bolivia, Reveals Minister*, NEWSWEEK (June 29, 2015), <http://europe.newsweek.com/pope-chew-coca-leaves-bolivia-reveals-minister-329482>.

2. *Id.*

3. *Id.*

4. *Id.*

5. See Joanna Plucinska, *Pope Francis Samples Coca Leaves, the Main Ingredient in Cocaine, on Bolivia Trip*, TIME (July 8, 2015), <http://time.com/3950582/pope-francis-coca-bolivia-altitude-cocaine/> (showing that the Pope sought to consume the coca leaf as a means of showing respect for “local Bolivian customs”).

6. Gaffey, *supra* note 1.

7. *Id.*

8. See Tom Blickman, *Coca Leaf: Myths and Reality – A Beginner’s Guide to Coca*, TRANSNAT’L INST. (Aug. 5, 2014), <https://www.tni.org/en/primer/coca-leaf-myths-and-reality>.

9. See Plucinska, *supra* note 5.

leaves to chew on his visit as a means to show respect for local Bolivian custom.¹⁰

Notwithstanding the cultural significance to the indigenous peoples of Bolivia, coca is also known to be a main ingredient in the production of cocaine,¹¹ an addictive and prohibited substance under the United Nations Single Convention on Narcotic Drugs, 1961¹² ("Convention"), an international treaty designed to limit the possession, use, trade in, distribution, import, export, manufacture, and production of drugs exclusively to medical and scientific purposes.¹³ In addition to the coca leaf, the Convention covers a multitude of other narcotics, ranging from opium to cannabis, with the overarching goal of achieving international cooperation with respect to governing the proper or improper fluxes of narcotics.

The Convention, which is "concerned with the health and welfare of mankind,"¹⁴ provides limited breathing room for those members who question the prohibition of particular substances under its terms. Bolivia, in a rare move, withdrew from the Convention, later reaccessing with the stipulation that the coca leaf is an exception to the Convention.¹⁵ As of January 11, 2013, Bolivia was permitted to return as a member to the Convention with a reservation that allowed "traditional coca leaf chewing; the consumption and use of the coca leaf in its natural state for cultural and medicinal purposes, such as its use in infusions; and also the cultivation, trade and possession of the coca leaf to the extent necessary for these licit purposes."¹⁶

The paradoxical irony does not lie behind the Bolivian stipulation but rather behind the fact that the United States has not

10. *Id.*

11. Gaffey, *supra* note 1.

12. Single Convention on Narcotic Drugs, 1961, as Amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961, Aug. 8, 1975, 976 U.N.T.S. 105 [hereinafter Convention on Narcotic Drugs].

13. See U.N. Office on Drugs & Crime [UNODC], *Single Convention on Narcotic Drugs, 1961*, UNODC, <https://www.unodc.org/unodc/en/treaties/single-convention.html?ref=menu> (last visited Jan. 1, 2016).

14. Convention on Narcotic Drugs, *supra* note 12, pmbl.

15. See U.N. Secretary-General, Depositary Notification, Bolivia (Plurinational State of): Accession, U.N. Doc. C.N.94.2013.TREATIES-VI.18 (Jan. 11, 2013).

16. *Id.*

attempted the same maneuver with respect to policies enveloping the recreational use of marijuana.¹⁷ A greater irony is that the United States remains one of the largest critics of the Bolivian tactic of withdrawal and reaccession.¹⁸ As recently as September of 2015, the United States “again ‘decertified’ Bolivia over what it calls a failure to comply with international narcotics agreements.”¹⁹ Decertification enables the United States to “withdraw aid packages, and impose certain additional measures on a government that is deemed not to be cooperating with American directives.”²⁰ The decertification of Bolivia has been widely construed as hypocritical, however, “given that the U.S. may be in contravention”²¹ of the Convention, as a handful of its states have now legalized the recreational use of marijuana.

Although marijuana is now legal in several states,²² the Convention does not necessarily warrant protection for its recreational use.²³ The Convention allows “[s]tates parties to use cannabis for medical purposes”²⁴; however, recreational use does not “meet the requirements of the international drug control treaties.”²⁵

This noncompliance raises questions about the effectiveness of such treaties. This Note discusses the archaic and constricting nature of the Convention. As morals, political landscapes, and science change over time, it is sometimes necessary to permit, or at the very least reflect upon, such changes rather than stifle them. This Note will analyze the future of the Convention, as its

17. Protocol Amending the Single Convention on Narcotic Drugs, 1961, Mar. 25, 1972, 976 U.N.T.S. 3, 99 (demonstrating that the United States has not attached any reservations since the Convention was amended in 1972).

18. Samuel Oakford, *The White House Blacklisted Bolivia for Growing Coca While US States Sell Legal Weed*, VICE NEWS (Sept. 16, 2015), <https://news.vice.com/article/the-white-house-blacklisted-bolivia-for-growing-coca-while-us-states-sell-legal-weed>.

19. *Id.*

20. *Id.*

21. *Id.*

22. See *Where Pot is Legal*, CNN MONEY, <http://money.cnn.com/interactive/news/economy/marijuana-legalization-map/> (last visited Mar. 24, 2017).

23. See INT’L NARCOTICS CONTROL BOARD, REPORT OF THE INTERNATIONAL NARCOTICS CONTROL BOARD FOR 2014, at 25 (2014), https://www.incb.org/documents/Publications/AnnualReports/AR2014/English/AR_2014.pdf.

24. *Id.* at 35.

25. *Id.* at 25.

effectiveness is increasingly being undermined by its members' inability to abide by its provisions.

Part I of this Note will examine the history of the Convention, specifically the rationale for its creation as well as the goals it intends to achieve. This Part will also include a discussion regarding the governing bodies of the Convention, particularly the International Narcotics Control Board (INCB), which seek to enforce compliance amongst signatories to the treaty. Additionally, this Part will discuss procedural mechanisms whereby parties can propose amendments or reservations to the Convention. Part II will provide an in-depth analysis of how Member States have come to skirt their responsibilities owed to the Convention. This Part will discuss the state of Bolivia and its fight to preserve coca leaf chewing, which has sociocultural importance in the country. This Part will discuss how Bolivia's withdrawal and subsequent reaccession to the Convention with reservations poses a threat to the manner by which the global community views these treaties, namely the seriousness with which Member States consider such treaties. In addition, this Part will also address U.S. interactions with the Convention, particularly with respect to the domestic legalization of marijuana at the state level, in light of the continued federal prohibition against its recreational use in the United States. Lastly, this Part will discuss how the United States views the provisions of the Convention and how its current position of "flexibility" contravenes the Convention itself. Part III will analyze why the Bolivian and U.S. examples of circumvention, in light of current Convention procedures, both pose problems for the international narcotics community and to the Convention itself by demonstrating the inability of the Convention and the INCB to punish wayward signatories. This Part will highlight why current Convention practice does not permit meaningful change for those who seek it. In addition, this Part will analyze why the INCB, which is the policing body of the Convention, has only exacerbated hindrances facing the Convention. Lastly, Part IV will highlight several possible solutions to the problems, namely the problem of contravention without reprimand. These possible solutions include the adoption of a blanket amendment to the Convention, which might prevent a signatory from withdrawing and reaccessing with reservations to the Convention, and empowerment of the INCB with the proper tools to reprimand signatories who violate the Convention.

I. THE SINGLE CONVENTION ON NARCOTIC DRUGS, 1961

The adoption of the Convention is historically “regarded as a milestone in the history of international drug control.”²⁶ The Convention sought to codify preexisting multilateral treaties involving the control of narcotics and “extended the existing control systems to include the cultivation of plants that were grown as the raw material of narcotic drugs.”²⁷

The principal objectives of the Convention are to limit the flow of narcotics only to the medical and scientific community and to also “deter and discourage drug traffickers.”²⁸ In addition to such objectives, the U.N. Office on Drugs and Crime, a U.N. agency seeking to help governments to address drug and crime-related issues, has stated that the Convention seeks to combat the abuse of such narcotics by “coordinated international action.”²⁹

This Part will provide a brief, but thorough, background on the Convention. Section A will describe a short history of the Convention’s creation, including its overarching goals and aspirations as an international document. Section B will describe the governing bodies within the Convention, particularly highlighting the importance of the INCB. Lastly, section C will describe amendment and reservation procedure under the Convention and what is required when signatories wish to change or adopt a stance with respect to the Convention.

A. Background on the Convention

Prior to the establishment of the Convention, there had been a number of multilateral treaties dealing with drug control on an international level.³⁰ This old regime of treaties, however, was superseded by the Convention when member countries saw the “need to start fresh” by enacting one binding document.³¹ Seventy-three states were represented by chosen representa-

26. UNODC, *supra* note 13.

27. *Id.*

28. *Id.*

29. *Id.*

30. N.Y.C. BAR: COMM. ON DRUGS & THE LAW, THE INTERNATIONAL DRUG CONTROL TREATIES: HOW IMPORTANT ARE THEY FOR US DRUG REFORM? (2012), http://www2.nycbar.org/pdf/report/uploads/3_20072283-InternationalDrugControlTreaties.pdf.

31. *Id.*

tives at the U.N. Conference for the Adoption of a Single Convention on Narcotic Drugs ("Conference"),³² whose goal was to "replace by a single instrument the existing multilateral treaties in the field, to reduce the number of international treaty organs exclusively concerned with the control of narcotic drugs and to make provision for the control of the production of raw materials of narcotic drugs."³³ At the Conference, which was held from January 24 to March 25 of 1961,³⁴ representatives crafted a document that sought to balance the pragmatic goals of international drug compliance with a series of more lofty goals aimed at bettering mankind.

