

# **High compliance**, a *lex lata* legalization for the non-medical cannabis industry

How to regulate recreational cannabis in accordance with the Single Convention on narcotic drugs, 1961



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# Article 4

## General obligations

16. As the Board has repeatedly emphasised, legalization and regulation of cannabis for non-medical and non-scientific purposes, as foreseen in Bill C-45, cannot be reconciled with Canada's international obligations under Article 4 (c) of the 1961 Single Convention.

INCB, *Brief on the conformity of Bill C-45...*, 13 April 2018

13. The general obligations of State Parties to the 1961 Single Convention on Narcotic Drugs are set forth at Article 4.

*Article 4*

*GENERAL OBLIGATIONS*

*The parties shall take such legislative and administrative measures as may be necessary:*

- (a) To give effect to and carry out the provisions of this Convention within their own territories;*
- (b) To co-operate with other States in the execution of the provisions of this Convention; and*
- (c) **Subject to the provisions of this Convention, to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs. [emphasis added]***

INCB, *Brief on the conformity of Bill C-45...*, 13 April 2018

« The provisions to which paragraph (c) is “subject”, *i.e.* which are excepted from its application, are article 49, article 2 paragraph 9 (whose practical importance seems highly hypothetical) ... »

*and others*

*Commentary on the Single Convention* (p. 110)

The provisions to which paragraph (c) is “subject” all concern different forms of non-medical use (other than medical and scientific use).

The limitation to medical and scientific uses does not apply to these specific non-medical uses.

The obligation is to “limit exclusively ... subject to some exemptions”

This is why the preamble does not mention “limit exclusively” but a “generally acceptable” limitation

*Desiring* to conclude a generally acceptable international convention replacing existing treaties on narcotic drugs, limiting such drugs to medical and scientific use, and providing for continuous international co-operation and control for the achievement of such aims and objectives,

Preamble, *Single Convention on narcotic drugs, 1961*.

(1) the limitation to “medical and scientific use” is not absolute: it is a generally acceptable limitation allowing for some exceptions

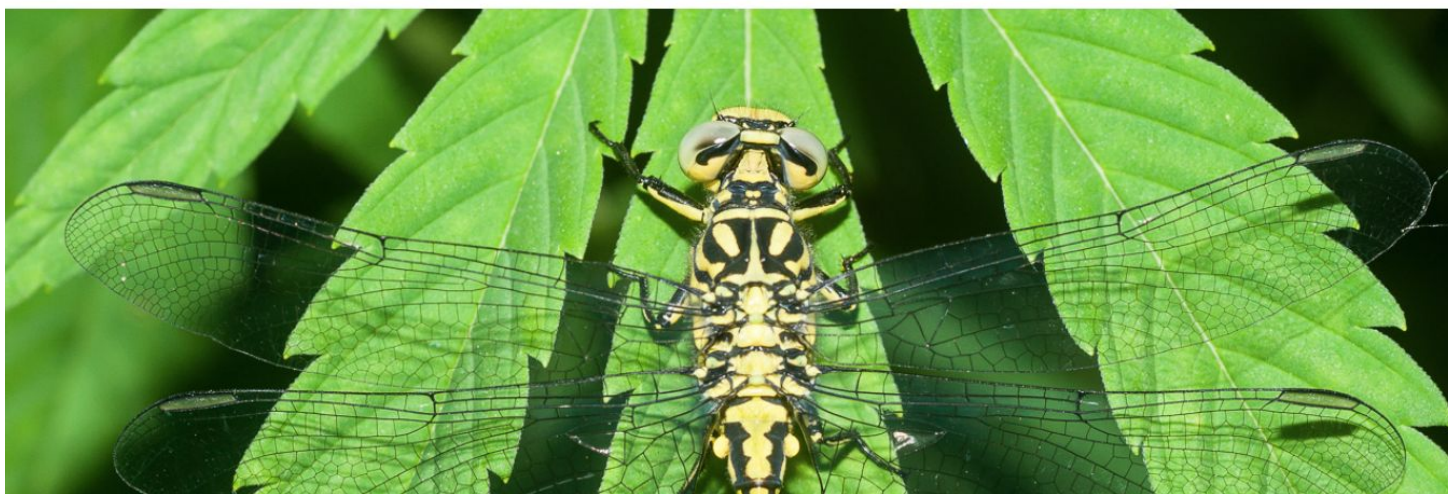
(2) there is no textual obligation to prohibit non-medical uses; there is only an explicit mention of prohibition of drugs listed in Schedule IV (where cannabis is not).

