

**THE SPECTRE OF ARTICLE 14: THE INCB REPORT
FOR 2021, REGULATED CANNABIS MARKETS AND
THE BOARD'S POTENTIAL ENFORCEMENT MEASURES**

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Executive summary

- In its Annual Report for 2021, the International Narcotics Control Board (INCB) presents an impressive overview of the state of international drug control relative to the provisions of the UN drug control conventions. In so doing, it continues to demonstrate a welcome adjustment of position on a range of issues relating to human rights and a more general growing and implicit appreciation for the operation of the global drug control regime within a web of interlocking – and often conflictual – regime complexes.
- Within this context, and a multilateral system where treaty breaches in one form or another are an unexceptional feature of international law, the INCB is playing an increasingly pivotal role in responding to the adoption of regulated cannabis markets for adult recreational use by a growing number of parties, counter to the provisions of the Conventions; a topic to which the Report for 2021 devotes significant attention.
- Although not mentioned explicitly within the Report in relation to cannabis, recent comments by the INCB President in relation to regulated markets highlight the Board’s power to deploy enforcement measures if, under Article 14 of the Single Convention, it has ‘objective reasons to believe that the aims of this Convention are being seriously endangered by reason of any Party, country, or territory to carry out the provisions of this Convention’.
- Article 14, as with Article 19 of the 1971 Convention, constitutes what can be regarded as a four-stage escalation ladder and accompanying range of actions that begin with dialogue and consultations and increase in severity depending on the responses of national governments to INCB requests and proposals. Ultimately, as part of a ‘name and shame’ process, having drawn the attention of the Parties, the Commission on Narcotic Drugs (CND or Commission) and the Economic and Social Council (ECOSOC or Council) to the matter, the Board may recommend an import and export embargo on licit drugs from or to the country concerned. Although never reaching this stage, this is often considered the Board’s ‘nuclear option’. Such potential measures can be seen as remedial and preventative, performing both a deterrent and corrective function.
- The confidential nature of much of the Article 14 procedure makes analysis of possible implications challenging. Nonetheless, it is clear that its application relative to regulated cannabis markets would take the Board and Parties to the Conventions into complex and uncharted territory.
- In responding to any implementation by the Board of the Article 14 procedure, it seems unwise for governments to simply dismiss its mandate or seek legal loopholes. Both actions are not cost free, both in terms of drug control and respect for international law more broadly. Recognising the benefits of regulated cannabis markets, national authorities would be better advised to accept that the treaties are not infinitely flexible and work towards regime reform and modernisation. Similarly, considering the contemporary political realities of the issue at hand, the INCB should avoid a rigid ‘treaties say no’ approach, carefully weigh up its deployment of Article 14 and use, in close consultation with Parties, its considerable expertise to consider all options available to resolve increasing systemic tensions.

Introduction

With COVID-19 continuing to overshadow many aspects of contemporary life, it is no surprise that the pandemic is a constant theme within the Report of the International Narcotics Control Board (INCB or Board – see Box 1) for 2021.¹ Not only is it given prominence at the very start of the foreword by the Board's President, Ms. Jagjit Pavadia, but it is also evident throughout what is yet again a very thorough analysis of the world drug situation and countries' responses to it. As with a range of other issues in recent years, the Board explicitly frames its response to COVID-19 in terms of both achieving the objectives of the international drug control conventions as well as contributing to broader UN programmes such as the Sustainable Development Goals (SDGs).

In a welcome continuation of looking beyond Vienna in its reporting on and assessment of states' policy choices, the Report – both within the main text and the Recommendations – offers valuable comment on the vital intersection between drug policy and the human rights obligations of States. Further, the Board explicitly calls out governments on a range of issues including extrajudicial targeting of persons suspected of involvement with drug offences, use of the death penalty for drug offences, proportionality and alternatives to conviction and punishment.² Human rights and the humanitarian character of the issue is also evident within the INCB's ever more important discussion of the supply and availability of controlled substances for medical and scientific purposes, including during emergency situations like COVID-19.³ Moreover, in continuing this trend for the broader perspective, the Board's analysis of illegal financial flows relating to drug trafficking in this year's thematic chapter is framed very much in terms of development and security.⁴

Overall then, and while perhaps not described in such terms, information within the Annual Report for 2021 is presented with an increasing awareness of the operation of the international drug control system within a web of interlocking and often conflictual regime complexes,⁵ a range of UN system-wide programmes and a multiplicity of multinational treaties across a range of issue areas. On this last point, it is worth noting that since the adoption of the UN Charter, more than 70,000 treaties have been registered with the UN Secretariat, 'and treaty making activity continues at an unrelenting pace'.⁶ The operation of each treaty, and in some instances the regime of which it is a constitutive part, certainly

displays specific characteristics. Nonetheless, many commonalities exist. This includes those relating to regime evolution, the divergence of Parties' perspectives vis-à-vis their obligations, resultant tensions within a treaty regime and sometimes instances of non-compliance. As Bruno Simma and Christian J. Tams point out '...it seems natural that real and or alleged treaty breaches are by no means an exceptional feature of international law in its "age of treaties"'. 'The real question', they continue, 'is whether international law provides means and methods to respond to them'.⁷

Within this context, this IDPC-GDPO analysis contends that where growing regime tension around regulated cannabis markets is concerned, the INCB is playing an increasingly pivotal and responsive role, particularly in relation to its potential deployment of enforcement measures. It can be argued that this is the case since, unlike within many other issue area regimes, the UN drug control treaties do not include explicit mechanisms for review and possible adaptation.⁸ As in recent years, the Report for 2021 devotes attention to what it often refers to as 'legalization'. In addition to references to specific governments currently operating – or in some instances still considering the implementation of – legally regulated cannabis markets for adult non-medical use,⁹ the issue is legitimately singled out for attention in the Recommendations section. Here, echoing the message woven throughout the Report, it is noted, in similar terms to previous years, that 'The Board continues to reiterate its concern regarding the legalization of the use of cannabis for non-medical and non-scientific purposes in several jurisdictions, with other jurisdictions considering similar action'.¹⁰ Following on from statements concerning the undermining of 'universal adherence' of the drug control conventions and more recent soft law instruments,¹¹ the Board reminds 'all parties to the 1961 Convention as amended that, under Article 4, paragraph (c), thereof, and subject to the provisions of that Convention, the production, manufacture, export, import, distribution of, trade in, use and possession of drugs are limited exclusively to medical and scientific purposes and that any measures allowing for the use of cannabis for non-medical purposes are in violation of the legal obligations incumbent upon parties'.¹² As we have argued elsewhere, and despite some commentaries adopting a contrary view, a strong legal case can be made that this is a legitimate interpretation of the Single Convention.

As suggested, on their own, such assertions can be seen as a continuation of the Board's approach as

displayed in previous Annual Reports,¹³ statements and press releases. Nevertheless, in the face of a growing number of jurisdictions contemplating or embracing legally regulated cannabis markets, when considered with several other factors a subtle – yet significant – change is discernible.¹⁴ Principal among these is a recent statement by the President of the Board. Without singling out any specific government, at the September 2022 Intersessional meeting of the CND, Ms. Pavadia reiterated that ‘the Board continues to consider that the legalization of drugs for non-medical purposes gravely undermines the consensus the conventions represent among States Parties’. In this regard, she then very specifically drew ‘attention to Article 14 of the 1961 Convention, Article 19 of the 1971 Convention and Article 22 of the 1988 Convention, on the measures by the Board to ensure execution of the provisions of the conventions’. ‘The substantive articles’, the President continued, ‘empower the Board to look into any case of deviation of any provision and enter into an extensive confidential dialogue with the concerned member state’. On this point, she concludes, ‘If the Board has objective reasons to believe, after due consideration of all the facts of the case, the Board can refer the issue to the Parties, the [Economic and Social] Council and the CND for discussion.’¹⁵ In so doing, Ms. Pavadia explicitly introduced the spectre of the Board’s enforcement powers to the debate.

Box 1 The INCB: Role and composition

The INCB is the ‘independent, quasi-judicial expert body’¹⁶ that monitors the implementation of the 1961 Single Convention on Narcotic Drugs (as amended by the 1972 Protocol), the 1971 Convention on Psychotropic Substances and the precursor control regime under the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

The Board was created under the Single Convention and became operational in 1968. It is formally independent of governments, as well as of the UN, with its 13 individual members serving in their personal capacities. The World Health Organization (WHO) nominates a list of candidates from which three members of the INCB are chosen, with the remaining 10 selected from a list proposed by Member States. They are elected by ECOSOC and can call upon the expert advice of the WHO.

In addition to producing a stream of correspondence and detailed technical assessments arising from its country visits (all of which, like the minutes of INCB meetings, are never made publicly available), the INCB produces an annual report summarising its activities and views.

