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NOTE: AN EVALUATION OF THE EFFECTS OF THE LEGALIZATION OF MARIJUANA IN COLORADO AND WASHINGTON FROM AN INTERNATIONAL LAW PERSPECTIVE

*Aparna Bushan**

I. OVERVIEW

The legalization of marijuana in the states of Colorado and Washington has raised issues that the international community has not previously been forced to consider. Through examining relevant state laws, current federal legislation and applicable international agreements, this Note will outline the legal ramifications that the legalization of marijuana in Colorado and Washington could have both nationally and internationally. This Note will further evaluate all reasonable alternatives available to the United States in meeting the requirements mandated of it by the international agreements it is party to.

Main Issue

The United States' national legislation is currently in conflict with the international agreements it is party to. From a purely national perspective, the federal legislation governing the United States has numerous discrepancies with the recent laws in Colorado and Washington State regarding the usage of recreational marijuana.¹ These discrepancies in national and state law in turn have resulted in international consequences. As a party to various international conventions that govern the use of marijuana, the United States has contravened several convention provisions by allowing for the possession of marijuana. The legalization of marijuana in two states now requires the United States to justify its actions internationally in order to remain party to the affected international agreements.² Essentially, the conflict between state and federal law has resulted in a divergence between the United States and the international agreements it is committed to.

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¹ See *A Liberal Drift*, THE ECONOMIST (Nov. 10, 2012), <http://www.economist.com/news/united-states/21565972-local-votes-suggest-more-tolerant-country-but-not-more-left-wing-one-liberal-drift> (positing that divergence in state law and federal law regarding the legalization of medical marijuana in California may “spell trouble”) [hereinafter *A Liberal Drift*]. See also *Marijuana Resource Center: State Laws Related to Marijuana*, OFFICE OF NAT’L DRUG CONTROL POLICY, <http://www.whitehouse.gov/ondcp/state-laws-related-to-marijuana>.

² Rep. of the Int’l Narcotics Control Bd. for 2012 UN Doc E/INCB/2012/1 at 80-83 (2013) [hereinafter INCB 2012 Report].

Relevant Background Information

In order to appreciate the scope of the issue faced by the United States internationally one must first recognize and understand the various drug control conventions the United States is a party to. The United States is a signatory of three different international agreements regarding the usage of illicit drugs: the Single Convention on Narcotic Drugs (“SCND”),³ the Convention on Psychotropic Substances (“CPS”),⁴ and the United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (“1988 UN Convention”).⁵

Single Convention on Narcotic Drugs (1961)

All of the nations that are signatories of the SCND are required to make the production, trade, and possession of illicit substances for non-scientific and non-medicinal purposes a punishable offense.⁶ Therefore, by permitting the legalization of marijuana in Colorado and Washington, the United States violated the agreement.

The objective of the SCND is to restrict worldwide possession, usage, manufacturing and the trade and trafficking of drugs, with the exception of certain substances that are to be used for purely medical and scientific purposes.⁷ The Convention classifies illicit drugs by categorizing them into four separate schedules based on their common usages, features and corresponding levels of control.⁸ Cannabis is classified as a Schedule I narcotic because of its addictive properties that are perceived as presenting a serious risk of abuse from its users.⁹ It is also classified as a Schedule IV substance since it is viewed by the World Health Organization as a drug within Schedule I that is particularly susceptible to abuse and known to produce ill effects that are not offset by substantial therapeutic advantages.¹⁰ Schedules I and IV are acknowledged as being the most stringent categories and cover other drugs, including opium and coca. Ironically,

³ United Nations Single Convention on Narcotic Drugs, Mar. 30, 1961, 520 U.N.T.S. 151 [hereinafter Single Convention].

⁴ United Nations Convention on Psychotropic Substances, Feb. 21, 1971, 1019 U.N.T.S. 175 [hereinafter CPS].

⁵ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 1582 U.N.T.S. 95 [hereinafter 1988 UN Convention].

⁶ JONATHAN P. CAULKINS ET AL, MARIJUANA LEGALIZATION: WHAT EVERYONE NEEDS TO KNOW 145 (2012) [hereinafter WHAT EVERYONE NEEDS TO KNOW].

⁷ See Single Convention, *supra* note 3, art. 4 at 4. Article 4 contains a description of the “general obligations” of the parties to the treaty, including “. . . to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs.” *Id.*

⁸ *Classification of Controlled Drugs*, EUR. MONITORING CTR. FOR DRUGS AND DRUG ADDICTION, <http://www.emcdda.europa.eu/html.cfm/index146601EN.html>.

