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TRADE LAW AND LEGALISED CANNABIS MARKETS IN INTERNATIONAL TRADE LAW AS WELL AS IN NATIONAL LAWS

Canada, Uruguay

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ABSTRACT

This legal opinion focuses on the interaction between legalised cannabis markets and international trade law obligations by giving an overview of pertinent regulations under international trade law as well as how Canada and Uruguay took these into account when legalising cannabis. In brief, the opinion attempts to provide: (i) a general overview of trade law and the possible rules of the multilateral trading system that might be affected by cannabis legalisation; (ii) insight into the potential impact of import/export rules on cannabis legalisation; (iii) an examination of the degree of friction – if any – between trade law and the use of state-owned enterprises in legalised cannabis markets; and (iv) a sense of the role that 'international standards' play in trade law and their relevance for cannabis legalisation. The opinion supplements these discussions by highlighting the ways in which Canada and Uruguay – two countries with established cannabis legalisation regimes – have attempted to deal with the relevant issues

EXECUTIVE SUMMARY

The Federal Office of Public Health (FOPH) requested that the Swiss Institute of Comparative Law (SICL) draft a legal opinion focusing on the interaction between legalised cannabis markets and international trade law obligations. This opinion represents the culmination of those efforts. In brief, the opinion attempts to provide: (i) a general overview of trade law and the possible rules of the multilateral trading system that might be affected by cannabis legalization; (ii) insight into the potential impact of import/export rules on cannabis legalization; (iii) an examination of the degree of friction – if any – between trade law and the use of state-owned enterprises in legalized cannabis markets; and (iv) a sense of the role that 'international standards' play in trade law and their relevance for cannabis legalization. The opinion supplements these discussions by highlighting the ways in which Canada and Uruguay – two countries with established cannabis legalization regimes – have attempted to deal with the relevant issues. The following represents a summary of findings in each of the aforementioned categories.

Summary of findings:

Trade law generally

- The primary sources of international trade rules are multilateral treaties, which are overseen by the World Trade Organization (WTO). Plurilateral and bilateral trade agreements (generally, free trade agreements (FTAs)) form another large body of rules governing the trade relations between members of those agreements, but the WTO provides the backbone of the legal structure.
- There are many WTO treaties that could potentially apply to a liberalized cannabis market, including, but not limited to, goods-related agreements such as the General Agreement on Tariff and Trade 1994 (GATT) and the Agreement on Technical Barriers to Trade (TBT), as well as the primary agreement on services, the General Agreement on Trade in Services (GATS). All WTO Member states are bound by the provisions of each of these treaties.
- WTO law is less apt to be applicable where a product is fully banned to both domestic and foreign producers/consumers than it is where there is a partial liberalization. This is due, in part, to the fact that WTO law is aimed to protect equal conditions of competition and therefore is particularly concerned about discrimination that may result from a country's decision to (directly or indirectly) restrict importation/exportation of a product. While the GATT in particular favors liberal market access of products, it emphasizes the conditions of importing and exporting rather than the type of goods. The WTO Agreements are generally silent about the treatment of specific products in the context of importation/exportation: the Agreements do not set forth specific requirements relating to whether seeds, seedlings, source materials or other precursors for commercial production of cannabis can be imported/exported, for example.).
- Because the WTO dispute settlement system only provides for Member states to complain against other Member states, the risk of litigation in the WTO is, as a general matter, relatively low. A lack of market incentives and legal certainty further lowers the likelihood that a case will be initiated in the WTO against a particular cannabis liberalization scheme.

Import/export rules

- In the context of goods, WTO Member states have obligations relating to market access (e.g., GATT Article XI prohibits 'quantitative restrictions' on trade between Members) and non-discrimination (e.g., most-favored nation, or MFN, treatment and national treatment obligations contained in, among other areas, Articles I and III of GATT and 2.1 of TBT). MFN obligations likewise apply across all services under the GATS, while countries affirmatively opt-in, on a sectoral basis, to market access and national treatment obligations in the services context.

- Cannabis legalization schemes are more likely to be at odds with the non-discrimination rules when more favourable treatment is accorded to domestic producers or service suppliers relative to “like” imported products/services and/or where more favourable treatment is accorded to products/ suppliers from one (or a group of) country(ies) relative to that of other WTO Members.
- Frictions between these obligations and a given measure would be more pronounced still if the measure(s) provide(s) little or no opportunity for foreign entities/persons to participate in the now-liberalized domestic market. For example, if a domestic market for recreational cannabis and/or medicinal cannabis were permitted but imported products were banned from entering it or if a licensing program was implemented that based the granting of a license upon nationality, trade rules might be violated.
- GATT and GATS contain exceptions that can serve to justify otherwise GATT-inconsistent or GATS-inconsistent measures. For example, both Agreements allow for measures that are ‘necessary to protect public morals’ (XX(a) of GATT and XIV(a) of GATS) or ‘necessary to protect human, plant or animal life or health’ (XX(b) of GATT and XIV(b) of GATS). However, the case law indicates that the applicability of a given exception depends on complex analysis that considers, among other things: the overall trade restrictiveness of the measure, the extent to which the measure fulfils a legitimate governmental objective (in the sense of pursuing an aim advanced by an exception; such as protecting human, animal or plant life or health under XX(b) of GATT and/or XIV(b) of GATS) and the availability of other, less trade-restrictive, measures. The success rate of invocations of general exceptions clauses in cases actually brought to WTO dispute settlement is extremely low.
- **National approaches**
  - **General**
    - In Kanada wurde die Vereinbarkeit des Ein- und Ausfuhrverbots mit den Vorgaben des internationalen Handelsrechts im Gesetzgebungsprozess kaum thematisiert. Ein Vertreter des kanadischen Departements für auswärtige Angelegenheiten erklärte jedoch, das Vorhaben sei mit den Verpflichtungen Kanadas unter NAFTA, der WTO und dem CETA vereinbar, ohne dies weiter auszuführen.
    - Weder im Gesetzgebungsprozess zur Legalisierung von Cannabis in Uruguay noch in anderen einschlägigen Quellen finden sich Hinweise darauf, dass die Auswirkungen der Legalisierung von Cannabis auf Uruguays Verpflichtungen nach dem internationalen Handelsrecht thematisiert worden wären.
  - **Import and export under national law**
    - In Kanada ist es verboten, Cannabis ein- oder auszuführen, das nicht medizinischen oder Forschungszwecken dient.
    - In Uruguay regelt und kontrolliert der Staat die Ein- und Ausfuhr von Cannabis. Bisher scheint Uruguay Cannabis lediglich exportiert, jedoch nicht importiert zu haben. Detaillierte Regelungen zum Im- und Export finden sich bisher jedoch nur für Cannabis zu medizinischen oder Forschungszwecken sowie für Industriehanf.

State-run monopolies

- Where a state decides to allow for the cultivation of cannabis, the Single Convention (see Articles 28 and 23) indicates the creation of an agency (or agencies) to carry out certain functions, including the designating of land upon which cultivation can take place, licensing cultivators, and taking physical possession of the product from those growers. A question then arises as to whether GATT or GATS rules conflict with this requirement.

- Neither GATT nor GATS prohibits Members from having state trading enterprises or monopoly service providers, respectively. Rather, both agreements establish rules for their behaviour. In essence, these entities must make market decisions on a commercial basis and must abide by the non-discrimination obligations codified in the GATT and GATS.
- Ultimately, there is little to suggest that Articles 28 and 23 of the Single Convention on the one hand, and the requirements of GATT Article XVII and GATS Article VIII, on the other, are necessarily incompatible. Neither of the latter two articles (nor any other WTO Agreement) prohibit the creation of the type of agency contemplated by Article 23 of the Single Convention. Similarly, the functions that Article 23 demands of the agency responsible for controlling cannabis would not appear to be facially invalid from a WTO standpoint. Rather, a country liberalizing its cannabis market would have to make sure that the agency was motivated by commercial factors in its market activity (buying, selling, etc) and that it would not discriminate against WTO Member in a way proscribed by the GATT and/or GATS.
- **National approaches relating to state agencies**
    - In **Kanada** entscheiden die Provinzen und Territorien, ob der Vertrieb nur durch ein staatliches Monopol gestattet sein oder auch privaten Anbietern offenstehen soll. In den Provinzen New Brunswick, Nova Scotia, Prince Edward Island und Québec dürfen lediglich rein staatliche Verkaufseinrichtungen Cannabis anbieten. Auf Bundesebene scheint das Verhältnis dieser Frage zum Drogenkontrollsystem der Vereinten Nationen sowie zum internationalen Handelsrecht im Gesetzgebungsprozess kaum thematisiert worden zu sein.
    - In **Uruguay** reguliert und kontrolliert der Staat ausser Export und Import auch den Verkauf sowie die Produktion von Freizeitzwecken dienendem Cannabis. Der Verkauf von Cannabis im Inland geschieht durch staatlich lizenzierte Apotheken. Die Vereinbarkeit mit dem Drogensystem der Vereinten Nationen sowie mit dem internationalen Handelsrecht scheint im Gesetzgebungsverfahren nicht thematisiert worden zu sein.