While the Board certainly possesses delegated authority from Parties to monitor national drug policies and assess their relationship with the treaties, it is important to note that it has no independent agency to enforce the provisions of the international drug control conventions. It is commonly acknowledged that the INCB relies predominantly on informal pressure in its attempts to encourage what it perceives to be treaty compliance. A key method is its ability to apply leverage through naming and shaming what it judges to be ‘errant’ governments¹⁷ – or what has been called ‘regulation by revelation’. Under such a mechanism, international organisations rely on publicity of behaviour to prompt remedial action by Nation States.¹⁸ And here, the Board’s Annual Report represents a key document within the operation of the UN drug control system.¹⁹ It plays an important role in not only providing an analysis of the ‘drug control situation world-wide and potential situations that may endanger the objectives of the international drug control treaties’,²⁰ but also in setting the subsequent tone of debates and identifying areas that it feels are of concern. Writing in 1973, the authors of the Commentary on the Single Convention on Narcotic Drugs, 1961, highlighted how ‘The Board’s reports publishing its observations and recommendations may be the organ’s most potent instrument for the promotion of effective international and national drug control, the power of public opinion being a very important element in the strength of the international drug control regime.’²¹ As can be seen over the past 45 years or so, the potency of the Report has arguably shifted away from the public and more towards influencing opinion within the CND, the UN’s central policy-making body on the issue of drugs. To be sure, where the issue of regulated cannabis markets is concerned, a combination of the Board’s Annual Reports and periodic statements have been effective in generating or heightening support from those States Parties aligning with its own stance towards challenges to the existing regime architecture. Though not alone, the Russian Federation has recently been particularly vocal – and indeed aggressive – in this regard.

Beyond overt support from Parties, the effectiveness of this informal influence is, to a certain extent, also dependent upon the Board’s potential to invoke its formal powers; that is to say its rational-legal authority as laid out in the conventions. This, as the President suggests, has its origin in Articles 14 and 19 of the 1961 and 1971 Conventions respectively. These constitute a four-stage escalation ladder and accompanying range of actions that begin with dialogue and consultations and increase in

severity depending upon the responses of national governments to INCB requests and proposals (see Figure 1 in relation to the Single Convention as amended by the 1972 Protocol).

As is the norm, the Report for 2021 devotes several paragraphs to a general discussion of these articles under the heading, 'Action taken by the Board to ensure the implementation of the international drug control treaties'.²² As is noted, 'Since its establishment, INCB has invoked article 14 of the 1961 Convention as amended and/or article 19 of the 1971 Convention with respect to various States and has engaged in a close dialogue with them with the objective of bringing about compliance with each party's international legal obligations under the conventions'.²³ Within this context, the Board's potential measures can be seen as 'remedial and preventative',²⁴ performing both a deterrent and corrective function. Moreover, as Neil Boister notes, 'the Single Convention and the 1972 amending Protocol give the INCB wide powers to enforce implementation by the Parties'.²⁵ Or, as the 1976 Commentary on the Protocol Amending the Single Convention on Narcotics Drugs, 1961 puts it, Article 14 'provides for several means of persuasion or pressure intended to induce' a country or territory 'to implement' the treaty.²⁶

Although making some reference to the 1971 Convention, the following analysis uses the Board's Annual Report for 2021 as an entry point to explore primarily 'Measures by the Board to ensure the execution' of the Single Convention on Narcotic Drugs (as amended by the 1972 Protocol amending the Single Convention on Narcotic Drugs, 1961). Although yet to be explicitly linked within the Annual Report itself, this is arguably the core drug control instrument vis-à-vis increasing tensions around policy shifts to regulate cannabis markets. The aim here, therefore, is to examine in detail an aspect of the Single Convention that has in the past, including in our own analyses of the operation of the INCB, received limited attention.

Mindful of both the growing number of jurisdictions currently considering or moving towards the implementation of regulated markets and the apparently related emergence of overt mention of the Board's potential enforcement measures, the assumption is made that in one way or another the Article 14 procedure will become more prominent within the international debate: public or otherwise. Consequently, having provided an overview of its provisions – including some consideration of their interpretation – discussion includes a brief

examination of its drafting history. The intention is to gain a better understanding of the aims and concerns of those involved in designing the only sanction mechanism within the Convention. It also offers a discussion, albeit necessarily speculative, of the possible implications for Parties already in or likely to soon find themselves in breach of the conventions in relation to cannabis.

Under the bonnet: The mechanics of Article 14

Article 14 of the Single Convention, as 'reinforced' by the 1972 Protocol,²⁷ provides the Board with several measures that it can take against governments if, in line with Paragraph (1)(a), it has 'objective reasons to believe' that certain conditions exist (emphasis added). The 1972 Protocol substituted the words 'objective reasons' for the word 'reason' in the language of the original 1961 treaty text. The Commentary explains that the 'new phrase including the word "objective" was introduced in order to reassure some delegates to the 1972 Conference that the Board would have to base its actions on objective facts and not on purely subjective considerations'.²⁸ Within this context, the necessary conditions are first, that 'the aims' of the Single Convention 'are being seriously endangered by reason of the failure of any Party, country or territory to carry out the provisions of this Convention' (emphasis added). And second, that 'If without any failure in implementing the provisions of the Convention, a Party, a country or territory has become, or if there exists evidence of a serious risk that it may become, an important centre of illicit cultivation, production, manufacture of, or traffic in or consumption of drugs' (emphasis added).

This clause to 'extend the scope' of Article 14 is also a direct result of the amending Protocol²⁹ with the second kind of so-called 'dangerous drug situation[s]'³⁰ included to acknowledge the existence of different causes underlying the INCB's concern. Importantly for this discussion, it clearly differentiates between instances of what the Board considers non-compliance with the provisions of the Single Convention and what might be regarded as suboptimal compliance where matters go beyond the control of the government concerned.³¹

In both cases, a range of consequential measures include requests for information and explanations, public declarations – if appropriate – that a Party has violated its obligations, and significantly, recommendations concerning both drug import

and export embargo procedures. Often regarded as the Board's 'nuclear option', the embargo procedure gives the INCB a 'prosecutorial role, in that it collects evidence and a quasi-judicial role, in that it recommends the embargo'. Moreover, 'its decision cannot be overturned by a higher body'.³² As with all decisions under the article, those relating to embargo must be 'taken by a two thirds majori-

ty of the whole number of the Board'.³³ If sufficient agreement can be found, the INCB consequently is provided with a mechanism that in some way equates to the recommendation to Parties of treaty-specific countermeasures 'to induce or compel the State responsible for the treaty breach back into compliance'.³⁴

Figure 1. The four stages of the Article 14 Procedure³⁵

Stage 1

If on examination of information from permissible sources the INCB has 'objective reasons' to believe that the aims of the Single Convention are being 'seriously endangered by reason of the failure of any Party, country or territory to carry out the provisions' of the Convention, the Board has the right to propose to the Government concerned the opening of consultations or to request it to furnish explanations.

Article 14(1)(a) of the Single Convention (as amended by Article 6(1)(a) of the 1972 Protocol).



Stage 2

If, after acting under subparagraph (a), the Board should find it necessary, it may call upon the government concerned to adopt such remedial measures as the circumstances demand.

Article 14(1)(b) (as amended by Article 6(1)(b) of the 1972 Protocol)



Stage 3

If it thinks such action is necessary for the purposes of assessing a matter referred to in subparagraph (a), the Board may propose to the government concerned that a study of the matter be conducted in its territory by such means as the government deems appropriate.

Article 14(1)(c) of the Single Convention (as added by the 1972 Protocol)



Stage 4

If the measures taken by the Board under Article 14 (1) (a) and (b) do not produce the desired results, or that there is a serious situation that needs cooperative action at the international level with a view to remedying it, the Board may call the attention of the Parties, ECOSOC and the CND to the matter. After considering reports of the Board and the CND, the Council may draw the attention of the General Assembly to the matter. Such actions are permitted if, among other things, the Board considers that the aims of the Convention are being 'seriously endangered'. At this stage, in line with Article 14(2), the Board may recommend the Parties to stop the import and export of drugs from or to the country or territory concerned.

Article 14(1)(d) of the Single Convention (as amended by Article 6(1)(d) of the 1972 Protocol. Originally Article 14(1)(c))

Consultations and studies

More specifically, Article 14(1)(a) (and Article 6(1)(a) of the 1972 amending Protocol) provides that if, on examination of information submitted by a government or by a recognised agency,³⁶ the INCB believes that either of these conditions have been met, it has the right to confidentially consult with that Party or request it to supply information. After taking such action, Article 14(1)(b) (and Article 6(1)(b) of the 1972 Protocol) provides that the Board may call upon the government to adopt ‘such remedial measures as shall seem under the circumstances to be necessary for the execution of the provisions’ of the Single Convention. Article 6(1) of the 1972 Protocol gives the INCB the ‘added power at this stage to propose to a Party that a study be carried out in the territory, and if it agrees and requests help, to provide help and settle the details with the Party’ (emphasis added).³⁷ According to Article 14(1)(c), the ‘person or persons whom the Board intends to make available shall be subject to the approval of the Government’ and the ‘modalities’ and ‘time limit’ within which the study must be completed ‘shall be determined by consultation between the Government and the Board’.³⁸ The Board ‘may nominate its own members, members of its own secretariat or other entities of the United Nations Secretariat, or other experts’ (emphasis added). Governments are permitted to reject the Board’s nominations without saying why and the Board does not have to offer alternatives.³⁹ Furthermore, the Government ‘shall communicate to the Board the results of the study and shall indicate the remedial measures that it considers necessary to take’. That said, if none of these steps result in what the Board deems to be ‘satisfactory explanations’, the government concerned has ‘failed to adopt any remedial measures which it has been called upon to take’, or it appears that ‘there is a serious situation’, the Board can escalate matters.

