THE GLOBAL COMMODITIZATION OF MARIJUANA AND HEMP

WHERE IN THE WORLD IS CANNABIS HEADED?

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The global experiment of legalizing and commoditizing cannabis has shown more than anything that cannabis as a product is here to stay. With more governments recognizing its value and potential, cannabis companies becoming major contributors to the world economy, and noncannabis organizations recognizing the commodity as an investment opportunity, now is the time to consider the industry's next steps and how it will impact international trade. In this article, an international group of legal and industry experts discusses the growing worldwide cannabis industry, the protection of cannabis intellectual property, recent developments in Mexican cannabis laws, and the implications of international treaties and trade.

Cannabis as a Global Commodity

Cannabis as a commodity is no different than gold, oil, wheat, or corn: whoever can produce the greatest quantity at the lowest price will lead the game. Global cannabis is estimated to be a $300 billion annual cash crop, with the potential for a trillion dollars of global market capitalization in the next decade.[1] New countries are legalizing marijuana and hemp for import and export every month, and the global supply chain is becoming increasingly complex.

A primary cause for interest in the cannabis industry is the world's recognition of cannabis's potential well beyond its use as a product to smoke. Cannabis presents a seemingly endless array of end products, including but not limited to beauty and wellness products, pharmaceuticals, medicine, concrete (hempcrete), drywall, paper, biodiesels, alcohols, tobacco-industry innovations, textiles, hemp plastic, pet supplements, and food and beverages.[2] To be sure, in the new era of cannabis products, consumers will eat it, drink it, lather it onto their skin, and even take a bubble bath in it.

The job market presents a wide array of opportunities, with numerous sectors within the field including cultivation, production, manufacture, distribution, and cannabis-focused

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biotech, and ancillary products and services such as consulting, hydroponics, lighting systems, and packaging. New entrants to the market typically grapple with commoditization. At the state level, there are consumer-driven price controls: buyers are not going to tolerate paying triple the amount for products available for less in the state next door. The same concept will unfold at the global level: competition, supply and demand, and public sentiment will be the driving forces. There will be price compression and constant pressure from the consumer for lower prices. Understanding the natural cause-and-effect dynamic inherent in the cannabis market is critical to a cannabis business's success at the local, state, national, and international levels.

Investments and Developments in the International Market

Cannabis companies have had to overcome the challenges of a slow, incremental process of reforming the legal and regulatory schemes governing the industry. Nonetheless, the "green rush" has generated billions of dollars in sales and consistently inspires promising projections for the future of the market. In their 2020 report, Arcview Market Research and BDS Analytics identified $10.2 billion in global sales in 2018 and $14.9 billion in 2019, a 47.5 percent increase.[3] They project that global legal cannabis sales will reach $57 billion by 2027.[4]

As a result of these lucrative projections, the cannabis market has seen large, big-name companies make sizable investments. Constellation Brands invested $4 billion in Canopy Growth in 2018 for a 38 percent stake in the company. Altria Group Inc., formerly known as Marlboro cigarette producer Philip Morris, invested $12.8 billion in e-cigarette maker Juul for a reported stake of around 35 percent. Altria also invested $1.8 billion in Cronos Group Inc. for a 45 percent stake.

Deanna Callahan, director of global operations for the international cannabis consulting company Gateway Proven Strategies (GPS), identifies three major parts of the global cannabis market:

> At GPS, we see the global cannabis ecosystem existing in three key sectors. We refer to them as the "Innovators," the "Investors," and the "Incumbents." The "Innovators" are the nascent cannabis and hemp companies that are pioneering the new frontier, developing [intellectual property (IP)] for new products, cultivating raw material, manufacturing products, and supplying distribution, logistics, and even retail storefronts to get those products to consumers. The "Investors" are individuals or funds interested in placing their capital in this nascent industry. GPS is focused on guiding these investors to place their capital in innovative companies that are responsible, well-structured, and poised to advance the development of this industry as a whole. The "Incumbents" are the large enterprises that operate in traditional industry segments. This includes companies operating in industries including [consumer packaged goods], fashion, pharmaceutical, food and beverage, tobacco, automotive, and more.[5]

Callahan believes that "incumbent" companies investing in cannabis-derived products can be the key to igniting even greater global demand:

> If a global giant like Coca-Cola issued a bid opportunity for hemp-derived plastic bottles in an effort to replace all or a significant portion of the petroleum-based plastic bottles in their supply chain, that statement alone would drive investors to inject capital into innovative cannabis companies that hold or have access to the IP for hemp plastics and the business acumen to form a company structure, build out operations, raise capital, and leverage that IP to develop and supply products that meet that demand. That bid opportunity would also drive farmers to produce hemp varieties that will service the demand emerging from the manufacturing sector. Downstream logistics and distribution companies would then adapt to support the new demand for these raw materials. All this, of course, would not be possible without innovation-focused legislative initiatives.[6]

In addition to investments, mergers and acquisitions are happening left and right in the cannabis industry. Hexo, a Quebec-based marijuana producer, partnered with Molson Coors and recently acquired Newstrike Brands Ltd. for $263 million. Aurora Cannabis acquired MedReleaf for $3.2 billion. Canopy Growth announced plans to purchase Acreage Holdings for $3.4 billion. Green Thumb Industries Inc. acquired Essence Cannabis for a reported figure of $290 million.[7]