International standards

Two goods-related agreements directly discuss international standards: the Agreement on Sanitary and Phytosanitary Measures (SPS) and the TBT Agreement.

- **SPS Agreement**
    - The scope of the SPS Agreement is limited. Its reach extends only to measures aimed at the protection of health from pests or disease and measures focused on protecting health from contaminated food, beverages, or feedstuffs.
    - The SPS Agreement is likely only relevant to the discussion of a liberalized cannabis market to the extent that there is an ‘edibles’ portion of that market.
    - To the extent that the SPS governs a given measure, Member countries are encouraged to use international health and safety standards, guidelines and recommendations. If they do so, they are relatively immune from challenge under the SPS. Members may use measures which result in higher standards if there is scientific justification.
- **TBT**
    - The TBT Agreement attempts to ensure that technical regulations (i.e. mandatory rules related to product characteristics, including those that establish proper packaging, marking or labelling), standards, testing and certification procedures do not create unnecessary obstacles to trade, while also providing WTO Members with the right to implement measures to achieve legitimate policy objectives, such as the protection of human health and safety, or the environment.

  - In the context of legalized cannabis market, there are many conceivable pathways for technical regulations to be instrumental in a legalization effort.
  - Article 2.4 of the TBT requires that technical regulations be based upon international standards, to the extent those standards exist.
  - Even when international standards exist, Members are not compelled to follow them if they are not relevant, or if they would be *ineffective* or *inappropriate* means for the fulfilment of the legitimate objectives pursued.
  - The ISO published a series of documents relating to the "Safety, security and sustainability of cannabis facilities and operations", but one cannot definitively say that these would be considered "international standards" within the meaning of the TBT.
- **National approaches related to standards**
  - **Definition of cannabis under national law**
    - In Kanada umfasst der Begriff des Cannabis in erster Linie die Cannabis-Pflanze sowie -Pflanzenteile. Nicht erfasst sind nicht lebensfähige Samen, der ausgewachsene Stängel ohne jegliche andere Pflanzenteile sowie Fasern eines solchen Stängels und die Wurzeln. Eine Einzeldosis Cannabis darf einen THC-Gehalt von höchstens 10 mg haben.
    - In Uruguay umfasst der Begriff des psychoaktiven Cannabis die blühende Spitze mit oder ohne Frucht der weiblichen Cannabis-Pflanze sowie ihre Derivative mit einem THC-Gehalt von mindestens 1 %. Ausgenommen sind jedoch die Samen und die vom Stängel abgetrennten Blätter. Industriehanf darf eine THC-Gehalt von 1 % nicht überschreiten, für dessen Samen gilt 0.5 % als Schwelle. Das in Apotheken erhältliche Cannabis weist einen THC-Gehalt von bis zu 9 % (ALFA, BETA) oder bis zu 15 % (GAMMA) auf.
  - **Labelling requirements under national law**
    - In Kanada müssen Cannabis-Produkte mit bestimmten Angaben ausgewiesen werden. Hierzu gehören Angaben insbesondere zur Lizenz, zum Produkt, zur Losnummer sowie verschiedene Warnhinweise.
    - In Uruguay müssen Cannabis-Produkte mit bestimmten Angaben ausgewiesen werden. Hierzu gehören Angaben insbesondere zur herstellenden Firma, zum Produkt, zur Losnummer, zur Verwendung, verschiedene Warnhinweise sowie ein Barcode der Stempelmarke zur Nachverfolgung.

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I. FACTS

The Federal Office of Public Health (FOPH) has mandated the Swiss Institute of Comparative Law (SICL) to draft a legal opinion on limitations for legalised cannabis markets due to international trade law. The FOPH has provided the SICL with the following facts:

"Le 28 avril 2021, la Commission de la sécurité sociale et de la santé publique du Conseil national (ci-après CSSS-N) a décidé de donner suite à l'initiative parlementaire 20.473 Siegenthaler (« Réguler le marché du cannabis pour mieux protéger la jeunesse et les consommateurs »), décision à laquelle sa commission sœur du Conseil des États (ci-après CSSS-E) a adhéré le 19 octobre 2021. En conséquent, une procédure législative a été engagée pour que la CSSS-N élabore un projet d'acte. Cette initiative parlementaire (iv. pa.) a pour objectif de créer un marché légal du cannabis et une réglementation globale de la culture, de la production, du commerce et de la consommation de cannabis contenant du THC.

L'objectif de cette initiative pourrait entrer en conflit avec plusieurs traités internationaux, notamment [entre autres] les règles en matière de libre-échange.

Un marché légal du cannabis existe ou est en projet dans plusieurs pays au niveau international (notamment en Uruguay, au Canada, dans certains états américains, à Malte, au Luxembourg, en Allemagne, aux Pays-Bas, etc.). Dans le cadre de l'élaboration du projet d'acte, il serait ainsi nécessaire d'identifier les principaux points de tensions […] et de déterminer quelle a été l'approche des pays ayant mis en place un marché légal du cannabis."

II. QUESTIONS

This legal opinion will address the following questions:

1. **Import/export rules:**
   1.1. What WTO rules are likely to be applicable to a legalised cannabis market in which import and export (and other aspects of the market) are highly regulated/controlled by the state?
   1.2. Are the rules discussed in response to question 1.1. likely to pose significant challenges for the creation of a legalised, highly regulated, cannabis market? If so, how?
   1.3. Are there any limitations on legalising cannabis under the Schengen-Agreement (esp. Arts. 71-73), as far as it concerns trade law issues?
   1.4. How did Canada and Uruguay deal with possible limitations originating from international trade law when legalising cannabis?
   1.5. Is import and/or export of cannabis allowed under the domestic law of Canada and Uruguay?

2. **Rules relating to state-owned monopolies and state-owned enterprises:**
   2.1. Describe the legal requirements for state-owned monopolies and/or state-owned enterprises when legalising cannabis under the UN Convention on Narcotic Drugs (Single Convention), in particular, Arts. 23 and 28.
   2.2. Describe any rules provided by international trade law that specifically relate to the establishment and functioning of state-owned monopolies and/or state-owned enterprises (esp. Art. XVII of the GATT).
   2.3. Describe the degree to which the dictates of the UN Convention on Narcotic Drugs (as discussed in response to question 2.1.) complement or conflict with those advanced by international trade law, particularly in the context of legalised cannabis markets.
   2.4. How did Canada and Uruguay deal with possible requirements of state-owned monopolies and/or state-owned enterprises under international trade law and/or the UN Convention on Narcotic Drugs when legalising cannabis?

3. **Health and safety standards:**
   3.1. Discuss the extent to which products are required to adhere to international health and safety standards, according to international trade rules.
   3.2. Related to the issue of standards, how did Canada and Uruguay define ‘cannabis’? If possible, indicate applicable THC-levels, and address whether said levels refer to the plant or the final product and why the respective levels have been chosen.
   3.3. Do Canada and Uruguay have labelling requirements? If so, briefly describe them.

With regard to the national law, this opinion will focus on primary sources, most notably on laws and parliamentary documents.

III. ANALYSIS

1. Rules on import and export of cannabis

Before examining the interplay between international trade law and the creation of a legalized cannabis market, it is worth providing a brief synopsis of the international trade order and, in particular, its legal sources.