⁹ *Id.*

¹⁰ See Single Convention, *supra* note 3, art. 3(5), at 4. Article 3(5) grants the INCB the power to place a drug on Schedule IV should the World Health Organization find that “a drug in Schedule I is particularly liable to abuse and to produce ill effects and that such liability is not offset by substantial therapeutic advantages not possessed by substances other than drugs in Schedule IV.” *Id.*

cannabis was listed Schedule IV due to pressure by the United States in the United Nations.¹¹ To monitor and support all the government's party to the treaty in achieving the convention's goals, the SCND established the International Narcotics Control Board ("INCB").¹²

The INCB is an independent, quasi-judicial expert body that was established in 1968. Its members serve impartially and currently enforce the provisions of the SCND, the CPS and the 1988 UN Convention.¹³ The INCB's duties include questioning governments thought to have violated treaty provisions, proposing remedial measures if governments are found to breach said provisions and, if required, assisting governments in overcoming difficulties they may be facing in enforcing treaty provisions.¹⁴ This requires close cooperation between the INCB and the governments of the nations that are signatories of the conventions it enforces. The INCB also publishes an annual report that outlines the yearly status of the international drug control system and provides recommendations to governments on areas of improvement in drug control.¹⁵ If the INCB discovers that a government has not taken the measures necessary to remedy a situation, it can call the matter to the attention of the parties concerned or remit the issue to the Commission on Narcotic Drugs and the United Nations' Economic and Social Council.¹⁶ As a last measure, the treaties monitored by the INCB allow the INCB to recommend that countries stop importing and/or exporting drugs from the defaulting government body.¹⁷

CPS (1971)

The CPS was established in 1971 to address issues created by drugs that were not covered by the SCND. Similar to the SCND, it too aims to implement an international control system for the illicit substances governed by its

¹¹ JAY SINHA, PARLIAMENT OF CANADA, THE HISTORY AND DEVELOPMENT OF THE LEADING INTERNATIONAL DRUG CONTROL CONVENTIONS (2005), <http://www.parl.gc.ca/content/sen/committee/371/ille/library/history-e.htm>.

¹² See Single Convention, *supra* note 3, art. 5, at 4-5. Article 5 establishes the INCB as an "International Control Organ," and art. 9 describes the "Composition and Function" of the INCB. *Id.*

¹³ See *Mandate and Functions*, International Narcotics Control Board. <http://www.incb.org/incb/en/about/mandate-functions.html>.

¹⁴ Int'l Drug Policy Consortium [IDPC], *The International Narcotics Control Board: Current Tensions and Options for Reform*, IDPC Briefing Paper 7 (2008).

¹⁵ INCB Annual Report, *supra* note 2, at v.

¹⁶ See Single Convention, *supra* note 3, art. 14(1)(d) at 8. Article 14(1)(d) states that "If the Board finds that the Government concerned has failed to give satisfactory explanations when called upon . . . or has failed to adopt any remedial measures which it has been called upon to take . . . [the Board] may call the attention of the Parties, the Council and the Commission to the matter." *Id.*

¹⁷ See Single Convention, *supra* note 3, art. 14(2), at 7. Article 14(2) grants the Board the power, "if it is satisfied that such a course is necessary, [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 . . ." *Id.*

provisions.¹⁸ Although the United States is a signatory of this international agreement, a further examination is unnecessary for the purposes of this Note as the Convention does not speak to the national or international effects of the legalization of marijuana in Colorado and Washington.

1988 UN Convention

The 1988 UN Convention supplements both the SCND and the CPS.¹⁹ The Convention aims to end international drug trafficking through the promotion of international cooperation between law enforcement bodies. It seeks to prevent illicit trafficking, to promote the arrest and trial of drug traffickers, and deprive drug traffickers of their profits.²⁰ The legalization of marijuana in Colorado and Washington has breached the 1988 UN Convention by allowing for the production, distribution, sale and delivery of the illicit substance contrary to Article 3(1)(a) of the Convention.²¹

II. ANALYSIS OF THE ISSUE AT HAND

To better understand the discrepancy in U.S. state and federal legislation a detailed examination of the provisions that govern the two levels of government is required.

The Federal Perspective on Marijuana

In 1970 the United States Congress introduced the Controlled Substances Act as a way of nationally enforcing its SCND obligations. The CSA categorizes all illicit substances under five schedules, with each schedule outlining the

¹⁸ United Nations Office on Drugs and Crime [UNODC], *A Century of International Drug Control* (2008), http://www.unodc.org/documents/data-and-analysis/Studies/100_Years_of_Drug_Control.pdf.

¹⁹ See 1988 UN Convention, *supra* note 5. The Preamble to the 1988 UN Convention explains that the General Assembly of the United Nations requested the Commission on Narcotic Drugs to hold its thirty-first session to prepare a “. . . draft convention against illicit traffic in narcotic drugs which considers the various aspects of the problem as a whole, and in particular, those not envisaged in existing international instruments . . .”. *Id.*

²⁰ See 1988 UN Convention, *supra* note 5 at 9. The preamble to the articles adopted by the 1988 Convention articulate that the “Parties to this Convention . . . recogniz[e] . . . that illicit traffic is an international criminal activity, the suppression of which demands urgent attention and the highest priority;” that the Parties are “Determined to deprive persons engaged in illicit traffic of the proceeds of their criminal activities and thereby eliminate their main incentive for doing so”; and that the Parties are “Determined to improve international co-operation in the suppression of illicit traffic by sea, [and] recogniz[e] that eradication of illicit traffic is a collective responsibility of all States and that, to that end, co-ordinated action within the framework of international co-operation is necessary.” *Id.*

