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Implementation of the international drug control treaties: Challenges and future work of the Commission on Narcotic Drugs, the World Health Organization and the International Narcotics Control Board in the review of substances for possible scheduling recommendations

Conference room paper submitted by the International Narcotics Control Board, titled: "Options to address the proliferation of non-scheduled chemicals, including designer precursors – contribution to a wider policy dialogue" **

Summary

This document summarizes the challenges that the proliferation of designer precursors and other non-scheduled chemicals poses to international precursor control efforts, actions taken to-date by Governments and the International Narcotics Control Board as well as options that may be explored to address those challenges.

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A. Introduction

1. The Board has for several years drawn attention[1] to the challenges that the proliferation of non-scheduled chemicals, in particular designer precursors,[2] pose to international drug control efforts. Actions to address these challenges were also proposed in various resolutions of the General Assembly, the Economic and Social Council and the Commission on Narcotic Drugs, most recently in Commission resolution 60/5 on "Increasing international coordination in relation to precursors and non-scheduled precursor chemicals used in the illicit manufacture of narcotic drugs and psychotropic substances".

2. The Board has also highlighted the issue of designer precursors in connection with the scheduling process for methyl *alpha*-phenylacetoacetate (MAPA), a pre-precursor of amphetamine and methamphetamine that falls into this category of chemicals and has no known legitimate use. MAPA is recommended for international scheduling and will be considered at the sixty-third session of the Commission on Narcotic Drugs for inclusion in the tables of the 1988 Convention.

3. To further aid and provide an evidence base for a wider policy discussion on the matter, Member States were requested by the Board, in circular letter C.L.8 of 5 March 2019, to provide information on the different approaches taken at the national level to address non-scheduled chemicals used in illicit drug manufacture, including the scope and basis of action in practice in the absence of specific regulations or laws applying to such substances. Findings of that information-gathering exercise are presented in the present paper to provide context to the options proposed.

B. The issue

4. With few exceptions, all recent assessments of chemicals undertaken by the Board within its mandate to recommend for possible inclusion in the tables of the 1988 Convention concerned designer precursors. This development started in 2014 with APAAN, followed by the subsequent assessments of APAA and MAPA (all three chemicals are pre-precursors of amphetamine and methamphetamine), and 3,4-MDP-2P methyl glycidic acid and its methyl ester (pre-precursors of MDMA).[3] A similar development appears to begin to occur with fentanyl precursors, where after the international scheduling of the two key precursors, NPP and ANPP, in 2018, incidents involving a closely related pre-precursor started to emerge and there are indications that a specific derivative of that pre-precursor which disguise, or mask, its chemical identity is also already being explored by illicit operators.

5. The number of closely related non-scheduled chemicals that could potentially be used to replace traditional (controlled) precursors is almost infinite, and additional substitutes for some of the scheduled chemicals are already available in illicit markets.

6. To address this situation, which typically involves inter-regional trafficking, it will be important to provide Governments worldwide with a common legal basis to seize the chemicals in question and establish a sufficient deterrent for traffickers to be dissuaded from turning to such substances. At present, the only legally binding framework for such action at the global level is the 1988 Convention.

[1] The most recent and most comprehensive account of the matter is available in the 2018 report on precursors.

[2] A designer precursor is a close chemical relative of a controlled precursor or drug, which is purpose-made to circumvent controls and usually does not have any recognized legitimate use.

[3] The scheduling history, summarizing all scheduling decisions related to the 1988 Convention, is included in annex 1.