The primary sources of international trade rules are multilateral treaties, which are overseen by the World Trade Organization (WTO). Plurilateral and bilateral trade agreements (generally, free trade agreements (FTAs)) form another large body of rules governing the trade relations between members of those agreements, but the WTO provides the backbone of the legal structure. The Organization features agreements on trade in goods, trade in services and trade in intellectual property (the collective multilateral treaties overseen by the WTO will be referred to herein as the "WTO Agreements"). These treaties, which are binding on the 164 WTO Member states (Members),[1] are buttressed by a dispute settlement process that allows panels – generally composed of three independent arbiters – to resolve individual disputes through interpretation of WTO rules and an appellate structure to adjudicate the legality of those findings, where necessary.[2]

There are many WTO treaties which *may* bear upon a liberalized cannabis market,[3] including:

Trade in Goods

- **The *General Agreement on Tariff and Trade* (GATT)**. The GATT is the principal document governing trade in goods. In brief, GATT aims to promote negotiations that will facilitate market access of Members' goods to the markets of other Members and non-discriminatory regulatory treatment of foreign goods once on the market. The basic market access rules include those restricting the use of quantitative restrictions and those supporting the lowering of tariff and non-tariff barriers (NTBs). The non-discrimination rules center around the Most-favoured nation obligation (MFN), that ensures equivalent treatment of all goods from WTO Members on another Member's market, and the national treatment obligation, which aims to ensure equal conditions of competition for WTO Member goods in comparison to the conditions offered domestic goods.
- ***The Agreement on Technical Barriers to Trade* (TBT)** - The TBT attempts to ensure that technical regulations, standards, and testing and certification procedures do not create unnecessary obstacles to trade, while also providing members with the right to implement measures to achieve legitimate policy objectives, such as the protection of human health and safety, or the environment. The TBT requires Members to base technical regulations on international standards if such standards exist.

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1 Importantly, Members are responsible for the acts of states and municipalities within their territory, from the viewpoint of WTO law. Thus, as a general matter, Switzerland is responsible for Cantonal governments complying with WTO rules in connection with a cannabis legalization (or any other) program that impacts upon international trade.

2 At present, the WTO Appellate Body is inoperative, as appointments to the appellate court have been systematically blocked (by the United States).

3 Given that the SICL is attempting to identify possible tensions of a stylized liberalization scheme, not all of the agreements are discussed in detail in the context of this opinion (e.g., the SICL has not given full consideration to the possible ways in which the TRIPS, the Agreement on Agriculture or the Licensing Agreement might impact upon the regime). Nevertheless, depending on the specific makeup of a given liberalization framework, these Agreements could prove relevant.

- ***Agreement on the Application of Sanitary and Phytosanitary Measures* (SPS) -** The SPS recognizes the right to protect human, animal and plant life or health, particularly against pests and diseases impacting food sources; while also imposing restrictions on SPS measures in order to avoid abuse. The SPS gives latitude in allowing countries to establish their own health standards but looks favourably upon those measures that are based upon existent international standards.
- ***Agreement on Agriculture*** – Agricultural goods have generally been considered a sensitive sector of tradable goods; with food safety and security being at the centre of those concerns. Historically, this manifested in high barriers to trade in such goods. *The Agreement on Agriculture* was aimed at alleviating some of the concerns and normalizing the market relative to other tradables. This was principally accomplished by replacing existing quantitative restrictions with tariffs (sometimes quite high). The Agreement on Agriculture also establishes a framework for the types of subsidies (financial or other support) that may and may not be provided by governments to producers and/or exporters of agricultural products.
- ***The Agreement on Import Licensing Procedures*** (Licensing Agreement) – The Licensing Agreement provides guardrails for licensing schemes established in connection with importation. In particular, the rules attempt to ensure that there is transparency in the licensing schemes that are created and establishes parameters that will help to safeguard against discriminatory procedures.

Trade in Services

- ***General Agreement on Trade in Services (GATS)*** - GATS covers measures of Members affecting "trade in services" (see Article I:1 of the GATS), which is defined in Article I:2 of the GATS as the supply of a service: (1) from the territory of one Member into the territory of any other Member (cross-border supply); (2) in the territory of one Member to a service consumer of any other Member (consumption abroad); (3) by a service supplier of one Member, through a commercial presence in the territory of any other Member (supply through a commercial presence); or (4) by a service supplier of one Member, through the presence of natural persons of a Member in the territory of any other Member (supply through the presence of natural persons). GATS establishes an MFN requirement on trade in services and allows Members to offer certain market access and national treatment obligations.

Trade of Intellectual Property

- *The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)* – TRIPS is the trade system's multilateral agreement on intellectual property (IP). The Agreement sets out minimum standards of protection to be provided by each Member in: copyright; trademarks including service marks; geographical indications including appellations of origin; industrial designs; patents including the protection of new varieties of plants; the layout-designs of integrated circuits; and undisclosed information including trade secrets and test data. The obligations of MFN and national treatment apply.

Free Trade Agreements

While free trade agreements (FTAs) and customs unions are inconsistent with the most-favored nation (MFN) obligation set forth in Article I:1 of GATT (and Article II:1 GATS)), GATT Article XXIV (and GATS Article V, for service agreements) allow them to be entered into, provided certain requirements are met. The principal requirement is that the free-trade area or customs union eliminates duties and other trade restrictions for 'substantially all trade' between the members of the FTA or customs union.[4]

[4] See Article XXIV of GATT.

The WTO agreements implicitly permit FTAs to create further FTAs with individual WTO Members or with other FTAs.

A WTO Member, Switzerland is also a Member of the European Free Trade Association (EFTA) along with Liechtenstein, Iceland and Norway. In addition to the EFTA Convention and the Free Trade Agreement with the European Union (EU) of 1972, Switzerland currently has a network of 33 free FTAs with 43 partners (many of these being FTAs between EFTA and another state). Notably, Switzerland's FTA network includes agreements with other countries that have or are establishing cannabis liberalization schemes (e.g., Canada). Negotiations are under way with other such countries (e.g., MERCOSUR, which includes Uruguay).

EFTA FTAs stipulate that differences between the parties are to be resolved by diplomatic means to the extent possible. However, they also provide for an arbitration procedure for disputes if diplomatic means are unable to facilitate an acceptable outcome for parties. An arbitration tribunal of this kind is set up for each individual case and is made up of three arbitrators. The tribunal will issue a binding and final ruling as to whether the measure being disputed is compatible with the relevant free trade agreement.[5]

1.1. International Trade Law

WTO rules likely to be applicable to a legalised cannabis market in which import and export (and other aspects of the market) are highly regulated/controlled by the state

Regulations relating to the trade of a given product or service may be thought of as existing along a spectrum. At one end of the spectrum, there is little to no regulation: a foreign or domestic product/service faces very little resistance in being brought to market. At the other end of the spectrum, there is a total ban on the product/service: neither foreign nor domestic firms may bring the product/service to market. Notably, international trade law is relatively uninvolved in regulating *either* of these extreme positions. Rather, it is across the vast middle of the spectrum – in which a product or service *may* be brought to market, but faces some combination of tariffs, internal taxes, health and safety standards, packaging and labelling requirements, etc. that limits the ability to do so – where the WTO rules take on their greatest relevance. This is an important point to recognize in the context of liberalizing a previously banned product (e.g., cannabis) because it shows that one cannot assume that trade law will react welcomingly to every type of market liberalization.

As cannabis liberalization schemes are increasingly being launched, some trade provisions may be in tension with (aspects of) these efforts. While we do not attempt to identify *all* of the WTO rules that might possibly bear on a legalized cannabis market, the contours of existent cannabis legalization frameworks (e.g., those in Canada and Uruguay) indicate some possible points of friction. These will be explored below by identifying the potentially relevant rules in the *GATT*, the *TBT*, and the *GATS*. While it is possible that a certain cannabis legalization framework may have constituent parts that involve obligations contained in the Agreement on Agriculture, the Trade Facilitation Agreement, and the Import Licensing Agreement (*inter alia*), these are not discussed.

One final note of preface will help to aid in understanding the substantive rules. Specifically, the WTO Agreements are generally silent about the treatment of specific products in the context of importation/exportation. For example, the Agreements do not set forth specific requirements relating to whether seeds, seedlings, source materials or other precursors for commercial production of cannabis can be imported/exported. Similarly, the WTO Agreements do not provide specific mandates relating

5 https://www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/Freihandelsabkommen/inhalt_freihandelsabkommen/streitbeilegung.html.

to whether importation of 'ready-to-use' cannabis products by wholesalers or sale outlets should be (dis)allowed. Rather, WTO law is focused on any discrimination that may result from a country's decision to (directly or indirectly) restrict importation/exportation of a product. This will be seen in the discussion of the rules that follows.