Investments and moves within the industry have made cannabis one of the fastest-growing consumer products in North America, with reports showing an annual compound growth of almost 40 percent from 2012 to 2019. The outlook is positive for key markets. The U.S. cannabis market is projected to reach $75 billion in sales by 2030.[8] Roth Capital Partners estimates U.S. cannabis penetration rates will eventually reach 20 percent (one in five adult Americans).[9] (As a comparison, roughly 160 million Americans consume alcohol and spend on average $100 per month on alcohol.[10]) Canada is estimated to achieve a $5.8 billion market by 2024.[11] And Europe is estimated to reach a market value of $98 billion by 2025—should cannabis become recreationally legalized.[12]

Despite growing sales in international markets, cannabis is still hindered by a patchwork of different laws and regulations in different countries. Research by Gateway Proven Strategies in 2019 identified countries that have laws providing for some form of import or export of cannabis. Those that allow importing include Argentina, Australia, Austria, Brazil, Canada, Cayman Islands, Chile, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Iceland, Ireland, Italy, Lesotho, Macedonia, Mexico, Netherlands, Peru, Poland, Switzerland, United Kingdom, and United

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States. Those that allow exporting include Australia, Belgium, Canada, Chile, Colombia, Cyprus, Denmark, France, Greece, Israel, Jamaica, Lesotho, Macedonia, Netherlands, Switzerland, United States, Uruguay, and Zimbabwe.

Cannabis has overcome the hurdles of burdensome regulations to become a flourishing worldwide industry, but its true potential will not be realized until it can function like any other commodity. Fortunately, investment and maturation of the market are helping drive worldwide progress on cannabis law.

Intellectual Property

Global markets mean global innovation, and global innovation means that IP protections are vital. For cannabis companies to operate globally and develop their brands, the IP strategy should come first. Cannabis industry entrepreneurs often find themselves so preoccupied with navigating jurisdictional regulatory hurdles that they tend to overlook the value of their IP when, in fact, IP generally accounts for 80 percent of the value of a company.[13] The 2018 Agriculture Improvement Act (Farm Bill) provided for the import and export of hemp to and from the U.S., thereby connecting the U.S. to the global hemp market and elevating the importance of IP protection in this fast-growing industry.[14]

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IP generally comprises patents, trademarks, trade dress, trade secrets, and copyrights, which enable inventors and assigning entities to earn recognition or financial benefit from what they invent or create.[15] Trademarks and trade dress serve to indicate the source and quality of goods or services, while patents protect the functionality or design of a novel concept. Copyrights protect artistic and literary works such as books, artwork, computer programs, databases, and advertisements. Trade secrets are information that is confidential yet can be sold or licensed, such as the famously secret recipe for Coca-Cola.

Patents. The global patent system plays a unique role in the cannabis industry because there is no bar against patenting illegal substances.[16] Cannabis and hemp patents must meet the same criteria as any other patentable subject matter in that the claimed invention must be (1) patent-eligible subject matter, (2) new, (3) nonobvious, and (4) useful (meaning that the invention must work, though it is not required to work well or to be a good idea).

The three types of patents are utility patents, design patents, and plant patents.[17] Utility patents protect the way an article is used and works, while design patents protect the way an article looks. Plant patents protect newly invented or newly discovered asexually reproduced distinct and new varieties of plants. In the U.S., plant patents and utility patents provide the patent owner with exclusive rights to the subject matter of the patent for a period of 20 years from the date of filing the application. Design patents have a 15-year term from the date the design patent is granted.[18]

Cannabis utility patents, which are directed to properties of the plant itself, comprise methods of treatment, formulations, plant breeding methods, and unexpected uses.[19] Ancillary products, such as smoking devices and software, make up a significant number of cannabis- and hemp-related patent filings as well.

Plant patents may seem like a natural fit for an industry based around plants; however, plant patents are subject to a number of limitations and provide relatively narrow protection.[20] In the U.S., plants must be asexually reproduced, and as such, the only protection is essentially for that of clones.[21] This is problematic in the cannabis family of plants, which tend to have plant-to-plant variation even within the same family, *Cannabis sativa L.*, to which both hemp and marijuana belong. Furthermore, while utility and design patents are generally recognized in foreign jurisdictions, plant patents are unique to the U.S. and Australia.[22]

Multijurisdictional plant variety protection is available in member countries of the International Convention for the Protection of New Varieties of Plants (UPOV Convention) as an alternative to plant patent protection. As of February 3, 2020, 76 countries, including the U.S., are currently members.[23]

The Plant Variety Protection Act (PVPA) is the U.S. implementation of the UPOV Convention and is administered by

the U.S. Department of Agriculture (USDA). The PVPA provides patent-like protections to plant breeders who produce any new, uniform, and stable sexually or asexually reproduced or tuber-propagated plant variety.[24] The plant variety protection (PVP) certificate must be applied for within one year after the public sale or dissemination of the plant in the U.S. The owner of the PVP certificate is afforded a number of rights, including the ability to exclude others from selling or importing or exporting the plant variety into or out of the U.S. However, the PVPA requires a seed deposit with the USDA; and because the USDA is a federal agency, it cannot accept seed deposits for illegal (e.g., cannabis) plants. Therefore, cannabis plant breeders cannot obtain protections through the PVPA in the U.S.

Companies intending to secure patent protection in multiple countries may file an application directly in a national or regional patent office via the Paris Convention, or file an international patent application under the Patent Cooperation Treaty, which is generally referred to as a PCT application.