7. However, recent developments challenge the international precursor control system of the 1988 Convention in the following ways:

(a) The precursors scheduling system pursuant to article 12, paragraphs 2–7, of the 1988 Convention was conceived with *individual* substances in mind that would be placed under international control one-by-one. However, substance-by-substance scheduling lags behind the speed of innovation of illicit operators. It is reactive, resource-intensive and lengthy (both as regards the array of procedural steps required to complete assessments substantiating scheduling decisions, and in view of the entry into force of such decisions at the international level only after 180 days of a decision by the Commission being communicated by the Secretary-General to States). In addition, data on licit uses of designer precursors, which are required for the Board's assessments, may not be readily available and the concomitant requirement under the Convention for *post facto* evidence of substances having actually been used in illicit drug manufacture is not conducive to pro-active scheduling;

(b) Monitoring of international legitimate trade is at the core of the international precursors control regime. However, many of the chemicals that have recently emerged were designed specifically to circumvent controls and therefore have no legitimate use beyond being used for limited research and analytical purposes. Accordingly, there is no regular commerce and trade in them that could be monitored to any avail (they are not available off-the-shelf but rather may be made on demand);

(c) To achieve the goal of providing a common legal basis to seize chemicals, scheduling substances in Table II of the 1988 Convention could be enough. In practice, however, scheduling in Table I tends to be the favoured approach because it is perceived to be the stricter control measure as it enables parties to make the sending of pre-export notifications mandatory for other parties in respect of each individual shipment involving a scheduled substance and thereby enhances international trade monitoring efforts. However, that measure is hardly effective for designer precursors without regular trade.

C. Options to address the proliferation of non-scheduled designed precursors

8. Options to address the proliferation of non-scheduled chemicals are summarized in the below chart, highlighting whether the given option applies at the national and/or international level, and whether it is voluntary or mandatory in nature:

	Nat.	Int.	Vol.	Mand.
GOAL: Common global framework (binding!) and basis for action	✓	✓	✗	✓
Voluntary cooperation with industry (incl. extended / generic definitions; ISSL)	✓	✗	✓	✗
Flexible exchange of intelligence & information; international LE and regulatory cooperation	✓	✓	✓	✗
Domestic controls; 'generic' scheduling (esters, immediate precursors); accelerated procedures; reversal of burden of proof; removal of element of "intent to manufacture"	✓	✗	✗	✓
Resolutions – e.g., CND Res. 56/13 (2013) and 60/5 (2017)	✓	✓	✓	✗
List of chemicals with no known legitimate uses ("interdiction list")	✓	✓	✓	✗
1988 Convention: article 13 in combination with article 3	✓	✓	✗	✓
1988 Convention: article 12, para.8; and article 24	✓	✗	✓	✗
1988 Convention: priority scheduling (regular); early consideration of close chemical relatives	✓	✓	✗	✓
1988 Convention: generic amendment/ footnote to tables or substances (esters,..); fast-track	✓	✓	✗	✓
1988 Convention: scheduling (separation of interdiction from licit trade monitoring)	✓	✓	✗	✓
Sensitizing and training prosecutors on synthetic drugs and precursors (INCB & UNODC)	✓	✗	✓	✗

Nat. – action at national level | Int. – action at global level | Vol. – voluntary | Mand. – mandatory (globally binding)

Source: INCB Precursors Control Section.

Options at the international level that are binding on all parties (mandatory)

9. The preferred course of action is to establish a common legal basis at the international level which is binding on all parties (i.e. international and mandatory). This can only be done within the existing framework of the 1988 Convention, or through amendments to it and/or to its tables. Possible options, some of which could be applied in combination, include:

(a) the early consideration of close chemical relatives in scheduling notifications: already at the time when a chemical is proposed for scheduling, the scope of control should be carefully considered. As such, States parties may consider, if appropriate, to notify several closely related substances together, but in an itemized fashion (i.e. listing individual chemical relatives as separate substances but submitted as part of a group of substances[4]), to enable a comprehensive yet distinct review of technically linked substances. This would allow the review and assessment of substances that present the same or similar challenges in a more effective and efficient manner while respecting the requirements of the 1988 Convention to review scheduling proposals substance-by-substance;

(b) measures to increase the speed of the scheduling and assessment process, such as using a revised and scaled-down assessment questionnaire for designer precursors, a shorter response period (deadline) and perhaps a simplified decision-making process including the use of virtual means, where appropriate;