1.1.1 GATT

1.1.1.1. Article I – MFN

Article I of GATT represents the principal MFN obligation in the Agreement. In essence, the MFN obligation provides that, when/if a WTO Member provides a benefit (e.g., in the form of a tariff reduction on a given product) to one WTO member, it is obliged to immediately and unconditionally extend the same benefit to the 'like' products of other WTO members. Imagine, for example, that country A is liberalizing its cannabis market, and that Country B and Country C are both producers of legalized cannabis. If we assume that the cannabis from country B is 'like' that of country C, then it would be a violation to, *inter alia*, place a greater tariff or internal tax on country B's cannabis relative to country C's (and vice versa).

The concept of 'likeness' is key to any non-discrimination analysis (in the WTO context, for both MFN and national treatment): only "like products" need to be given competitively equal conditions. Yet because "likeness" is not the same as "identity" (allowing for "non-same" products to still be "like"), decisionmakers will need to examine various aspects of a product to determine if a non-discrimination obligation exists at all.

As a general matter, an assessment of the 'likeness' of products is a determination about how competitive two comparable products are (in the words of the Appellate Body, "the nature and extent of a competitive relationship between and among products").[6] In assessing whether two or more products are 'like', adjudicators will generally compare (i) the physical characteristics of the products; (ii) the end uses of the products; (iii) the tariff classification of the products; and (iv) the consumer tastes and habits with respect to the products. These factors are considered as part of a holistic analysis.

In the context of a legalized cannabis market, it is worth noting that not all cannabis-based products would be deemed 'like' the others. For example, a decisionmaker may not consider 'edibles' 'like' other forms of recreational cannabis due to, *inter alia*, the differences in the physical characteristics, end uses (e.g. one is ingested, the other smoked) and the ways in which consumers view the substitutability of the products. Similarly, a decisionmaker may find that differences in end-uses, consumer tastes and preferences and physical characteristics indicate that medical cannabis is not 'like' recreational cannabis.[7]

Relatedly, it is possible that the 'likeness' analysis might help justify differences in treatment (e.g., on the basis of THC content), due to variances in risk profiles of certain cannabis products. This happened in the *EC-Asbestos* case, in which asbestos and chrysotile fibers were held not to be like products largely on the basis of consumers' perceptions of health/safety differences between the two products. (That said, one should not overstate the relevance of *EC-Asbestos*. Indeed, cannabis might be viewed more similarly with alcohol; a product line that has been featured in a great deal of WTO dispute settlement. In these cases, traditional comparative analysis prevailed, though it should be mentioned

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6 In *Philippines-Distilled Spirits*, the Appellate Body held that the same basic test applies to determine whether products are 'like' within the meaning of III:2, first sentence of GATT (discussed below). Further, in *US-Clove Cigarettes*, the Appellate Body ruled that this test also applies to determine whether products are 'like' within the meaning of Article 2.1 of the TBT Agreement (also discussed below).

7 This notwithstanding, it is important to keep in mind that non-discrimination obligations would nevertheless exist ***within*** each of the 'like' product categories (e.g., the market for recreational cannabis or the market for medical cannabis, providing these constitute categories of 'like' products).

that the ratio of alcohol to overall ingredients was generally viewed as a legitimate means by which to discriminate among product groups. This may indicate that separations based on THC-limits would likewise be legitimate.)

1.1.1.2. Article III – National Treatment

While the MFN obligation aims to curtail discrimination among/between foreign products on a WTO Member's market, the 'national treatment' obligation contained in GATT Article III (and elsewhere) tries to limit discrimination *against* foreign products in favor of 'like' domestic products. Article III:1 articulates a general principle that *internal* measures (e.g., sales taxes or other conditions of sale, transportation, use, etc.) should not be applied "so as to afford protection to domestic production". Article III:2 provides two non-discrimination obligations; one obligation set out in the first sentence of Article III:2 relating to internal taxation of 'like products' and the other obligation set out in the second sentence of Article III:2 relating to internal taxation of 'directly competitive or substitutable products'. The national treatment obligation of Article III of the GATT 1994 not only concerns internal taxation dealt with in Article III:2, however. Article III also applies to internal regulation(s) (dealt with primarily in Article III:4). The test for consistency of a measure with III:4 requires examining (1) whether the measure *affects* the internal sale, offering for sale, purchase, distribution, or use of like products); (2) whether the imported and domestic products are *like* products; and (3) whether the imported products are accorded *less favorable treatment*.

The development of a cannabis legalization framework that does not consider the national treatment obligations might inadvertently include measures that violate the state's GATT obligations. This would be the case, for example, where there is discrimination against imported cannabis at the point of internal sale (e.g., charging a larger sales tax on imported cannabis relative to domestically-sourced cannabis) or a regulation that places an undue burden on foreign producers' attempts to bring cannabis to market relative to domestic producers (e.g., imposing different certification requirements for imported cannabis).

1.1.1.3. Article XI – Quantitative Restrictions

The GATT has a general prohibition on the use of measures that limit the amount of goods entering or leaving a market. GATT Article XI states,

> No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

Article XI has a broad scope, prohibiting not merely bans or quotas but any measures that can – even indirectly or in practice - be considered 'restrictions' on trade. This includes licensing procedures that are subject to either administrative decision making (i.e., are not merely for statistical purposes) or waiting times longer than a few days. Moreover, Article XI's prohibition extends to importation *and* exportation.

As a result, a degree of tension exists between WTO Members' cannabis liberalization schemes – at least insofar as they are envisaged to have rather severe import/export limitations – and their GATT obligations. There is also a tension between certain aspects of the Single Convention's dictates relating to importation (e.g., Article 30 notes that "Parties shall require that trade in and distribution of drugs be under license" except when a state enterprise carries it out) and exportation (e.g., certain elements of Article 31) and GATT Article XI.

Friction between a given liberalization scheme and GATT Article XI is arguably greater when there is a wide-scale liberalization within a country *combined with* severe restrictions on importation (e.g., a ban). There may be a path for justifying a liberalization scheme that allows for little or no importation, but which constrains domestic cannabis use to the fulfillment of some medical and/or scientific purpose. However, this path is made much narrower when a recreational cannabis market is allowed to develop domestically while importation is precluded.

Relationship between Article XI and Article III GATT

One final note about the relationship between Article XI (which pertains to 'border' or 'external' measures) and Article III (which concerns 'internal' measures) should be made. Essentially, where a measure only applies to imports (e.g., an import quota of 'x' tons of hemp), Article XI applies. By contrast, where a measure applies to both imports and domestic products, then Art. III governs the measure (e.g., a sales tax on both imported and domestically produced bicycles).[8] Understanding this relationship helps explain why a complete ban on a product is a potentially more in harmony with WTO rules than is the creation of product sourced only by domestic producers. Howse and Eliason, while discussing Canadian import controls in the context of cannabis and Article XI, capture this dynamic, stating,

> A blanket ban on imports or exports where the product is legally available domestically is a clear violation of Article XI. As the panel stated in *Brazil-Tyres*, '[t]here is no ambiguity as to what 'prohibitions' on importation means: Members shall not forbid the importation of any product of any other Member into their markets.'[9]

1.1.2. TBT Agreement

For the TBT Agreement requirements to apply to a measure, the measure must be either a 'technical regulation', a 'standard'[10] or a 'conformity assessment procedure'.[11] As domestically-created 'standards' and conformity assessment procedures (CAPs) have not received much attention in the context of WTO litigation,[12] the SICL will focus on 'technical regulations'. This term is defined in Annex 1.1 of the TBT Agreement as a:

> [d]ocument which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

Importantly, the list provided in the last sentence of the definition is not exclusive. Moreover, the explicit inclusion of "related processes and production methods" broadens the scope of the TBT's coverage to include an examination of rules determining the way a product was/is produced.

It is easy to imagine that a legalized cannabis market might employ technical regulations (and perhaps even for CAPs supporting those technical regulations) to support the overall legalization effort. For example, the establishment of maximum THC-levels might be considered a technical regulation – because this could amount to 'laying down' of a product characteristic. Similarly, aspects relating to packaging and labelling would fit within the definition.

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8 There have been cases in which a panel opened the door to allowing the application of *both* Article III:4 and Article XI:1 (see, for example, Panel Report, *India – Autos*, paras. 7.222-7.224) to the same measure, but this is not a dominant trend in the case law.