The preamble to the Convention states that one of the primary reasons for its creation is to recognize that addiction to narcotics constitutes a "serious evil,"³⁵ both to the individual and the social and economic well-being of mankind.³⁶ Although the preamble is ambitious in its attempts to achieve both practicality and optimism, the Convention unyieldingly recognizes the necessity of narcotics with respect to medical use, noting that it is "indispensable for the relief of pain and suffering and that adequate provision must be made to ensure the availability of narcotic drugs for such purposes."³⁷ In order to achieve international cooperation, the Convention is "guided by the same principles and aimed at common objectives."³⁸ Yet, domestic agendas often clash with the "principles"³⁹ and "common objectives"⁴⁰ of the international community, making these goals less attainable. For example, countries like Bolivia have historically maintained the cultural importance of the coca leaf, and countries like the United States have recently revised their views on the recreational use of marijuana. Thus, both domestic agendas appear to

32. See Final Act (with Annexed Resolutions) of the United Nations Conference for the Adoption of a Single Convention on Narcotic Drugs, Mar. 30, 1961, 520 U.N.T.S. 151 [hereinafter Final Act]. For the list of Member States and the dates they became party to the treaty, with or without stipulations, see *id.*; Convention on Narcotic Drugs, *supra* note 12.

33. Final Act, *supra* note 32.

34. *Id.*

35. Convention on Narcotic Drugs, *supra* note 12, pmb1.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

conflict with the views of the international community with respect to limiting the nonmedical use of narcotics.

Distinct from a self-executing treaty (e.g., a treaty that becomes “judicially enforceable upon ratification”⁴¹), the Convention is judicially enforceable upon legislative implementation by the parties.⁴² Under Article 4 of the Convention, parties are obligated to take legislative and administrative measures that are necessary to give effect to and carry out the provisions of this Convention within their own territories, to cooperate with other states in the execution of the provisions of this Convention, and (subject to the provisions of this Convention) to limit the production, manufacture, export, import, distribution of, trade in, use and possession of drugs to medical and scientific purposes.⁴³ Article 4 thus requires that Member States take their own measures in complying with the text of the treaty itself. Article 4, as a means of self-relying compliance, tends not to be ineffective, as Member States still seem to ignore the boundaries of the Convention. This tension is only furthered by domestic agendas that conflict with the Convention, as only signatories have the power to implement legislation as a corrective measure. Thus, the Convention relies upon several governing bodies to ensure compliance with its provisions.

B. Governing Bodies of the Convention

Article 5 of the Convention delegates international supervision of narcotics to two major governing bodies, otherwise known as “International Control Organs”⁴⁴: the Commission on Narcotic Drugs of the Economic and Social Council (“Economic and Social Council”), and the INCB.⁴⁵ The functions of the INCB are laid down in several different treaties: the Convention; the Convention on Psychotropic Substances of 1971; and the United Nations

41. *Self-Executing Treaty Definition*, CORNELL U. L. SCH., https://www.law.cornell.edu/wex/self_executing_treaty (last visited Mar. 24, 2017).

42. *See id.* (“A treaty could be identified as either self-executing or non-self executing by looking to various indicators, including statements that are made by Congress or the Executive regarding the treaty, indeterminate language of the treaty, or if the treaty deals with a matter within the exclusive law-making power of Congress, indicating that Congress must create implementing legislation.”).

43. Convention on Narcotic Drugs, *supra* note 12, art. 4.

44. *Id.* art. 5.

45. *Id.*

Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.⁴⁶ While the Economic and Social Council acts as the “central policy-making body within the UN system for dealing with drug related matters,”⁴⁷ the INCB ensures that the provisions of the international drug treaties are carried out by member governments⁴⁸ and will be the focus of this Note. The INCB is comprised of thirteen members, each of whom are elected by the Economic and Social Council for a time period of five years (with the possibility of reelection).⁴⁹ Of these thirteen members, ten are elected from a list of individuals nominated by state party governments.⁵⁰ The remaining three individuals are chosen from a list of persons designated by the World Health Organization “for their medical, pharmacological or pharmaceutical experience.”⁵¹ Members of the INCB are expected to serve objectively, regardless of the state from which they hail.⁵²

As the INCB is primarily tasked with “monitoring national drug policies and assessing their relationship with the treaties,”⁵³ scholars have been keen to note that the INCB has no “police power to enforce the Conventions’ provisions.”⁵⁴ Because the INCB has been designated as the “quasi-judicial monitoring body”⁵⁵ for the proper implementation of the Convention, it is obligated to monitor individual state compliance with the articles set forth by the Convention itself but is not necessarily empowered to have the requisite impact on violating states as one might expect.⁵⁶ The INCB is called upon to require explanations

46. *Mandate and Functions*, INT'L NARCOTICS CONTROL BOARD, <https://www.incb.org/incb/en/about/mandate-functions.html> (last visited Jan. 1, 2016).

47. DAVE BEWLEY-TAYLOR & MIKE TRACE, BECKLEY FOUND. DRUG POLICY PROGRAMME, REPORT 7: THE INTERNATIONAL NARCOTICS CONTROL BOARD: WATCHDOG OR GUARDIAN OF THE UN DRUG CONTROL CONVENTIONS 3 (Feb. 2006), <http://idpc.net/publications/2006/01/international-narcotics-control-board-watchdog-or-guardian-of-un-drug-control-conventions>.

48. *Id.*

49. *The International Narcotics Control Board*, INT'L NARCOTICS CONTROL BOARD, <https://www.incb.org/incb/en/about.html> (last visited Jan. 1, 2016).

50. *Id.*

51. *Id.*

52. *Id.*

53. BEWLEY-TAYLOR & TRACE, *supra* note 47, at 3.

54. *Id.*

55. *Mandate and Functions*, *supra* note 46.

56. *Id.*

if Member States have violated particular articles of the Convention.⁵⁷ When, and if, a Member State is not compliant with the Convention, the INCB is required to “propose appropriate remedial measures”⁵⁸ to those Member States.⁵⁹ If said Member States are unable to meet these requirements or implement such remedial measures, the INCB is asked to “assist Governments in overcoming such difficulties,”⁶⁰ specifically by opening up consultations whereby the INCB will make recommendations as to how the Member State can better comply.

C. Amendment and Reservation Procedure Under the Single Convention

Pursuant to Article 47 of the Convention, any party to the treaty may propose an amendment.⁶¹ The text of the proposed amendment and its reasons for submission must be communicated to the U.N. Secretary-General.⁶² A letter containing the reasons for which the moving party is seeking to amend the Convention may also accompany this amendment.⁶³ From there, the U.N. Secretary-General communicates the proposed amendment and its accompanying explanations to both the parties to the Convention and the Economic and Social Council of the United Nations (“Council”).⁶⁴ The Council will then decide to either call a conference in accordance with Article 62, paragraph 4 of the Charter of the United Nations⁶⁵ or ask all parties to the Convention whether they accept the amendment.⁶⁶

If the amendment is circulated amongst the parties to the Convention and has not been explicitly rejected by any of the parties

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. Convention on Narcotic Drugs, *supra* note 12, art. 47.

62. *Id.*

63. For an example, see Bolivia’s proposal of amendments to the Convention on Narcotic Drugs. See U.N. Econ. and Soc. Council, Proposal of Amendments by Bolivia to Article 49, Paragraphs 1(c) and 2(e), Note Verbale dated Mar. 12, 2009 from the Permanent Mission of Bolivia to the U.N. Secretary-General, U.N. Doc. E/2009/78 (May 15, 2009) [hereinafter *Bolivian Amendment Proposal*].

64. Convention on Narcotic Drugs, *supra* note 12, arts. 47, 1 (defining “Council” as the Economic and Social Council of the United Nations).

65. *Id.* art. 47.

66. *Id.*

within eighteen months, it “shall thereupon enter into force.”⁶⁷ If any party to the Convention does decide, however, to reject the proposed amendment, the Council may call a conference to consider the amendment.⁶⁸ Member States may also decide to include reservations. Reservations differ from amendments in the context of the Convention in that, at the time of signature, ratification, or accession to the Convention, a party may reserve the right to temporarily permit (known as a transitional reservation) a narcotic that would otherwise be prohibited under the treaty.⁶⁹ Transitional reservations, however, are subject to further restrictions both in substance and in time. In other words, depending on the narcotic, transitional reservations permit lawful use of an otherwise unlawful narcotic under the Convention for a limited period of time. In the case of Bolivia, this transitional reservation would permit the practice of coca chewing for twenty-five years after becoming a party to the Convention.

1. Article 14 of the Convention: Delegated Powers to the INCB

Article 14 of the Convention sets forth “measures that the Board [INCB] may take to ensure the execution of the provisions” of the Convention.⁷⁰ When the INCB determines or has reason to believe that goals of the treaty are in danger by the behavior of a particular Member State, Article 14 enables the INCB to set forth “increasingly severe” steps that the state in question must follow to address the problem at hand.⁷¹

Article 14 states that if the INCB has “objective reasons to believe that the aims of the Convention are being seriously endangered by reason of the failure of any Party, country or territory to carry out the provisions of this Convention,”⁷² the INCB reserves the right to propose “consultations”⁷³ or to request that

67. *Id.*

68. *Id.*

69. *See id.* art. 49 (defining “transitional reservations” as the ability of a party at the “time of signature, ratification or accession [to] reserve the right to permit temporarily [drugs otherwise prohibited by the Convention] in any one of its territories. . .”).

70. *Treaty Compliance*, INT’L NARCOTICS CONTROL BOARD, <https://www.incb.org/incb/en/treaty-compliance/index.html> (last visited Jan. 1, 2016).

71. *Id.*

72. Convention on Narcotic Drugs, *supra* note 12, art. 14.

73. *Id.*

the state in question furnish “explanations.”⁷⁴ This allows the INCB to inquire as to why the state committed the violation. If the INCB concludes, however, that the Member State in question has not adopted the necessary measures or has provided an insufficient explanation in light of the violation, it may inform the parties to the Convention as well as the Economic and Social Council—who, in turn, brings the matter to the attention of the U.N. General Assembly.⁷⁵

Though it appears that the INCB does not wield significant power under Article 14 because it can only ask questions, it nevertheless retains the right to “recommend to parties that they stop the import of drugs, the export of drugs, or both, from or to the country or territory concerned.”⁷⁶ Said another way, the INCB reserves the right to make a recommendation to the United Nations and parties therein with respect to drug import and export capabilities of a state party who is found to be violating the Convention. Although this might seem like a powerful tool, individuals in the community have gone so far as to suggest that it is unlikely that such a measure would be taken in a “humanitarian” context.⁷⁷ In other words, although the INCB has the power to make the recommendation to other Member States that they cease import and export relationships with the violating state, the recommendation is unlikely to go heeded. Overall, the powers granted to the INCB under Article 14 relate only to encouraging treaty compliance and do not allow it to punish those who violate the treaty, therefore limiting the effectiveness of the INCB.