Direct filing in one of the 176 contracting states provides the applicant with a 12-month right of priority. The applicant must file subsequent applications in other member countries within the 12-month period if it intends to secure patent rights in multiple countries for the same invention. Applicants may choose to file directly if they intend to secure patent rights in only a few countries and know exactly in which countries they plan to file.

As an alternative to direct filing, applicants may file a PCT application. This is not an international patent application but rather a priority date placeholder recognized by other PCT member countries. In the PCT process, the applicant files a local application first, followed by a PCT application with the International Bureau within 12 months of the filing of the first application. PCT applicants then have up to 18 months to nationalize or file their PCT application with the patent offices of member countries in which they plan to file. The extended period of time of up to 30 months from the date of filing the first application can provide applicants with the ability to test the market, secure investors, and determine in which countries they intend to file applications. As the number of cannabis-legal countries continues to grow, PCT applications may provide a more flexible and economical filing strategy for applicants prioritizing nationalization into legal recreational markets as those markets develop.

Trademarks. Trademarks present a unique set of issues for cannabis and hemp businesses. Trademarks identify the source of a product or service. In most jurisdictions, the trademark owner must have a "bona fide intent" to use the mark in interstate commerce. Where cannabis is illegal, there can be no bona fide intent for legal use in commerce; therefore, cannabis trademarks for cannabis plant products cannot be obtained in those jurisdictions. However, in some cases, cannabis trademarks can be obtained for ancillary products. Cannabis trademarks for hemp vary based on the jurisdiction in which they are filed. In the U.S., hemp is a legal commodity; however, hemp trademarks still may be refused based on failure to satisfy the Federal Food, Drug, and Cosmetic Act (FDCA).[25]

The U.S. Food and Drug Administration's (FDA's) approval of the seizure medication Epidiolex® brought cannabidiol (CBD) within regulatory reach of the FDA. Because of this, the FDA can regulate the interstate sale of CBD; and as of June 2020, the FDA forbids the interstate sale of certain types of products containing CBD. In the U.S., CBD-related trademark refusal typically occurs when the trademark is applied to products that are foods and beverages, supplements, and oils.

Hemp processors and growers in the U.S. intending to trademark the service of growing must be able to show that they have complied with a USDA-certified program. As of June 2020, programs have been approved in Delaware, Florida, Georgia, Iowa, Kansas, Louisiana, Massachusetts, Montana, Nebraska, New Jersey, Ohio, Pennsylvania, South Carolina, Texas, Washington, West Virginia, and Wyoming.[26] In states without approved hemp plans, federal restrictions can be avoided by directly registering state cannabis trademarks in states that permit cannabis use and sales.[27]

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Trademarks for hemp and marijuana can be registered with much greater ease in Canada. Amendments to the Canadian Trademarks Act took effect on June 17, 2019, making it easier for Canadian cannabis companies not only to get their brands into the Canadian market but also to launch them globally.[28] The primary impact of this change is a move away from requiring the commercial sale of a product or advertisement of a food service prior to Canadian cannabis companies formally registering their trademark.[29] The new rules allow cannabis companies to immediately register their trademark upon completion of an advertising period.

Canada now follows the international classification system under the Nice Agreement. The Nice Agreement establishes

a uniform international system of classifying goods and services, known as the Nice Classification, for the purpose of registering trademarks and service marks.[30] There are a total of 88 contracting parties to the Nice Agreement, including, in addition to Canada, the U.S., most of the European Union (EU), Australia, China, and Israel.[31]

The new rules also allow Canadian cannabis companies to reap the benefits of the Madrid Protocol.[32] The Madrid Protocol is one of two treaties encompassing the Madrid System for the International Registration of Trademarks.[33] The protocol is a filing treaty that provides cost-effective ways for trademark holders to protect their marks in multiple countries by completing only a single filing, with one set of fees.[34]

Mexico's delay in issuing medical cannabis regulations not only restricts the public's access to products but also incentivizes the growth of illicit CBD companies.

The EU Intellectual Property Office (EUIPO) does not have a blanket ban on cannabis-related trademark registrations, but it also does not allow for easy access in the way that Canada does. There is no harmonized law in the EU on cannabis, and, contrary to popular opinion, not a single EU country's laws allow for recreational use.[35] Further, a cannabis-related trademark application may be denied on the basis that it is "contrary to public policy or to accepted principles of morality."[36]

Legal Cannabis Landscape in Mexico

A noteworthy part of the global cannabis industry and development of laws regulating legal cannabis is Mexico. Following significant regulatory trends in other countries, such as the U.S. and Canada, Mexico began taking steps toward allowing the use of cannabis. The legislative process to amend certain provisions of the General Health Law (*Ley General de Salud* or LGS) resulted in the June 19, 2017, publication of changes acknowledging the therapeutic benefits of tetrahydrocannabinol (THC).[37] This opened the door to the research and academic study of medicinal cannabis and, subject to a permit by the Federal Commission for the Protection against Sanitary Risk (COFEPRIS), allowed the importation of medications containing THC. At that time, cannabis products without a sanitary license, self-production, harvest, and possession of more than five grams of cannabis were still prohibited.