9 Antonia Eliason & Robert Howse, A Higher Authority: Canada's Cannabis Legalization in the Context of International Law, 40 MICH. J. INT'l L. 327 (2019) (Eliason and Howse), at 363.

10 Standards will be discussed more fully in the context of Section 3.1, infra.

11 Conformity assessment procedures' (CAPs) are defined in Annex 1.3 to the TBT as: [a]ny procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled.

12 As will be noted in the Section 3.3, "international standards" have been an issue that has received attention in WTO jurisprudence.

Where the TBT applies to cannabis liberalization frameworks, we identify a few potential sources of friction with TBT obligations.

1.1.2.1. Article 2.1 – MFN and National Treatment

Article 2.1 of the TBT Agreement requires that Members ensure, with respect to technical regulations, that products imported from the territory of any Member will be accorded treatment no less favorable than that given to like products of national origin and to like products originating in any other country. That is, the TBT Agreement contains both an MFN obligation and a national treatment obligation. Significantly, there are no general exceptions that might justify TBT Agreement-inconsistent 'technical regulations.'

1.1.2.2. Article 2.2 – Trade Restrictiveness

A technical regulation must not restrict trade more than is necessary to fulfil its policy objective. TBT Article 2.2 states that technical regulations must not be "prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade."

To determine whether a measure is overly 'trade-restrictive', the Appellate Body in *US – Tuna II*, stated that,

> A panel should begin by considering factors that include: (i) the degree of contribution made by the measure to the legitimate objective at issue; (ii) the trade-restrictiveness of the measure; and (iii) the nature of the risks at issue and the gravity of consequences that would arise from nonfulfilment of the objective(s) pursued by the Member through the measure.[13]

While Article 2.2 of the TBT Agreement may not be the most obvious source of tension for cannabis legalization measures, the likelihood of high trade restrictiveness associated with such measures makes Article 2.2's mandates worthy of consideration.

1.1.2.3. Article 2.4

Article 2.4 stipulates that Members must base any technical regulations on relevant international standards, to the extent international standards exist. This will be more fully discussed in Section 3.1, *infra*.

1.1.3. GATS – Trade in Services

Like the GATT, MFN and national treatment obligations are relevant concepts in the GATS. WTO Members' MFN obligations are by default applicable across all services, but each Member had the opportunity to exempt services or service sectors from its MFN obligation in Article II GATS by virtue of setting out an "Article II Exemption List" as an annex.

The obligations on quantitative restrictions and national treatment (Articles XVI and XII respectively) are found in the so-called "Specific Commitments" section of the GATS. These principles therefore apply only to those services sectors or sub-sectors of services activity that are specified by individual WTO Members. If a service sector does not appear on the Member's List of Specific Commitments, it will not be subject to the obligations of market access or national treatment. Where a service or service sector does appear on this list, the extent of obligations can be limited.

For its part, Switzerland, like Canada, has agreed to be bound in certain sectors relevant to a liberalized cannabis market. These include, *inter alia*, wholesaling, distribution, and retailing services. As previously noted, these commitments bring obligations analogous to GATT XI (on quantitative restrictions)

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13 Appellate Body Report, *US – Tuna II (Mexico)*, para. 322. See also Appellate Body Reports, *US – COOL*, paras. 374-378; and *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.197

and GATT III (national treatment) to bear on the aforementioned sectors.[14] Importantly, Switzerland's commitments do not extend to pharmaceuticals.

Eliason and Howse draw on Canada to illustrate one way in which a Member could fall afoul of GATS' national treatment obligations in the wholesaling, distribution, and retailing services sectors. Specifically, they identify Article 62(7)(e)(iii) of the Canadian Cannabis Act – which gives the Minister of Justice the ability to deny a permit to a service provider on the sole ground that 'the applicant is an organization that was incorporated, formed or otherwise organized outside of Canada' – as being "a clear violation of Canada's obligation of National Treatment in the GATS".[15]

While national treatment obligations extend far beyond licensing requirements, it is worth noting that GATS features specific requirements relating to licensing and professional qualifications. A main provision containing such is Article VI.[16] Article VI:4 provides that (subject to future negotiations or more specific disciplines) professional licensing and qualification requirements must be:

> (a) based on objective and transparent criteria, such as competence and the ability to supply the service; (b) not more burdensome than necessary to ensure the quality of the service; [and] (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

Ultimately, it is important that the dictates of the GATS be considered in formulating the precise make-up and function of the internal market for cannabis.

1.2. Challenges for creation of a legalised cannabis market due to WTO rules

Whether and how the rules discussed in response to question 1.1. are likely to pose significant challenges for the creation of a legalised, highly regulated, cannabis market

In attempting to understand the significance of the challenges that might be posed to cannabis liberalization schemes by MFN, national treatment or other WTO obligations, one must be aware of the fact that the likelihood of a country's measure actually facing a legal challenge in the context of the WTO is low. There are many reasons for countries **not** to initiate claims, even when there is a reasonable suspicion that a trading partner is failing to act consistently with WTO obligations. This is certainly true in the context of cannabis. For example, there are many countries that have no desire to develop a liberalized cannabis market. As such, they may see little commercial advantage in bringing a claim. For those countries that *are* creating (or have created) such a marketplace, other equally compelling deterrents may be present. In particular, it is likely that those countries are themselves unsure about the legal grounding of one or more aspect(s) of their own legalized market and may not wish to shed light on those potential vulnerabilities.

Even if a case is initiated, the WTO dispute settlement system requires countries to negotiate before establishing a panel. This mandatory consultation phase gives an opportunity to the claimant and the respondent to arrive at a mutually beneficial conclusion.

In the event a claim is initiated in the WTO dispute settlement system, there are legal defences that may be available to justify otherwise inconsistent measures.

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14 Service Schedules for all WTO Members (including, Switzerland) can be found on the WTO's website at: https://www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm.

15 Eliason and Howse, at p. 377.

16 Notably, GATS also contains provisions on monopolies and state enterprises (Article VIII; which will be discussed more fully in Section 2.2, *infra*).

1.2.1. GATT exceptions

In the event that a Member has acted inconsistently with one or more GATT obligations, it may nevertheless be possible to legally justify those measures through an appeal to an appropriate exception.[17] In the context of legalized cannabis, it would appear that the most relevant GATT exceptions are:

- XX(a) – which allows Member States to take measures necessary to protect public morals.
- XX(b) – which allows Members to take measures necessary to protect human, plant or animal life or health.
- XX(d) – which states that Members may take measures 'necessary to secure compliance with laws or regulations which are not otherwise inconsistent with the provisions of the GATT'.

Whether a country will be able to successfully defend a measure using one of the exceptions contained in Article XX is a two-step process.[18] The first step is to look at the individual elements within Article XX (i.e., those individual elements found in items (a) through (j)) to see whether a measure falls within the subject matter of the chosen exception and if there is the required relationship between the measure and the pursuit of the policy interest (together, these are referred to as the 'provisional justification' stage). The second step is to consider the preambular language of Article XX (the "chapeau") that evaluates if the measure is applied in a permissible manner.

1.2.1.1. Provisional justification

1.2.1.1.1. XX(a) – Public Morals

In order to establish that a measure is provisionally justified under Article XX(a), the analysis proceeds in two stages, according to the AB in *Colombia-Textiles* (2016). First, the measure must be 'designed' to protect public morals. This involves determining that there is a relationship between the otherwise GATT-inconsistent measure and the protection of public morals, where the latter denotes standards of right and wrong conduct maintained by or on behalf of a community or nation (see the Panel Report for *US – Gambling*, para. 6.465). Generally, panels and the Appellate Body have been deferential to a state's claim that a measure is 'designed' to protect public morals.

The second step in the analysis is the determination that the measure is "necessary". The Appellate Body in *Korea-Beef* (2001) provided a 'balancing test' to determine whether a measure is necessary. This test looks at (1) the contribution the measure makes to the stated purpose (e.g., protecting human life or health) (2) The importance of the common interest or values protected and (3) the impact of the measure on imports or exports. If this test yields a preliminary finding that the measure is, in fact, "necessary", it must be reconfirmed by comparing the actual measure to alternatives – specifically, is there a less-trade restrictive alternative that makes an equal contribution to the objective and is reasonably available.