II. SKIRTING THE RESPONSIBILITIES OF THE CONVENTION

Bolivian and U.S. circumvention of responsibilities owed to the Convention has played a significant role in highlighting procedural and political loopholes by which these particular signatories have evaded their duties. The Bolivian government has attributed its tactics to a longstanding historical and cultural connection to the coca leaf, whereas the United States has decidedly

74. *Id.*

75. See BEWLEY-TAYLOR & TRACE, *supra* note 47.

76. *Id.*; see also Convention on Narcotic Drugs, *supra* note 12, art. 14.

77. N.Y.C. BAR: COMM. ON DRUGS & THE LAW, *supra* note 30, at 3 (stating that a former U.S. Assistant Secretary of State and member of the INCB noted that this is not a very “strong provision”).

settled into a method of “flexibility” in interpreting the Convention.

In this Part, section A will draw attention to the Bolivian method of withdrawal and reaccession, specifically with a reservation exempting the coca leaf from the Convention. Furthermore, section B will discuss the United States in its flexible interpretation of the Convention as a means of denying that a violation has occurred with respect to the domestic legalization of marijuana in a number of individual states.

A. Bolivian Example—Withdrawal and Reaccession with Reservations

The coca leaf, known primarily for being one of the major components to the production of cocaine, has been grown in Bolivia and the Andean region of South America for centuries.⁷⁸ In Bolivia itself, it is estimated that nearly one-third of the population consumes the coca leaf in its natural form as though it were coffee or tea.⁷⁹ Coca has been cultivated in Bolivia for centuries, mainly by small farmers in the Chapare and Yungas regions of the country.⁸⁰ But the coca leaf was not always a crop associated with economic or narcotic liberalization within the country of Bolivia. Instead, the coca leaf in Bolivia represents a significant cultural and social component to its traditional and ancient heritage.⁸¹ For example, the coca leaf in Bolivia is a staple in practicing medicine as well as a component in various religious ceremonies.⁸² Bolivia sought to propose an amendment to the Convention, exempting the coca leaf from its purview for these culturally significant reasons.⁸³ The Bolivian amendment, however, failed to muster the votes needed to pass,⁸⁴ but its subsequent procedural maneuver of withdrawing from the Convention and

78. Ruxandra Guidi, *Coca Is Known as the Main Ingredient in Cocaine. But for Bolivia, It's More Than That*, PUB. RADIO INT'L (Sept. 25, 2015), <https://www.pri.org/stories/2015-09-23/coca-known-main-ingredient-cocaine-bolivia-its-more>.

79. *Id.*

80. BOLIVIA: A COUNTRY STUDY (Rex A. Hudson & Dennis M. Hanratty eds., 1989).

81. *See infra* Part II.A.1.

82. *See id.*

83. *See infra* Part II.A.2.

84. *See id.*

then reacceding with an exemption for the coca leaf circumvented the obstacles Bolivia was facing with respect to coca leaf usage.

1. Importance of the Coca Leaf in Bolivian Society

The sacred coca leaf, known as “hoja divina”⁸⁵ to natives in the region, has been used within the Andean society since approximately 3,000 BCE.⁸⁶ Used in religious ceremonies and as traditional medicine among the upper-class of the Incan empire, the coca leaf and the legends surrounding its cultivation trace back to stories of the plant being used as a means of sustenance and survival.⁸⁷ Spanish domination of the Bolivian peoples, however, led to the suppression of the coca leaf due to its association with indigenous belief structure.⁸⁸ The Spaniards, in their attempt to promote Catholicism, believed that the coca leaf was an “instrument of the devil.”⁸⁹

Nevertheless, the Spaniards realized that the coca leaf had advantages. In forcing the natives to work in mines, Spaniards became aware that coca leaf chewing helped to alleviate perpetual hunger and fatigue of the workers.⁹⁰ Inevitably, the Spaniards understood that this crop could be cultivated and sold back to the workers at inflated prices—enslaving workers to a plant associated with their cultural heritage.⁹¹

To the Bolivian farmer, and those who perpetuate the cultivation of the coca leaf, this plant has historical and cultural significance because it has been harvested within the region for thousands of years. This sacred plant, however, is now subject to severe scrutiny in the United States’ War on Drugs and is within the scope of prohibited substance under the Convention.⁹² The distinction between using the coca leaf for traditional and medicinal purposes and using it to produce cocaine is a staunch one and worthy of recognition.

85. See *Bolivia: Legacy of Coca*, ANDEAN INFO. NETWORK (June 9, 2004), <http://ain-bolivia.org/2004/06/bolivia-legacy-of-coca/>.

86. *Id.*

87. *See id.*

88. *See id.*

89. *Id.*

90. *See id.*

91. *See id.*

92. *See id.*

The method by which natives consume the coca leaf, known in the region as "acullico,"⁹³ is the same now as it was in the time of the Incans.⁹⁴ The individual removes the leaves individually and places them in his or her mouth, chewing them until they develop into a ball, which is then held between the cheek and gums.⁹⁵ The individual then takes an alkaline mixture, which varies depending upon the region, and introduces it into the ball of leaves, which "facilitates the release of the desired active principles."⁹⁶ As the ball of leaves are left in the mouth over time, the resulting substance is consumed by the individual, with the ball of leaves remaining until the process is complete.⁹⁷

This process has been found to alleviate the various ills and discomforts of those who consume it.⁹⁸ The coca leaf has been particularly praised for its beneficial effects on respiration, which is an "important consideration" for Bolivians, who inhabit some of the highest-elevated regions in the world.⁹⁹ Other methods of consuming the leaf (i.e., coca tea) exist for the purposes of relieving nausea, dizziness, headaches, or mountain sickness associated with the content of the air and atmospheric pressure.¹⁰⁰

Besides the health benefits associated with the leaf¹⁰¹ chewing coca also has immense traditional and religious uses. In Bolivia, certain natives chew the coca leaf during various ceremonies, including marriages and wakes.¹⁰² In addition, when a new individual is introduced to head a district of Bolivia, he is obligated to take a drink and a pinch of coca with each head of household.¹⁰³ Bolivian divination, black magic, and shamanistic healers are also known to practice through the medium of coca.¹⁰⁴ It

93. *Id.*

94. See Richard T. Martin, *The Role of Coca in the History, Religion, and Medicine of South American Indians*, 24 *ECON. BOTANY* 422 (1970).

95. *Id.*

96. *Id.* at 430.

97. *Id.*

98. *Id.* at 432.

99. *Id.*

100. *Id.*

101. The leaf is also considered to be an effective means of preventing dental issues and alleviating the pains associated with rheumatism, headaches, and external sores, particularly to reduce the swelling of wounds and eye irritation, and can also be used as an aphrodisiac. See *id.* at 432-33.

102. *Id.* at 426.

103. *Id.*

104. *Id.*

is easy to understand then, given the practical and cultural significance of the coca leaf, why the Bolivian peoples remain attached to the practice, notwithstanding the Convention's prohibition.

2. Bolivia's Proposed Amendment

In March of 2009, two years after the INCB published its annual report (which called for the abolition and prohibition of coca leaf usage), Bolivian President Evo Morales sent a letter to the U.N. Secretary-General under Article 47 of the Convention.¹⁰⁵ Morales made a passionate argument for why Bolivia should be exempted from the prohibition due to its traditional practice of chewing coca leaves and accompanied the letter with what was a then-proposed amendment.¹⁰⁶

Morales argued that coca leaf chewing is "a one-thousand-year-old ancestral practice of the Andean indigenous peoples that cannot and should not be prohibited."¹⁰⁷ In citing the historical practice of chewing coca leaves,¹⁰⁸ Morales zealously argued that the use of coca leaves is both a "sociocultural"¹⁰⁹ and ritualistic practice of the indigenous population of the Andes, and that coca leaves are closely linked to Bolivian "history and cultural identity."¹¹⁰ Morales then argued that "[t]he objective of the Single Convention on Narcotic Drugs of 1961 is to control drug abuse, not to prohibit 'habits' or sociocultural practices that do not harm human health."¹¹¹ Though one could argue that drug addiction is in itself a habit, Morales argued that this prohibition was actually conflicting with the U.N. Declaration on the Rights of Indigenous Peoples, which states that "indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources,

105. Bolivian Amendment Proposal, *supra* note 63.

106. *Id.*

107. *Id.*

108. See also Evo Morales Ayma, *Let Me Chew My Coca Leaves*, N.Y. TIMES, Mar. 14, 2009, at A21 (noting the controversy surrounding the prohibition on chewing coca leaves, a tradition with "cultural significance that transcends indigenous cultures and encompasses the mestizo population").

109. Bolivian Amendment Proposal, *supra* note 63.

110. *Id.*

111. *Id.*

seeds, medicines, knowledge of the properties of fauna and flora.
... ”¹¹²

On March 12, 2009, President Morales communicated Bolivia's proposed amendment and accommodating letter to the U.N. Secretary-General¹¹³ formally requesting the deletion of paragraphs 1(c) and 2(e) of Article 49 of the Convention.¹¹⁴ Paragraph 1 of Article 49 sets forth the narcotics that parties may temporarily permit under the reservation procedure,¹¹⁵ with subsection (c) to paragraph 1 dealing with coca leaf chewing in particular.¹¹⁶ Paragraph 2 of Article 49, however, generally places restrictions upon reservations that parties make when becoming a party to the Convention. Specifically, subsection (e) of paragraph 2 states that “[c]oca leaf chewing must be abolished within twenty-five years from the coming into force of this Convention.”¹¹⁷

Bolivia disagreed with paragraph 2(e), which would have required the country to cease coca leaf chewing by December of 1989.¹¹⁸ For sociocultural reasons. Bolivia proposed an amendment requesting that the prohibition of the coca leaf be deleted from the text of the Convention.¹¹⁹ The amendment suggested that because the “sociocultural practice of coca leaf chewing cannot be permitted temporarily as if it were doomed to disappear some day and as if it were an evil that should be permitted only for a transitional period,”¹²⁰ the United Nations should remove Article 49, paragraph 1(c) and 2(e). In support of its proposed amendment, Morales argued that the restrictions and prohibition of coca leaf chewing amounted to a violation of the rights of indigenous peoples.¹²¹ Specifically, Morales highlighted the right

112. G.A. Res. 61/295, U.N. Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

113. See Bolivian Amendment Proposal, *supra* note 63.

114. *Id.*

115. *Id.*; see also Convention on Narcotic Drugs, *supra* note 12, art. 49(1).