²¹ See 1988 UN Convention, *supra* note 5, art. 3(1)(a), at 12. Article 3(1)(a) of the 1988 UN Convention requires that “Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally: the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever . . . of any drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended, or the 1971 Convention.” *Id.* Marijuana is listed as one such substance under both Schedule I and Schedule IV of the Single Convention, *supra* note 3, at 26.

varying degrees of a drug's potential abuse and its acceptance for medical use in treatment.²² Marijuana is considered part of the Schedule I substance category²³ which means it has a high potential for abuse, no accepted medical use in the United States, and that there is a lack of accepted safety for use of the drug under medical supervision.²⁴ Penalty provisions outlined under section 841 of the CSA criminalize marijuana possession, with imprisonment terms ranging from five years to life depending on the various factors outlined in the Act.²⁵ Despite changes in multiple state provisions regarding the legalization of medical marijuana²⁶, and the decriminalization and legalization of marijuana²⁷, current CSA provisions continue to categorize cannabis as a Schedule I substance and criminalize its possession.

The State Perspective on Marijuana

In the United States marijuana is currently decriminalized in eighteen states, medical marijuana is legalized in twenty-three states²⁸ and recreational marijuana is legalized in the states of Alaska, Oregon, the District of Columbia, Colorado and Washington.²⁹ While specifics vary from state to state, the decriminalization of marijuana differs from current CSA provisions by not subjecting persons found in possession of small amounts of marijuana to criminal records.³⁰ States that have decriminalized marijuana can still impose state regulatory laws and civil fines on persons found in possession of the substance. Conversely, while laws differ based on jurisdiction, legalizing marijuana removes most legal ramifications associated with usage of the substance.³¹ While particulars of legislation detailing legalization differ between Colorado and Washington, both states have implemented similar regulatory schemes regarding the usage, possession and sale of marijuana. Since the focus of this Note is on the legalization of marijuana, it will strictly focus on the state laws of Washington and Colorado, the first government entities in the world to legalize marijuana.³²

Both Colorado and Washington decided to reform their previous provisions on marijuana for three reasons: public health and safety, elimination of black

²² CSA 21 U.S.C. § 811(c).

²³ CSA 21 U.S.C. § 812 Schedule I.

²⁴ CSA 21 U.S.C. § 812 (b)(1).

²⁵ CSA 21 U.S.C § 841 (2012).

²⁶ LISA N. SACCO & KRISTIN FINLEA, CONG. RESEARCH SERV., R43164, STATE LEGALIZATION INITIATIVES: IMPLICATIONS FOR THE FEDERAL LAW ENFORCEMENT (2014) (stating that over half the states and the District of Columbia have allowed for the use of medical marijuana) [hereinafter STATE LEGALIZATION INITIATIVES].

²⁷ *Id.* at 5.

²⁸ *State Medical Marijuana Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Jan. 29, 2015) <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

²⁹ *Marijuana Overview* NATIONAL CONFERENCE OF STATE LEGISLATURES (Feb. 23, 2014) <http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx>.

³⁰ STATE LEGALIZATION INITIATIVES, *supra* note 26, at 5.

³¹ *Id.*

³² *A Liberal Drift*, *supra* note 1.

market sales and increasing overall tax revenue.³³ From a public health and safety perspective, both states found previous marijuana regulatory laws to be an inefficient use of law enforcement resources that could be better utilized by targeting violent crimes instead. The states also determined that legalizing marijuana by taxing it heavily would result in a decrease in black market sales and an increase in tax revenue, thereby increasing funding for government social assistance programs.

Washington I-502

Washington reformed its legislation through the introduction of Washington Initiative 502 (I-502), which took effect on November 6, 2012 when the legalization of marijuana was authorized by popular vote.³⁴

The I-502 gives the Washington State Liquor Control Board (“WSLCB”) authority to grant licenses to three tiers of marijuana distribution sectors: producers, processors and retailers.³⁵ Washington has mandated that all recreational marijuana be purchased through a licensed retailer and that non-licensed persons are not permitted to grow, produce or sell their own marijuana. In order to be considered for a recreational marijuana license, the party applying must have been a Washington resident for at least two years.³⁶ However, non-Washington residents will be permitted to purchase a small amount of marijuana for recreational use while in Washington. The general public can purchase recreational marijuana in limited quantities and, similar to alcohol consumption, the use of marijuana must be limited from public view.³⁷ I-502 also implemented a twenty-five percent excise tax to be compounded at each tier of the marijuana supply chain on which consumers are expected to pay additional sales tax. Current calculations estimate revenue generated within the first five years of the introduction of recreational marijuana to reach two-billion dollars (USD).³⁸