Going public

In this regard, under Article 14(1)(c)⁴⁰ (and Article 6(1)(d) of the 1972 Protocol) the INCB can call the attention of the Parties, ECOSOC, and the CND to the matter. ECOSOC’s involvement is relevant here since it is the parent body of the CND.⁴¹ This is an option that the President was keen to highlight. ECOSOC may also ‘draw attention of the General Assembly to the matter’. In order to do this, however, one or more of the following conditions must be met:

- Either the aims of the Convention are being seriously endangered and it is impossible to resolve the matter satisfactorily in any other way
- Or the INCB finds that there is a serious situation that needs cooperative action at the international level with a view to remedying it
- Or bringing such a situation to the notice of the Parties, ECOSOC and the CND is the most appropriate method of facilitating co-operative action.⁴²

If one of these conditions is met, the Board can, in line with Article 14(3), make what Boister calls a ‘special report’,⁴³ including the views of the defaulting Party, to ECOSOC ‘which shall forward it to all Parties’. Action by the Board here might, in line with Article 6(d) of the 1972 Protocol, be called ‘a “public action” because it not only rebukes the country or territory concerned, but also has the right to publish its reports through the Council’.⁴⁴

Embargo

According to Article 14(2), ‘when calling attention of the Parties, the Council and the Commission’ to the matter, the INCB ‘may’, ‘if it is satisfied that such a course is necessary, recommend to Parties that they stop the import of drugs, the export of drugs, or both, from or to the country or territory concerned, either for a designated period or until the Board shall be satisfied as to the situation in that country or territory’. It should also be noted that the ‘State concerned may bring the matter before the Council’.

While this is the case, this is a significant shift within the Article 14 process since it ‘moves from one of cautioning to punishing the Party’.⁴⁵ As one expert noted, the ‘Board’s recommendation has doubtless a punitive character’ and the ‘nature of a sanction’.⁴⁶ The gravity of the procedure is recognised by the Commentary on the Single Convention on Narcotic Drugs, 1961: ‘The initiation of a procedure to examine whether a Government of a Party or Non-Party has failed to carry out the provisions of the Single Convention is a serious and very delicate matter under the present conditions of international relations, particularly since it might lead to a recommendation of an international embargo on the import and export of drugs, or both against the country or territory involved’. Consequently, it goes on to stress that ‘the nature of the procedure of article 14, as well as its text, requires the Board to apply the provisions of the article with particular prudence’.⁴⁷

This view is echoed by the Commentary on the amending Protocol. Here it is noted that the recommendation of a drugs embargo 'is a very serious measure' and, expressing some limitation on the Board's mandate, points out that 'it cannot be assumed that the Board has the authority except in very grave situations'.⁴⁸ Describing the problematic nature of a situation where the Article 14 procedure may lead to a drugs embargo, the Commentary continues: 'It is submitted that it may normally not be very easy to arrive at such a conclusion, and that the Board would in the cases of serious non-compliance with the Single Convention covered by Subparagraph (d) generally retain its discretionary power to act or not to act under that subparagraph'.⁴⁹

The 1971 Convention

Mindful of the close relationship between the Single Convention and that dealing with psychotropic substances,⁵⁰ it is no surprise that the Board possesses similar embargo powers under the 1971 Convention.

Once again, it has the right to ask a Party to provide the information that it needs in relation with the Parties' execution of the 1971 Convention's provisions. Article 19 permits it to recommend an embargo against a Party when it has 'reason' – though not in this case 'objective' reason – to believe that the aims of the Convention are being 'seriously endangered' by the Party's failure to carry out the Convention's provisions.

This is subtly different to the Single Convention in terms of compliance. However, like the 1961 Convention, the procedure is initiated with the INCB requesting an explanation in terms of Article 19(1)(a) and ratchets up to calling upon the party 'to adopt such remedial measures as shall seem under the circumstances to be necessary for the execution of the provisions of the Convention' under Article 19(1)(b). In the case of a Party failing to respect either of these steps, the Board can call the attention of other Parties and the CND and ECOSOC to the matter in line with Article 19(1)(c).⁵¹ At this stage the INCB may, under Article 19(2), advise an embargo. If the Board is 'satisfied that such a course is necessary', it 'may' 'recommend to the Parties that they stop the export, import, or both, of particular psychotropic substances, from or to the country or region concerned either for a designated period or until the Board is satisfied as to the situation in that coun-

try or region'. Here again then, the INCB alone can lift the recommendation for the embargo. As with its sister treaty, under article 19 all decisions require a two-thirds majority.

The story so far

The confidential nature of the early stages of the Article 14 procedure makes it difficult to surmise the frequency of its application. In 2012, and without any identification of the Parties involved, it was estimated that in the years since the Single Convention was ratified the INCB had only threatened action against nations approximately five times. Escalation had apparently been avoided after governments reconsidered or changed policy options as the Board considered appropriate.⁵² According to Herbert Schaepe, Secretary of the INCB between 1991 and 2004, 'Ultimately the issue was solved because the pressure was such that the country did not want to be named at the Economic and Social Council as being in breach of the treaty'.⁵³

As a reading of the Annual Reports – including this year's – reveals, Afghanistan is the only country whose dealings with the Board under Article 14 have broken the surface and become public. Relating specifically to illegal opium production, its position since 2000, however, is somewhat unique and after 16 years became concerned specifically with the country's need for support from the international community. The Report for 2021 devotes 20 paragraphs to the issue, including the dilemmas posed by the Taliban take-over.⁵⁴

Recommendations for an embargo have never been triggered. Yet, as Boister highlights, 'Although these powers have never been used, they do represent potentially powerful instruments for enforcing observation of the obligations of the early drug conventions'.⁵⁵ Moving beyond a concern regarding reputational damage present during earlier stages of the Article 14 procedure, the Damoclean threat of embargo is certainly likely to influence government behaviour in one way or another. In many ways, the Board's 'nuclear option' may be regarded much like other coercive responses to treaty breaches, 'vehicle[s] that hardly ever leav[e] the garage'. Yet, 'like rarely used vehicles, they do remain around, ready to be taken out for the occasional trip, when the circumstances require'.⁵⁶ Thus, it is fair to conclude that they should not be disregarded lightly.

Drafting history: A delicate balancing act

As with all international instruments, it is instructive to briefly examine the drafting history of Articles 14 and 19, as well as Article 6 of the 1972 Protocol. Such an exercise is useful in attempting to gain an understanding of the intentions of those involved in the often-lengthy negotiations and the resultant compromise and nuanced treaty language. Numerous issues relating to ‘Measures by the Board to ensure the Execution of the Provisions’ of the 1961 and 1971 Conventions and the 1972 Amending Protocol appear within the Official Records, but two key themes are discernible. On the one hand is the desire to give the Conventions, and consequently the Board, ‘teeth’, and on the other is concern regarding potential overreach of the INCB’s mandate and power.

The 1961 Conference

The consolidating nature of the treaty meant that delegates to the UN Conference for the adoption of the Single Convention between January and March 1961 were inevitably drawing on language and concepts from earlier international instruments. Specifically, the 1925 and 1931 Geneva Conventions,⁵⁷ along with the 1953 New York Opium Protocol,⁵⁸ authorised the INCB’s predecessor body, the Permanent Central Opium Board (PCOB), ‘to adopt certain measures against Parties and non-Parties which failed to comply with treaty provisions’. As the Commentary on the Single Convention points out, ‘These measures have often been referred to as “sanctions” or “enforcement measures”’.⁵⁹ Further, with the draft Convention having been through several iterations since 1948,⁶⁰ the text was already well developed by the time diplomats met in New York. That said, early on in discussions it became clear that some remained worried that there were ‘defects’ in the international drug control system, that ‘enforcement procedures’⁶¹ in the penultimate draft ‘were not sufficient to remedy the present situation’ and that the new convention should not weaken the existing control framework.⁶² For example, according to the Director of the Permanent Anti-Narcotics Bureau of the League of Arab States, this was the case since ‘there were still member States which took no steps to ban the cultivation of cannabis, combat illicit traffic or seize opium’. ‘The situation was so grave’, continued Mr. Safwat, ‘that if stringent measures were not taken, the results would be catastrophic from the health, economic and social points of view’.⁶³ Reflecting a widely held

position at the time (and one often still in evidence at the CND today), India echoed this perspective and noted it was ‘in favour of any measures which effectively ensured that parties took steps to combat the scourge of addiction’⁶⁴ (emphasis added). A similar position was adopted by the Greek representative who argued his delegation wanted to see a Convention ‘with teeth’.⁶⁵ The requisite bite in this case related predominantly to the issue of a mandatory embargo – a topic to which much discussion was devoted.