116. Convention on Narcotic Drugs, *supra* note 12, art. 49(1)(c).

117. *Id.* art. 49(2)(e).

118. Abraham Kim, *The Plight of Bolivian Coca Leaves: Bolivia's Quest for Decriminalization in the Face of Inconsistent International Legislation*, 13 WASH. U. GLOBAL STUD. L. REV. 559, 565 (2014).

119. See Bolivian Amendment Proposal, *supra* note 63.

120. *Id.*

121. See *id.* In his letter to the U.N. Secretary-General, Morales cited to Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples, which states:

of indigenous peoples to maintain and protect their heritage, including human resources, such as the coca plant and the cultural expressions that stem therefrom.¹²² In short, President Morales objected to the prohibition because the country viewed the use of coca leaves as a traditional ancestral right. Despite his passionate argument, the proposal was rejected by seventeen Member States on the grounds that this change could affect the integrity of the Convention and open the door for other Member States to follow in Bolivia's footsteps.¹²³ Most significantly, many Member States "indicated that they had no objections to the coca leaf chewing, per se, which they recognized as an age-old practice of indigenous peoples; however, they could not agree to the Bolivian amendment on the grounds that it would jeopardize the integrity of the Convention."¹²⁴

3. Bolivia's Withdrawal and Subsequent Reaccession with Reservations

The rejected amendment led to Bolivia's subsequent withdrawal from the Convention on June 29, 2011.¹²⁵ Withdrawal refers to "a unilateral act by which a nation that is currently a

[I]ndigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions . . . and visual and performing arts. They also have the right to maintain, control, protect, and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

Id.; see also G.A. Res. 61/295, *supra* note 112, art. 31.

122. Bolivian Amendment Proposal, *supra* note 63.

123. See *Press Conference on Bolivia's Proposed Amendment to 1961 Narcotics Drug Convention*, UNITED NATIONS (June 24, 2011), http://www.un.org/press/en/2011/110624_Bolivia.doc.htm.

124. *Id.*

125. *International Narcotics Control Board Regrets Bolivia's Denunciation of the Single Convention on Narcotic Drugs*, UNITED NATIONS OFFICE ON DRUGS & CRIME (July 6, 2011) <https://www.unodc.org/lpo-brazil/en/frontpage/2011/07/06-junta-internacional-de-control-de-narcoticos-la-menta-la-denuncia-de-bolivia-de-la-convencion-unica-de-estupefacientes.html>.

party to a treaty ends its membership in that treaty.”¹²⁶ Withdrawal of one Member State, however, will not affect the others still party to the Convention, as they remain bound to the provisions of the Convention itself.¹²⁷

On December 29, 2011, only several months after Bolivia’s withdrawal from the treaty, President Morales, pursuant to Article 50, paragraph 3, which allows states to reaccede to the treaty, unless said reservation has been objected to by one-third of the Member States,¹²⁸ proposed Bolivian reaccession to the Convention with a reservation stating that it would not be bound by the prohibition of coca leaf chewing.¹²⁹ In this reservation, Bolivia argued for the right to permit traditional coca leaf chewing and “the consumption and use of the coca leaf in its natural state for cultural and medicinal purposes; its use in infusions; and also the cultivation, trade and possession of the coca leaf to the extent necessary for these licit purposes.”¹³⁰ In order for this proposed reservation not to pass, it would have required one-third of the 183 Member States (61 Member States) to object within one year of the U.N. Secretary-General circulating this reservation amongst the signatories.¹³¹ As that time expired, only fifteen Member States, including the United States, objected to the reservation, thereby permitting the reaccession.¹³²

The United States and the INCB disagreed with the Bolivian tactic of withdrawal and subsequent reaccession with a reservation to the treaty. The United States formally objected¹³³ to the

126. Laurence R. Helfer, *Terminating Treaties*, in THE OXFORD GUIDE TO TREATIES 635 (Duncan Hollis ed., 2012).

127. *Id.*

128. *Id.*

129. See U.N. Secretary-General, Depositary Notification, Bolivia (Plurinational State of): Communication, U.N. Doc. C.N.829.2011.TREATIES-28 (Dec. 29, 2011).

130. *Id.*

131. U.N. Office on Drugs & Crime [UNODC], *Bolivia to Re-accede to UN Drug Convention, While Making Exception on Coca Leaf Chewing*, <https://www.unodc.org/unodc/en/frontpage/2013/January/bolivia-to-re-accede-to-un-drug-convention-while-making-exception-on-coca-leaf-chewing.html?ref=fs3> (last visited Mar. 24, 2017).

132. *Id.*

133. See U.N. Secretary-General, Depositary Notification, United States of America: Objection to the Reservation Contained in the Communication by the Plurinational State of Bolivia, U.N. Doc. C.N.361.2012.TREATIES-VI.18 (July 10, 2012).

new reservation on the grounds that it could lead to a larger supply of coca, “thereby fueling narcotics trafficking and related criminal activity.”¹³⁴ Although the United States seemed to object on more substantive grounds, the INCB argued more philosophically, hinting at what precedent this might set for other signatories. The INCB argued that, while the maneuver might “be in line with the letter of the Convention, such action is contrary to the Convention’s spirit.”¹³⁵ In its statement, the INCB thus recognized that Bolivia legally carried out its tactic, but it disagreed entirely with the purposes for which Bolivia undertook them. The INCB explained its concerns with the tactic as follows:

The international community should not accept any approach whereby Governments use the mechanism of denunciation and re-accession with reservation, in order to free themselves from the obligation to implement such certain treaty provisions. Such approach would undermine the integrity of the global drug control system, undoing the good work of Governments over many years to achieve the aims and objectives of the drug control conventions, including the prevention of drug abuse which is devastating the lives of millions.¹³⁶

Regardless of its displeasure with Bolivia’s actions, the INCB remained powerless to discipline the country, besides suggesting to parties of the Convention that they refrain from importing or exporting drugs from Bolivia.¹³⁷ The INCB’s inability to punish Bolivia, whose actions, at least in the eyes of the INCB, clearly circumvented the “Convention’s spirit,”¹³⁸ highlights two issues with the Convention. First, the INCB remains powerless to prevent and substantively reprimand tactics that, while legal, go against the purposes of the Convention. More importantly, the

134. U.S. DEP’T OF STATE, BUREAU OF INT’L NARCOTICS & LAW ENF’T, 2014 INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT 108 (Mar. 2014), <http://www.state.gov/j/inl/rls/nrcrpt/2014/vol1/222849.htm>.

135. *International Narcotics Control Board Regrets Bolivia’s Denunciation of the Single Convention on Narcotic Drugs*, *supra* note 125.

136. *Id.*

137. See generally AMIRA ARMENTA & MARTIN JELSMA, TRANSNAT’L DRUG INST., THE UN DRUG CONTROL CONVENTIONS: A PRIMER, TRANSNAT’L DRUG INST. (Oct. 2015), https://www.tni.org/files/publication-downloads/primer_unconventions_24102015.pdf (stating that, in the event of apparent violations of the Convention, such a recommendation is simply “as a last resort”).

138. *International Narcotics Control Board Regrets Bolivia’s Denunciation of the Single Convention on Narcotic Drugs*, *supra* note 125.

INCB's inability to punish these wrongdoers sets a precedent for other countries to follow Bolivia's example, knowing that there will likely be limited repercussions, if any at all.

B. The United States and its Doctrine of Flexibility

Think tank policy groups, like the Transnational Institute, argue that provisions in treaties like the Convention are now "outdated, no longer 'fit for purpose' to deal with new challenges and do not reflect the reality of today's multicultural and multiethnic world."¹³⁹ In particular, "legal tensions between national policy practices and the treaty framework are on the rise, especially in the area of cannabis regulation."¹⁴⁰ This is certainly true with respect to the United States' state-level change in position with respect to cannabis and the implications this change creates with respect to honoring international agreements.¹⁴¹ There are several implications stemming from the interactions between federal and state-level law with respect to cannabis, including those regarding international treaty obligations, such as the Convention. In terms of its relationship to international treaties, like the Convention, the U.S. doctrine of "flexibility" leads many to question what implications such a doctrine might have on the international stage.

1. Federal, State, and International Treaty Obligations

Under the Controlled Substances Act (CSA), marijuana is a Schedule I drug prohibited by federal law, unless otherwise specified.¹⁴² In support of its designation of marijuana as a Schedule I drug, U.S. Congress and the Drug Enforcement Administration (DEA), who is in charge of enforcing the CSA, stated that marijuana "has a high potential for abuse, . . . has no currently accepted medical use in treatment in the United States, . . . [and] lack[s] . . . accepted safety [protocols] for use of the drug or other substance under medical supervision."¹⁴³ Notwithstanding this

139. ARMENTA & JELSMA, *supra* note 137, at 16.

140. *Id.* at 16–17.

141. See generally Allison E. Don, *Lighten Up: Amending the Single Convention on Narcotic Drugs*, 23 MINN. J. INT'L L. 213 (2014) (discussing domestic legislation in Colorado and Washington legalizing the recreational use of marijuana in light of international narcotic prohibitions).

142. 21 U.S.C. § 812 (2017).

143. § 812(b)(1); see also John Hudak, *The Conflict Between Federal and State Marijuana Laws Claims a Victim*, NEWSWEEK (June 20, 2015, 4:47 PM),

designation, petitions have been made by the average U.S. citizen as well as governors of individual states to reschedule marijuana out of its status as a Schedule I narcotic.