(3) the object and purpose of the treaty is to “protect the health and welfare of [hu]mankind” by establishing international measures of control.



« abuse »

#### 4. THE MEANING OF WORDS: ABUSE, ILL EFFECTS, ADDICTION, MISUSE



*High Compliance* (pp. 66–73)

## ANNEX I. Text, context, and use of “abuse”

**Table A1.** Comprehensive list of mentions of the term “abuse” in the three international drug control Conventions

Convention	Article	Mention	Remarks
Single Convention on narcotic drugs, 1961 (as amended by the 1972 Protocol)	Preamble	“Recognizing that addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind, Conscious of their duty to prevent and combat this evil, Considering that effective measures against <b>abuse</b> of narcotic drugs require coordinated and universal action”	<i>The first occurrence of the term is linked (although not directly associated or correlated) to the concepts of “addiction” and “evil” (see also: Lines, 2014, at 87–101, supra note 316)</i>
	Article 2(9)	“Parties are not required to apply the provisions of this Convention to drugs which are commonly used in industry for other than medical or scientific purposes, provided that: (a) They ensure by appropriate methods of denaturing or by other means that the drugs so used are not liable to be <b>abused</b> or have ill effects (article 3, paragraph 3) and that the harmful substances cannot in practice be recovered”	<i>“Abuse” is associated with, or complemented by, “ill effects”</i>
	Article 3(3)	“Where a notification relates to a substance not already in Schedule I or in Schedule II, ... (iii) If the [WHO] finds that the substance is liable to similar <b>abuse</b> and productive of similar ill effects as the drugs in Schedule I or Schedule II or is convertible into a drug, it shall communicate that finding to the Commission which may, in accordance with the recommendation of the [WHO], decide that the substance shall be added to Schedule I or Schedule II”	<i>Article 2, paragraph 9, and Article 3 paragraphs 4 and 5 point at this sentence when mentioning “abuse and ill effects” suggesting this paragraph should be seen as a reference for the understanding of what “abuse” refers to.</i>
	Article 3(4)	“If the [WHO] finds that a preparation because of the substances which it contains is not liable to <b>abuse</b> and cannot produce ill effects (paragraph 3) and that the drug therein is not readily recoverable, the Commission may, in accordance with the recommendation of the [WHO], add that preparation to Schedule III”	<i>“Abuse” is associated with, or complemented by, “ill effects”</i>
	Article 3(5)	“If the [WHO] finds that a drug in Schedule I is particularly liable to <b>abuse</b> and to produce ill effects (paragraph 3) and that such liability is not offset by substantial therapeutic advantages not possessed by substances other than drugs in Schedule IV, the Commission may, in accordance with the recommendation of the [WHO], place that drug in Schedule IV”	<i>“Abuse” is associated with, or complemented by, “ill effects”</i>