(c) a generic amendment to the tables of the 1988 Convention, or a footnote attached to individual substances listed in the tables: similarly to the generic clause already contained in the tables which extends the application of Convention measures to salts of scheduled substances whenever the existence of such salts is possible (with express exceptions applicable to some of the substances), a generic clause or footnote could be introduced to automatically include certain closely related chemicals associated with newly or even already scheduled substances (e.g. certain esters);[5] and

(d) introduction of a category or sub-category of scheduled substances with no known legitimate uses within one of the existing tables for which the powers and obligations to seize and interdict are not linked to requirements to monitor (non-existent or severely limited) licit trade.

10. In this context, it should be noted that some further study may be required to determine the feasibility and most appropriate modality for the implementation of some or all of the above options. While some may require an amendment to the 1988 Convention itself and may therefore be less immediately achievable, others may be within the authority and purview of the Commission on Narcotic Drugs to consider and take proactive action on. Yet others may be comprised within the Board's mandate and powers with respect to initiating proposals for scheduling (which is equal to that of individual States Parties under article 12, paragraph 2), potentially providing a more direct avenue to more innovative scheduling approaches that are in the process of being examined by the Board.

11. With regard to the powers of the Commission itself, there may be additional, as yet not fully explored avenues available to address the situation in a more comprehensive manner. Notably, pursuant to article 12, paragraph 13 of the 1988 Convention, the Commission "shall periodically review the adequacy and propriety of Table I and Table II". The Commentary on the 1988 Convention notes that the duty

[4] The recent scheduling of 3,4-MDP-2-P methyl glycidic acid (and its salts) along with (only) its methyl ester (3,4-MDP-2-P methyl glycidate) can serve as an example, where the initial notification by a State Party only referred to the methyl ester and the Board, within its mandate to propose substances for scheduling of its own accord, submitted a complementary notification proposing the acid during the assessment process. Based on the option envisaged here, a future notification may extend not only to one ester, but also the acid and other esters, thereby enabling a series of individual reviews encompassing a substance group, saving time and resources without going against the letter of the Convention.

[5] Examples of such clauses also exist in schedule I and schedule II of the 1961 Convention.

of the Commission to periodically review the adequacy and propriety of the tables "arises independently of the procedure followed by the Commission (…) with respect to the scheduling process".[6] Accordingly, there may be room for the Commission to initiate and conduct a review and, within certain bounds, a revision of the tables with a view to reinstating their "adequacy and propriety" in the face of newly emerged challenges that cannot be satisfactorily addressed with the mechanisms already in place. While neither the Convention itself nor the Commentary provide additional guidance on procedural ways of such a "periodic review" that is distinct from its powers within the standard scheduling process outlined in article 12, paragraphs 2–7, there is arguably room for both interpretation and action, provided there is political readiness to embrace this aspect of the Commission's mandated functions under the 1988 Convention.

Options at the international level that are non-binding (voluntary)

12. Other non-binding (voluntary) options for action at the international level include the exchange of intelligence and actionable information, and voluntary cooperation with industry (public-private partnerships), as well as the related international cooperation.

Exchange of intelligence and actionable information

13. This relates to law enforcement authorities sharing intelligence with a view to identifying links between cases, building up cases (including non-criminal cases) and preventing future cases involving non-scheduled chemicals using similar modi operandi. The Board is already promoting this through its Project Prism and Project Cohesion, and with the help of the Precursors Incident Communication System (PICS), but there is still uneven participation in these initiatives between regions and countries.

14. The difficulties faced by law enforcement authorities when investigating cases involving non-scheduled chemicals are well documented (see paras. 21–26 below), yet not insurmountable. A concrete action in this area could be the sensitization and training of criminal justice practitioners, including in particular prosecutors and judges, on the specificities of drug-related crime involving synthetic drugs and precursors, including non-scheduled designer precursors. Such an activity could be conducted jointly by relevant international partners or technical assistance providers, and INCB.