Recently, the Department of Justice (DOJ) and the DEA rejected a petition to reschedule marijuana out of Schedule I of the CSA, maintaining marijuana's status as a federally prohibited substance. Interestingly, in the memorandum denying this petition, the DOJ and the DEA highlight treaty considerations, and specifically the Convention,¹⁴⁴ to support their position. By calling attention to the fact that the United States is a party to the Convention, the memorandum noted the importance of ensuring that the CSA acts in accordance with U.S. obligations under the treaty. Thus, the DOJ and DEA argued that they were restrained from rescheduling marijuana in the CSA because, "where a drug is subject to control under the Single Convention, the DEA Administrator (by delegation from the Attorney General) must issue an order controlling such drug under the Schedule he deems most appropriate to carry out such [treaty] obligations."¹⁴⁵ It was determined that in order to try to meet international obligations under the Convention, marijuana must remain a Schedule I substance under the CSA.

As of the publication of this Note, recreational use of marijuana is legal in Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, Washington, and the District of Columbia.¹⁴⁶ One in five individuals in the United States now live in a state that permits recreational use of marijuana without a medicinal predicate.¹⁴⁷ Although the push for marijuana legalization does not necessarily have one clear root, certain rights groups, like the American Civil Liberties Union (ACLU), have provided reasons for why they seek marijuana reform.¹⁴⁸ Groups like the ACLU see the "war on marijuana" as being a "colossal

<http://www.newsweek.com/conflict-between-federal-and-state-marijuana-laws-claims-victim-345099>.

144. Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 Fed. Reg. 53,767 (proposed Aug. 12, 2016) (to be codified at 21 C.F.R.).

145. *Id.*

146. See Melia Robinson, *It's 2017: Here's Where You Can Legally Smoke Weed Now*, BUS. INSIDER (Jan. 8, 2017, 11:00 AM), <http://www.businessinsider.com/where-can-you-legally-smoke-weed-2017-1>.

147. *Id.*

148. See *Marijuana Law Reform*, AM. C.L. UNION, <https://www.aclu.org/issues/criminal-law-reform/drug-law-reform/marijuana-law-reform> (last visited Mar. 19, 2017).

waste of resources, with states spending billions of dollars and devoting thousands of hours of police work to it.”¹⁴⁹ The ACLU also argues that the enforcement of marijuana laws tends to perpetuate some of the “starkest racial disparities”¹⁵⁰ across the United States. Others have argued that legalizing marijuana might have some form of value socially, economically, and even internationally by perhaps helping take profits away from cartels.¹⁵¹ Based on this changing legal landscape, the use of marijuana in recreational form is clearly a hot-button issue amongst legislatures and legislators across the United States, but even more so amongst voters.¹⁵² Similar to the significance with which Bolivians have emphasized their right to utilize the coca leaf, U.S. voters are now beginning to view these referendums as the “triumph of average citizens over a draconian legal system that imprisons large numbers of nonviolent drug users unnecessarily”¹⁵³ and over a failed “War on Drugs.”¹⁵⁴ Nevertheless, states that have permitted marijuana for recreational use remain in “defiance” of federal law.¹⁵⁵ Most significantly, because the Convention is not a self-executing treaty, each Member State is obligated¹⁵⁶ to implement laws enforcing the treaty itself within its own jurisdictions.¹⁵⁷ And while treaties like the Convention are “concerned primarily with federal law,” this does

149. *Id.*

150. *Id.*

151. See Desirae Hoover, *4 Reasons Why Legalizing Marijuana Could Be the Solution to America's Problems*, HUFFINGTON POST (Sept. 6, 2016, 1:46 PM), http://www.huffingtonpost.com/desirae-hoover/4-reasons-why-legalizing-b_11870030.html.

152. See *Marijuana on the Ballot*, BALLOTPEDIA, http://ballotpedia.org/Marijuana_on_the_ballot#2016 (last visited Jan. 8, 2016) (noting federal, state, and local legislative initiatives and the particular momentum with which ballot measures are being voted upon with respect to marijuana legislation).

153. See Scott C. Martin, *A Brief History of Marijuana Law in America*, TIME (Apr. 20, 2016), <http://time.com/4298038/marijuana-history-in-america/>.

154. *Id.*

155. See Donna Leinwand Leger, *Marijuana to Remain Illegal Under Federal Law, DEA Says*, USA TODAY (Aug. 11, 2016, 5:54 PM), <http://www.usatoday.com/story/news/2016/08/11/dea-marijuana-remains-illegal-under-federal-law/88550804/>.

156. See N.Y.C. BAR: COMM. ON DRUGS & THE LAW, *supra* note 30, at 2 (stating that, pursuant to the 1969 Vienna Convention on the Law of Treaties, a “country may not circumscribe its obligation” under the treaty “by enacting a conflicting domestic law”).

157. See generally *id.*

“not exempt state and local governments from requirements of international law.”¹⁵⁸

Policing bodies of international conventions, such as the INCB and the U.N. Office on Drugs and Crime,¹⁵⁹ have scrutinized the legalization of recreational marijuana.¹⁶⁰ In its annual report in 2014, the INCB acknowledged that, while cannabis remains a controlled narcotic under federal law, the “legalization of the production, sale and distribution of cannabis for non-medical and non-scientific purposes” in individual states does not “meet the requirements of the international drug control treaties,”¹⁶¹ including the Convention, as recreational use of marijuana does not satisfy a medical, or any otherwise permissible, purpose. The INCB warned that the provision that requires Member States to limit the use of narcotics to medical and scientific purposes is “strictly binding and not subject to flexible interpretation.”¹⁶²

2. Doctrine of Flexibility

In the face of direct opposition to the legalization of recreational marijuana use, the U.S. government seems to maintain the view that “flexible interpretation”¹⁶³ permits the country to interpret the treaty in a way that philosophically circumvents

158. *Id.* at 3.

159. The U.N. Office on Drugs and Crime (UNODC) is tasked with assisting Member States of these conventions by means of “field-based technical cooperation projects to enhance the capacity of Member States to counteract illicit drugs, crime, and terrorism.” See *About UNODC*, UNITED NATIONS OFFICE ON DRUGS & CRIME, <https://www.unodc.org/unodc/en/about-unodc/index.html?ref=menutop> (last visited Mar. 20, 2017). The UNODC also provides “normative work to assist States in the ratification and implementation of the relevant international treaties, the development of domestic legislation on drugs, crime and terrorism. . . .” *Id.*

160. See Christopher Ingraham, *The U.N. Really Wishes that Voters in Alaska and Oregon Hadn’t Legalized Weed*, WASH. POST: WONKBLOG (Nov. 14, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/11/14/the-u-n-really-wishes-that-voters-in-alaska-and-oregon-hadnt-legalized-weed/> (showing remarks of current and former Executive Director of the UNODC, Yury Fedotov, regarding state-level legalization of marijuana in the United States and its incompatibility with existing conventions).

161. INT’L NARCOTICS CONTROL BOARD, *supra* note 23, at 11.

162. *Id.*

163. Damon Barrett, Martin Jelsma, & David Bewley-Taylor, *Fatal Attraction: Brownfield’s Flexibility Doctrine and Global Drug Policy Reform*, HUFFINGTON POST: U.K. POL. BLOG (Nov. 18, 2014), http://www.huffingtonpost.co.uk/damon-barett/drug-policy-reform_b_6158144.html.

the letter of the Convention. In support of the flexible interpretation position, William R. Brownfield, the Assistant Secretary of State for Drugs and Law Enforcement,¹⁶⁴ reiterated what the United States refers to as its “four pillars”¹⁶⁵ policy, which articulates the U.S. view on how the international community should proceed regarding drug policy.¹⁶⁶ The first pillar Brownfield set forth was to assure the international community that the United States would “respect the integrity of the existing UN Drug Control Conventions” by conveying its interest in remaining a Member State to such treaties.¹⁶⁷ Second, Brownfield stressed the importance of the international community “accept[ing] flexible interpretation of those conventions,” an interpretation that, presumably, would allow greater latitude for exceptions to the changing legal climate regarding marijuana policy.¹⁶⁸ Third, Brownfield stated that Member States and the international community should “tolerate different national drug policies, to accept the fact that some countries will have very strict drug approaches; [whereas] other countries will legalize entire categories of drugs.”¹⁶⁹ This would require all countries to “work together in the international community”¹⁷⁰ and to maintain “some tolerance for those differing policies.”¹⁷¹ Lastly, Brownfield urged in the fourth pillar that,

whatever our [international community] approach and policy may be on legalization, decriminalization, de-penalization, we [the international community] all agree to combat and resist the criminal organizations – not those who buy, consume, but those who market and traffic the product for economic gain.

164. This is now known as the Bureau of International Narcotics and Law Enforcement Affairs—a bureau within the U.S. State Department tasked with fighting international crime, illegal drugs, and instability abroad with the intent of reducing the amount of crime and drugs that reach the shores of the United States. See *Bureau of International Narcotics and Law Enforcement Affairs (INL)*, U.S. DEP'T STATE, <https://www.state.gov/j/inl/> (last visited Mar. 24, 2017).

165. Barrett, Jelsma, & Bewley-Taylor, *supra* note 163.

166. William R. Brownfield, Assistant Sec'y of State, Press Briefing: Trends in Global Drug Policy (Oct. 9, 2014), <https://2009-2017-fpc.state.gov/232813.htm>.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

Respect the conventions; flexible interpretation; tolerance for national polices; criminal organizations – that is our [U.S.] mantra.¹⁷²

As the representative of the U.S. government, Brownfield rationalized the four pillars by stating that “things have changed since 1961,”¹⁷³ and, thus, the United States must be given enough flexibility to allow it to incorporate changes into policies.¹⁷⁴ Brownfield and the United States fail to see, however, that the country, as a member to treaties like the Convention, has international obligations irrespective of independent interpretations of how the international community should proceed with respect to drug policy. The fact remains that the United States’ flexible interpretation still tends to violate the provisions against the recreational use of marijuana and spirit of the Convention itself.