*High Compliance (pp. 124–128)*

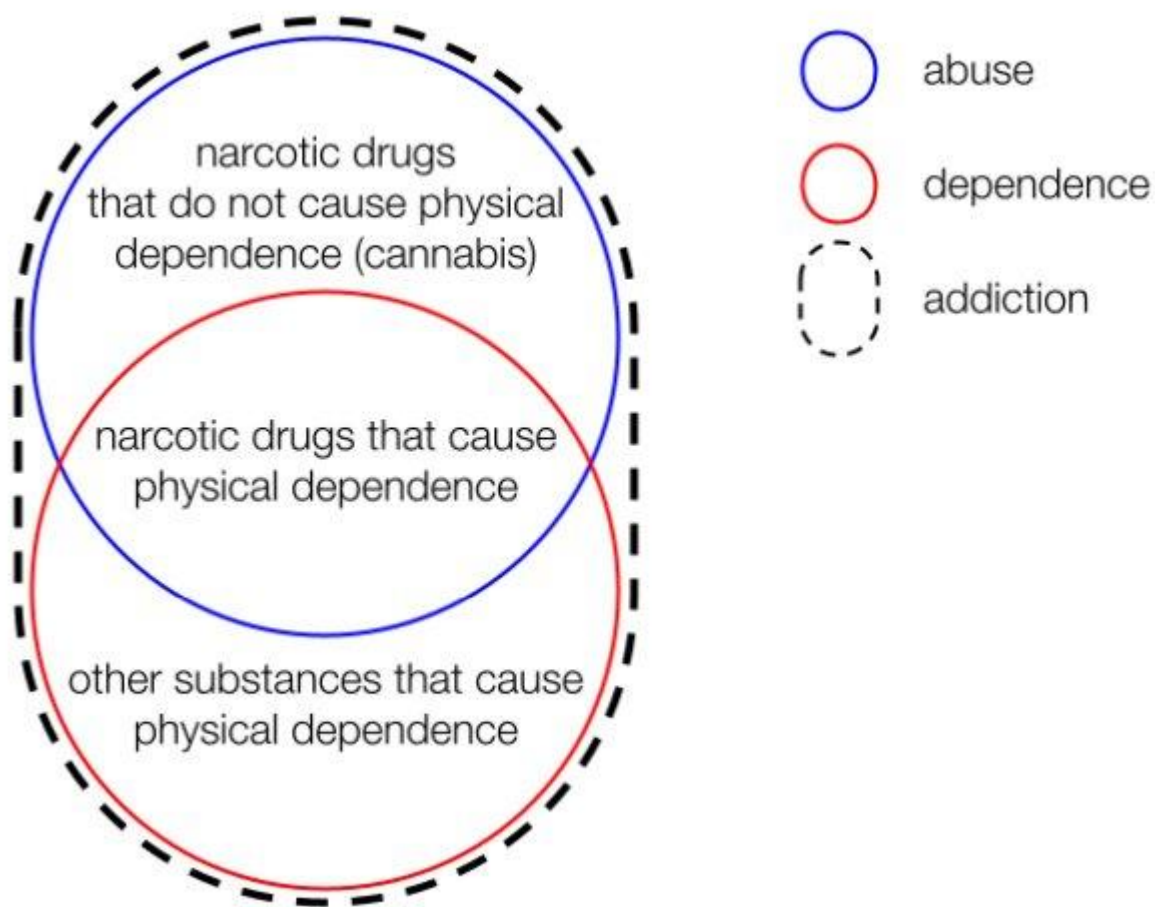
*Recognizing* that **addiction** to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind,

*Conscious* of their duty to prevent and combat this evil,

*Considering* that effective measures against abuse of narcotic drugs require co-ordinated and universal action,

Preamble, *Single Convention on narcotic drugs, 1961*.