15. Addressing non-scheduled chemicals through enhanced cross-border cooperation should also include Government authorities more systematically informing their counterparts in transit and destination countries about known outbound shipments containing such chemicals so that the authorities there can anticipate and take action on incoming shipments. In several cases, internationally non-scheduled substances may be controlled at the national level, thereby facilitating enforcement action. The INCB Information Package on the Control of Precursors, available to Government officials at the secure web site of the Board, already provides a list of substances not in Table I or Table II of the 1988 Convention that are controlled at the national level in various countries.

16. International action through involvement of the Board has also proven successful in relation to the exchange of intelligence about potential vendors and buyers who advertise their readiness to buy and/or capacity to sell non-scheduled chemicals on the web. Similarly, the Board's role in facilitating voluntary cooperation at the national level between government authorities on the one hand, and online trading companies and B2B platforms on the other hand, to investigate suspicious postings and enhance barriers to online supply of precursors, has proven successful and could therefore be further enhanced in relation to non-scheduled chemicals.

[6] Commentary on the 1988 Convention, para.12.42.

Voluntary cooperation with industry (public-private partnerships)

17. It will also be important to promote more widely the limited international special surveillance list of non-scheduled substances (ISSL) [7] as a core element of Governments' voluntary cooperation with industry. The ISSL not only lists 55 individual chemicals that are known to be used as substitutes in illicit drug manufacture. In 2013, INCB expanded the list in a generic manner, by introducing 'extended definitions' that capture common derivatives as well as other closely related chemicals that can be converted into one of the scheduled precursors by readily applicable means.[8] In 2019, the ISSL was further updated to highlight those chemicals which do not have any known legitimate uses with a view to providing governments with an additional tool to help them determine the legitimacy of a shipment involving such chemicals.

18. Generally, the success of industry cooperation as a tool to address the proliferation of non-scheduled chemicals and designer precursors at the international level depends to a large extent on the systematic reporting of suspicious cases and denied requests and orders to the relevant competent national authorities, and further to INCB as a global focal point. One of the challenges is that related investigations never start because the "case" stops with a suspicious request being denied without anyone being informed. As such, no enforcement action can be taken nor can traffickers be stopped from placing their order elsewhere.

Options at the national level

Member States' responses to a circular letter on "Measures to address the use of non-scheduled chemicals in illicit drug manufacture"

19. In March 2019, the Board sent a circular letter to all Governments to enquire about the different national approaches and regulatory and law enforcement measures that are currently being taken to address the use of non-scheduled chemicals (NSC) in illicit drug manufacture, including their level of implementation and related challenges, experiences and lessons learned.

20. Specifically, the questions included in the questionnaire focused on: (i) whether cases involving NSCs are investigated and what is the extent of information and intelligence-sharing with counterparts abroad; (ii) what type of sanctions are applied, if any (criminal, civil and/or administrative); (iii) whether criminal provisions extend to NSC based on the international obligation under article 3 together with article 13 of the 1988 Convention to criminalize the manufacture, transport and distribution of "materials" for illicit drug manufacture; (iv) whether voluntary cooperation mechanisms with industry extend to NSC; (v) whether action on NSC distinguishes between substances with and without legitimate uses (and if so, how); and (vi) what awareness-raising measures, if any, are taken in respect of NSC (and if so, targeting whom). As at 1 February 2020, 63 Governments had responded.

21. While responses appeared to indicate that the term "non-scheduled chemical" was not always consistently understood (by some it was understood as referring exclusively to internationally non-controlled substances, by others as also encompassing substances not controlled at the national level), it is clear that emerging chemicals not under national control pose challenges for all Governments. The challenges range from limitations on the extent to which cases involving such substances can be investigated and the type of sanctions that can be applied, to difficulties in identifying and establishing voluntary cooperation mechanisms with relevant operating partners and companies.