C. The Bolivian and U.S. Dance: What the Maneuvers Mean for the Convention

Maneuvers such as Bolivia’s withdrawal and reaccession and the U.S. pillars justification draw attention to the archaic nature and rigidity of the Convention. For example, Bolivia operated within the parameters set out by the Convention by withdrawing and subsequently reaccessing with reservations but was thereafter criticized for what was, essentially, a circumvention of the Convention’s purpose. Further, the United States arguably is violating the Convention by using Brownfield’s “four pillars” to rationalize state allowance of marijuana usage for recreational purposes. Both approaches seem to exemplify that the Convention chastises those who act legally under the Convention if the actions seem to go against the spirit of the Convention and is restrictive in a changing landscape. As both President Morales of Bolivia and William Brownfield of the U.S. State Department note,¹⁷⁵ treaties such as the Convention set forth a “one size fits all’ arrangement with a rigid prohibitionist approach to drugs that every country in the world is expected to adopt.”¹⁷⁶ As a result, when countries like Bolivia seek to exempt narcotics

172. *Id.*

173. *Id.*

174. *Id.*

175. *See generally id.*; Bolivian Amendment Proposal, *supra* note 63.

176. ARMENTA & JELSMA, *supra* note 137, at 16.

that are subject to the Convention's prohibitions based on legitimate secondary uses, like cultural traditions, they are criticized by both the Convention itself as well as policing bodies, such as the INCB. Similarly, when countries such as the United States seem to dictate their own "flexible" interpretation of treaties due to shifts in domestic policy, they are nonetheless acting in contravention of the treaty because strict compliance is required. In refusing to address the fact that independent states within its territory are legalizing the recreational use of marijuana, the United States has not adhered to the strict protocol demanded by the terms of the Convention. And although the independent state policy is not that of the federal government, the United States is responsible for compliance by states within the country itself.

In decertifying Bolivia, and thereby permitting the United States to withhold its aid packages to Bolivia, the United States cited Bolivia's withdrawal from the Convention and subsequent reaccession with a reservation, complaining that Bolivia "continues to promote the worldwide cultivation and commercialization of coca leaf products, contrary to the conventions' foundational premises and Bolivia's own reservation [to the Convention]."¹⁷⁷ In Latin American nations, this U.S. process of decertification has long led to the contributing notion that the U.S. government is arrogant and hypocritical when it comes to drug policy.¹⁷⁸ The United States also fails to note that its four pillars have justified state legalization of marijuana for recreational use, which violates the Convention's prohibition of the use of recreational marijuana. Though other Member States do not support the procedural methods employed by Bolivia in withdrawing and reaccessing with reservations, Bolivia at least attempted to follow the rules set forth by the Convention as well as the INCB. For example, John Walsh, coordinator of the Washington Office on Latin America's drug policy program,¹⁷⁹ explicitly noted that, in

177. Oakford, *supra* note 18.

178. *U.S. Decertification of Bolivia: A Blast From the Past*, WASH. OFFICE ON LATIN AM. (Sept. 17, 2009), <https://www.wola.org/2009/09/us-decertification-of-bolivia-a-blast-from-the-past/>.

179. The Washington Office on Latin America is a leading research and advocacy organization that also has special programs surrounding the legalization and regulation of both cannabis and the coca plant. See *About Us*, WASH. OFFICE ON LATIN AM., <https://www.wola.org/about-us/> (last visited Mar. 24, 2017).

“terms of its adherence to the convention system, Bolivia is in fact more in line with international narcotics law”¹⁸⁰ than the United States, primarily because its method of withdrawal and reaccession with reservations was “explicitly approved by UN member states.”¹⁸¹ The United States approach, however is different because it is, in essence, ignoring procedure and the parameters of the Convention with its doctrine of flexibility.

The use of flexible interpretations by the United States is not readily acceptable to the international community. As a result, it is “hypocritical and arrogant that the U.S., with legal recreational marijuana in several states in violation of the UN Single Convention, justifies Bolivia’s decertification by citing the country’s noncompliance with the same international accord.”¹⁸² There are clear problems posited by both Bolivia’s approach of withdrawal and reaccession with declarations and the U.S. method of simply ignoring international law and replacing compliance with its own flexible interpretation of the treaty itself. As the “idea of having a Single Convention”¹⁸³ was an “initiative” of the United States, it should, in particular, do its best to comply with the terms of the Convention.¹⁸⁴ More significantly, as the Convention appears unable to best address changing drug policies for nations, on both the domestic and international stage, the international narcotics treaty regime remains in a constant state of stasis.

III. WHY CURRENT CONVENTION PROCEDURES DO NOT PERMIT MEANINGFUL CHANGE

The Convention needs to be adjusted to either allow Member States to modify their stances with respect to particular narcotics or to counteract measures taken by states who intentionally ignore the Convention’s provisions. There are a variety of ways to modify the Convention. These solutions include reforming the Convention itself and modifying the responsibilities relating to Member States and governing bodies, such as the INCB.¹⁸⁵ It is important to note, however, that many of these possibilities set the stage for “significant procedural complications and political

180. Oakford, *supra* note 18.

181. *Id.*

182. *Id.*

183. ARMENTA & JELSMA, *supra* note 137, at 3.

184. *See generally id.*

185. *See id.*

obstacles,”¹⁸⁶ as demonstrated by the rejected Bolivian amendment and subsequent U.S. political criticisms after its reaccession to the Convention. These obstacles work to prohibit meaningful reform that may allow the treaty to evolve over time. Most significantly, the difficulty of making such modifications often prevents reform from occurring as a whole. As a result, rather than playing legal hopscotch to try and comply with the Convention,¹⁸⁷ some Member States¹⁸⁸ have proceeded by simply ignoring the treaty altogether. Thus, because wholesale reform seems improbable, and because ignoring treaty provisions undermines the purposes of the treaty, new proposals are needed to effectuate change. This Part will discuss why proposed amendments to and withdrawal from the Convention are ineffective methods to achieve necessary change—namely, the promotion of equal treatment with respect to signatory status of compliance. Furthermore, this Part will discuss why withdrawal and subsequent reaccession with reservations highlights the circumventive threats that Member States pose to the Convention regime. In addition, this Part will analyze why the doctrine of “flexibility” poses a threat to treaty compliance generally, as exemplified by the U.S. stance with respect to marijuana and permissive recreational use at the state level. Lastly, this Part will discuss how the INCB’s role has transitioned from a compliance watchdog to a body that instead critiques proposed policy and why that role does not comply with the Convention’s vision of how it should operate.

A. Problems with Proposed Amendments and the Scorn of Withdrawal

Pursuant to Article 47 of the Convention, any Member State is permitted to propose an amendment.¹⁸⁹ Thus far, the procedure

186. *Id.* at 20.

187. *See id.* at 20 (stating that, because of reform difficulty, U.S. states and Uruguay have “moved forward with cannabis regulation before finding a legal solution to the problem of infringing the treaty system”).

188. *See* Laura Graham, *Legalizing Marijuana in the Shadows of International Law: The Uruguay, Colorado, and Washington Models*, 33 WIS. INT’L L.J. 140, 165 (2015) (arguing that the ability of “the United States to openly violate provisions of the conventions with relative impunity invites future treaty violations”). Further, the article notes that without “flexibility or revision of the scheduling,” the Convention might continue to “lose authority over the actions of member states.” *Id.* at 165.

189. Convention on Narcotic Drugs, *supra* note 12, art. 47.

governing the amendment process has only been invoked twice in the case of international drug control conventions.¹⁹⁰ As exhibited by Bolivia's proposed amendment to the Convention, invoking the amendment process is incredibly difficult and will likely fall short and come under heavy scrutiny, as seen through the condemnation of the Bolivian amendment by other signatories, like the United States. The United States led the opposition to the Bolivian amendment to the Convention and based its decision on the grounds that it wished to "maintain the integrity of the Convention, which constitutes an important tool for the global fight against drug trafficking."¹⁹¹

Unlike Bolivia, the United States did not propose an amendment to the Convention with respect to marijuana. Rather, the United States adopted a flexible approach to interpreting the Convention. This approach, however, is a hypocritical circumvention of the treaty, the integrity of which the United States has sought to maintain by rejecting procedurally invoked amendment procedures by other signatories, like Bolivia. Moving forward, the United States has two options: withdraw from the Convention entirely or propose an amendment that accounts for its change in domestic policies with respect to marijuana.¹⁹² Withdrawing entirely from the Convention could possibly bring adverse consequences including, but not limited to, isolation, sanctions, and a damaged reputation.¹⁹³ Additionally, although the Bolivian method of withdrawal and reaccession is another path the United States could take, it is unlikely to do so, given the reaction of the INCB and others in the international community to Bolivia's tactic.

190. See ARMENTA & JELSMA, *supra* note 137, at 20 (showing that amendment procedures were invoked first in 1972, and later in 2009, when Bolivia proposed its amendment exempting the country from abolishing coca chewing under Article 49 of the Convention).

191. Martin Jelsma, *D-Day for Bolivia's Coca Chewing Amendment*, TRANSNAT'L INST. (Feb. 3, 2011), <https://www.tni.org/en/article/d-day-bolivias-coca-chewing-amendment>.

192. See Molly Quinn, *Implications of U.S. Noncompliance with the Single Convention on Narcotic Drugs of 1961*, MICH. J. INT'L L. (Mar. 9, 2015), <http://www.mjlonline.org/implications-of-u-s-noncompliance-with-the-single-convention-on-narcotic-drugs-of-1961/>.

193. See *id.* (arguing that if the United States, as a "global hegemon," were to outright withdraw from the Convention, it would likely face adverse consequences, such as "international isolation, trade sanctions, removal of financial assistance and a damaged reputation").

Bolivia's inability to successfully amend the Convention, coupled with the United States' seeming refusal to propose an amendment or withdraw from the Convention, leads to two main observations. First, countries are unlikely to propose an amendment that they know will likely be unsuccessful. This will lead countries to either withdraw from the treaty or act in contravention of its provisions. Second, there is no mechanism in place to punish Member States who violate the treaty's provisions. These observations lead to the notion that this Convention is not equipped to allow signatories to change stance with respect to narcotics policies. Furthermore, it also demonstrates the inability of its policing body to defend the Convention from signatories who blatantly disregard its compliance provisions.