## Trends to legalise the non-medical use of drugs, with an emphasis on cannabis



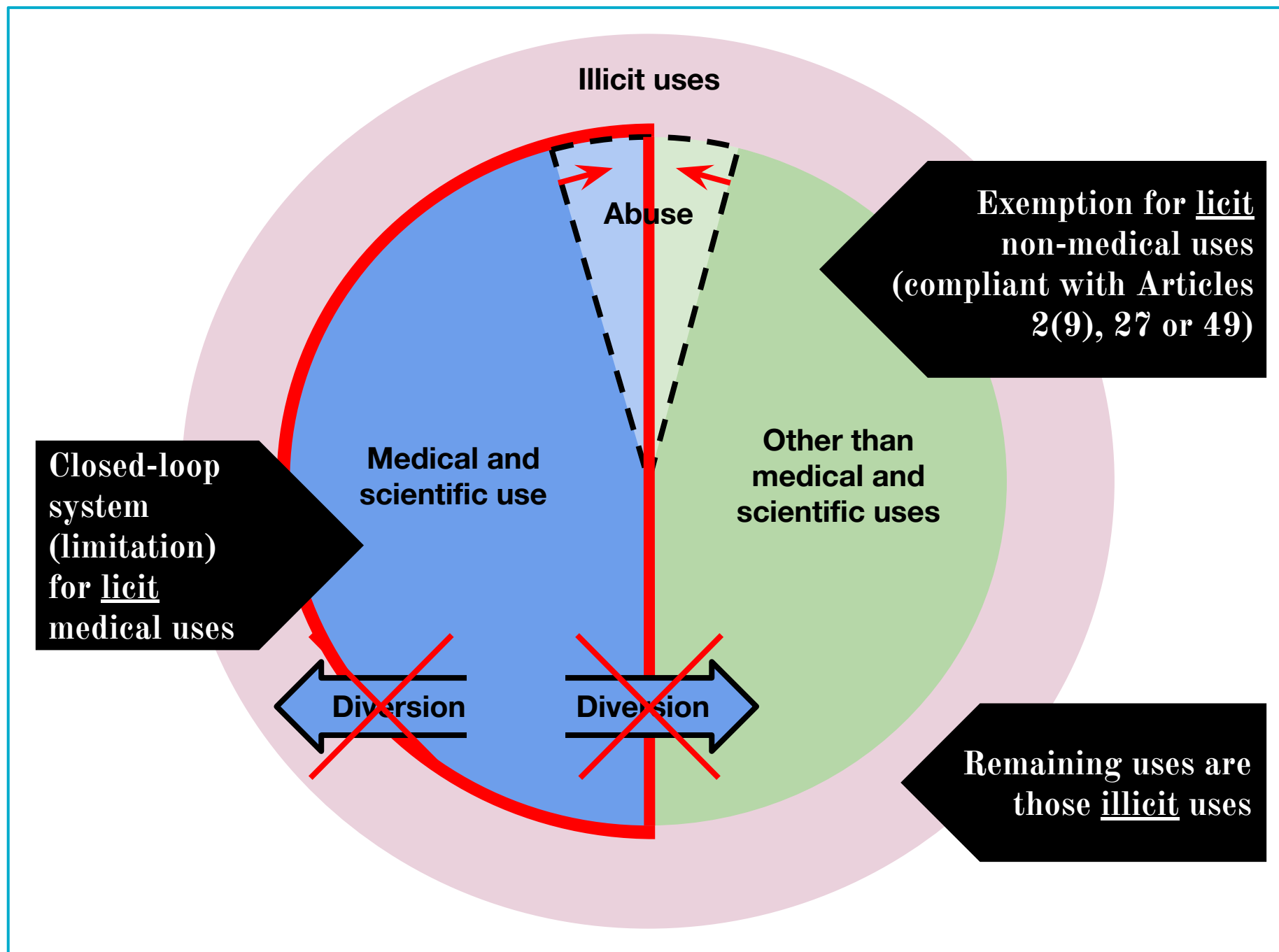
*High Compliance* (p. 61)

Countries must avoid « abuse » (substance use disorders) and « ill effects » (potential harms).

This is valid for both “medical and scientific uses” and “other than medical and scientific uses”