[7] The Board established the ISSL in 1998, in response to ECOSOC resolution 1996/29. The ISSL is available as part of the Board's Information Package on the Control of Precursors and is regularly updated.

[8] Note that all five recently scheduled meth/amphetamine and MDMA pre-precursors had been included in the ISSL since the introduction of the extended definitions in November 2013.

22. About a third of the Governments responding to the questionnaire reported not having any legal basis or being only able to act on substances that are already under national control.

23. About half of the responding Governments reported being able to take some form of action on nationally non-controlled chemicals under existing legal provisions that do not make specific reference to them. The following options were reported in this context:

(a) Treatment of non-scheduled chemicals as "materials" used for illicit drug manufacture within the meaning of articles 13 and 3 of the 1988 Convention, investigated and prosecuted as criminal offences in their own right;

(b) Use of non-scheduled chemicals in illicit drug manufacture as a preparatory act or an act of assistance in the commission of a drug-related offence (both considered as separate, stand-alone offences);

(c) Seizure of non-scheduled chemicals as mere evidence in the investigation and prosecution of other drug-related offences without carrying sanctions of their own; and

(d) Application of sanctions and seizure of non-scheduled chemicals for violation of customs law in case of mislabelling of misdeclaration.

24. At the same time, most countries who reported such options also indicated having to substantiate varying degrees of "connection" between the non-scheduled chemicals encountered and actual illicit drug manufacture happening (e.g. direct involvement of the substance in the manufacture of a drug or precursor; its occurrence in an illicit manufacturing context, like in a clandestine laboratory; an actual indication or other circumstances giving rise to a reasonable inference of the use of the substance in illicit drug manufacture; a general suspicion or a specific, individual suspicious shipment or order; or proof of actual knowledge of its intended use in illicit drug manufacture). In sum, the main challenge identified across respondents in being able to resort to any of the fall-back options in national law, centred on the requirement (versus the ability in practice) to prove a particular form or degree of intent concerning the use of the substance.

25. It is worth noting that most countries who responded to the circular reported not making any distinction, in law or in practice, between nationally non-controlled substances with and those without known legitimate uses. Some Governments reported that the process to place a substance without known uses under national control was facilitated or accelerated. One example of the distinction making a difference in practice was reported by a country that uses the absence of legitimate uses of a substance as an argument to substantiate the presence of "imminent danger", a legal concept that provides the grounds necessary for customs officials to effect preventive seizures (a technique as yet unchallenged in court).

26. The European Union Voluntary Monitoring List (VML), which represents a non-binding tool to complement and facilitate the application of the "catch-all" clause for precursors applied in European Union member countries, lists non-scheduled substances with no known legitimate uses in a separate category (Part B). The assumption is that evidentiary challenges associated with the need to provide "sufficient evidence" regarding the use of listed substances for illicit drug manufacture may be reduced, as the absence of legitimate uses in itself is an indicator of illicit use. However, (binding) European Union legislation does not attach any explicit legal consequences to this differentiation – neither in terms of different evidentiary rules or standards to be applied, nor in the application of regulatory regimes, the scope of powers to seize such substances, or the type of sanctions –, which means that the distinction introduced in the VML presently appears to have very limited effect in practice, as attested by several European Union member States.

Other national approaches

27. INCB is also aware of the following approaches recently put in place or currently being considered at national and regional levels:

(a) In May 2019, the Government of Canada placed three precursors of fentanyl and fentanyl analogues (ANPP, NPP and benzylfentanyl) under national control. All three precursors were listed under an extended scope of control that also included their derivatives and analogues and the salts of those derivatives and analogues;

(b) The Government of the Netherlands is looking into amending the Abuse of Chemical Substances Act. Specifically, this involves the compilation of a list of chemicals that are not included in Regulation (EC) No. 273/2004 of the European Parliament and the European Council, and European Council Regulation (EC) No. 111/2005, that can be easily converted into a drug or drug precursor, and for which no legitimate industrial uses are known, with a view to prohibiting the import, export, transport or possession of such chemicals without a permit;

