

Third Study Commission Questionnaire 2024
United States of America—Federal Judges Association

1. **Does your country have legislation, or regulations, and/or court rules of procedure that are relevant to the topic of our focus this year – chemical substances and essential equipment possibly used in illicit drug manufacturing and trafficking, including importing, exporting, for domestic distribution and use and private sector due diligence.**

Each state has its own laws governing illegal drug distribution, manufacturing, including precursors. With respect to federal laws, here is a broad overview of the federal landscape:

Listed Chemicals and Immediate Precursors:

What are they?

The Controlled Substances Act regulates “listed chemicals” by separating them into two different lists. 21 U.S.C. § 802(33). A “list 1” chemical

means a chemical specified by regulation of the Attorney General as a chemical that is **used in manufacturing a controlled substance** in violation of this subchapter **and is important to the manufacture of the controlled substances**, and such term includes (until otherwise specified by regulation of the Attorney General, as considered appropriate by the Attorney General or upon petition to the Attorney General by any person) the following: [then goes on to list various chemicals].

21 U.S.C. § 802(34) (emphasis added). A “list 2” chemical, in contrast,

means a chemical (other than a list I chemical) specified by regulation of the Attorney General as a chemical that is **used in manufacturing a controlled substance** in violation of this subchapter, and such term includes (until otherwise specified by regulation of the Attorney General, as considered appropriate by the Attorney General or upon petition to the Attorney General by any person) the following chemicals [then goes on to list various chemicals].

21 U.S.C. § 802(35) (emphasis added). Many of the list 1 and 2 chemicals are precursors. For example, ephedrine is a List I chemical that is a precursor to the Schedule II controlled substance methamphetamine.

Congress also regulates scheduled listed chemical products, which are products lawfully sold as nonprescription drugs that contain any of the List I chemicals ephedrine, pseudoephedrine, or phenylpropanolamine. 21 U.S.C. § 802(45).

Independently, Congress regulates “immediate precursors.” 21 U.S.C. § 802(6). An “immediate precursor” means a substance--

- (A) which the Attorney General has found to be and by regulation designated as being the principal compound used, or produced primarily for use, in the manufacture of a controlled substance;
- (B) which is an immediate chemical intermediary used or likely to be used in the manufacture of such controlled substance; and

(C) the control of which is necessary to prevent, curtail, or limit the manufacture of such controlled substance.

21 U.S.C. § 802(23). Congress also authorized the Attorney General to “place an immediate precursor in the same schedule in which the controlled substance of which it is an immediate precursor is placed or in any other schedule with a higher numerical designation.” 21 U.S.C. § 811(e).

What regulations are in place?

- 1) A person “who manufactures or distributes any controlled substance [i.e. an immediate precursor] or a list I chemical, shall obtain annually a registration issued by the Attorney General in accordance with the rules and regulations promulgated by him.” 21 U.S.C. § 822(1).
- 2) A person “who dispenses, or who proposes to dispense, any controlled substance [i.e. an immediate precursor], shall obtain from the Attorney General a registration issued in accordance with the rules and regulations promulgated by him.” 21 U.S.C. § 822(2).
- 3) Record keeping requirements. 21 U.S.C. § 830.

Criminal laws

Because an “immediate precursor” can be classified as a controlled substance, the criminal offenses outlined in 21 U.S.C. § 841 could apply to immediate precursors. Section 841 makes it illegal to knowingly or intentionally

- (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
- (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

21 U.S.C. § 841(a).

For offenses involving listed chemicals:

Any person who knowingly or intentionally--

- (1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;
- (2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter; or
- (3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

is subject to prosecution and up to 20 years or 10 years in prison, depending on the circumstances. 21 U.S.C. § 841(c).

The Controlled Substances Act also criminalizes the wrongful distribution of a listed chemical, and criminalizes the possession of a listed chemical “with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall.”

Other related efforts:

Congress directed the Attorney General to “establish an advisory panel” with federal, state, tribal, and local law enforcement and regulatory agencies with experience investigating and prosecuting illegal transactions of precursor chemicals; continue to “maintain an active program of seminars and training to educate wholesale and retail distributors of precursor chemicals and supplies regarding the identification of suspicious transactions and their responsibility to report such transactions[,]” and “provide assistance to State, tribal, and local law enforcement and regulatory agencies to facilitate the establishment and maintenance of educational programs for distributors of precursor chemicals and supplies.” 21 U.S.C. § 872a.

This information may be found in [Listed Chemicals and Federal Regulation of Controlled Substance Precursors \(fas.org\)](http://fas.org).

In addition to the Controlled Substances Act, Congress has passed various other laws.

In 2006, Congress passed the Security and Accountability for Every Port Act of 2006, where the Commissioner must establish, as part of the annual performance plan required in the budget submission of the United States Customs and Border Protection under 31 U.S.C.A. § 1115, performance indicators relating to the seizure of methamphetamine and methamphetamine precursor chemicals in order to evaluate the performance goals of the United States Customs and Border Protection with respect to the interdiction of illegal drugs entering the United States. Pub. L. No. 109-347 120 Stat. 1884 (Oct. 13, 2006) (codified as 6 U.S.C.A. § 220).

Additionally, the Commissioner must, on an ongoing basis, analyze the movement of methamphetamine and methamphetamine precursor chemicals into the United States. In conducting the analysis, the Commissioner is to:

- consider the entry of methamphetamine and methamphetamine precursor chemicals through ports of entry, between ports of entry, through international mails, and through international courier services;
- examine the export procedures of each foreign country where the shipments of methamphetamine and methamphetamine precursor chemicals originate and determine if changes in the country's customs over time provisions would alleviate the export of methamphetamine and methamphetamine precursor chemicals; and
- identify emerging trends in smuggling techniques and strategies.