While an appeal to 'public morals' in the context of GATT-inconsistent aspects of legalization schemes might seem to be fruitful strategy, much depends on the nature of the scheme. Ultimately, an invocation of XX(a) would need to revolve around the claim that a societal norm is being breached by allowing cannabis to be bought, sold and used. That is a difficult claim to make whilst in the midst of domestic legalization.

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[17] To the extent available, a GATT exception has the power to justify behaviour that is inconsistent with any of the obligations set forth in the GATT. They do not, however, always have the power to justify violations of certain other agreements (e.g., the TBT).

[18] This two-step analysis was confirmed in the first Appellate Body decision, *US – Gasoline*, in 1996.

1.2.1.1.2.XX(b) – Protection of Human, Animal or Plant Life or Health

GATT Article XX(b) allows a country to justify an otherwise GATT-inconsistent measure when said measure is "necessary to protect human, animal, plant life or health". The test of applicability mirrors that which prevails for the public morals exception, with an examination of the design of the measure and an application of the 'necessity' test (using the same balancing test aforementioned).

Article XX(b) may offer a more plausible defence for an import/export ban than XX(a) in the cannabis legalization context. For example, if the domestic market was limited to medicinal cannabis and if it could be demonstrated that allowing greater importation of cannabis would lead to unwanted problems (e.g., more recreational use, which might relate to higher negative health consequences), for a state could try to establish this as provisional justification. However, this argument may be undercut if a domestic recreational market is foreseen. Certainly, the country invoking the exception could claim that risks associated with differences in quality between domestic and foreign sources would justify limiting trade. It is questionable, however, whether a panel would consider something akin to a full ban on importation of cannabis to be appropriate under those circumstances (e.g., a licensing scheme on imports/exports may be considered as both feasible and less trade-restrictive).

1.2.1.1.3.XX(d) – Securing Compliance with Laws or Regulations

Article XX(d) provides an exception for measures that are "necessary to secure compliance with laws or regulations which are not inconsistent" with the provisions of the GATT.' On the surface, XX(d) would seem to offer an opportunity to explicitly tether the commitments set forth in the Single Convention with WTO rules (i.e., a country would argue that the measure was meant to secure compliance with the Single Convention). However, Panels and the Appellate Body have found that the 'laws and regulations' referred to in Article XX(d) relate to the *domestic law* of the country invoking the exception. Thus, Switzerland's commitment to the Single Convention – an international law obligation - is an insufficient basis upon which to invoke the XX(d) exception.

It is possible for a country to have sufficiently incorporated the international convention standards into its own domestic law, in which case, the XX(d) justification may be available.[19] However, even if a country could show the domestic law sufficiently incorporated the Single Convention, it is not clear that a panel would deem a cannabis legalization effort to be a measure taken to 'secure compliance' with the UN Convention, as it is a treaty which, on the whole, is meant to constrain (sometimes quite narrowly) the market for drugs.

1.2.1.2. The Chapeau

If provisional justification confirms the availability of one of the exceptions vis-à-vis a given measure, a country invoking the exception must then demonstrate conformity with the "chapeau" of Article XX. Over the years, most measures that have been provisionally justified have failed to pass the chapeau-scrutiny.

The object and purpose of the chapeau of Article XX is to make sure that provisionally justified measures are not *applied* in such a way as would constitute a misuse or an abuse of the exceptions of Article XX. The chapeau dictates that the application of the trade-restrictive measure may not constitute 'a means of arbitrary or unjustifiable discrimination between countries where the same conditions

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[19] The Appellate Body has clarified that an international instrument must operate "with a sufficient degree of normativity and specificity under the domestic legal system of a Member so as to set out a rule of conduct or course of action, and thereby qualify as a 'law or regulation'" within the meaning of XX(d) (See *India-Solar Panels*). Such an inquiry is carried out on a case-by-case basis, taking into account all the other relevant factors relating to the instrument and the domestic legal system of the Member.

prevail'; or 'a disguised restriction on international trade'.[20] The Appellate Body has said that the interpretation and application of this language is a search for the appropriate line of equilibrium between, on the one hand, the right of Members to adopt and maintain trade-restrictive legislation and measures that pursue certain legitimate societal values or interests and, on the other hand, the right of other Members to trade.

Ultimately, the foregoing discussion of the GATT Article XX exceptions suggests that, while countries may be able to justify cannabis legalization schemes that are otherwise GATT-inconsistent by invoking one or more of the exceptions, such an outcome is neither guaranteed nor, at least in some cases, will it be likely.

1.2.2. TBT exceptions

Although it has no general exceptions, the Agreement on Technical Barriers to Trade does provide some opportunities for those Members that have fallen afoul of the TBT. For example, the preamble provides that,

> […]
>
> Recognizing that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement;
>
> […].

Importantly, the Appellate Body has recognized this sixth recital as providing relevant context for understanding Article 2.1 of the TBT (i.e., the MFN and national treatment obligations of the TBT).[21] This gives Members some basis upon which to advance TBT violation defences similar to those brought in connection with a GATT XX(b) defence.

Similarly, Article 2.2 of the TBT, which prohibits measures that create 'unnecessary obstacles to international trade', stipulates those measures taken 'to fulfil a legitimate objective', may be allowed. The non-exhaustive list of such 'legitimate objectives' are: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment.

1.2.3. GATS Exceptions

GATS has a general public policy exception (**Article XIV**) that, like GATT, provides opportunities for Members to justify otherwise GATS-inconsistent measures, where said measures aim at: the protection of public morals and public order (**XIV(a)**); the protection of human, animal or plant life or health (**XIV(b)**); and to secure compliance with laws or regulations which are not inconsistent with the GATS

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20 There significant jurisprudence dealing with the notions of 'arbitrariness' and 'unjustifiability' in connection with the chapeau, which, for the sake of brevity, will not be recounted here.

21 In particular, the Appellate Body in *US-Tuna II (Mexico)*, para. 213 stated,

> Although the sixth recital does not explicitly set out a substantive obligation, we consider it nonetheless sheds light on the meaning and ambit of the 'treatment no less favorable' requirement in Article 2.1, by making clear, in particular, that technical regulations may pursue legitimate objectives but must not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination.

(**XIV(c)**). The analysis conducted in conjunction with these exceptions mirrors that which takes place in the context of the GATT.

1.3. Limitations on legalising cannabis due to trade law under the Schengen-Agreement

Limitations on legalising cannabis under the Schengen-Agreement (esp. Arts. 71-73), as far as it concerns trade law issues

The potential tensions that exist between the Articles 71-73 of the Schengen Agreement and the WTO Agreements would ostensibly centre around the notion of 'illicit';[22] where the latter agreements might find non-discrimination violations or market access violations where the line drawn between 'licit' and 'illicit' has the effect of criminalizing/banning a product while simultaneously erecting a legal market for what it takes to be a 'like' product.

In reviewing Articles 71-73 of the Schengen Agreement, the SICL did not find there to be *unique* challenges to trade (relative to those established by the UN Conventions). In fact, Article 71.1 essentially brings the Schengen-Agreement into accord with the UN Conventions, stating,

> The Contracting Parties undertake as regards the direct or indirect sale of narcotic drugs and psychotropic substances of whatever type, including cannabis, and the possession of such products and substances for sale or export, to adopt in accordance with the existing United Nations Conventions, all necessary measures to prevent and punish the *illicit* trafficking in narcotic drugs and psychotropic substances.[23]

1.4. National laws dealing with limitations under international trade law

Die **Vereinten Nationen** haben den Umgang mit Cannabis als Betäubungsmittel insbesondere im Einheits-Übereinkommen über die Betäubungsmittel mit seinem Zusatzprotokoll vom 25. März 1972 (Einheits-Übereinkommen), im Übereinkommen über psychotrope Stoffe vom 21. Februar 1971 sowie im Übereinkommen gegen den unerlaubten Verkehr von Betäubungsmitteln und psychotropen Stoffen vom 20. Dezember 1988 geregelt. Diese **verbieten** grundsätzlich die **Ein- und Ausfuhr von Cannabis**, soweit dieses nicht medizinischen oder wissenschaftlichen Zwecken dient.[24] Aus dem **internationalen Handelsrecht** können sich nun jedoch **entgegenlaufende Regelungen** ergeben. Wird in einem Mitgliedstaat der Erwerb von Cannabis zu Freizeitzwecken legalisiert, so kann es im Gegenteil einen Verstoss gegen die Grundsätze des internationalen Freihandels darstellen, die Ein- und Ausfuhr von Cannabis zu verbieten.[25] Es stellt sich also die Frage, ob und wenn ja, wie Staaten, die Cannabis zu Freizeitzwecken legalisiert haben, mit den Vorgaben des internationalen Freihandels umgehen.