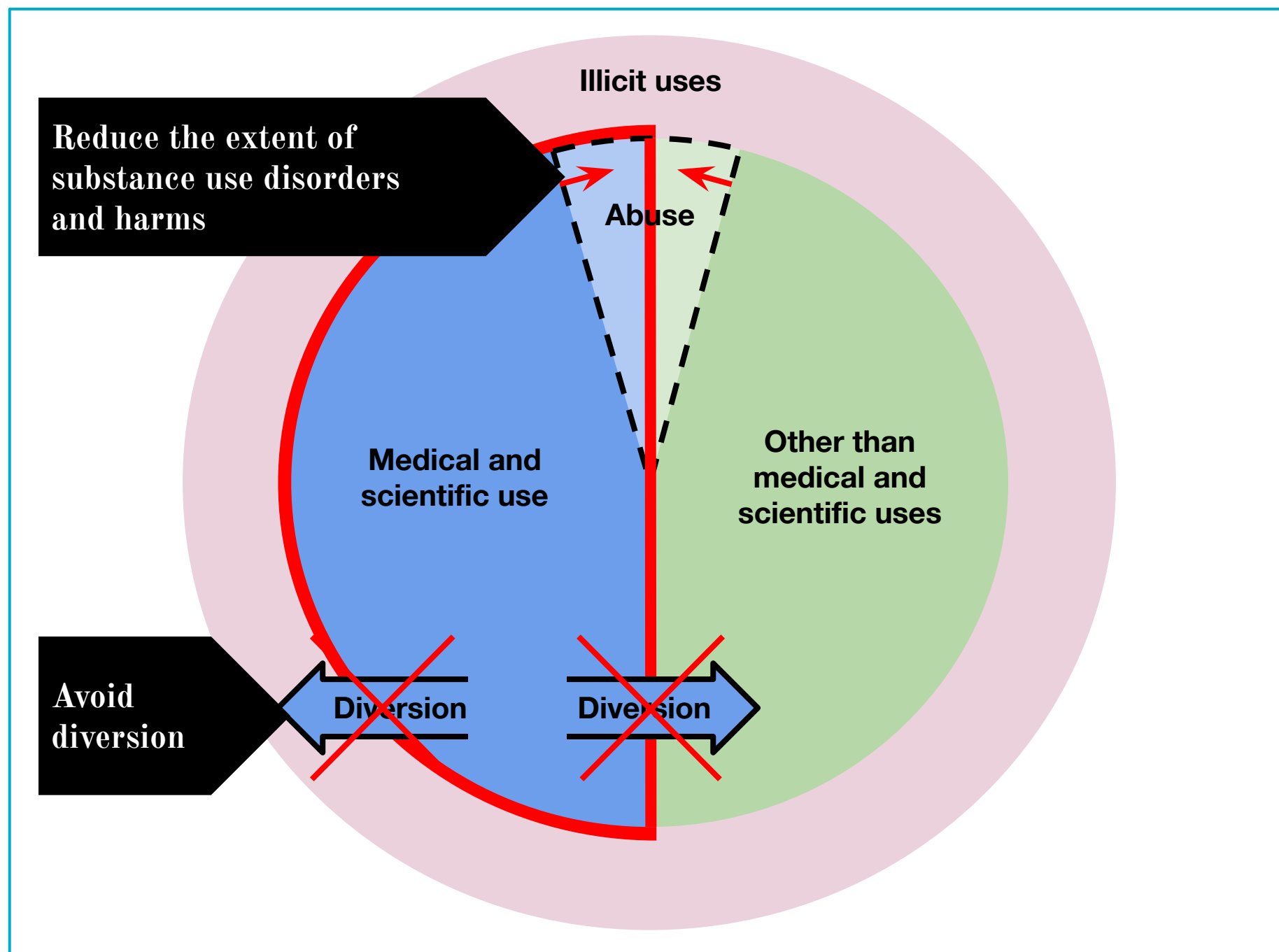
**In order to protect the health and welfare of humankind, Parties have to avoid substance use disorders and harms. For all uses.**

## Trends to legalise the non-medical use of drugs, with an emphasis on cannabis





## Trends to legalise the non-medical use of drugs, with an emphasis on cannabis





# Article 2(9): a legal **framework** for non-medical use

## Article 2(9)

9. Parties are not required to apply the provisions of this Convention to drugs which are commonly used in industry for other than medical or scientific purposes, provided that:

(a) They ensure by appropriate methods of denaturing or by other means that the drugs so used are not liable to be abused or have ill effects (article 3, paragraph 3) and that the harmful substances cannot in practice be recovered; and

(b) They include in the statistical information (article 20) furnished by them the amount of each drug so used.

## Article 2(9)

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(a) They ensure by appropriate methods of denaturing or by other means that the drugs so used are not liable to be abused or have ill effects (article 3, paragraph 3) and that the harmful substances cannot in practice be recovered; and

(b) They include in the statistical information (article 20) furnished by them the amount of each drug so used.

**SAME THING**

## Article 2(9)

If THC is the “harmful substance” in cannabis...  
Then what is the “harmful substance” in a  
single-compound drug?



*ut res magis valeat quam pereat = effet utile*

**The principle of maximum effectiveness**

**ILC: “a true general rule of interpretation”**

We have to interpret treaty provisions in a way that none of them is left void, without effect, or meaningless –as long as the resulting interpretation remains aligned with the object and purpose of the treaty.

**The only way to make sense of Article 2(9)(a) under the principle of maximum effectiveness is to consider that either “denaturing” or “other means” can be applied, with the goal of reducing abuse, ill effects, and ultimately, the harmful effects of the substance.**

# Article 2(9) and intertemporal law

## Drafters:

- (1) **intertemporal flexibility** made explicit
- (2) **acknowledgedly vague language**

“Some delegations felt that the provisions of paragraph 4 were unnecessary and should be deleted as they provided for a future condition which might never arise. It was the consensus of opinion in the Committee that a decision on the deletion of this provision should await consideration of the amendment procedure (article 54). If a flexible amendment procedure was adopted then it might be possible to dispense with this provision.”