Later, on October 30, 2018, COFEPRIS issued the Guidelines for the Sanitary Control of Cannabis and Its Derivatives (*Lineamientos en Materia de Control Sanitario de la Cannabis y Derivados de la Misma*). Such guidelines set forth the agency's criteria for reviewing and resolving applications to authorize the sale, import, and export of cannabis products for medical and scientific use and its pharmacological derivatives, provided they have 1 percent or less THC content. This step, however, was reversed on March 26, 2019, when COFEPRIS announced the revocation of such guidelines on the grounds of omitted legal formalities that must be met for the issuance of government guidelines for general application. Reference was also made to the contradiction in import/export taxation rules, which prohibit the importation of cannabis plants. It is important to note that the guidelines' revocation does not imply a reversion of the legalization of cannabis for medical and scientific use. Technically, applications for COFEPRIS permits could still be filed even if the new secondary rules are not officially issued. Also, if any of the permits or authorizations issued at the end of 2018 are canceled, legal recourses would be available to the affected parties.

Judicial determinations. On the judicial front, with the uncertainty about how to lawfully access the aforementioned products, on August 14, 2019, the Mexican Supreme Court ruled in favor of Mrs. Margarita Garfias, the mother of an epileptic son, who sued the executive branch (i.e., health ministry) for its failure to issue the legally mandated rules for medical cannabis, claiming that such omissions are affecting her son's human right to health. The court set an immovable deadline of 180 business days to issue such secondary regulation. However, as of the date of submission of this article for publication, such rules have not been issued. This failure to regulate not only is unlawfully restricting the public's access to products that could help with their health but also is incentivizing the growth of illicit CBD companies that sell products of questionable quality.

In terms of judicial resolutions, on October 31, 2018, the Mexican Supreme Court issued two separate *amparo*[38] protection resolutions in favor of individuals challenging the constitutionality of certain LGS provisions prohibiting marijuana consumption. Based on the human right to self-determine one's health and personality, these resolutions—the fourth and fifth issued by Mexico's highest court—are derived in mandatory jurisprudence, whose main effects can be summarized as such: (1) any person who is denied a permit by COFEPRIS for the recreational use of marijuana is entitled to a favorable *amparo* resolution by a federal district court ordering COFEPRIS to issue such permit, and (2) the

Mexican Congress must amend the challenged provisions in order to permit, under certain guidelines, cannabis consumption. This jurisprudence did not imply an authorization or legalization of cannabis commercialization, supply, sale, or distribution; an authorization or legalization of cannabis consumption without previously issued COFEPRIS authorization; or a general decriminalization of marijuana. Instead, a deadline was set by the nation's highest court for the legislative power to legalize accordingly.

Legislative progress. On the legislative front, several bills have been introduced in both the Senate and the Chamber of Deputies (lower house). On November 6, 2018, a bill was introduced in the Senate to issue the General Law for the Regulation and Control of Cannabis (*Ley General para la Regulación y Control de Cannabis*).[39] The bill was filed by then Senator Olga María Sánchez Cordero, a former supreme court justice who is now President López Obrador's secretary of the interior. The proposed law aims to regulate the full cannabis chain of value for "adult" (the term favored in Mexico in lieu of the term "recreational"), commercial, and scientific use. Senator Sánchez and the Senate majority leader authored the bill, which was seen by many as a signal that cannabis legalization would be a priority in the national agenda, especially considering that Obrador mentioned cannabis legalization as a way to acknowledge the failure of the war on drugs.

The supreme court deadline initially expired on October 31, 2019. Shortly before that day, an updated draft of the bill was circulated with new changes and additions. Unfortunately, the Senate committees were not able to reach a consensus for the preliminary approval of the bill, so the supreme court granted an extension until April 30, 2020. On March 4, 2020, the committees approved the bill in general terms, which was a significant legislative step in the process. However, the supreme court granted a new extension until December 15, 2020, due to the suspension of legislative work under the coronavirus pandemic.[40]

The current bill will still legalize cannabis for all uses. The distinction between nonpsychoactive and psychoactive cannabis is set at 1 percent THC, and the respective uses will be allowed by a license or permit system to be governed by the Mexican Cannabis Institute (name updated to *Instituto Mexicano del Cannabis*). Vertical integration is banned (except for local communities historically harmed by prohibition), and a restriction on foreign investment in license holder entities is set, for now, at 49 percent. The limit on possession for recreational purposes is increased to 28 grams; and for home cultivation, the limit is set at four plants per individual or six per household. Edibles, beverages, and cosmetics will be allowed, provided they do not contain more than 1 percent THC. For cultivation, surface limits are set for indoor and outdoor growing, and requirements for traceability and testing of the seeds are imposed.[41]

There are still important loopholes to be filled in this process, likely through secondary regulations such as patenting of cannabis variations, labeling, taxation, import/export rules, and consumer protection and advertisement rules under public health principles. Considering the ruling political party's majority in the Mexican Congress (both houses), it is likely that the proposed regulations will be passed, though perhaps modified in order to reflect the input by antilegalization advocates.

International Treaties

While legal cannabis laws continue to develop in Mexico and similar countries, the prospect of more nationally legalized cannabis programs raises the issue of inconsistency with international treaties. But are these treaties a moot point when it comes to marijuana legalization?