The 1953 Protocol contained provisions authorising the PCOB ‘to impose, with binding effect on Parties, an embargo on the import of opium or the export of opium, or both, upon any country or territory which has failed in a serious manner to comply with provisions of the Protocol’⁶⁶ (emphasis added). While relating only to opium, this measure escalated the seriousness of possible responses open to the PCOB since the preceding provisions within the Protocol focused on a recommendatory embargo.⁶⁷ Consequently, it was this more significant clause that provided the foundations for the enforcement measures within the third draft of the Single Convention.⁶⁸

As will have been gathered from the preceding discussion, the mandatory nature of the embargo never made it to the final draft. While there was some discussion concerning the potential health and humanitarian consequences of such a mechanism,⁶⁹ and of the fact that it had never been deployed, opposition derived principally from a desire to limit the power of the new Board. Despite proponents’ views that a mandatory embargo ‘would have psychological effects conducive to a better implementation of the new treaty’,⁷⁰ many States, the USSR especially vocal amongst them, were concerned about infringement on national sovereignty, a concern that also ultimately removed a draft provision relating to a mechanism for a mandatory local inquiry.⁷¹ Where compulsory action as directed by the INCB was concerned, States were anxious that the body should not become ‘all powerful’⁷² or be given the ‘powers of a super-government’.⁷³ There was also concern that it should not be given equal weight to the International Court of Justice, the specified – and ultimate – forum within the Convention for dispute resolution.⁷⁴ Within this context, the Canadian delegate noted: ‘If drugs were to be used for medical and scientific purposes only, some form of enforcement should be envisaged, but it had to be reasonable’. ‘The inclusion of unnecessary and unrealistic police measures would not only be unlikely to ensure enforcement’, continued Mr. Curran, ‘but would prevent many countries from signing

the convention'. Ironically, he concluded his intervention on this point by noting that 'Canada had no reason to fear that the provisions' of the article 'would be applied to it'.⁷⁵

While possible overreach of the Board's mandate dominated discussions, the deterrent effect of an embargo, even if it was to be only recommendatory in nature, was not overlooked. For example, Harry Greenfield of the PCOB was keen to point out that on three occasions before the Second World War enforcement provisions of the 1925 Convention 'had been initiated', but 'not carried to a conclusion'.⁷⁶ The implication of this statement being that the quiet commencement of what is the Article 14 process and the threat of an embargo today had been sufficient to bring recalcitrant governments back into line. Such a view was supported by the UK delegate who noted that consequently it would be 'Undesirable to deprive the Board of any weapon which might have had practical value in the past'.⁷⁷ Moreover, embargo measures under the Single Convention represented a significant departure from those within the long-standing and widely adopted 1925 and 1931 Conventions. Reflecting upon the issue in International Organization in 1962, a year before the 1953 Protocol finally came into force,⁷⁸ Adolf Lande of the Division of Narcotic Drugs and someone closely involved with the drafting of the Single Convention, explains that despite only surviving as a recommendatory measure, the new Convention contained an important modification. 'While under the existing treaties only an import embargo could be recommended', he pointed out, 'the new convention provided for an import and export embargo'. Lande describes the significance of this change in the following terms: 'While a recommended import embargo might be a measure of doubtful value because it could endanger necessary supplies for sick people and could not affect the industrially advanced countries which manufactured their narcotic drugs themselves, an export embargo would affect primarily the economic interests of an offending country and theoretically might constitute an appropriate sanction'.⁷⁹ An important point to which we will return.

The 1971 and 1972 Conferences

Interestingly, and much to the chagrin of many delegations that felt that the issue had been settled in 1961, the issue of enhancing the Board's powers vis-à-vis Article 14 resurfaced during meetings for the 1972 amending Protocol. Amidst a widespread acknowledgment that the 'drug situation' had worsened and become more complex since the pleni-

potentiary conference for the Single Convention, the US delegation pushed hard for the (re)introduction of a mandatory embargo.⁸⁰ Within the context of President Nixon's recently declared 'war on drugs' and an associated 'aggressive international anti-narcotics campaign',⁸¹ such a 'drastic solution' was deemed 'vital to prevent the further spread of drug abuse', which was seen to be a 'deadly threat', and a necessary response to a 'State's flagrant violation of the Convention'.⁸² Once again, concerns regarding national sovereignty and excessive power of the Board won out.⁸³ Several delegates, including the USSR, pointed out that only the UN Security Council had the right to impose sanctions against a government,⁸⁴ with the proposed US amendments giving the INCB 'powers that were virtually greater'⁸⁵ and that the Board should not be granted 'police functions'.⁸⁶

Unsurprisingly, similar discussions had been evident the previous year during preparatory meetings for the 1971 Convention. Many States, including again the USSR prominent among them,⁸⁷ opposed any expansion of the Board's mandate, with Soviet representative Mr. Babian fearful of the body being granted 'excessively wide powers' under the new instrument.⁸⁸

Possible implications of Article 14

The confidential nature of at least the early stages makes it difficult to know precisely how the Article 14 process plays out in practice. Although it has been initiated, if never progressed through to embargo, on several occasions, there is no public record to learn from. It is nonetheless a useful exercise to think through the process to assess governments' possible responses and options. It is likely to commence with a government's submission of information to the Board concerning policy developments for the Annual Report. Theoretically, it may also begin if the Board receives information from an approved body or organisation as laid out in the Single Convention. Either route would trigger the dispatch of a letter indicating the INCB's concerns to the government in question. It is critical to note here that there is a point in the process when any resultant interaction between a government and the Board may legitimately go beyond the usual, and mandated, relationship.

It will be recalled that one of the routes to initiation of the Article 14 procedure is predicated on the Board having 'objective reasons' to believe that the

aims of the Single Convention are being ‘seriously endangered’ by reason of the failure of any Party, country, or territory to carry out the provisions of the Convention.⁸⁹ Mindful of the strong interpretive case that can be made that adoption of regulated cannabis markets puts governments in breach of the Single Convention, it is very likely that some governments have received letters. Moreover, it cannot be ruled out that the Board has already initiated the first stage of the Article 14 procedure for one or more countries, that confidential consultations have been taking place and/or requests to furnish explanations made. Strong indications that this is the case can be seen in the language deployed by the Board in both its Annual Reports and various statements periodically since 2012; language that surely has often been remarkably like that used by the Russian Federation. For instance, responding specifically to Canada’s cannabis regulation bill in 2018, a Board press release spoke in terms of a ‘violation of fundamental provisions’ of the Single Convention, Canada’s resultant ‘disregard of its legal obligations and diplomatic commitments’ and its contribution to ‘weakening the international legal drug control framework and undermining the rules-based international order’.⁹⁰ Similar language can also be found in the Board’s Annual Report for 2019.⁹¹ Most recently and perhaps more significantly, as noted above, at the September 2022 CND intersessional meeting, the President of the Board spoke specifically in terms of Articles 14 and 19.⁹²

Considering the expectation that Article 14 has the potential to alter State behaviour, this is understandably the INCB’s public position even though according to the Commentary on the amending protocol, the Board ‘may, but is not bound’ to either, propose the opening of consultations or request a government to furnish explanations. As the Commentary also notes, ‘although the text does not state this, it is submitted that the Board may combine with its request for explanations a proposal for consultations’.⁹³

Whichever route the Board chooses for engagement, it remains at all times bound by provisions of the Single Convention describing its authority explicitly in terms of co-operation and dialogue; a requisite condition that the INCB tends to at least pay lip service. Specifically, Article 9(5) of the amended 1961 Convention states ‘All measures taken by the Board under this Convention shall be those most consistent with the intent to further the co-operation of Governments with the Board and to provide the mechanism for a continuing dialogue between Governments and the

Board which will lend assistance to and facilitate effective national action to attain the aims of this Convention’. Additionally, the 1972 amending Protocol specifies several of the Board’s functions and the ‘restrictions imposed upon its authority’.⁹⁴ While this is the case, ‘in accordance with the understanding of the 1972 Conference’⁹⁵ and ongoing concern during discussions regarding the overreach of the Board’s power, in instances of identified non-compliance ‘a Government is in no event legally bound to accept the Board’s proposal of consultations’ (emphasis added). Regarding cases of non-compliance, however, it is obliged to furnish the ‘requested explanations’.⁹⁶

Uncharted territory

The adoption of regulated cannabis markets, and hence the existence of a clear treaty breach, brings both the Board and the governments concerned into uncharted territory. As a result, any consultation and ‘extensive dialogue’ should a government choose to engage in is bound to be inherently problematic. The fact that the Article 14 process has never reached the embargo stage indicates, as Greenfield suggested in 1961 and Schaepe in the late 1990s, that in previous instances where enforcement measures have been applied, governments have been willing and able to bring policies and practice back into line with approaches that the Board deemed necessary.