Colorado Amendment 64

Like the I-502, Colorado introduced Amendment 64 as a ballot initiative to modify the statewide drug policy concerning cannabis. Now part of Article 18, section 16 of the Colorado State Constitution, the amended law closely mimics that of I-502. Major similarities include the three tier supply chain system, the tax rate compounding on each tier of the supply chain with an additional sales

³³ Matt Ferner, *Why Marijuana Should Be Legalized: ‘Regulate Marijuana Like Alcohol’ Campaign Discusses Why Pot Prohibition Has Been A Failure*, HUFFINGTON POST, Aug. 28, 2012, http://www.huffingtonpost.com/2012/08/28/why-marijuana-should-be-legalized_n_1833751.html.

³⁴ Matt Sledge, *Colorado, Washington Pot Legalization Deals Drug War Major Blow*, HUFFINGTON POST, Nov. 7, 2012, http://www.huffingtonpost.com/2012/11/07/colorado-washington-pot-legalization-_n_2086023.html.

³⁵ See, e.g., Sedro-Wooley, Oregon Ordinance 1789-14 (Feb. 17, 2014). Recitals to Sedro-Wooley City Ordinance stating that WSLCB began accepting applications for I-502 licenses on November 18, 2013. Retail sales of marijuana for recreational purposes began in 2014.

³⁶ See Washington State Liquor Control Board, *FAQs on I-502: Public Safety/Criminal*, http://www.liq.wa.gov/marijuana/faqs_i-502.

³⁷ *Id.*

³⁸ *Id.*

tax for the end consumer³⁹, and oversight of the Colorado state marijuana regulatory system by the state liquor control board.

The Federal Response

Although there is an evident disparity between the recreational marijuana initiatives passed in Washington and Colorado and federal CSA legislation, President Obama has stated that the federal government has “bigger fish to fry,” implying that pursuing marijuana users was not a priority for the federal Department of Justice (DOJ).⁴⁰ Thus, the federal DOJ’s response to the legalization of marijuana in Washington and Colorado has been to not challenge state laws based on the condition that states will “implement strong and effective regulatory and enforcement systems.”⁴¹ The DOJ has also reserved its right to file a lawsuit at a later date since the states’ regulation of marijuana is still considered illegal under the CSA.⁴²

While the DOJ has left the legalization of marijuana in Colorado and Washington unchallenged, federal prosecution relating to the use of marijuana will still be strictly enforced in eight scenarios. These eight high-priority areas include: the distribution of marijuana to minors; revenue from the sale of marijuana going to a criminal enterprise; diversion of marijuana from states where it is legal to states where it is considered illegal; state-authorized marijuana activity used as a cover for the trafficking of other illegal activity; violence and the use of firearms in the cultivation and distribution of marijuana; drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use; growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and preventing marijuana possession or use on federal property.⁴³ However, should the DOJ determine that “state enforcement efforts are not sufficiently robust,” it has the authority to shut down state-licensed growers and retailers.⁴⁴

Although the federal government has permitted state regulation of recreational marijuana, a major point of contention does exist. Since marijuana remains illegal under federal law, banks are prohibited from handling profits

³⁹ Joseph Henchman, *Taxing Marijuana: The Washington and Colorado Experience*, TAX FOUNDATION FISCAL FACT no. 437 at 1 (Aug. 2014) (Explaining that Colorado differs from Washington in that there is a 15% excise tax on each tier with sales tax being 10%).

⁴⁰ Ryan J. Reilly & Ryan Grim, *Eric Holder Says DOJ Will Let Washington, Colorado Marijuana Laws Go Into Effect*, HUFFINGTON POST, Aug. 29, 2013, http://www.huffingtonpost.com/2013/08/29/eric-holder-marijuana-washington-colorado-doj_n_3837034.html [hereinafter Holder].

⁴¹ Evan Perez, *No Federal Challenge to Pot Legalization in Two States*, CNN (Aug. 30, 2013), <http://www.cnn.com/2013/08/29/politics/holder-marijuana-laws/>.

⁴² Sarah Kliff, *Justice Dept. Won't Stop States from Legalizing Pot. Here's What That Means*, WASHINGTON POST (Aug. 29, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/08/29/justice-dept-wont-stop-states-from-legalizing-pot-heres-what-that-means/>.

⁴³ Eric Holder, *supra* note 40.

⁴⁴ Jacob Sullum, *Justice Department Gives Yellow Light to Marijuana Legalization*, FORBES (Aug. 29, 2013), <http://www.forbes.com/sites/jacobsullum/2013/08/29/justice-department-gives-yellow-light-to-marijuana-legalization/>.

from marijuana sales due to anti-money-laundering rules.⁴⁵ This means that marijuana shops will be unable to use basic banking services, such as checking and savings accounts, making everyday business transactions nearly impossible.