Three United Nations (U.N.) conventions provide the basis for international drug control: the Single Convention on Narcotic Drugs of 1961, as amended by the 1972 Protocol; the Convention on Psychotropic Substances of 1971; and the U.N. Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.[42] Most countries in the world have joined such treaties, including Canada, the U.S., and Uruguay.[43] Taken together, these drug control treaties provide requirements for state/country parties to limit the legal production, sale, and use of drugs to medical and scientific purposes.[44] Oddly enough, however, the treaties do not explicitly require criminalizing the classified substances—the 1961 convention merely requires that the use of Schedule IV drugs such as marijuana be prohibited if the party determines that the "prevailing conditions in its country" dictate such prohibitions necessary as the "most appropriate means of protecting the public health and welfare," while the 1971 convention prohibits any use of these substances except for scientific and limited medical purposes.[45]

The treaties task three bodies with oversight and implementation roles: the Commission on Narcotic Drugs (CND), the International Narcotics Control Board (INCB), and the World Health Organization (WHO).[46] The INCB is tasked with ensuring implementation of the international drug control conventions.[47] The INCB's first line of power for implementation is to propose remedial measures to governments that are failing to comply with provisions of the treaties; as a last resort, the INCB has the power to recommend that parties cease importing drugs from defaulting countries and/or exporting drugs to defaulting countries.[48] In sum, the strongest (and perhaps only) enforcement tool behind these treaties is the power to recommend an embargo.

In January 2019, the WHO released a recommendation proposing that cannabis be removed from the Schedule IV category of drugs in the 1961 convention.[49] On June 24, 2019, the CND—a U.N. body composed of 53 member countries that oversee the triad of international drug conventions—held its first meeting discussing the WHO's January 2019 recommendation.[50] The leading countries opposing the recommendation included China, Nigeria, Pakistan, and Russia. Mexico raised comparisons between cannabis, sugar, and

caffeine; and Canada suggested looking into tobacco and alcohol use—two substances not mentioned in the conventions.[51]

International Trade Issues

Beyond international treaties, international trade in cannabis and hemp products gives rise to both transnational and local compliance concerns and obligations. Failing to properly ascertain compliance obligations at the transnational, national, state, or municipal level can lead to seizures, exclusions, recalls, fines, penalties, liquidated damages, and other mischief in the country of importation and final place of sale within that country.

Transnational customs issues. Core transnational customs law issues include determining the finished goods' proper customs classification, value for appraisement, and country of origin. Classification and appraisement are harmonized at the international level and implemented by national legislation (frequently with additional refinement).

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Classification. Classification of goods in international trade is harmonized at the six-digit level under the auspices of the World Customs Organization:

> The Harmonized Commodity Description and Coding System generally referred to as "Harmonized System" or simply "HS" is a multipurpose international product nomenclature developed by the World Customs Organization (WCO). It comprises about 5,000 commodity groups; each identified by a six digit code, arranged in a legal and logical structure and is supported by well-defined rules to achieve uniform classification. The system is used by more than 200 countries and economies as a basis for their Customs tariffs and for the collection of international trade statistics. Over 98 % of the merchandise in international trade is classified in terms of the HS.[52]

Determining proper classification is crucial: different tariff provisions carry different rates of duty,[53] and failure to properly classify goods can result in incorrect pricing to customers as well as exposure in the foreign jurisdiction to retroactive and unforeseen duty payments, plus possible penalties for prior underpayments.

World Trade Organization (WTO) member countries use the HS as the base from which they develop their final—and usually more detailed—tariff provisions. In the U.S., the result is the Harmonized Tariff Schedule of the United States (HTSUS), which goes on to provide two additional levels of subclassification for each product entering the country, resulting in a 10-digit classification used to enter the goods into the U.S.[54] Although all countries are allowed to make additional subclassifications beyond the six-digit HS code, harmonization at the six-digit level is designed to facilitate international trade by creating a significant level of comfort as to how goods will be classified upon entering the territory of trading partners.

Despite the significant degree of harmonization across the globe with respect to classification, goods are not always classified in the same way in different countries, and classification disputes between importers and customs officials routinely arise. Because proper classification is often unclear and frequently a subject of dispute, countries around the globe have implemented administrative classification ruling request procedures to help provide comfort and transparency to stakeholders.

Some examples of classification rulings issued by the U.S. Customs and Border Protection (CBP) involving cannabis and hemp include the following[55]:

- CBP Ruling N308348 (January 8, 2020): Bulk CBD oil from Colombia imported in a carrier consisting of a medium-chain triglyceride oil was classified under HTSUS 3824.99 as "Prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries," dutiable at 5 percent or 6.5 percent, depending on the percentage by weight of triglyceride oils.
- CBP Ruling N305743 (September 3, 2019): CBD facial and body scrub from Colombia was classified under HTSUS 3304.99.5000 as "Beauty or make-up preparations and preparations for the care of the skin," which carries a duty-free rate.
- CBP Ruling N305504 (August 28, 2019): Hemp biomass consisting of hemp leaves that had undergone shredding, drying, grinding, and pelletizing was classified under HTSUS 1404.90.9090 as "Vegetable products not elsewhere specified or included," a duty-free designation.
- CBP Ruling N305442 (August 7, 2019): Aromatherapy CBD oil from China was classified under HTSUS 3307.49.0000, which covers "Preparations for perfuming or deodorizing rooms, including odoriferous preparations used during religious rites," normally dutiable at

6 percent but subject to an additional 25 percent due to the Trump administration's section 301 tariffs on products made in China.
- CBP Ruling N301911 (December 17, 2018): CBD in bulk powder form was classified under HTSUS 2907.29.9000, which covers "Polyphenols; phenol-alcohols: Other" and carries a duty rate of 5.5 percent ad valorem.
- CBP Ruling N301829 (December 6, 2018): Tariff classification, country of origin, marking, and status under the North American Free Trade Agreement (NAFTA) of imported hemp powder called "HempBev 65" was classified under HTSUS 2306.90.0130 as "Oilcake and other solid residues . . . of hemp," dutiable at 0.32 cents per kilogram.
- CBP Ruling N301281 (November 19, 2018): Imported CBD medicinal preparation marketed under the brand Epidiolex® was classified under HTSUS 3004.90.9230 as a "medicament," a provision that carries a duty-free rate.