The current circumstances, however, far exceed those that the drafters had in mind. This is particularly so since they were drawing on treaty language and views of compliance dating back to 1925. Indeed, as a reading of the Commentary to the Single Convention reveals, an example of a government’s potential malfeasance included permitting the diversion of drugs into illegal channels within a country because of an excessive number of licensed drug manufacturers or importers. In this case, it was imagined that the Board might propose that the number of licences should be limited.⁹⁷ More recently, the ongoing and now well-known Article 14 measures relating to Afghanistan’s illegal opium production, speak very directly to the provision of technical and financial assistance and the invocation of Article 14 bis of the amended Single Convention.⁹⁸ This was added by the 1972 Protocol and, as discussed in the Report for 2021, when considered alongside the measures set out in Article 14, ‘explicitly authorises the Board to address its recommendations “to the competent United Nations organs

and to the specialized agencies” regarding technical and financial assistance.⁹⁹

The political dynamics surrounding the adoption of regulated markets, and hence responses on all sides, are far more complicated; a reality that the Board itself acknowledges. For example, when outlining a range of contemporary challenges facing the international drug control system at the CND’s September 2022 intersessional meeting, the INCB President highlighted that where ‘the legalization of controlled substances for non-medical purposes’ is concerned, ‘the situation is more complex and poses what the Board considers a threat to the consensus embodied in the conventions and reaffirmed in the UNGASS outcome document.’¹⁰⁰ Ms. Pavadia concludes by noting that ‘Ultimately the Board will continue to support State Parties in any deliberations on these complex matters, and the way forward can only be determined by State Parties to the Conventions.’¹⁰¹ In so doing, particularly within the context of spotlighting the issue of consensus – a practice the Board frequently follows – the President seems to lay out two simultaneous courses of action; neither of which are straightforward.

First, any notion of genuinely co-operative dialogue is severely compromised when accompanied by open and essentially threatening references to the powers of the Board under Article 14. While the President’s most recent pronouncement on the matter only referred to the possibility that it could legitimately ‘refer the issue to the Parties, Council and CND for discussion’, itself a serious move in terms of undesirable reputational damage, the ‘nuclear option’ of an embargo in the background inevitably also casts a long shadow over any deliberations. Moreover, mindful of the democratic provenance of decisions to regulate cannabis markets, it is difficult to see what a Board adopting a traditionally rigid outlook can bring to discussions with errant governments about seeking ‘solutions.’¹⁰² Although, as has been discussed in detail elsewhere,¹⁰³ the INCB has in the past often been perilously close to exceeding its mandate when criticising national policy decisions, initiation of Article 14 clearly permits such a move. That said, no matter how energetically the Board points out that governments are in breach, it is impossible to imagine that national authorities will reverse what are regarded within individual polities to be progressive policy shifts that better protect the health, welfare and rights of their citizens than prohibition-oriented approaches.

In this regard, it is reasonable to suggest that during any consultations under Article 14(1)(a), the

Board should move beyond a simple ‘treaties say no’ approach. A 2019 critique of the Board’s Annual Report for 2018 points out that ‘Though correct in its assertion that non-medical markets operate beyond the boundaries of the drug control conventions, the time is surely right for the Board to deploy its “independent expertise and experience, accumulated over half a century” to assist states in recalibrating their relationship between a domestic policy choice deemed most appropriate to specific national circumstances with treaty obligations dating to a very different era; both in terms of our understanding of the properties of cannabis itself and market interventions intended to eliminate its non-medical and non-scientific use.’¹⁰⁴ This would seem to be particularly so if a State has requested INCB assistance.

Second, the President is quite correct in pointing out that only States Parties can determine the way forward. It will be recalled how much discussion at the 1961, 1971 and 1972 treaty conferences was devoted to limiting the Board’s potential to infringe on national sovereignty. As is often noted, it is the Parties that own the conventions. As alluded to above, however, this does not mean that the Board can absolve itself of any responsibility to engage in constructive dialogue and work to pursue resolution. Further, it would be problematic if Parties simply ignore the INCB, particularly where its mandate is clear and defensible. During a period when leniency towards cannabis offences was seen as a serious threat to the control system, the 2006 World Drug Report recommended that ‘Either the gap between the letter and the spirit of the Single Convention, so manifest with cannabis, needs to be bridged, or parties to the Convention need to discuss redefining the status of cannabis.’¹⁰⁵ Despite the Board’s various efforts at dissuasion, it is becoming clear that a growing number of States are beginning to find themselves at odds with their obligations under the drug control conventions; a reality that makes such a view more pressing today than ever. It is vital, therefore, that Member States finally take up this call and, moreover, that the INCB plays a constructive role in the resultant discussion.

While this is the case, in choosing to explicitly highlight the concept of consensus, it can be argued that the Board is currently seeking to exert normative pressure and enlist traditionally prohibitionist States in the CND, the Russian Federation prominent amongst them, in defending the mythical ‘Vienna Consensus’ and the current shape of the international drug control regime. Such an expansion of the name-and-shame mechanism so often deplo-

yed via the Annual Report in many ways appears to circumvent the formal route and mandated sequencing whereby under Article 14 the Board can refer issues of concern to Parties, the Council and the Commission for deliberation. Indeed, as the issue evolves and systemic tension increases, there seems to be a blurring of the lines between the deployment of public condemnations in the Annual Report and elsewhere and the formal progression of the Article 14 procedure, particularly the provisions concerning confidentiality.

Remedial measures

The proceeding discussion has focused on potential consultations between the Board and governments under Article 14(1)(a), a preliminary stage within the enforcement mechanism that is governed by the usual provisions concerning a collaborative spirit of co-operation and dialogue and Parties' agreement to take advice and assistance. It is important, however, to also examine the next stage in the process that subtly deviates from this norm as well as explicitly introducing the concept of remedial measures. As outlined above, if, having been through – or at least proposed – consultations and having been furnished with explanations, it is 'satisfied that it is necessary to do so'¹⁰⁶ the Board may call upon the government concerned to adopt remedial measures 'as shall seem under the circumstances to be necessary for the execution' of the Single Convention¹⁰⁷ (emphasis added).

As described by the Commentary on the Single Convention, the Board may follow such an approach towards a government 'only if it does not, within a reasonable period of time, receive a reply to its request for an explanation, or if the reply does not satisfy the Board that no serious failure to comply with provisions of the Single Convention as described in Subparagraph (a) in fact exists.'¹⁰⁸ Put simply, if the Board is dissatisfied with the results of any interaction, or if there has been a lack thereof, it can legitimately deviate from a normal process of dialogue and escalate the seriousness of engagement. The Commentary on the Protocol spells out how 'The Board may lend assistance or give advice only to a Government requesting it expressly or by clear implication [...] the Board may in particular not recommend remedial measures to a Government without its agreement, except under article 14, paragraph 1, subparagraph (b)' (emphasis added).¹⁰⁹ This is in fact the only scenario within the Convention where the Board can recommend remedial measures to a Party 'without its consent'.¹¹⁰

While being distinctly unlikely, this is the case even though any action is supposed to remain 'consistent with the intent to further the co-operation of Governments with the Board and to provide the mechanism for a continuing dialogue between Governments and the Board which will lend assistance to and facilitate effective national action to attain the aims' of the Single Convention.¹¹¹

Surprisingly, there was remarkably little discussion of remedial measures during any of the meetings at the 1961, 1971 and 1972 treaty conferences. Again, particularly in relation to the Single Convention, this may be explained by the fact that deliberations were informed to a large extent by the mandate of the PCOB as laid out within the existing treaties.¹¹² Nonetheless, the Commentaries continue to provide some useful – although not extensive – background information for interpreting the relevant provisions. To be sure, although remedial measures are first explicitly mentioned in paragraph (1)(b), there is a very reasonable assumption that they may be discussed during any consultation process resulting from the preceding provision. For example, it is noted that at any meeting relating to the INCB's request for explanations, 'The Government's participation might be very helpful in the Board's efforts to formulate the remedial measures which would be most adequate under the particular conditions of the country or territory involved'.¹¹³ S.K. Chatterjee concurs, pointing out that 'The real purpose of a consultation is not merely to discuss but also to suggest remedies'.¹¹⁴

All that said, it seems that paragraph (1)(b) remains significant in terms of remedial measures. There is not only a shift from co-operation, dialogue, and an emphasis on governments' requests for assistance and advice to unilateral calls for corrective action from the Board, but the Board may also move away from operating confidentially.¹¹⁵ Additionally, it is important to note that within the context of the amending Protocol, calls for remedial measures in the case of 'a serious drug situation' can only be applied to instances of non-compliance as set out in Article 14(1)(a).¹¹⁶ As with the issue of consultations, the Board appears to have some discretion regarding any calls for remedial measures. For instance, when discussing proposals to a government for a study (Subparagraph (1)(c)), the Commentary on the Single Convention states, 'The Board is not in all cases required to suggest remedial measures before proceeding to the application of that subparagraph'. It goes on to note that 'It may omit a request for the adoption of such measures if, in the light of explanations which it has received from the

Government in question or of other circumstances, it considers that its request would not be met by a positive response'. 'In fact', it concludes, 'the exercise of power under subparagraph (b) to propose remedial measures appears to be discretionary'.¹¹⁷ While this is the case, it is also useful to be aware of two additional points should events move beyond the level of consultations to explicit engagement with remedial measures. First, according to the Commentary on the Single Convention, 'The Board's request may consist of a general appeal to adopt "remedial measures", without specifying them, or may indicate in more or less detail what measures the Board considers necessary'.¹¹⁸ This suggests that there would be some space for a government to propose its own remedy or remedies should the Board follow the 'general appeal' route. Second, and in relation to the option of a more detailed call, it should however be noted that: 'The proposed measures need not be in conformity with the national law of the country or territory concerned. The Board may propose any changes in domestic law and regulations which are required to bring them back into accord with the provisions of the Single Convention. It may, however, be expected that the Board would in such cases endeavour to limit to a minimum the burden which would be imposed on the legislative or regulatory authorities concerned'.¹¹⁹