III. INTERNATIONAL CONSIDERATIONS

By allowing the legalization of recreational marijuana in Colorado and Washington, the United States goes against the mandate of both the SCND⁴⁶ and the 1988 UN Convention.⁴⁷ This results in problems on an international front.

International Response

In its annual report the INCB directly responded to the legalization of marijuana in Colorado and Washington by explicitly stating: “the board reiterates that the legalization of cannabis for non-medical, non-scientific purposes would be in contravention to provisions of the 1961 convention as amended by 1972 protocol.”⁴⁸ In its overall recommendations the same report specifically drew attention to the United States, urging the federal government to take the “necessary measures to ensure full compliance with the international drug control treaties on its entire territory.”⁴⁹

Other than brief mention in the 2012 INCB report, the United States has not faced international backlash regarding its disregard of the SCND⁵⁰ and 1988 UN Convention⁵¹ provisions. Regarded as the current world superpower and an advocate of international cooperation, the United States should proactively reconcile the differences in its federal legislation and the international agreements it is party to in order to avoid negative criticisms.⁵² Also, as a pioneer in the field of marijuana legalization, many nations will look to the United States for direction regarding future marijuana regulation.

Although amongst the first in its field, the United States should attempt to learn from other nations that have implemented recreational marijuana regulatory measures to determine which route it should take in meeting its national and international obligations. To determine the best course of action for the United States to take in ensuring compliance with the SCND⁵³ and the 1988 UN Convention,⁵⁴ this Note analyzes three countries which have developed recreational marijuana regulatory policies: the Netherlands, Portugal, and Spain.

⁴⁵ David Ingram, *U.S. May Help Marijuana Shops Get Banking Services*, REUTERS (Sept. 10, 2013), <http://www.reuters.com/article/2013/09/10/us-usa-crime-marijuana-idUSBRE9891EK20130910>.

⁴⁶ Single Convention, *supra* note 3.

⁴⁷ 1988 UN Convention, *supra* note 5.

⁴⁸ INCB Annual Report, *supra* note 2, at 63.

⁴⁹ *Id.* at 116.

⁵⁰ Single Convention, *supra* note 3.

⁵¹ 1988 UN Convention, *supra* note 5.

⁵² Robert Kagan, *A Changing World Order?* WASHINGTON POST (Nov. 15, 2013), http://www.washingtonpost.com/-opinions/a-changing-world-order/2013/11/15/4ce39d1a-489a-11e3-b6f8-3782ff6cb769_story.html.

⁵³ Single Convention, *supra* note 3.

⁵⁴ 1988 UN Convention, *supra* note 5.

While North Korea has also legalized marijuana, it is not an appropriate country to study since its international obligations differ vastly from that of the United States.⁵⁵

IV. COUNTRY CASE STUDIES

A. The Netherlands

While the Dutch have not legalized recreational marijuana, they have decriminalized it. The Netherlands differs from other government states that have decriminalized marijuana because of its coffee-shop policy. The policy allows the sale of a limited quantity of marijuana per person per day in coffee shops that are strictly regulated by government agencies.⁵⁶ While this may seem contrary to SCND⁵⁷ objectives, the Dutch federal legislation meets its international requirements as it has a clause stating that the production, trafficking and possession of marijuana are punishable offences. However, since the SCND⁵⁸ does not contain clauses which “concern the *actual enforcement* of the legislation”, the coffee shop policy is not in contravention of the SCND.^{59,60} Best stated by former Chief of Demand Reduction for the UN Drug Control Programme Cindy Fazey, “the Conventions say that there must be an offence under domestic criminal law, it does not say that the law has to be enforced, or that when it is what sanctions should apply . . .”⁶¹ When the 1988 UN Convention⁶² pressured countries to criminalize the possession of marijuana, the Netherlands chose to ratify the provision “with reservation,” allowing the Dutch to be part of the 1988 Convention but not be required to adhere to that specific condition. Thus, the Dutch have been able to successfully allow for the sale and possession of small amounts of marijuana while maintaining their international agreements.

A major flaw with current Dutch law governing marijuana arises as a result of the Dutch government strictly enforcing laws against the growing and wholesaling of cannabis, making the production of marijuana illegal. Although allowed up to five cannabis plants per person, this supply limitation does not meet the needs of Dutch coffee shops. Therefore, by allowing people to buy and sell a substance which cannot be legally produced in sufficient quantity to meet market needs, the Dutch government is inadvertently promoting the use of a black market. The government is essentially forcing coffee shop owners to interact with criminals since there is no legal way for business owners to obtain

⁵⁵ Adam Taylor, *North Korea Has A Surprising Attitude To Marijuana*, BUSINESS INSIDER (Jan. 15, 2013, 8 p.m.), <http://www.businessinsider.com/north-koreas-and-marijuana-2013-1>.

⁵⁶ *Dutch Drug Policy*, <http://www.holland.com/us/tourism/article/dutch-drug-policy.htm>.

⁵⁷ Single Convention, *supra* note 3.