Valuation. Valuation concepts are harmonized at the transnational level by virtue of the WTO Valuation Agreement. Determining the proper valuation for customs purposes is crucial because the amount of duties payable upon importation is usually derived from an ad valorem assessment against the dutiable value of the goods. In other words, declaring a value that is lower than the legal appraised value will normally result in underpayment of customs duties.

Transaction value is the key concept under the WTO Valuation Agreement and is broadly defined at the international level as follows:

> The price actually paid or payable [and] is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods, and includes all payments made as a condition of sale of the imported goods by the buyer to the seller, or by the buyer to a third party to satisfy an obligation of the seller.[56]

Where parties are unrelated and the transaction is otherwise at arm's length, the buyer may use the foreign seller's invoice price as the value to be declared to customs authorities. However, many circumstances can give rise to a situation where the foreign seller's invoice price cannot serve as the sole basis for declaring customs values. As just one example, where the importer has provided the foreign seller with something at a reduced cost or free of charge that is incorporated into the final good (called an "assist" in customs parlance), the appraised value declared to customs authorities must include the value of the assist. For example, if a U.S. importer buys vials in Chile that are already labeled for CBD oil and then sends those vials to Uruguay, where they are filled with CBD oil and subsequently shipped to the U.S., the appraised value declared to the CBP must include both the value of the vials and the value of the CBD oil.

Country of origin. Along with properly classifying and valuing merchandise, importers are also required to determine and declare the proper country of origin for their imported goods.

The U.S. general rule, which applies to goods not covered under a free trade agreement (e.g., NAFTA), is referred to as the "substantial transformation" test. Under the substantial transformation test, goods originate in the last country where they underwent a process resulting in goods with a new "name, character, or use."[57] Thus, if raw cannabis is grown in Country A and shipped to Country B, where it is refined into CBD oil, the cannabis undergoes a substantial transformation in Country B, and the product must be marked with a country-of-origin disclosure such as "Made in Country B" upon importation into the U.S. On the other hand, starting with bulk CBD oil and ending with CBD oil in vials would not result in a substantial transformation in the country where the CBD oil was packaged.

Where a free trade agreement between trading partners exists, the substantial transformation test is usually relaxed by special so-called "tariff shift" and related country-of-origin "marking" rules.

Regardless of what test applies, country-of-origin determinations can be notoriously complex when more than one country is involved with producing a finished imported good.

Core local issues. Core local issues include the importing nation's laws and regulations governing consumer protection, product labeling, and false advertising. State- and municipal-level regulations and compliance obligations may also need to be met.

In the U.S., federal agencies involved with these issues as they relate to cannabis and hemp products include the FDA (food, nutritional supplements, product labeling) and the Federal Trade Commission (false advertising, eco/natural/organic claims, Made in the USA). In addition, individual states enact laws subject to the supremacy clause. Examples include the Indiana hemp law and the Washington ban on foods containing CBD.[58]

Foreign countries and the provinces, states, and municipalities within them may have laws and regulations in force that must be followed. Any noncompliance with local laws can lead to nightmare scenarios, including recalls, penalties, import bans, etc.

Although the framework for customs classification and valuation starts with internationally harmonized precepts, arriving at conclusions acceptable to customs authorities in any given jurisdiction is not always straightforward. Challenges also routinely arise in determining the correct country of origin of a finished good when more than one country was involved in its production. Therefore, while experienced U.S. customs attorneys can help narrow down the customs law answers in foreign jurisdictions, hiring an experienced customs attorney licensed and practicing in the foreign jurisdiction is the only approach reasonably calculated to ensure smooth sailing abroad. *A fortiori*, hiring local counsel to help navigate

consumer protection, labeling, and false advertising laws in a foreign jurisdiction is even more important: there is no internationally harmonized backbone from which to extrapolate compliance requirements in those areas of law, and the gravest of consequences can arise from noncompliance.

Changing the Conversation

Cannabis as a commodity is in the difficult position of having to overcome a worldwide legal framework that has made the plant and its derivatives largely illegal for decades. Navigating domestic and international law is a new frontier for industry players and legal experts who have recognized the potential of cannabis in the global marketplace. However, the momentum of cannabis law reform and global demand for the vast array of products has created a shift in how cannabis functions in the global economy. The question is not how cannabis will survive despite its illegality in so many areas of the world, but how businesses will adjust to the ever-changing landscape to generate profits and avoid regulatory pitfalls both at home and abroad. ◄

Notes

1. Todd Harrison, *How Cannabis Could Be a Trillion Dollar Industry in 10 Years*, Investopedia (Mar. 4, 2019), https://www.investopedia.com/how-cannabis-can-become-an-industry-worth-trillions-4588542.

2. Mark Bradley, *Cannabis as a Commodity: Investing in South America*, YouTube (May 20, 2019), https://www.youtube.com/watch?v=saoQAd9AzVo.