How then might a State respond to the concept of remedial measures, either during consultations or later stages of the Article 14 process? There are of course many options, each depending upon the individual circumstances, political exigencies of the specific government and inevitably the Board's stance and resultant engagement. National authorities may choose to simply ignore the Board and claim that it is exceeding its mandate. Perhaps an indication of things to come, this seemed to be the approach of the USA when, although not mentioning the Article, it challenged the role of the Board at the Commission's intersessional meeting in September 2022.¹²⁰ Continuing to build on the concept of treaty flexibility, among other lines of argument that appeared to come perilously close to undermining the value of multilateral agreements in general, the US representative put forward the view that the 'INCB often poses as a quasi-judge, but the treaties do not assign that role at all'. Consequently, it was concluded, treaty interpretation should be regarded as the sole prerogative of the parties.¹²¹ It is plausible to speculate that such a stance represents the early stages of US diplomats preparing the ground for federal-level cannabis regulation and more direct clashes with the UN drug control framework and its

own treaty obligations. Conversely, it may suggest that US federal authorities are coming under increasing pressure from the Board regarding the growing number of State-level policy shifts. Either way, the tactic seems unwise considering not only the possible implications for other aspects of the treaty regime itself, such as the Board's increasingly proactive and welcome stance on human rights, but also the growing importance of international law and the current fragility of the rules-based international order beyond drug control.

Another related approach might be to apply creative, if again problematic, interpretations of the Board's mandate specifically in relation to Article 14 itself. This is a perspective that the USA hinted at during the same intersessional meeting with the representative stressing the importance of the sovereignty of parties to the Single Convention. The Canadian statement highlighting the lack of leakage to the illegal trade from its own federally regulated cannabis market may have also been alluding to the adoption of a similar approach.¹²² There is no space to undertake a full analysis here, but as a reading of the Commentaries on both the Single Convention and the amending Protocol reveals, there are indeed instances where the INCB is said not to be bound to act against parties 'if the failure to comply with treaty provisions has only a domestic impact'.¹²³ This might be referred to as the extra-jurisdictional effects of non-compliance. Politically attractive as this language may seem as a potential escape clause, its application in relation to regulated markets appears unconvincing. On the face of it, the approach would seem to rely to a large extent on the concept of 'domestic impact' being taken completely out of context vis-à-vis the rest of the treaty, principally Article 4(c) and how that critical provision relates to the overall aims of the Single Convention. Any notion that the Board has no mandate to initiate the procedure of Article 14 if 'lack of control or defective control' has no impact beyond its own borders arguably relates in the main to a Party's approach to the operation of the existing legal market as recognised by the Convention. That is to say, adherence to the provisions pertaining to import and export limits, excessive drug manufacture and so on in order to prevent it from becoming a 'centre of the international illicit traffic'.¹²⁴ It is true that, as with other international instruments across a range of issue areas, not all aspects of the Single Convention are entirely clear. Indeed, when referring to the key clause of Article 14, S.K. Chatterjee points out that 'under what circumstances the Board will have "objective reasons to believe"',

that the aims of the Convention are being seriously endangered, 'cannot be easily concluded from the provisions of this Convention'. Interestingly, however, according to Chatterjee's interpretation 'it is expected that a failure of a Party, country or territory to adopt and observe a proper control system, thus endangering the international situation and not the domestic situation, will justify the Board taking action'.¹²⁵

At the risk of being accused of selectivity, more constructive and limited creative interpretations might involve the government, or indeed governments in question in the form of a likeminded group, exploring taking ownership of the remedial measures procedure and inverting a relationship whereby the Board normally takes the lead. This might be part of a study process as per Article 14(1) (c) and involve a range of experts from across the UN system. Within this context, governments might, for example, present to the Board a form of treaty reform, including inter se modification,¹²⁶ as a remedy. This is not as farfetched as it might at first appear. In discussing Article 14 remedial measures in relation to treaty-compliant governments, the Commentary for the amending Protocol points out that it might be possible 'to understand the words "necessary for the execution of the provisions of this Convention" as including measures necessary for a different and better implementation of those provisions'. It continues, 'If that view were accepted, the Board could, in the case of a situation referred to in the second sentence of Subparagraph (a), call upon the Government concerned complying with the provisions of the Conventions to adopt such other methods of compliance as in its view would be necessary for a better execution of the treaty, i.e. for the purpose of achieving better results therefrom'.¹²⁷ It is true that such a perspective does not speak directly to the circumstances of governments in breach of the conventions. Nonetheless, it can be argued that in moving to adjust its relationship with certain provisions of the conventions a government would in reality be protecting the integrity of the international control regime and ensuring its efficient execution. A government may also wish to explore the possibility of linking any remedial measures along these lines with its obligations under other international instruments, particularly those relating to human rights and especially in terms of positive human rights. That is to say, within this context, instances where governments are obliged to take action in order to protect an individual's rights rather than simply refrain from certain behaviour that results in a deprivation of rights.¹²⁸

From consultations to public reproach

Whatever option a government chooses, there remains a possibility that the Board will feel that it has 'failed to give satisfactory explanations'. Again, this time within the context of Subparagraph (1) (d), how further escalation might play out is difficult to predict. Outcomes would depend upon the options pursued on all sides. As is the case at earlier stages of the process, the Board has 'discretionary power to act or not under the subparagraph (d)'.¹²⁹ It seems likely, however, that if unable to generate what it deemed to be the necessary policy response from a government at an earlier phase in the process the INCB would utilise the not inconsequential option of formally taking the issue to other Parties, the Council, and the Commission and effectively going public with the dilemma. To borrow Mr. Green's term, it would represent the use of a significant 'weapon' within the Board's arsenal, especially since it will be recalled that ECOSOC has the authority to draw the attention of the General Assembly to the matter. It is important to keep in mind that the purpose of Article 14 has always been twofold: to bring recalcitrant States back into line and deter other Parties from following similar courses of action in the first place. As with other informal processes outside Article 14, a key mechanism for this is name-and-shame.

For many years such a process tended to focus on policies that the Board considered to be 'contrary to the letter and/or the spirit of the treaties', especially in relation to liberalising trends.¹³⁰ That said, in what should be seen as a positive development, more recently the INCB has used its Annual Report to highlight policy approaches operating in contravention of widely agreed international human rights norms. Moreover, rather than speaking in general terms, it now names individual States. For instance, as noted earlier, the Report for 2021 specifically calls out the Philippines, Singapore, and Sri Lanka in relation to continued use, or in the case of the latter resumption of use, of the death penalty for drug-related offences.¹³¹

Writing under the heading 'Publicity the Principal Weapon of the International Narcotics Control Board', Lande noted in a 1972 report that the Article 14 embargo measures were indeed 'not its most potent means of influencing governments to carry out their treaty obligations'. In his view, rather than any embargo itself, the most effective measure was the publicity accompanying the Article 14 process,

including calling the attention of parties, the CND and ECOSOC to the issue or the publication and distribution as appropriate of a report 'on the serious failure of a country to carry out its obligations.'¹³² Certainly, as the Commentary to the Protocol points out, the provision can be deployed by the Board 'as a means of persuading the Government involved to abide by the rules of the Single Convention, i.e. as a kind of sanction which the Board may adopt with or without recommending under paragraph 2 an embargo on the import and export of narcotic drugs, or of both, against a country or territory concerned.'¹³³ Although framed in terms of its intention to 'assist the Government involved in its difficulties',¹³⁴ this form of 'sanction' in some ways links to recent comments of the Board's President concerning what she not unreasonably referred to as 'the oldest principle of international law', *pacta sunt servanda*; the concept that 'all treaties are binding on all parties and their requirements are to be executed in good faith'.¹³⁵

By drawing the attention of Parties and important parts of the UN system to deviation from this core legal principle, the intention seems to be to shame governments in question into recalibrating policy positions so that they correspond with what is presented as the common good and the concept of universalism. To better understand the Board's now well ingrained position, it is instructive to examine a statement by an INCB representative at the 24th session of the CND in 1972.¹³⁶ Then, the rhetorical question was posed: why, having engaged with States whose policies had put them at odds with the drug control treaties, did the PCOB and more recently the new Board 'stop at the first confidential phases' and 'not recommend an embargo'? According to the representative, 'The answer is not that we were not faced with any situations that called for concern, but, very simply, that between 1945 and the present date, we have not been faced with States acting in bad faith'. 'What is a State acting in bad faith?', he continued, 'It is a State, which in a serious matter, and being in possession of full information, prefers its national interests to the fundamental interest of the international community – that entity which exists and really must be called by its proper name – and refuses to take the measures it is in a position to take'.¹³⁷