⁵⁸ *Id.*

⁵⁹ WHAT EVERYONE NEEDS TO KNOW, *supra* note 6 at 147.

⁶⁰ Single Convention, *supra* note 3.

⁶¹ David Bewley-Taylor & Cindy Fazey, *The Mechanics and Dynamics of the UN System for International Drug Control*, FORWARD THINKING ON DRUGS (March 14, 2003), <http://www.forward-thinking-on-drugs.org/review1.html>.

⁶² 1988 UN Convention, *supra* note 5.

greater than 5g of marijuana.⁶³ When questioned about this evident failing in regulatory policy, the former Dutch Minister of Health, Hedy D'Ancona, stated that the government was “already so happy with what [it] had, that [it] did not realize which problems [it] was also getting.”⁶⁴

B. Portugal

Like the Netherlands, Portugal too decriminalized the use of recreational marijuana. However, Portugal went one step further and in addition to decriminalizing marijuana, it also decriminalized all other illicit substances. The new law, which came into effect in 2001, was a government strategy focused on encouraging drug abusers to seek treatment instead of punishing them.⁶⁵ While the sale and trafficking of illegal drugs still mandates criminal conviction, the new law, in principle, trumped 1988 UN Convention⁶⁶ provisions which encouraged criminalization of the use and possession of illicit substances, since the law made use and possession of up to ten days worth of a drug an administrative offence instead of a criminal offence.⁶⁷ However, the United Nations cannot speak against the Portugal's actions of decriminalizing all illicit substances as Article 3(2) of the 1988 UN Convention⁶⁸ states that all measures adopted by a signatory state are “subject to [domestic] constitutional principles and the basic concepts of [domestic] legal systems.”⁶⁹ Therefore, Portugal can adopt a modest punitive criminal justice approach to drug possession without breaching its international obligations.⁷⁰

Ten years after the law on decriminalization of illicit drugs was passed, Portugal has seen a significant improvement in the country's drug problems.⁷¹ Portugal is unique in the sense that it did not implement decriminalization as a way to combat an increase in public usage of cannabis but rather, aimed to provide treatment to those individuals that need it most. As stated by Mr. Goulao, President of the Portuguese Drug Institute, in removing the “fear and stigma” of criminal punishment drug users are encouraged to seek the help they

⁶³ *Dutch Coffee Shop Fined 10m Euros for Breaking Drug Law*, BBC NEWS (Mar. 25, 2010), <http://news.bbc.co.uk/2/hi/europe/8587576.stm>.

⁶⁴ JEAN-PAUL GRUND & JOOST BREEKSMA, *COFFEE SHOPS AND COMPROMISE* 31 (2013).

⁶⁵ *Portugal Legalises Drug Use*, BBC NEWS (July 7, 2000), <http://news.bbc.co.uk/2/hi/europe/823257.stm>.

⁶⁶ 1988 UN Convention, *supra* note 5.

⁶⁷ EMCDDA, *Drug Policy Profiles: Portugal*, EUROPEAN MONITORING CENTRE FOR DRUGS AND DRUG ADDICTION (June 2011), <http://www.emcdda.europa.eu/publications/drug-policy-profiles/portugal>.

⁶⁸ 1988 UN Convention, *supra* note 5.

⁶⁹ *Id.*

⁷⁰ Steve Rolles & Niamh Eastwood, *Drug Decriminalisation Policies in Practice: A Global Summary*, TRANSFERM DRUG POLICY FOUNDATION (2009), <http://www.tdpf.org.uk/resources/publications/drug-decriminalisation-policies-practice-global-summary>.

⁷¹ Since 2001 cases involving heroin dropped from 33% to 13% in 2008. See *id.*, p. 1004.

need.⁷² It was with the intent of improving public health that Portugal decided to change its drug policy.

C. Spain

Current Spanish law does not criminalize the possession of marijuana, but does criminalize its sale.⁷³ This regulatory system has resulted in the emergence of cannabis “social clubs” (CSC’s), which are non-commercial entities with the objective of providing its members with enough cannabis to meet their personal needs. First established in 2002, these not-for-profit entities have various benefits which include providing members a certain standard of quality marijuana,⁷⁴ an alternative to the unregulated marijuana black market, accountability, and job creation. Membership can either be acquired through invitation by two pre-existing members who are willing to guarantee that the party wishing to join is a cannabis consumer or through presentation of a medical report which confirms that the person has an illness for which cannabis use is recommended. Members are not allowed to sell cannabis nor distribute it to minors. Spanish common law has established that the possession of large quantities of cannabis does not constitute a crime unless is done for the purpose for trafficking.⁷⁵ This makes it legally permissible for clubs to possess large amounts of cannabis at any one time.