B. Temporary Withdrawal and Subsequent Reaccession with Reservations—the Bolivian Method

When amendment proposals fail, parties might be inclined to revert to the method employed by Bolivia: withdrawal and reaccession with reservations. When parties withdraw and subsequently reaccede with reservations, it seems that such a tactic may be “nothing more than a crass attempt to evade legal obligations just at the point when they begin to impose real constraints.”¹⁹⁴ This poses alarming circumventive threats to the foundation upon which international treaties are built because, if Member States are permitted to join but are not reprimanded when they violate the treaty, other Member States will begin to question adhering to the treaty's provisions.

Bolivia's actions have opened the door for other countries to potentially withdraw and reaccede with reservations, which may very well threaten international multiparty agreements, such as the Convention. If other Member States wish to take such an approach, the procedure of withdrawal and reaccession with reservations will likely “undermine the value of treaty bargains in general and would specifically prejudice non-reserving states that had relied on the terms of their treaty partners' initial ratification decisions.”¹⁹⁵ The Bolivian method thus frustrates Member States, who initially agreed to the treaty with the expectation that terms would remain unchanged or, at the very

194. Laurence R. Helfer, *Not Fully Committed? Reservations, Risk, and Treaty Design*, 31 YALE J. INT'L L. 367, 372–73 (2006).

195. *Id.* at 373.

least, would not be drastically distorted by subsequent procedural maneuvers. Specifically, the Bolivian method “sanctions the unilateral and selective rejection of only those treaty commitments that the denouncing state disfavors, while leaving the remaining treaty provisions intact,”¹⁹⁶ evoking an international fear that Member States can pick and choose what provisions of the treaty they wish to follow. This scheme of withdrawing and reaccessing with “late reservations” circumvents the antiquated views that the treaty and INCB hold—that the treaty will remain unchanged, even when domestic agendas of respective Member States are altered. Though it may benefit independent Member States to have an ability to maneuver around particular aspects of treaties that threaten their domestic policies, this maneuver ultimately undermines the Convention itself, its policing bodies, as well as treaties generally within the international framework.

C. Tabula Rasa or Ignorance—a New Treaty or Denunciation in Light of U.S. Noncompliance

Commentators have argued that another viable option is the creation of an entirely new treaty that specifically governs narcotics that have been subject to modern liberalization.¹⁹⁷ This would seem to include individual treaties aimed at addressing specific narcotics. The creation and implementation of an entirely new treaty to address specific narcotics, however is not only myopic but also threatens the goals of the Convention, as multilateral treaties are designed to promote and perpetuate international participation in the governing of narcotics.

Member States who raise issues with one or more of the treaty provisions have also toyed with the idea of pure denunciation and withdrawal. Some have noted that in “light of the jurassic nature of the drug control treaties and the seemingly insurmountable procedural and political obstacles to change them, the question is often raised why countries should not simply ignore or withdraw from the UN drug control treaty regime.”¹⁹⁸ Simply ignoring the terms of a treaty, however, does not lead to

196. *Id.*

197. See generally Elana Rodman, *From Criminalization to Regulation: New Classifications of Cannabis Necessitate Reform of United National Drug Treaties*, 40 *BROOK. J. INT’L L.* 647 (2014).

198. ARMENTA & JELSMA, *supra* note 137, at 22.

long-term treaty compliance or the creation of international “common objectives,”¹⁹⁹ as doing so without consequence would antagonize fully compliant Member States into questioning their own loyalty to the Convention or perhaps ignoring it as well. The United States runs the risk of encouraging noncompliance by other signatories in light of its transitioning domestic marijuana policy and subsequent ignorance of international narcotics treaties, such as the Convention.

As recreational use of marijuana is legal in a handful of U.S. states (with the prospect of more on the horizon), the INCB has repeatedly urged the United States to “resolve the contradiction between the federal and state levels in the implementation” of its obligations under the Convention.²⁰⁰ Currently, U.S. federal law still prohibits the recreational use of marijuana, however, state law differs in multiple states across the country. Merely ignoring the requests made by the policing body of the international drug control conventions does not reflect well upon the Member State or the policing body itself. Specifically, if other countries observe the hypocrisy with which the United States has seemed to conduct itself with, other powerful Member States similarly will ignore the provisions with which they disagree, leading to the overall notion that this treaty is one that can be molded to shape their own policy preferences.

D. How the INCB Perpetuates Obstacles

As the INCB operates as an independent monitor of Member State obligations under international drug control conventions,²⁰¹ it plays a significant role in the international drug control system, expanding far beyond the Convention itself.²⁰² Nevertheless, while the INCB is “tasked with monitoring national

199. Convention on Narcotic Drugs, *supra* note 12, pmbl.

200. *UN Accuses USA of Violating Drug Treaties*, EUR. COALITION JUST & EFFECTIVE DRUG POLICIES (Nov. 15, 2012), <http://www.encod.org/info/UN-ACCUSES-USA-OF-VIOLATING-DRUG.html>.

201. See DAMON BARRETT, INT'L HARM REDUCTION ASS'N, UNIQUE IN INTERNATIONAL RELATIONS: A COMPARISON OF THE INTERNATIONAL NARCOTICS CONTROL BOARD AND THE UN HUMAN RIGHTS TREATY BODIES (2008), <http://www.ihra.net/files/2010/06/16/Barrett-UniqueinInternationalRelations.pdf>.

202. *Id.*

drug policies and assessing their relationship with the treaties,”²⁰³ it is particularly important to recognize that the INCB has “no police power to enforce the Conventions’ provisions.”²⁰⁴

It is general understanding, however, that the INCB “often relies on informal pressure in its attempts to encourage what it perceives to be treaty compliance.”²⁰⁵ Such pressure is limited to the INCB’s ability to exert procedural pressures.²⁰⁶ In what commentators have described as “name and shame”²⁰⁷ procedures, the INCB has the power to inform the U.N. General Assembly of any impropriety when it finds that a Member State did not provide a legitimate explanation for its apparent violation of the Convention (subsequent to the initial violation inquiry) and said party failed to pursue proper remedial measures.²⁰⁸ Additionally, when such procedures are not enough, the INCB can also recommend to Member States that they cease the “import of drugs, the export of drugs, or both, from or to the country or territory concerned.”²⁰⁹ This power is what commentators have referred to as the “nuclear option,”²¹⁰ and is considered to be a “persuasive mechanism”²¹¹ for ensuring treaty compliance.²¹² It is therefore the responsibility of the INCB not only to “monitor treaty compliance”²¹³ but also “report perceived infractions to influential bodies within the U.N. and consequently exert significant pressure upon nation states.”²¹⁴ These powers, however, are seemingly not strong enough to guarantee Convention compliance. Even in making its reports to the United Nations, whether it be condemning Bolivia’s tactics or critiquing U.S. circumvention, the INCB does not seem to deter wrongdoers and ensure strict compliance of the Convention’s provisions.

Analysts also note that the INCB tends to surpass its mandate with respect to reforming the treaty itself.²¹⁵ As exemplified by

203. BEWLEY-TAYLOR & TRACE, *supra* note 47, at 3.

204. *Id.*

205. *Id.*

206. *Id.* at 3–4.

207. *Id.* at 4.

208. *Id.*

209. *See id.*; *see also* Convention on Narcotic Drugs, *supra* note 12, art. 14.

210. BEWLEY-TAYLOR & TRACE, *supra* note 47, at 4.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *See* ARMENTA & JELSMA, *supra* note 137, at 15.

the Bolivian and U.S. examples, some have argued that it is the responsibility of the INCB to provide detailed and hands-on technical assistance in ensuring means of treaty compliance rather than simply acknowledging that the treaty is being violated.²¹⁶ That said, one of the largest criticisms of the INCB is that it is moving away from its mandate as the “watchdog” of the conventions by “describing the global situation, and bringing attention to challenges and dilemmas” and toward a “guardian” role by challenging any policy that does not correspond with the original version of the control system.²¹⁷ In other words, it remains the strongest critic of any signatory that has a change in policy when it comes to how that signatory views a particular narcotic and the purposes it might serve. Thus, to some, the INCB appears to be neglecting its role in “reconcile[ing] differences between the member states’ positions and looking at the options that emerge as the debate progresses.”²¹⁸ The INCB appears to be reluctant in adapting to changing domestic policies regarding the narcotics that the Convention governs and finding potential solutions. This appears to trouble drug policy think tanks and those signatories who seek reform. Rather than encourage policies that may alleviate particular tensions or support particular agendas in various nations, Member States remain locked in to how the INCB frames their modes of compliance or noncompliance. Notwithstanding the INCB’s views with respect to its role, however, they still fail to have the necessary tools to ensure general compliance with those treaty provisions.

IV. POSSIBLE SOLUTIONS

There are several possible solutions that the international community might wish to explore. These range from altering the substance of the Convention itself (by way of an amendment), to providing the governing bodies of the Convention with sufficient tools to dissuade Member States from violating or circumventing Convention norms. Lastly, the governing bodies themselves, particularly the INCB, might wish to refocus the purposes for which they were designed and instead encourage reform for Member States and the Convention itself.

216. *See id.*

217. BEWLEY-TAYLOR & TRACE, *supra* note 47, at 1.

218. ARMENTA & JELSMA, *supra* note 137, at 15.

A. Pass an Amendment Preventing Withdrawal and Reaccession

Precedent regarding amendments is generally unfavorable for states seeking to amend the Convention.²¹⁹ Thus far, there have been two proposed amendments to the Convention: a blanket series of amendments altering the Convention in 1972, known as the “1972 Protocol,” and second, the failed 2009 Bolivian proposal. Instead, Member States should unify behind the idea of a blanket amendment prohibiting withdrawal and reaccession with reservations and ignorance of the treaty, as it could avoid frustration sustained by many of the Member States. It could do this with a similar level of support comparable to that demonstrated for the 1972 Protocol.