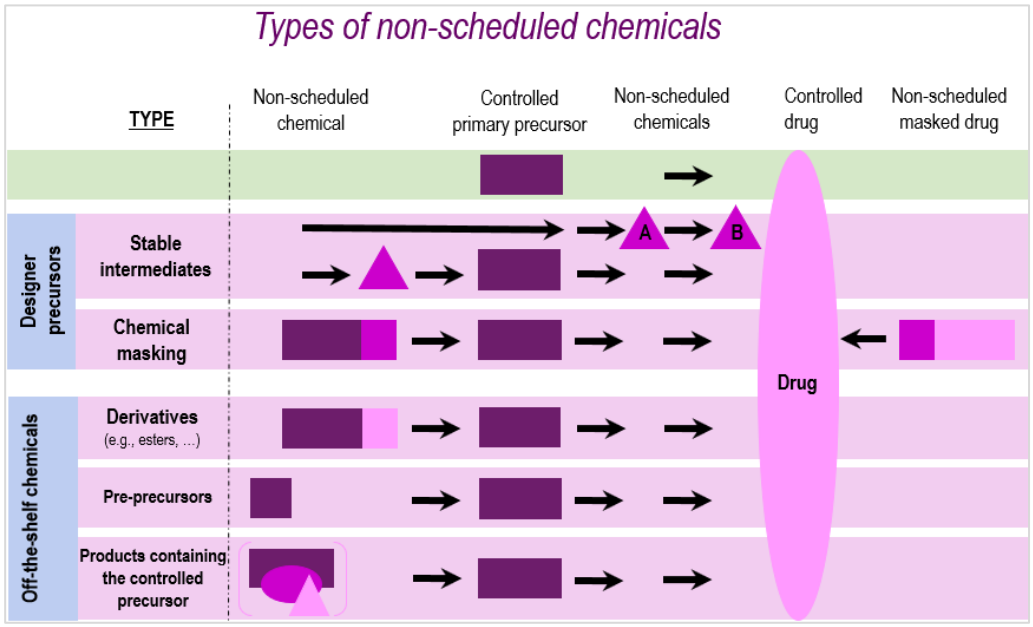
(c) The United States are in the process of controlling additional fentanyl precursors at the national level; one chemical was proposed for control including selected derivatives;

(d) As part of an assessment of the risks associated with fentanyl and fentanyl analogues, the United Kingdom's Advisory Council on the Misuse of Drugs recommended in early January 2020, among other things, that consideration be given to expand precursor controls to cover simple variants of ANPP (an immediate fentanyl precursor under international control);

(e) The European Union is amending its precursor legislation by adding a number of designer precursors to its category 1 list of chemicals. In addition to the chemicals that the Commission on Narcotic Drugs decided to add to Table I of the 1988 Convention in 2019, and MAPA (a scheduling decision to be taken at the sixty-third session of the Commission), this also includes two additional precursors of amphetamine and methamphetamine, namely, P-2-P methyl glycidic acid and its methyl ester (as yet not internationally scheduled nor notified or assessed by the Board). The amended legislation is expected to enter into force later in the second half of 2020. The scheduling of derivatives of P-2-P methyl glycidic acid in Europe, the region most affected by their illicit use, provides an opportunity to examine the impact of this regional scheduling on the extent of use of these chemicals in the illicit manufacture of amphetamine and methamphetamine with a view to determining whether there is still a need for global action in the form of international scheduling.

D. Options for action

28. In light of the diversity of non-scheduled chemicals (see figure below) and the absence of a single, easy solution to address the proliferation of all types of chemicals at the same time, the Board considers that the following actions may be explored:



Source: INCB Precursors Control Section.