As a signatory of both the *SCND*⁷⁶ and the *1988 UN Convention*,⁷⁷ Spanish drug practices are still in compliance with both conventions’ requirements. This is because Article 36 of the *SCND*⁷⁸, which includes “possession” in its list of punishable offences, has been internationally interpreted as possession for the purpose of trafficking, not as possession for personal consumption. The *1988 UN Convention*⁷⁹ interprets personal consumption as a form of possession and urges state signatories to make all forms of possession a criminal offence. However, this resulted in much controversy and thus, as stated earlier, *1988 UN Convention*⁸⁰ defers to the domestic law of a party state in providing that all offences are to be prosecuted and punished in conformity with domestic law under Article 3(2).⁸¹ Furthermore, the European Union has permitted the cultivation of marijuana for personal use under Article 2.2 of the Council’s

⁷² *Towards a Ceasefire*, THE ECONOMIST (Feb. 23, 2013) <http://www.economist.com/news/international/21572184-experiments-legalisation-are-showing-what-post-war-approach-drug-control-could-look>.

⁷³ *Id.*

⁷⁴ *The Global Initiative for Drug Policy Reform: Spain*, BECKLEY FOUNDATION, <http://reformdrugpolicy.com/-beckley-main-content/new-approaches/future-directions-for-drug-policy-reform/spain/>.

⁷⁵ *Id.*

⁷⁶ Single Convention, *supra* note 3.

⁷⁷ 1988 UN Convention, *supra* note 5.

⁷⁸ Single Convention, *supra* note 3.

⁷⁹ 1988 UN Convention, *supra* note 5.

⁸⁰ *Id.*

⁸¹ *Id.*

Framework Decision, thus strengthening the clout of the Spanish government's marijuana provisions.⁸²

V. VIABLE ALTERNATIVES

Since the United States' national policy is currently in conflict with both the *SCND*⁸³ and the *1988 UN Convention*,⁸⁴ it must find a way to resolve the discrepancies in order to meet its international commitments. However, one must also consider whether international conventions dating back to 1961 have become outdated and ineffective in regulating drug use, thus making them impractical. Outlined below are the viable alternatives available to the United States in fulfilling its international obligations and the potential actions available to the United Nations should the United States not fulfil its requirements.

Alternatives available to the United States

1. Meet International Requirements

In attempts to abide by the international agreements it is a party to, the United States could enforce its federal legislation regarding marijuana usage by overriding the legalization of marijuana in Washington and Colorado. However, this would likely result in backlash from both the citizens of the states and the state government bodies. The backlash would result in exponential growth of the marijuana black market, leading to an increase in police regulation and resulting in a greater expenditure of tax payer dollars on enforcement.

2. Withdraw from International Conventions

The United States could take the polar opposite route of complete conformity by withdrawing from the international agreements pertaining to marijuana regulation in accordance with Article 46 of the *SCND*⁸⁵ and Article 30 of the *1988 UN Convention*.⁸⁶ Such a course of action would likely result in international condemnation and could, in extreme cases, trigger the international community to withdraw from economically associating with the country. However, since the United States is the world superpower, other countries would be less incentivized to express their disapproval given most nations' economic, social and political reliance upon the United States.

3. Denounce, then Re-ratify with Reservation

Although an unconventional route and not one that is necessarily viewed upon favourably, the United States could denounce (i.e. withdraw) from the *1988 UN Convention*⁸⁷ and then, like Netherlands, join the agreement with

⁸² Martin Alonso, Cannabis social clubs in Spain, TRANSNATIONAL INSTITUTE at 4 (Jan. 2011), <http://druglawreform.info/en/about-us/in-the-media/item/2595-drug-club-spains-alternative-cannabis-economy>.

⁸³ Single Convention, *supra* note 3.

⁸⁴ 1988 UN Convention, *supra* note 5.

⁸⁵ Single Convention, *supra* note 3.

⁸⁶ 1988 UN Convention, *supra* note 5.

⁸⁷ *Id.*

“reservation” on the provisions concerning the use of marijuana. Should the U.N. conclude that the United States is violating the *SCND*,⁸⁸ then the United States could use the case of the Netherlands as an example. Since the Netherlands has a law on the books stating that trafficking and possessing marijuana is illegal, it has met the technical requirements of the Convention even though it does not enforce its legislation to the extent desired by the UN. However, as noted by the Netherlands government, since the *SCND*⁸⁹ does not stipulate enforcement provisions of its laws, the United States would not be in violation of any requirements either.

While this alternative essentially discredits the *SCND*⁹⁰ and the *1988 UN Conventions*⁹¹ since it allows countries to pick and choose which provisions to abide by, it remains a valid alternative.⁹² Some nations could argue that by re-ratifying with a reservation for clauses regarding marijuana provisions, the United States would violate the Vienna Convention on the Law of Treaties⁹³ since its actions would be “incompatible with the object and purpose of the treaty” under VCLT Article 19.⁹⁴ However, as the world superpower, the United States would likely have few nations speak against its actions.

Course of Action available to International Bodies

Since no country has ever been found to have violated international drug control treaties, there is no precedent or formula for the United Nations to follow in response to the legalization of marijuana in Colorado and Washington. Thus, whichever action the United Nations chooses in this case will set a precedent for the international community.