3. Arcview Mkt. Research & BDS Analytics, The State of Legal Cannabis Markets: 2020 Update (7th ed. 2020).

4. Thomas Pellechia, *Legal Cannabis Industry Poised for Big Growth, in North America and Around the World*, Forbes (Mar. 1, 2018), https://www.forbes.com/sites/thomaspellechia/2018/03/01/double-digit-billions-puts-north-america-in-the-worldwide-cannabis-market-lead.

5. Interview with Deanna Callahan, Dir. of Glob. Operations, Gateway Proven Strategies (2019).

6. *Id*.

7. Nicholas Maithya, *Global Cannabis Market Can Expect Continued Growth*, Investing (May 7, 2019), https://www.investing.com/analysis/why-the-us-cannabis-market-is-getting-investors-excited-200417818.

8. Vivien Azer et al., *Cannabis: $75B Opportunity; Category Cross-Currents Keep Us Cautious on Booze*, Cowen (Apr. 11, 2018), https://www.cowen.com/insights/cannabis-75b-opportunity-category-cross-currents-keep-us-cautious-on-booze.

9. *13 Reasons to Love Marijuana Stocks*, Wealth Insider Alert (Apr. 24, 2019), https://wealthinsideralert.com/13-reasons-to-love-marijuana-stocks.

10. *Id*.

11. Chris Hudock, *Growth of the Canadian Legal Cannabis Industry*, New Frontier Data (Oct. 20, 2019), https://newfrontierdata.com/cannabis-insights/growth-of-the-canadian-legal-cannabis-industry.

12. *Two Canadian Investment Firms Make Investments in Two European Cannabis Companies*, Global AgInvesting (Jan. 12, 2019), https://www.globalaginvesting.com/two-canadian-investment-firms-make-investments-two-european-cannabis-companies.

13. *Ocean Tomo 300® Patent Index*, Ocean Tomo (2019), https://www.oceantomo.com/ocean-tomo-300.

14. Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 12608(a), 132 Stat. 4490, 5008 (amending the Controlled Substances Act by eliminating "hemp" from the definition of "marihuana").

15. *What Is Intellectual Property?*, World Intell. Prop. Org., https://www.wipo.int/about-ip/en (last visited Aug. 5, 2020).

16. Chandra Nath Saha & Sanjib Bhattacharya, *Intellectual Property Rights: An Overview and Implications in Pharmaceutical Industry*, 2 J. Advanced Pharmaceutical Tech. & Res. 88 (2011).

17. *Types of Patent Applications and Proceedings*, U.S. Pat. & Trademark Off., https://www.uspto.gov/patents-getting-started/patent-basics/types-patent-applicationsproceedings (last modified Nov. 16, 2017).

18. U.S. Patent & Trademark Office, Manual of Patent Examining Procedure (MPEP) § 1505 (9th ed. Rev. 10.2019, June 2020).

19. Lei Liu & Alice Tseng, *Cannabis Patents 101: Protecting Innovation and Growth*, Smart & Biggar (Apr. 17, 2019), http://www.smart-biggar.ca/en/articles_detail.cfm?news_id=1567.

20. *Id*.

21. *General Information about 35 U.S.C. 161 Plant Patents*, U.S. Pat. & Trademark Off., https://www.uspto.gov/patents-getting-started/patent-basics/types-patent-applications/general-information-about-35-usc-161 (last modified Sept. 22, 2017).

22. Daniel J. Knauss et al., *Protecting Plant Inventions*, 11 Landslide, no. 6, July/Aug. 2019, at 42, https://www.cooley.com/-/media/cooley/pdf/reprints/2019/2019-08-13-protecting-plant-inventions.ashx.

23. Members of the International Union for the Protection of New Varieties of Plants (Feb. 3, 2020), https://www.upov.int/edocs/pubdocs/en/upov_pub_423.pdf.

24. Knauss et al., *supra* note 22.

25. 21 U.S.C. § 331(*ll*); *see also id*. § 321(ff) (indicating that a dietary supplement is deemed to be a food within the meaning of the FDCA but prohibiting the introduction or delivery for introduction into interstate commerce of a food to which has been added a drug or a biological product for which substantial clinical investigations have been instituted and for which the existence of such investigations has been made public).

26. *Status of State and Tribal Hemp Production Plans for USDA Approval*, U.S. Dep't Agric., https://www.ams.usda.gov/rules-regulations/hemp/state-and-tribal-plan-review (last updated July 23, 2020).

27. Aviv-Nicolas Pollak, *Overcoming Barriers in Protection for Marijuana & Cannabis Trademarks*, *in* Dr. Eyal Bressler & Co., 1st Israel Conference on Medical Cannabis Intellectual Property: Commercial, Legal & Regulatory Aspects 6 (2016), http://static1.squarespace.com/static/529b01c5e4b0c313de27f918/t/5

77e3f7d725e25fb8efd9260/1467891583974/1st+Israel+Conference+on+Medical+Cannabis+Intellectual+Property+Commercial,+Legal+and+Regulatory+Aspects.pdf.

28. Lorelei Graham, *Impact of Trade-Marks Act Amendments on Cannabis Companies*, Norton Rose Fulbright (May 2019), https://nortonrosefulbright.com/en-ca/knowledge/publications/23b67593/impact-of-trade-marks-act-amendments-on-cannabis-companies.

29. *Id*.

30. *Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks*, World Intell. Prop. Org., https://www.wipo.int/treaties/en/classification/nice (last visited Aug. 5, 2020).