At the policy level

(a) Continue and systematize the policy dialogue on this issue during or complementary to the sessions of the Commission on Narcotic Drugs under the standing item of the Commission's normative agenda entitled: "Implementation of the international drug control treaties: Challenges and future work of the Commission on Narcotic Drugs, the World Health Organization and the International Narcotics Control Board in the review of substances for possible scheduling recommendations";

At the normative level (new internationally binding measures)

(b) Explore options for innovative scheduling action within the framework of the 1988 Convention, including by further studying the feasibility of:

(i) Generic amendments and/or footnotes to individual substances listed in Table I (and possibly Table II);

(ii) Separation of the requirement for interdiction from the requirement for licit trade monitoring for substances with no legitimate uses (possible sub-categories under Table I or II);

At the informative level (new tools to facilitate and guide non-binding action at national level)

(c) Compile and disseminate guidance material and/or good practices from national and regional jurisdictions concerning action against non-scheduled chemicals, including:

(iii) On the application of article 13 together with article 3 of the 1988 Convention to non-scheduled chemicals (criminalizing the use of "materials" for illicit drug manufacture);

(iv) On the interpretation and application in practice of the element of intent, including what may constitute adequate proof thereof in precursor-related crime;

(v) On chemicals with no known legal use and trade, including a set of recommended actions for Governments (presently part of the Board's ISSL);

At the operational level (enhanced implementation of existing tools and guidance for non-binding action at the national level)

(d) Explore practical amendments to the notification process for scheduling of chemicals in the tables of the 1988 Convention with a view to encouraging the notification of close chemical relatives of substances together with the main substance notified; and

(e) Explore the feasibility of joint technical assistance interventions with relevant international partner organizations, aimed at sensitizing and training criminal justice practitioners, including prosecutors and judges, on specific considerations in the prosecution and adjudication of drug-related crime involving synthetic drugs, precursors and non-scheduled chemicals.

29. The Board and its secretariat stand ready to provide their technical expertise, guidance and support to further explore and facilitate the policy dialogue among Member States on the issues outlined above and look forward to working with Governments and relevant stakeholders to fully harness the collective expertise already available at international, regional and national levels in addressing the fast-paced developments concerning non-scheduled chemicals and designer precursors.

Annex I: Scheduling history

Since 1988, the Tables of the 1988 Convention have been revised several times. This included the scheduling of new substances and the transfer of substances from Table II to Table I. The following amendments have been made:

Substance name	Effective date of scheduling in the Tables of the 1988 Convention
Table I	
3,4-MDP-2-P methyl glycidate ("PMK glycidate")	19 November 2019
3,4-MDP-2-P methyl glycidic acid ("PMK glycidic acid")	19 November 2019
Alpha-Phenylacetoacetamide (APAA)	19 November 2019
4-Anilino-*N*-phenethylpiperidine (ANPP)	18 October 2017
N-Phenethyl-4-piperidone (NPP)	18 October 2017
Alpha-Phenylacetoacetonitrile (APAAN)	6 October 2014
Phenylacetic acid	17 January 2011*
Acetic anhydride	8 December 2001*
Potassium permanganate	8 December 2001*
Norephedrine	15 November 2000
N-Acetylanthranilic acid	23 November 1992
Isosafrole	23 November 1992
3,4-MDP-2-P	23 November 1992
Piperonal	23 November 1992
Safrole	23 November 1992
Ephedrine	Initial list, 1988
Ergometrine	Initial list, 1988
Ergotamine	Initial list, 1988
Lysergic acid	Initial list, 1988
P-2-P	Initial list, 1988
Pseudoephedrine	Initial list, 1988
Table II	
Hydrochloric acid (excluding its salts)	23 November 1992
Methyl ethyl ketone	23 November 1992
Sulphuric acid (excluding its salts)	23 November 1992
Toluene	23 November 1992
Acetone	Initial list, 1988
Anthranilic acid	Initial list, 1988
Ethyl ether	Initial list, 1988
Piperidine	Initial list, 1988

* Date of transfer from Table II to Table I

Note: In March 2019, in accordance with the Board's recommendation, the Commission on Narcotic Drugs also decided not to include hydriodic acid in the tables of the 1988 Convention