1.4.1. Canada

Kanada hat mit seinem am 17. Oktober 2018 in Kraft getretenen **Cannabis Act**[26] Cannabis zu Freizeitzwecken in begrenztem Masse legalisiert. **Die Ein- und Ausfuhr solchen Cannabis' bleibt jedoch**

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22 This is substantially similar to the nature of some of the tension(s) that exist between WTO Agreements and the UN Conventions.

23 Emphasis added.

24 Siehe hierzu ausführlich F. Sprecher, Rechtsgutachten Völkerrechtskonformität einer Cannabisregulierung im Rahmen der Pa. Iv. Siegenthaler 2023, November 2023, S. 3 ff.

25 Siehe hierzu ausführlich die Punkte 1.2. und 1.2.

26 Cannabis Act (S.C. 2018, c. 16), verfügbar unter https://laws-lois.justice.gc.ca/eng/acts/C-24.5/ (18.12.2023).

weiterhin verboten.[27] Darin könnte ein Verstoss gegen den internationalen Freihandel gesehen werden.[28] Nach unserer Recherche scheint dies dem kanadischen Gesetzgeber jedoch kaum bewusst gewesen zu sein, jedenfalls scheint[29] dieser Aspekt im Gesetzgebungsverfahren nur einmal thematisiert worden zu sein.

Im Hinblick auf Import und Export von Cannabis wurde insgesamt **nur selten der völkervertragsrechtliche Rahmen thematisiert**. Vereinzelt finden sich Nachfragen zur Vereinbarkeit des geplanten Cannabis Acts mit dem Drogenkontrollsystem der Vereinten Nationen im Allgemeinen, jedoch ohne Bezug zur Ein- und Ausfuhr von Cannabis. Stattdessen plädiert insbesondere ein Abgeordneter in einigen Sitzungen ausführlich dafür, die Ein- und Ausfuhr von Freizeitzwecken dienendem Cannabis zu erlauben. Aber auch in diesen Wortmeldungen geht er nicht auf den internationalen Freihandel ein, obwohl die dortigen Vorgaben durchaus ein starkes juristisches Argument für die Legalisierung von Import und Export darstellen könnten.[30]

Erwähnenswert ist jedoch eine **Sitzung des *Standing Senate Committee on Foreign Affairs and International Trade*** im März 2018. Auf Nachfrage durch eine Senatorin erwähnt ein Vertreter von *Global Affairs Canada*, dem kanadischen Departement für auswärtige Angelegenheiten, unter anderem internationale Handelsabkommen, die für Kanada relevant sind. Der Vertreter versichert ausdrücklich, «**das Legalisieren von Cannabis wird keine von Kanadas Verpflichtungen unter NAFTA, unter der Welthandelsorganisation oder unter dem CETA, dem europäischen Handelsabkommen, brechen**.»[31] Der Vertreter führt aus, wie bei jeder Massnahme, welche Kanadas bestehende internationale Verpflichtungen betreffen könne, seien Überlegungen erforderlich, um mit diesen Verpflichtungen in Einklang zu bleiben. Diese Überlegungen hätten sie angestellt, bevor sie weiterverfahren hätten. Im Hinblick auf NAFTA könne er zudem sagen, die Legalisierung von Cannabis sei im Rahmen der NAFTA Verhandlungen nicht erwähnt worden.[32] **Weder die Senatorin noch der Vertreter von Global Affairs Canada erklären dabei, um welche Verpflichtungen es tatsächlich geht.** Wieder auf Nachfrage bestätigt der Vertreter von *Global Affairs Canada*, die Regelungen über die Einfuhr und Ausfuhr von Cannabis blieben unverändert. So bleibe Ein- und Ausfuhr von medizinischem Cannabis unter engen Voraussetzungen und mit Genehmigung durch das Gesundheitsministerium *Health Canada* gestattet

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27 Siehe hierzu unter Punkt 1.5.1. in diesem Gutachten.

28 Siehe hierzu ausführlich A. Eliason & R. Howse, A Higher Authority: Canada's Cannabis Legalization in the Context of International Law, in 40 Michigan Journal of International Law (Mich. J. Int'l L.) 2019, S. 327 ff. (358 ff.).

29 Für diese Recherche haben wir alle auf der Website des Gesetzgebungsverfahrens für den Cannabis Act (verfügbar unter https://www.parl.ca/legisinfo/en/bill/42-1/C-45, 15.12.2023) zur Verfügung gestellten Dokumente durchgesehen. Aufgrund der Länge der jeweiligen Dokumente haben wir grösstenteils mit einer Stichwortsuche gearbeitet, um eventuell einschlägige Passagen zu finden. Hierbei handelte es sich in erster Linie um die Stichworte «*export*» und «*treat*» (für «*treaty*» oder «*treaties*») sowie um eine Suche nach den ins Auge fallenden Akronymen NAFTA und CETA.

30 Siehe insbesondere House of Commons Standing Committee on Health, Nr. 071, 02.10.2017, verfügbar unter https://www.ourcommons.ca/documentviewer/en/42-1/HESA/meeting-71/evidence, Rn. 1710-1725; dasselbe, Nr. 072, 03.10.2017, verfügbar unter https://www.ourcommons.ca/documentviewer/en/42-1/HESA/meeting-72/evidence, Rn. 1125-1150; House of Commons Debates, Nr. 236, 22.11.2017, verfügbar unter https://www.ourcommons.ca/DocumentViewer/en/42-1/house/sitting-236/hansard (alle 15.12.2023), Rn. 1650, 1700.

31 Proceedings of the Standing Senate Committee on Foreign Affairs and International Trade, Nr. 41, 21.03.2018, verfügbar unter https://sencanada.ca/en/Content/SEN/Committee/421/aefa/41ev-53882-e (15.12.2023); Übersetzung durch das Institut.

32 Proceedings of the Standing Senate Committee on Foreign Affairs and International Trade, Nr. 41, 21.03.2018, verfügbar unter https://sencanada.ca/en/Content/SEN/Committee/421/aefa/41ev-53882-e (15.12.2023).

und sei im Einklang mit internationalen Betäubungsmittelkonventionen. Jede nichtautorisierte Ein- oder Ausfuhr von Cannabis bleibe eine schwere Straftat.[33]

Im **Bericht des *Standing Senate Committee on Foreign Affairs and International Trade*** zum Gesetzesentwurf verweist das Komitee ebenfalls auf die gerade dargelegten Erklärungen des Vertreters von *Global Affairs Canada*. Dabei nennt das Komitee **keine weiteren Quellen** für die Vereinbarkeit der Ein- und Ausfuhrregelungen mit den Vorgaben von NAFTA, CETA und der Welthandelsorganisation und stellt auch nicht genauer dar, worum es sich bei diesen Vorgaben genau handelt.[34]

1.4.2. Uruguay

Uruguay hat Cannabis durch sein **Gesetz über die Regulierung und Kontrolle von Cannabis (Ley 19172) vom 20. Dezember 2013**[35] legalisiert, dabei jedoch auch einer **strengen staatlichen Kontrolle** unterstellt. Dies umfasst auch den Import und Export von Cannabis, welchen der Staat kontrolliert und reguliert.[36] Im Gegensatz zum Verhältnis dieser Legalisierung von Cannabis zu den Vorgaben des Drogenkontrollsystems der Vereinten Nationen scheinen **Aspekte des internationalen Handelsrechts bisher jedoch kaum öffentlich thematisiert** worden zu sein. Unsere Recherche in den Sitzungsprotokollen und anderen Dokumenten zum Gesetzgebungsprozess,[37] in internationalen juristischen Datenbanken[38] sowie auf verschiedenen einschlägigen Websites[39] hat keinerlei Informationen hierzu ergeben. Wir konnten lediglich ausmachen, dass Uruguay die Welthandelsorganisation seit dem Jahre 2019 regelmässig in einem Fragebogen darüber informiert hat, dass für die Einfuhr von Cannabis eine Lizenz erforderlich ist.[40]

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33 Proceedings of the Standing Senate Committee on Foreign Affairs and International Trade, Nr. 41, 21.03.2018, verfügbar unter https://sencanada.ca/en/Content/SEN/Committee/421/aefa/41ev-53882-e (15.12.2023).