31. *Id*.

32. Graham, *supra* note 28.

33. *Madrid Protocol*, U.S. Pat. & Trademark Off., https://www.uspto.gov/trademark/laws-regulations/madrid-protocol (last modified Feb. 15, 2020).

34. *Id*. ("While an International Registration may be issued, it remains the right of each country or contracting party designated for protection to determine whether or not protection for a mark may be granted. Once the trademark office in a designated country grants protection, the mark is protected in that country just as if that office had registered it. The Madrid Protocol also simplifies the subsequent management of the mark, since a simple, single procedural step serves to record subsequent changes in ownership or in the name or address of the holder with World Intellectual Property Organization's International Bureau. The International Bureau administers the Madrid System and coordinates the transmittal of requests for protection, renewals and other relevant documentation to all members.").

35. *Trade Mark Protection for a Growing Cannabis Market*, Venner Shipley (Dec. 3, 2018), https://www.vennershipley.co.uk/resources/publications/2018/12/03/trade-mark-protection-for-a-growing-cannabis-market.

36. Council Regulation 2017/1001, art. 7(1)(f), 2017 O.J. (L 154) 1; Trade Marks Act 1994, c. 26, § 3(3)(a).

37. Ley General de Salud [LGS], Diario Oficial de la Federación [DOF] 16-12-2016, reformas DOF 19-06-2017 (Mex.), http://www.dof.gob.mx/nota_detalle.php?codigo=5487335&fecha=19/06/2017.

38. "*Amparo*" is a constitutional last-recourse appeal that, if granted, favors the appealing party against, in this case, existing provisions of Mexican law.

39. Iniciativa con Proyecto de Decreto por el que se Expide la Ley General para la Regulación y Control de Cannabis 06-11-2018 (Mex.), http://infosen.senado.gob.mx/sgsp/gaceta/64/1/2018-11-06-1/assets/documentos/Inic_Morena_LC.pdf.

40. Alfredo Pascual, *Deadline to Legalize Marijuana in Mexico Extended Again*, Marijuana Bus. Daily (Apr. 18, 2020), https://mjbizdaily.com/deadline-to-legalize-marijuana-in-mexico-extended-again.

41. For a more detailed summary of the bill, see *Mexico Cannabis Update #10*, Corral, Arzola, Armendáriz & Máynez (Oct. 22, 2019), https://www.caamlegal.mx/web/wp-content/uploads/2019/10/MexicoCannabisUpdate10.pdf, and *Mexico Cannabis Update #13*, Corral, Arzola, Armendáriz & Máynez (Feb. 12, 2020), https://www.caamlegal.mx/web/wp-content/uploads/2020/02/MexicoCannabisUpdate1312feb20.pdf.

42. *International Drug Control Conventions*, United Nations Off. on Drugs & Crime, https://www.unodc.org/unodc/en/commissions/CND/conventions.html (last visited Aug. 5, 2020).

43. Peter J. Meyer et al., Marijuana Legalization in Canada: Implications for U.S. Policy and International Drug Control 2 (2018).

44. *Id*.

45. Single Convention on Narcotic Drugs art. 2, § 5b, Mar. 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 204, *as amended by* Protocol Amending the Single Convention on Narcotic Drugs, 1961, Mar. 25, 1972, 26 U.S.T. 1439, 976 U.N.T.S. 3; Convention on Psychotropic Substances arts. 5, 7, Feb. 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175.

46. Amira Armenta & Martin Jelsma, The UN Drug Control Conventions: A Primer (2015), https://www.tni.org/en/publication/the-un-drug-control-conventions#9.

47. *Id*.

48. *Id*.

49. Madelaine Drohan, *Canada's Cannabis Conundrum*, OpenCanada (June 28, 2019), https://www.opencanada.org/features/canadas-cannabis-conundrum ("Drugs in that category are considered particularly harmful with few therapeutic uses. Removing cannabis from Schedule IV but leaving it in Schedule I, a category for drugs that have a high potential for abuse and addiction, would allow more research and freer trade in medical cannabis but would not change the illegal status of recreational cannabis.").

50. *Id*.

51. *Id*.

52. *What Is the Harmonized System (HS)?*, World Customs Org., http://www.wcoomd.org/en/topics/nomenclature/overview/what-is-the-harmonized-system.aspx (last visited Aug. 5, 2020).

53. Although tariff classification is harmonized to the six-digit level under the HS, countries remain free to determine the rates of duty that will apply to imported goods. In other words, duty rates are not harmonized across countries.

54. The proper 10-digit classification also must be determined in order to fill out a shipper's export declaration (SED), a document that must be filed with the U.S. government in connection with every commercial shipment leaving the country.

55. CBP rulings are available at https://rulings.cbp.gov/home.

56. *Technical Information on Customs Valuation*, World Trade Org., https://www.wto.org/english/tratop_e/cusval_e/cusval_info_e.htm (last visited Aug. 5, 2020).

57. Anheuser-Busch Brewing Ass'n v. United States, 207 U.S. 556, 562 (1908).

58. Regulation of Hemp, S. 516, 2019 Reg. Sess. (Ind. 2019), https://legiscan.com/IN/text/SB0516/id/2002034; *Hemp CBD in Food*, Wash. St. Dep't Agric., https://agr.wa.gov/departments/food-safety/food-safety/hemp-cbd-in-food (last visited Aug. 5, 2020).