Maintenance of the 'Vienna Consensus' and the concern for the shared interests of the international community more broadly have undoubtedly long been important points of leverage for the Board to exploit. That said, the current situation and consequently potential outcomes, arguably differ to those in the past in two significant ways. First, the cost-be-

nefit calculation made by States such as Canada in relation to perceived national interest and ongoing compliance with all aspects of the international drug control regime has shifted. In light of better understanding of not only the health implications of cannabis use, but also the ineffectiveness and negative consequences of many law enforcement-oriented market interventions, the nation reached a point where the cost of full adherence with the Single Convention outweighed the benefits. Moreover, any potential costs, including the ire of the INCB and potentially other Parties either within the CND or Council (or both), associated with non-compliance were seen to be exceeded by the advantages of what was deemed a more appropriate national policy response. Within the context of this dynamic, and in tune with an essential facet of Realpolitik, national interest was always likely to take precedence. Second, in previous years – and almost certainly up to and during the early 1970s – it is unlikely that the Board felt it necessary to simultaneously examine multiple and similar national policy choices through the lens of Article 14. That is not the case today. While Canada is currently the focus of much criticism from some Parties as well as the Board – and may already be under Article 14 measures of some description – it is no longer such an outlier where regulated cannabis markets are concerned. While, due to different reasons and deploying 'untidy legal justifications',¹³⁸ both Uruguay and the USA have managed to avoid the degree of criticism heaped upon Ottawa, serious moves towards similar policy shifts in a range of other countries, significantly including Germany, seriously reduces the Board's ability to isolate States and identify them as international pariahs fit for opprobrium. Such a situation in many ways reveals the limitations of the Board's influence outside the mechanisms of Article 14. Despite criticism in the Annual Report and elsewhere of Canada's policy choice and Ottawa's admission that this put it in breach of some aspects of the Single Convention regarding cannabis, other States have clearly not been deterred from pursuing similar approaches to better managing illegal cannabis markets. Nonetheless, one wonders to what extent any initiation of Article 14, even including escalation to public consideration by Parties, the Council, the Commission and even the General Assembly, would affect contemporary domestic discussions, however well advanced, in States determined to re-evaluate policy approaches.

The nuclear option: Still plausible?

Such a question inevitably leads to recommendations of embargo, the Board's 'nuclear option'.

As history shows, within not only the 1961 Convention but also the 1925 and 1931 treaties as well as the 1953 Protocol, this has always been ‘on the books’ as the ultimate deterrence to offending States. If Article 14 is a spectre looming, admittedly often in the background, over governments’ consideration of deviation from the provisions of the Single Convention, then embargo is arguably at its ethereal heart. Not only does it add more weight to any reputational damage incurred from earlier phases of the procedure, but it also brings with it potential for tangible costs for treaty breach. Reading between the lines, it seems fair to conclude that as part of a deterrence package the very idea of a recommended drugs embargo has played a role in persuading national authorities to alter behaviour. Or at the very least it has impacted national debates. Recall for example events in Australia in the late 1990s. Then, while not formally moving to sanction Canberra, the INCB secretariat let it be known that the country could ultimately face an international embargo of its opiate exports if it did not reconsider its position on safe injection rooms; ‘a significant consideration bearing in mind the lucrative legal Tasmanian opium crop’. The Board’s stance undoubtedly created confusion at the national level and consequently a delay in the implementation of the harm reduction intervention.¹³⁹

Any serious consideration of an embargo today certainly brings into focus the potential economic repercussions for a government finding itself under Article 14 measures. Yet it also brings into question the contemporary practicality of this important facet of the procedure. Writing as long ago as 1972, Adolf Lande noted that ‘Such measures would be of questionable value under present conditions which are very different from those which prevailed in the early period of the international narcotics regime when measures of this kind might have aided in reducing the illicit traffic.’¹⁴⁰ In exploring this perspective, and referring to the ‘export or import embargoes of drugs, which may be useful medicines’, Lande touches on what can be regarded as an inherent contradiction within the Single Convention; the option for the Board to recommend to Parties a ban on the export of medicines to States and consequently undermine the Convention’s overarching aim of protecting the health and welfare of humankind. While this latent tension was raised by some delegations as a concern during the 1961 and 1972 plenipotentiary conferences,¹⁴¹ it seems likely that an increasing – and welcome – awareness by the Board for fundamental connections between drug policy and human rights in recent years would dissuade it from recommending

an export embargo to the Party or Parties in question. This is particularly so within the context of the Board’s own work, including in this year’s Annual Report, in highlighting the importance of access to controlled substances for medical purposes.¹⁴² It is true that the implementation of any embargo would ultimately be the choice of other Parties to the Convention. It must also be acknowledged that many States, Canada for example, may well be self-sufficient in medicines. Nonetheless, the optics of the Board’s action would not be good within a global environment where 5 billion people live in countries with little or no access to pain relief and palliative care.¹⁴³

Although, writing as he was in the 1970s, not framing discussion in terms of human rights, Lande is prescient in pointing out that ‘Sanctions or the threat of sanctions of a more economic nature would be more appropriate at present’. ‘A threat of sanctions of this nature’, he continues, ‘might be helpful in inducing some governments to make a greater effort to improve their drug control administration’. Lande even goes so far as to suggest, ‘that it would be useful to authorize the Board in extreme cases of non-compliance with the provisions of the Single Convention, to propose to the Economic and Social Council to recommend some economic sanctions against the offending government’ and that ‘the value of economic sanctions in the drug field is worthwhile considering and may well be taken into account in more long-range plans to improve the international drug regime.’¹⁴⁴ Within contemporary debates concerning regulated cannabis markets, were the INCB to be seeking maximum pressure, this may indeed be a powerful route to pursue. This would be the case even if, for example, recommendations focused on a specific embargo of imports of medical cannabis products. Such action would, however, also certainly raise serious questions concerning not only differential power dynamics within the international community, but also authority within the UN system. For instance, from a Realist perspective, it seems unlikely that States possessing significant geopolitical power and economic influence would become the subject of substantive sanctions via the Article 14 procedure. On the issue of organisational authority, and in relation to a point that Lande himself acknowledges, many States, not just those within the Article 14 crosshairs, would surely be uneasy for the Board and ECOSOC to be engaged in any economic sanctions process. Numerous arguments may be made both ways and precedence taken from other treaty regimes. Nevertheless, while tucked away unused within the Single Convention,

it cannot be ignored that under the UN Charter sanctions normally fall within the competence of the Security Council.¹⁴⁵ In reality then, any decision to escalate to embargo as laid out in Article 14(2) and finally bring the coercive car out of the garage would be a massive move on the part of the Board and one that would send shockwaves throughout the UN system. All of which raises the obvious question. However dissatisfied the INCB – spurred on by States like the Russian Federation – may be with responses from offending governments, would it go so far as to deploy the weapon of embargo? Mindful of its central deterrent role within Article 14, this will surely become a question of increasing importance.

Concluding comments

Once again, the INCB finds itself in a fundamental predicament.¹⁴⁶ On the one hand, as the mandated watchdog monitoring the implementation of the drug control conventions, it must engage with Parties either operating in breach of those conventions or those authorities moving towards policy choices that would put them in a position of non-compliance. Failure to do so would severely undermine its credibility and authority within the regime. On the other hand, however, in so doing it must also recognise that – as with a range of other issue area regimes – the shape of the international drug control system is far from immutable. It is not unusual for States to re-evaluate the conditions and cost-benefit of regime membership in light of preferred domestic policy shifts as circumstances change.¹⁴⁷ Consequently, no matter how energetic some other Parties may call for an inflexible defence of the existing architecture, it would be unwise for the Board to simply adopt a ‘treaties say no’ position. To do so would once more severely undermine its credibility and authority within the regime. Within this context, it seems fair then to suggest that the INCB needs to carefully chart a middle course, consider all options that may lead to resolution, and carefully weigh up its deployment of Article 14 in this process, including its use as a spectre looming over the issue.

Considering the preceding discussion, it is legitimate to even go so far as to question the utility of the Article 14 procedure in relation to the adoption of regulated cannabis markets. The opening of confidential dialogue away from the glare of official forums certainly has the potential to generate constructive outcomes. Yet, triggering – or threat of triggering – Article 14 surely does little for the

tone and cadence of the accompanying mood music. Any mention, however oblique, to a range of sanctions risks changing the character of consultations and gives the impression that the Board is operating beyond its mandate and instead is acting as an ardent and unyielding guardian of the extant shape of the regime. Even warming up the engine of the coercive car in the garage arguably sends unhelpful signals.

Moreover, with an issue as fundamental as a treaty breach resulting from a democratic political process, one wonders about the effectiveness of the different components of the sanctions package within Article 14. As we have discussed, while ratcheting up the severity of the approach, in a similar fashion to the name and shame process outside Article 14, it seems unlikely that formal elevation to the CND, ECOSOC and even the General Assembly would have the desired effect. First, it seems implausible that a country like Canada would consider the reputational costs so high that it would roll back what officials regard to be an essentially successful policy choice. Even if there were doubts about the policy, the domestic political costs of a reversal due to INCB pressure appear intolerable.

Second, as increasing numbers of States move towards the adoption of regulated cannabis markets, the power of name and shame is naturally diluted and loses its potency in terms of both a deterrent and corrective mechanism. Further, while it is difficult to disagree with Boister that the recommendation of embargo in particular represents a potentially powerful instrument and more generally that coercive responses should not be lightly dismissed, its effectiveness seems increasingly doubtful under the current circumstances. Considering questions around both potential humanitarian implications relating to medicines and repercussions of any economically oriented countermeasures, it might be argued that the sanctions component of Article 14 is now a relic of a bygone era. Consequently, its utility in terms of deterrence and incentivising what a rigid INCB would deem to be appropriate remedial measures is also undermined.