1. International Court of Justice

While neither the *SCND*⁹⁵ nor the *1988 UN Convention*⁹⁶ specify a penalty for provision violators, *SCND* Article 48 does state that if a dispute arises regarding the interpretation or application of the Convention, then a nation can be referred to the International Court of Justice (ICJ).⁹⁷ The ICJ was established by the United Nations in 1946 with the objective of settling, in accordance with international law, legal disputes submitted to it by States and to give advisory

⁸⁸ Single Convention, *supra* note 3.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ 1988 UN Convention, *supra* note 5.

⁹² International Narcotics Control Board, *Statement by Mr. Raymond Yans, President, International Narcotics Control Board*, U.N. Doc E/incb/2012/1 (2013).

⁹³ The Vienna Convention on the Law of Treaties is widely recognized as the authoritative guide regarding the formation and effects of treaties. It codifies several principles of contemporary international law related to treaties.

⁹⁴ Vienna Convention on the Law of Treaties, May 23 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. The United States has signed, but not ratified, the Vienna Convention.

⁹⁵ Single Convention, *supra* note 3.

⁹⁶ 1988 UN Convention, *supra* note 5.

⁹⁷ WHAT EVERYONE NEEDS TO KNOW, *supra* note 6, at 148.

opinions on legal questions referred to it by authorized United Nations organs and specialized agencies.⁹⁸

While the ICJ can render a decision, its decisions are not enforceable without the assistance of the U.N. Security Council. Therefore, should the United States choose not to abide by the decision of the ICJ there would be no direct repercussion for not doing so. Indirect consequences may take the form of the international community's disapproval of the nation's actions, but because of the strength of the United States, this disapproval would likely be limited. Conversely, a refusal by the United States to act on an ICJ decision could discredit the ICJ as a legitimate source of authority for future issues. In any event, the United States is one of five permanent members of the U.N. Security Council and, as such, has a veto over any enforcement actions contemplated. Thus, the United Nations should be wary in referring this issue to the ICJ.

2. Public Rebuke

Public rebuke covers a wide spectrum of potential actions. The INCB has already publicly rebuked the United States, specifically the states of Colorado and Washington, in its annual report. The INCB's statements, which were printed in U.S. newspapers, do not seem to have resulted in any proactive action by the United States federal government. Raymond Yans, President of the INCB, stated that by violating the *SCND*,⁹⁹ the United States has "[undermined] the humanitarian aims of the drug-control system and are a threat to public health and well being of society far beyond those states."¹⁰⁰

Should the international community feel strongly enough about the United States violating convention provisions, it could choose to invoke economic sanctions against the nation. However, as stated, since the United States is a world power, this scenario seems extremely unlikely.

3. Amend the Requirements of the Affected Conventions

Any party can amend the *SCND*¹⁰¹ under Article 47 and the *1988 UN Convention*¹⁰² under Article 31. Amendment provisions in both conventions fall in line with Articles 39 and 40 of the *Vienna Convention*.¹⁰³ While not often done, if the United States can meet the stipulations required of it or if the United Nations determines that an appropriate number of state parties are amenable to amending the provisions in question, then the legalization of recreational

⁹⁸ The International Court of Justice is the pre-eminent judicial organ of the United Nations. The Court's role is to settle, in accordance with international law, legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies. In some instances its jurisdiction is compulsory, in others it is consensual.

⁹⁹ Single Convention, *supra* note 3.

¹⁰⁰ United Nations Information Service, *INCB President Voices Concern About the Outcome of Recent Referenda about Non-Medical use of Cannabis in the United States in a number of states*, United Nations Information Service, UNIS/NAR/1153 (Nov. 15, 2012).

¹⁰¹ Single Convention, *supra* note 3.

¹⁰² 1988 UN Convention, *supra* note 5.

¹⁰³ Vienna Convention, *supra* note 94.

marijuana could be accommodated. This would result in a significant change to the international drug landscape, resulting in various countries reconsidering the provisions governing recreational marijuana in their domestic jurisdiction.

VI. SUMMARY

Currently, the United Nations risks its reputation as an international regulatory body since other nations may view the United States' breach of treaty provisions as an acceptable form of conduct. This taint in reputation could potentially result in other nations breaching their United Nations treaty commitments. Thus, it would be in the best interests of both the United Nations and the United States to resolve their differences regarding the usage of marijuana. Through an analysis of the *SCND*,¹⁰⁴ the *1988 UN Convention*,¹⁰⁵ current federal and state perspectives regarding recreational marijuana in the United States, and a summary of three countries which have implemented marijuana regulations in their domestic state, this report has set forth the viable alternatives available to both bodies in reconciling their differences. Conversely, the United States risks international condemnation for violating its duties under the international agreements it is party to. Regardless of which route is ultimately taken, benefit is most likely to be had through mutual agreement.

¹⁰⁴ Single Convention, *supra* note 3.

¹⁰⁵ 1988 UN Convention, *supra* note 5.