Id.

USA Patriot Improvement and Reauthorization Act of 2005 added a sentencing enhancement for smuggling methamphetamine (including precursor chemicals) into the United States while using facilitated entry programs and created a mandatory consecutive sentence of 15 years in custody. *See* Pub.L. No. 109-177, 120 Stat. 192 (Mar. 9, 2006) (codified at 21 U.S.C. § 865).

2. Does your country have specific legislation on precursors control?

Yes.

Title of current legislation	Date of adoption	Last amended
Controlled Substances Act	October 27, 1970	December 2, 2022
Security and Accountability for Every Port Act of 2006	October 13, 2006	
USA Patriot Improvement and Reauthorization Act of 2005	March 9, 2006	

- 3. In your country, is an approval by a judge a pre-condition to launch investigations into a case of diversion and trafficking of precursors? Similarly, is a court order or approval by a judge required for effecting controlled or monitored deliveries?**

No.

- 4. When a drug/precursor-related crime is being investigated in your country, does the judiciary have any role (a) in the request for information from a foreign state and/or (b) in the provision of information to a foreign state?**

Yes. The United States Attorney's Office, acting in conjunction with the Office of International Affairs within the United States Department of Justice, will seek a court order consistent with the foreign government's treaty obligations to obtain the necessary evidence.

- 5. Does your country have legislation or court rules that relate to monitoring manufacture and distribution of precursors which are applicable over the entire national territory?**

Yes. See answer to 1.

- 6. Does your country have legislation or court rules that establish as a criminal offence the manufacture, transport and distribution of essential equipment intended to be used for illicit drug manufacturing?**

Yes. This answer is with respect to federal law.

21 U.S.C. § 863 makes it unlawful for any person—

- (1) to sell or offer for sale drug paraphernalia;
- (2) to use the mails or any other facility of interstate commerce to transport drug paraphernalia; or
- (3) to import or export drug paraphernalia.

The statute defines “drug paraphernalia” to include, among other things:

any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing,

preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, possession of which is unlawful under this subchapter.

21 U.S.C. § 863 (d).

7. In respect of non-scheduled chemicals/ equipment, is the fact that they have been mis-declared before the Customs, sufficient to impute ‘knowledge’ on the part of the supplier of their being used for illicit drug manufacture?

Mis-declaration before Customs would be evidence that the jury could consider, but would not be sufficient alone to impute knowledge on the part of the supplier that the non-scheduled chemicals/equipment was being used for illicit drug manufacture.

8. In your country, does domestic legislation include measures and/or civil, criminal and/or administrative sanctions to address non-scheduled chemicals and emerging precursors, namely those that are used as starting materials and/or intermediaries in the legitimate manufacture of substances in Table I and Table II of the 1988 Convention? If yes, which type of sanctions?

The Analogue Act provides that “[a] controlled substance analogue, shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in schedule I.” 21 U.S.C. § 813(a). It does so “to prevent underground chemists from altering illegal drugs in order to create new drugs that are similar to their precursors in effect but are not subject to the restrictions imposed on controlled substances.” *United States v. Klecker*, 348 F.3d 69, 70 (4th Cir. 2003). But at least one district court decision has suggested that this analogue statute does not include precursors not already considered an immediate precursor. *See United States v. Jones*, 2023 WL 3791547, at *3 (N.D. Ohio June 2, 2023). And generally, if a substance is not recognized as a controlled substance or listed chemical, they fall outside of the scope of federal criminal law. *See United States v. Sampson*, 140 F.3d 585, 589 (4th Cir. 1998) (“Simply because a substance looks like cocaine, and the defendant misrepresents to his unsuspecting purchaser that the substance is cocaine, does not make the mere distribution of that substance a violation of the federal narcotics laws.”).

9. Please elaborate on specific pieces of information and level of details that would allow you as a judge to act on information/intelligence/evidence received from counterparts in investigations related to new emerging drug precursor chemicals not under control in your country.

If Congress has not enacted a law that criminalizes an emerging drug precursor, then neither the federal government nor the court may punish a defendant for distributing, manufacturing, or possessing such substance.

10. Are there any specific provisions that allow you as judge to act on non-scheduled chemicals with no known legitimate uses? Would information from an

international body, or a collection of information from other countries, that a chemical has no known legitimate use facilitate your work in any way?

No, except possibly with respect to considering this behavior when sentencing (with respect to a separate crime).

11. As a judge, if you receive a request for assistance in a drug/precursor-related crime from a foreign country, whether at the investigation stage or in the context of a court proceeding (a hearing or a trial), how is it relevant to your determination to ensure that basic human rights, principles of natural justice, and/or rules of procedural fairness that exist in your country are respected?

The Office of International Affairs in the United States Department of Justice is responsible for obtaining evidence in the United States on behalf of foreign criminal investigators. I have not had any requests for court assistance under these circumstances.

12. Describe your own personal experience(s) as a judge that are relevant to the topic of our focus this year, whether it be presiding over an extradition hearing (a request to extradite an accused person to another country in order to be prosecuted in that other country), or receiving evidence in a court proceeding in your country from a witness who is testifying from another country and with the help of court officials in that other country, or helping to arrange for a witness in a court proceeding in another country to testify from a place in your own country, or responding to a request for assistance from an international court such as The Hague, or something else. These are just examples of things that you may have experienced; they are not meant to be exhaustive.

When presiding over a criminal trial in federal court, a witness testified by video (with the consent of all parties) while in a courtroom in Norway. The witness was placed under oath by the Norwegian judge and gave testimony that was received as evidence in both the criminal trial pending before me and in a matter pending in Norway. Everything worked seamlessly.