All that said, it remains incumbent upon States in breach to work with the Board to reconcile national policy choices with treaty obligations and international law more broadly. There is a growing evidence base to suggest that legal regulation is an effective way to better manage cannabis markets. Nonetheless, the undoubted flexibilities within the UN drug control conventions are far from infinite and legal gymnastics in search of interpretive loo-

pholes far from being risk-free. Within Vienna, and increasingly Geneva,¹⁴⁸ a disregard for international law weakens arguments concerning international obligations of States on issues like the death penalty for drug-related offences and extra-judicial killings. A better approach would be to pursue some form of regime reform and modernisation. Moreover, while this issue currently sits within a relatively obscure corner of the UN system, the ongoing integrity of the rules-based international order more broadly is too important to be simply dismissed by States when operating within the realm of drug policy; however tempting that may be. The very nature of the Article 14 procedure, especially the early stages, makes discussion necessarily speculative.

Nonetheless, it will be interesting to see not only what aspects of the procedure break the surface over the forthcoming months, but also to what extent – if at all – the Board focuses on enforcement measures within the thematic chapter of the Annual Report for 2022. An indication of the Board's increasing concern, this will be devoted to 'examining developments of the trend towards the legalization of cannabis for non-medical use.'¹⁴⁹

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Endnotes

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3. See for example, Paragraphs 129-136 and Recommendations 9-13, p. 126, International Narcotics Control Board (2022), *Report of the International Narcotics Control Board for 2021*, https://www.incb.org/documents/Publications/AnnualReports/AR2021/Annual_Report/E_INCB_2021_1_eng.pdf
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9. See for example discussion on Mexico (paragraphs 197-201), the USA (paragraphs 221-7), Luxembourg (Paragraph 256), the Netherlands (Paragraph 265-6), Malta (Paragraph 818)
10. Paragraph 902
11. Paragraph 903
12. Recommendation 3, p. 125
13. See previous IDPC analyses, available here: <https://idpc.net/publications/2022/01/re-framing-regime-performance-a-critique-of-the-incb-report-for-2020>
14. On this point it is interesting to note the Board's discussion of the difference between legalisation, decriminalisation and penalisation (Paragraphs 370-382). It is plausible to suggest that, beyond laying out flexibility within the treaties and associated potential for proportionality in drug-related criminal justice matters, the authors are also reinforcing the view that such flexibilities are finite
15. *Statement by Ms Jagjit Pavadia*, President of the International Narcotics Control Board, Commission on Narcotic Drugs, Thematic discussions 2022, Implementation of all our international drug policy commitments, following-up to the 2019 ministerial declaration: 'Responses not in conformity with the three international drug control conventions and not in conformity with applicable international human rights obligations pose a challenge to the implementation of joint commitments based on principle of a common and shared responsibility,' Afternoon session, 21 September 2022, https://www.incb.org/documents/Speeches/Speeches2022/day_1_CND_Intersessional_thematic_discussions_web.pdf
16. International Narcotic Control Board website, <https://www.incb.org/incb/en/about.html>
17. See: Friman, H.R., 'Behind the Curtain: Naming and Shaming in International Drug Control', pp. 143-165, in H. Friman (Ed) (2015), *The Politics of Leverage in International Relations: Name, Shame and Sanction*, Palgrave
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21. United Nations (1973), *Commentary on the Single Convention on Narcotic Drugs*, 1961, p. 199
22. Specifically, 'Action taken by the Board pursuant to articles 14 and 14 bis of the Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol and article 19 of the Convention on Psychotropic Substances of 1971'
23. Paragraph 296
24. Chatterjee, S.K. (1981), *Legal Aspects of International Drug Control* (Martinus Nijhoff Publishers), p. 264
25. Boister, N. (2001), *Penal Aspects of the UN Drug Conventions* (Kluwer Law International), p. 484
26. United Nations (1976), *Commentary on the Protocol Amending the Single Convention on Narcotic Drugs*, 1961, p. 21
27. Boister, N. (2001), *Penal Aspects of the UN Drug Conventions* (Kluwer Law International), p. 484
28. United Nations (1976), *Commentary on the Protocol Amending the Single Convention on Narcotic Drugs*, 1961, p. 25
29. Ibid., p. 21. Also see p. 25
30. Ibid., p. 26
31. Ibid., p. 21
32. Boister, N. (2001), *Penal Aspects of the UN Drug Conventions* (Kluwer Law International), p. 484
33. Article 14, Paragraph 6
34. Simma, B. & Tams, C.J. (2012), 'Reacting against Treaty Breaches,' in Duncan B. Hollis (Ed), *The Oxford Guide to Treaties*, Oxford University Press, p. 595
35. Adapted from Chatterjee, S.K. (1981), *Legal Aspects of International Drug Control* (Martinus Nijhoff Publishers), pp. 264-265
36. These can be United Nations organs or specialised agencies, or, 'provided that they are approved by the Commission on the Board's recommendation' other intergovernmental organizations or international non-governmental organizations 'which have direct competence in the subject matter and which are in consultative status' with ECOSOC. See Article 14 (1)(a)
37. Boister, N. (2001), *Penal Aspects of the UN Drug Conventions* (Kluwer Law International), p. 484
38. See Article 14 (1) (c)
39. United Nations (1976), *Commentary on the Protocol Amending the Single Convention on Narcotic Drugs*, 1961, p. 30. The Commentary offers no guidance on how to resolve a situation whereby a government and the Board cannot agree on the experts involved in the study. It seems reasonable to assume, however, that 'informal' and 'confidential' consultations would result in a mutually acceptable composition and avoid stalemate.
40. Article 14(1)(d) of the amended 1961 Convention
41. More precisely, the CND is a functional Commission of the Council as established in 1946 'to assist the ECOSOC in supervising the application of the international drug control treaties', <https://www.unodc.org/unodc/en/commissions/CND/index.html>
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43. Ibid. As Boister notes, 'It is therefore quite possible for the Board to prepare two reports, one in accordance with article 14(3) and the other in pursuance of Article 15 of the Convention'. Also see Chatterjee, S.K. (1981), *Legal Aspects of International Drug Control* (Martinus Nijhoff Publishers), p. 270
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46. Lande, A. (March 1973), 'The International Drug Control System,' *Drug use in America: Problem in Perspective. The Technical Papers of the Second Report of the National Commission on Marihuana and Drug Abuse. Volume III: The Legal System and Drug Control*, p. 112
47. United Nations (1973), *Commentary on the Single Convention on Narcotic Drugs*, 1961, p. 178
48. United Nations (1976), *Commentary on the Protocol Amending the Single Convention on Narcotic Drugs*, 1961, p. 32
49. Ibid., p. 33
50. See Bewley-Taylor, D. & Jelsma, M., 'Drugs and Crime', pp. 267-284, in Chesterman, S., Malone, D.M. & Villalpando, S. with Alexandra Ivanovic (Eds) (2019), *The Oxford Handbook of United Nations Treaties*, Oxford
51. As summarised by: Boister, N. (2001), *Penal Aspects of the UN Drug Conventions* (Kluwer Law International), p. 485
52. Bewley-Taylor, D. (2012), *International Drug Control. Consensus Fractured* (Cambridge University Press), p. 222
53. Ibid., pp. 222-223
54. Paragraphs 298-317
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56. Simma, B. & Tams, C.J., 'Reacting against Treaty Breaches,' in Duncan B. Hollis (Ed) (2012), *The Oxford Guide to Treaties* (Oxford University Press), p. 603
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58. 1953 Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium

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63. United Nations Conference for the Adoption of a Single Convention on Narcotic Drugs, New York – 24 January – 25 March 1961, Official Records, Volume I: Summary Records of plenary meetings, United Nations, New York, 1964, p. 80
64. *Ibid.*, p. 83
65. *Ibid.*, p. 83
66. United Nations (1973), *Commentary on the Single Convention on Narcotic Drugs*, 1961, United Nations, p. 176
67. See Article 12 (2), Recommendation of embargo Article 12 (3) Mandatory embargo. Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and use of Opium, New York, 23 June, 1953
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85. United Nations Conference to consider amendments to the Single Convention on Narcotic Drugs, 1961, Geneva – 6-24 March 1972, Official Records, Volume II: Summary records of plenary meetings, Summary records of meetings of Committee I and Committee II, United Nations, New York, 1973, p. 80

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Commentary also goes on to note 'A Government's consultations with the Board may however by themselves aid that Government in taking effective action to attain the aims of the Single Convention without the Board formally rendering assistance or giving advice'. United Nations (1976), Commentary on the Protocol Amending the Single Convention on Narcotic Drugs, 1961, p. 13

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Where growing regime tension around regulated cannabis markets is concerned, the INCB is playing an increasingly pivotal and responsive role, particularly in relation to its potential deployment of enforcement measures. This IDPC/GDPO report offers an analysis of the Article 14 enforcement procedures and how this may play out with countries considering legal regulation.