The Bolivian example demonstrates what is the “often contested and protracted nature of debate around the revision of a variety of regimes,” but particularly with a Member State’s ability to withdraw from the treaty because of an unfavorable provision and reaccede with a stipulation that allows the Member State to ignore that provision.²²⁰ This has led scholars to conclude that, “even where there is almost universal agreement on the need for some sort of reform, there is seldom a unanimously accepted vision of exactly what a recalibrated regime should look like.”²²¹ Thus, even though Member States and the INCB recognize that change is needed to prevent parties, such as Bolivia, from using maneuvers like withdrawal and reaccession with reservations to reflect their domestic policies, it remains uncertain as to what these changes would look like. Consequently, Member States, coalitions formed therefrom, and the Convention itself remain immobile, unable to address new challenges facing both the Convention and the parties bound to it. Although these examples do not demonstrate that Convention reform is an impossibility, they also do not demonstrate that consensus is likely.

Coalitions of Member States within the international community, otherwise known as “like-minded groups,”²²² have, in turn,

219. See generally Rodman, *supra* note 197.

220. DAVE BEWLEY-TAYLOR, TRANSNAT’L INST., SERIES ON LEGISLATIVE REFORM OF DRUG POLICIES NR. 19: TOWARDS REVISION OF THE UN DRUG-CONTROL CONVENTIONS: THE LOGIC AND DILEMMAS OF LIKE-MINDED GROUPS 6 (Mar. 2012), <https://www.tni.org/files/download/dlr19.pdf>.

221. *Id.*

222. See *id.*

become a blessing and a curse to international drug control treaties, such as the Convention.²²³ The Bolivian amendment met the opposition of seventeen like-minded signatories, thus demonstrating that Member State coalitions can cut both ways. They ensure that parties facially comply with the provisions of the Convention, but they also have the ability to halt large-scale reform within the narcotic treaty community. Although Bolivia's maneuvering may promote a form of circumvention, its actions demonstrate a stasis and inability to lead to more meaningful change within the Convention itself.

If a "group or bloc"²²⁴ of Member States then sought to prevent others, like Bolivia, from employing a reaccession tactic, a "safety in numbers approach [would] offer protective benefits,"²²⁵ thereby offering a path toward proposing a general amendment to the treaty itself. For Member States and coalitions seeking to eliminate this procedural circumvention of the Convention's provisions, a like-minded group is the best approach for the establishment of a blanket amendment that would prohibit this maneuver of withdrawing and reaccessing with reservations. If Member States were to unify behind their disapproval of Bolivia's tactic and what the United States is currently doing, for example, a blanket amendment prohibiting both approaches would lead to a sense of concord and legitimacy that international treaties, such as the Convention, require.

B. Greater Enforcement Power

Another possible maneuver that the United Nations and Member States may wish to consider is to empower the INCB or relevant governing bodies with the proper tools to enforce compliance. In the context of the Convention, these tools should go beyond the INCB's current power to bring a matter to the attention the U.N. General Assembly. Although the INCB's current powers may be enough to deter some, it is simply not enough to deter all from making unilateral decisions that have a greater impact on the way the global community views the Convention. As the United States example shows, the Convention fails to prevent

223. See generally *id.*

224. *Id.* at 5.

225. *Id.*

Member States from using self-defined “flexible” interpretations²²⁶ to circumvent unconditional compliance of the Convention.

As none of the recommendations made by the INCB are legally binding on the Member States,²²⁷ narcotics treaties, like the Convention, lack an “international police force standing at the ready to force countries to fulfill their obligations.”²²⁸ As a result, the INCB must resort to “quiet diplomacy” or “blaming and shaming” as means to sway compliance.²²⁹ Aside from embargo recommendations under Article 14, the INCB lacks any enforcement powers, and, instead, the committee relies upon the “good faith of states”²³⁰ to comply with the decisions and recommendations it sets forth.²³¹

If the INCB were empowered with the ability to reprimand, by way of some type of sanction, Member States that violate (or ignore) the terms and provisions of the Convention, a stronger deterrent would exist to persuade states to follow the rules. Furthermore, if the INCB did have enforcement power, the INCB would be able to encourage mutual respect for both the INCB and the Convention as an international accord.

The Convention, however, generally places restrictions upon the authority of the INCB to “further the co-operation of Governments” and to “facilitate effective national action to attain the aims” of the Convention.²³² Thus, according to the Convention, the INCB must “always operate in the ‘spirit of dialogue’” rather than adjudicate the guilt of Member States.²³³ If the INCB were to simply pronounce that they now possess the power to penalize Member States (either monetarily or in other form), this would likely breed resentment beyond that which some contend already exists between the INCB and the Member States it presides over. As a result, the form of that enforcement power should be determined in accordance with the provisions of the

226. Brownfield, *supra* note 166.

227. BARRETT, *supra* note 201, at 17.

228. N.Y.C. BAR: COMM. ON DRUGS & THE LAW, *supra* note 30, at 3.

229. *Id.*

230. BARRETT, *supra* note 201, at 27.

231. *Id.*

232. Convention on Narcotic Drugs, *supra* note 12, art. 9.

233. See Martin Jelsma, *Treaty Guardians in Distress: The Inquisitorial Nature of the INCB Response to Bolivia*, TRANSNAT'L INST. (July 12, 2011), <http://www.undrugcontrol.info/en/weblog/item/2626-treaty-guardians-in-distress>.

Convention itself. In other words, the enforcement power that strengthens the INCB's ability to monitor compliance should also stem from the support of Member States themselves.

C. Alter the Purpose of the INCB

Another possible path that the international narcotics community might take, specifically those signatories to the Convention itself, is to revise the scope and role of the INCB. As the INCB is the "body charged with monitoring the implementation of the conventions,"²³⁴ some commentators have argued that the INCB has forgotten its purpose and that the true INCB has been rather voracious in plunging itself into the waters of international policymaking. This is far different from what the INCB was designed to do as a policing body of the Convention.

The INCB limits itself to several methods of operation with respect to discharging its responsibilities. These methods include helping Member States formulate systems of narcotic estimates so that governments can better address supply and demand issues, monitoring and promoting measures taken by governments to prevent the diversion of these substances for illicit purposes, analyzing information provided by these governments in helping ensure their compliance to the Convention, and maintaining a dialogue with signatories to assist their compliance with the provisions therein.²³⁵ Now, however, many commentators seem to argue that the INCB no longer encourages a dialogue but instead offers lectures when signatories go astray of the duties INCB owed to the Convention.

In other words, member noncompliance, coupled with the view that the INCB has exceeded its mandate provided to it by the Convention, merely reiterates the notion that the blame is not to fall upon the back of one body. As the INCB vigorously voices its dismay with party noncompliance, it "ignores the limitations in the Conventions as regards interference with sovereignty and autonomy of member states in constructing national drug policy."²³⁶ Commentators have argued:

The Board [INCB] is misinterpreting the Conventions and oversteps its mandate when it tries to influence or control the

234. BEWLEY-TAYLOR & TRACE, *supra* note 47, at 1.

235. *Mandate and Functions*, *supra* note 46.

236. BEWLEY-TAYLOR & TRACE, *supra* note 47, at 9.

internal policies of governments as regards the use of controlled drugs, particularly when a government takes a different view from the Board, or individual Board members, in matters of public health policy, crime prevention, clinical practice or reduction of demand for illicit drugs. The Board frequently condemns the policies of sovereign states in these areas, even when it is unqualified to comment.²³⁷

While not the cure-all adjustment that the international narcotics community needs, a sincere revision of the INCB's mandate would be a significant first step toward positive adjustments. Rather than publicly admonish Member States like the United States for its ignorance or Bolivia for its circumvention of the "spirit" of the Convention, the INCB should work more closely with those Member States in synchronizing the goals of the Convention with progressive and changing attitudes toward particular narcotics.

In refocusing its mission, an adjustment to the treaty itself might not be entirely necessary. For example, it is not entirely clear that the INCB's opinion with respect to policymaking is a but-for cause of the disharmony within the international drug community. Nevertheless, as the Convention requires Member States to take actions on their own behalf, it is important that they respect the INCB and its sole job in administering compliance. Such respect would be improved by a self-imposed reminder that both the Member States and the INCB owe themselves to the Convention and not to each other.

CONCLUSION

While the Convention remains a milestone in the realm of international narcotics agreements, the problems highlighted by Bolivian and U.S. tactics, through withdrawal and reaccession with reservations and outright refusal to follow the treaty, respectively, raise concerns, both to signatories and the international narcotics regime as a whole. Signatories can evade the spirit of the Convention while also escaping punishment for a blatant refusal in abiding by its provisions. Furthermore, its governing body has transformed from one intended to encourage discussion on the matters faced by signatories to one more prone

237. TRANSNATIONAL INST., DRUG POLICY BRIEFING NR. 4: THE ERRATIC CRUSADE OF THE INCB (Feb. 2003), <https://www.tni.org/files/download/brief4.pdf>.

to criticism. The INCB remains powerless to ensure that all signatories comply with both the provisions and spirit of the Convention but also remains excessively eager to lecture Member States who seek some type of change. Furthermore, Member State drug policies that adhere to long-standing heritage and culture, or perhaps are changing to reflect progressivism by way of voter referendum, buttress these hostile critiques promulgated by the INCB, all of which lead to a continuous stream of tension and confusion amongst the international narcotics community.

In light of Bolivian withdrawal and reaccession with reservations, the United States has been keen to criticize the country on all fronts while maintaining the theory that the United States itself can flexibly interpret the treaty to allow domestic legislation surrounding the recreational use of marijuana.²³⁸ The frustration is not enveloped in the criticism, but instead in a system that punishes countries who conform (as exhibited by the Bolivian maneuver) and one that does not punish countries that patently ignore the provisions to which they are bound.

In sum, the Convention does not bind countries equally. Nor do those policing bodies monitoring compliance with the Convention have the ability to ensure that necessary compliance is unconditional. Therefore, the international community needs to answer this question: should the treaty be rewritten, or should more be done in order to enforce and ensure compliance? Which-ever manner the question is phrased, it must be done so with the legitimacy of international agreements kept in mind. Nevertheless, if Bolivia and the United States feel as though they do not have to comply, why should anybody else?

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238. See generally N.Y.C. BAR: COMM. ON DRUGS & THE LAW, *supra* note 30.

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