*Official Records from the 1961 Conference, Volume II* (p. 84)



## Drafters:

- (1) **intertemporal flexibility** made explicit
- (2) **acknowledgedly vague language**

<sup>5</sup> Some delegations felt that the provisions of paragraph 9 (paragraph 4 in the third draft) were unnecessary and should be deleted on the ground that they provided for a future condition which might never arise. It was agreed that a decision on the deletion of this provision should await consideration of the amendment procedure (article 54). If a flexible amendment procedure were adopted, it might be possible to dispense with this provision. The representative of France felt that drafting of this paragraph could be improved.

*Official Records from the 1961 Conference, Volume II (p. 262)*

The drafters of the Convention did not manage to agree on a flexible amendment process.

Instead, they opted to keep the **flexibility** of Article 2(9), a broad and vaguely-framed exemption, **for the future**.

**Intertemporal aspects of Article 2(9) allow to:**

(1) consider the meaning of terms as of today

(2) reconcile Article 2(9) with Article 49.

**International Court of Justice** (Costa Rica *v.* Nicaragua, pp.242–243)

“there are situations in which the parties’ intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used — or some of them — a meaning or content capable of evolving, not one fixed once and for all [...]

account should be taken of the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied.  
[...]

where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, [...] the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning.”

1. A Party may at the time of signature, ratification or accession reserve the right to permit temporarily in any one of its territories:

[...]

(a) The activities mentioned in paragraph 1 may be authorized only to the extent that they were traditional in the territories in respect of which the reservation is made, and were there permitted on 1 January 1961;

Article 49, *Single Convention on narcotic drugs, 1961*.

## Two exemptions of “non-medical uses” *Differentiated by time and sub-types*

**Traditional as of  
1<sup>st</sup> January 1961**  
*Article 49  
(transitional  
reservation)*

**Commonly  
used  
in industry**  
*Article 2(9)*

Entry  
into force

Date of expiration  
of Article 49

When (if)  
needed

If the Party complies with the  
requirements of Article 2(9),  
non-medical uses (and other activities)  
that are so exempted:

- are “licit”
- are “under legal authority”

*Article 33. Possession of drugs*

The Parties shall not permit the possession of drugs except **under legal authority**.

*Single Convention on narcotic drugs, 1961.*



*Article 3. Offences and sanctions*

1. Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally:

- (a) (i) The production, manufacture, extraction; preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance **contrary to the provisions of the 1961 Convention,** the 1961 Convention as amended or the 1971 Convention;

*United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988.*

*Article 14. Measures to eradicate **illicit** cultivation of narcotic plants and to eliminate illicit demand for narcotic drugs and psychotropic substances*

[...]

4. The Parties shall adopt appropriate measures aimed at eliminating or reducing **illicit** demand for narcotic drugs and psychotropic substances, with a view to reducing human suffering and eliminating financial incentives for illicit traffic. These measures may be based, *inter alia*, on the recommendations of the United Nations specialized agencies of the United Nations such as the World

*United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988.*

# 1971 Convention

**The 1971 Convention only applies to pure, isolated compounds. Not to these compounds when part of plant material.** The 1971 Convention does not apply to THC until the moment it is isolated as a pure compound.

This is largely agreed on, and corroborated:

- In the **text** of the 1971 Convention
- By the **drafters** of the 1971 Convention
- By the **Commentary** on the 1971 Convention (pp. 3, 25, 385)
- By István Bayer (1989 p. 23), a direct **testimony** to the drafting
- By the **INCB** in its 2014 *Contribution to the high-level review of the Political Declaration and Plan of Action* (p.68)
- Former **INCB** secretary Herbert Schappe [INCB-PSY 10/01]
- explained by **scholars** (Tupper, K. and Labate, B. (2012), *Human Rights and Drugs*, 2(1):17–28).

**In *High Compliance*, footnote 105 provides all the details, with appropriate references.**

# Compliance

# 2(9)(a) harm reduction

# 2(9)(b) reporting

16. As the Board has repeatedly emphasised, legalization and regulation of cannabis for non-medical and non-scientific purposes, as foreseen in Bill C-45, cannot be reconciled with Canada's international obligations under Article 4 (c) of the 1961 Single Convention.

*If foreseen differently than in Bill C-45,  
the regulation of cannabis for  
non-medical and non-scientific purposes  
could be reconciled with Article 4(c)*



*Beyond international law, if foreseen differently than in Bill C-45, Canada's legalization could better fit into the overarching goals of the international community by addressing environmental & biodiversity concerns, including affected populations in the licit system, and building sustainability.*