34 Report of the Standing Senate Committee on Foreign Affairs and International Trade, The Subject Matter of Bill C-45: An act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other acts, insofar as it relates to Canada's international obligations, Mai 2018, verfügbar unter https://sencanada.ca/content/sen/committee/421/AEFA/Reports/AEFA_BILLC-45_Report_Final_e.pdf (15.12.2023).

35 Ley Nr. 19172: Regulación y control del cannabis, verfügbar unter https://www.impo.com.uy/bases/leyes/19172-2013 (21.12.2023).

36 Art. 2 Ley 19172.

37 Mittels der Suchmaske der Website des uruguayischen Parlaments (verfügbar unter https://parlamento.gub.uy/documentosyleyes/busquedaAvanzada, 22.12.2023) konnten wir rund 90 Dokumente aus den Jahren 2012-2014 ausfindig machen, die das Wort «Cannabis» enthielten. Aufgrund der Länge der jeweiligen Dokumente haben wir jeweils eine Stichwortsuche durchgeführt mit den Begriffen «*export*» für *exportación*, «*oms*» für die spanische Abkürzung der Welthandelsorganisation, sowie «mercosur», «aladi» und «gatt» für die verschiedenen Handelsabkommen.

38 Wir haben die beiden englischsprachigen Datenbanken Westlaw Classic und HeinOnline mit den Schlagworten «*Uruguay Cannabis WTO*» durchsucht.

39 Dies betrifft insbesondere die Websites des Staates Uruguay (verfügbar unter https://www.gub.uy/), des uruguayischen *Instituto de regulación y control del cannabis* (IRCCA) (verfügbar unter https://ircca.gub.uy/) sowie der Suchemaske für Notifikationen an die Welthandelsorganisation (verfügbar unter https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S003.aspx, alle 22.12.2023) mit dem Stichwort «Cannabis» für den Vertragsstaat Uruguay.

40 World Trade Organization, Dokument G/MA/QR/N/URY/3 vom 01.11.2019, verfügbar unter https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/MAQRN/URY3.pdf&Open=True, S. 11; dieselbe, Dokument G/MA/QR/N/URY/4 vom 06.08.2020, verfügbar unter https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/MAQRN/URY4.pdf&Open=True, S. 11; dieselbe, Dokument G/MA/QR/N/URY/5 vom 18.07.2023, verfügbar unter https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/MAQRN/URY5.pdf&Open=True (alle 22.12.2023), S. 15.

1.5. Import and export of cannabis under national law

Import and/or export of cannabis in Canada and Uruguay

1.5.1. Canada

Kanada hat Import und Export von Cannabis im Cannabis Act geregelt. Demnach sind **Import und Export von Cannabis verboten, sofern der Cannabis Act selbst dies nicht ausnahmsweise gestattet**.[41] Eine solche Ausnahme findet sich lediglich für medizinische und Forschungszwecke sowie für Industriehanf. Demnach darf der zuständige Minister oder die zuständige Ministerin[42] Ein- und Ausfuhrlizenzen und -genehmigungen **ausschliesslich für Cannabis ausstellen, welcher medizinischen oder wissenschaftlichen Zwecken dient, sowie für Industriehanf**.[43] Die Ein- und Ausfuhr von Cannabis, welcher Freizeitzwecken dient,[44] ist mithin verboten. Ein Verstoss hiergegen kann im Falle einer sogenannten *indictable offence* mit einer Gefängnisstrafe von bis zu 14 Jahren bestraft werden[45] und im Falle einer sogenannten *summary conviction* mit einer Geldstrafe in Höhe von bis zu $5'000 und/oder einer Gefängnisstrafe von bis zu sechs Monaten bestraft werden.[46] Handelt es sich bei der schuldigen Person nicht um eine natürliche, sondern um eine juristische Person, so kann die Tat mit einer Geldstrafe von bis zu $300'000 bestraft werden.[47]

Um eine solche **Lizenz oder Genehmigung zu erhalten**, muss die interessierte Person einen Antrag einreichen, welcher jedenfalls Angaben über diejenigen Anteilseigner oder Mitglieder enthalten muss, die die Organisation direkt oder indirekt kontrollieren, sowie auf Anfrage weitere Informationen.[48] Bei diesen kann es sich auch um zusätzliche finanzielle Informationen handeln, die im Zusammenhang mit dem Genehmigungsantrag stehen.[49] Das Gesundheitsministerium *Health Canada* als zuständige Behörde entscheidet sodann über den Lizenzantrag. Hierfür sieht das Gesetz auch eine Liste an Gründen vor, weshalb der Antrag abgelehnt werden kann. Dies ist der Fall wenn die Lizenz eine Gefahr für die öffentliche Gesundheit oder Sicherheit bedeuten würde, bei unwahren Informationen im Antrag, bei Verstössen der antragstellenden Person gegen bestimmte Betäubungsmittelgesetze oder darauf beruhende Anordnungen innerhalb der letzten zehn Jahre, wenn die Person besonders jung ist, ihren gewöhnlichen Aufenthalt nicht in Kanada hat oder es sich um eine juristische Person handelt, die ausserhalb Kanadas gegründet wurde, wenn die Sicherheitsüberprüfung negativ ausfällt die antragstellende Person, wenn der Minister oder die Ministerin der Ansicht ist, die Ablehnung sei im öffentlichen Interesse oder bei anderen festgelegten Ablehnungsgründen.[50] Letztere betreffen den Fall, dass die antragstellende Person keine Lizenz dafür hat, die geplante Tätigkeit am vorgesehenen Ort auszuüben, oder wenn sie diese Lizenz abändern möchte.[51] Die eigentliche Genehmigung muss sodann verschie-

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41 Subsect. 11(1) Cannabis Act:
«*Importing and exporting*
Unless authorized under this Act, the importation or exportation of cannabis is prohibited."

42 Der Cannabis Act gibt nicht konkret vor, welches Ministerium für solche Aufgaben zuständig sein soll. Gemäss Sect. 4 Cannabis Act ernennt der Governor in Council ein Mitglied des Queen's Privy council for Canada zum zuständigen Minister oder zur zuständigen Ministerin für die Zwecke des Cannabis Acts.

43 Subsect. 62(2) Cannabis Act.

44 Sogenanntes «*recreational cannabis*».

45 Subsect. 11(3)(a) Cannabis Act.

46 Subsect. 11(3)(b)(i) Cannabis Act.

47 Subsect. 11(3)(b)(ii) Cannabis Act.

48 Subsects. 62(3), 62(4) Cannabis Act.

49 Subsect. 62(5) Cannabis Act C.

50 Subsects. 62(7)(a)-(h) Cannabis Act.

51 Subsects. 155(a)-(c) Cannabis Regulations (SOR/2018-144), verfügbar unter https://laws-lois.justice.gc.ca/eng/regulations/SOR-2018-144/ (18.12.2023).

dene Angaben zur geplanten Ein- oder Ausfuhr enthalten, neben den Informationen zur Lizenz insbesondere Verwendungszweck, Sorte, Menge sowie THC- und CBD-Gehalt des Cannabis, Name und Adresse der aus- oder einführenden Person im Ausland, Zollhafen, jedes Transportmittel sowie jedes Transit- oder Transportland.[52]

1.5.2. Uruguay

Aus dem uruguayischen **Ley Nr. 19172** ergibt sich lediglich, dass der **Staat Import und Export sowie alle anderen Stationen von Anbau bis Verkauf von Cannabis kontrolliert und reguliert**.[53] Detaillierte Angaben zu Ein- und Ausfuhr von Cannabis finden sich sodann in dazugehörigen **Verordnungen**: Decreto Nr. 246/021 enthält Vorgaben für die Ein- und Ausfuhr von medizinischen und Forschungszwecken dienendem Cannabis[54] und Decreto Nr. 282/020 enthält Regelungen speziell für Zollfragen für solche Im- und Exporte;[55] Decreto Nr. 372/014 schliesslich regelt die Ein- und Ausfuhr von Hanf.[56] **Eine Verordnung für die Ein- und Ausfuhr von Freizeitzwecken dienendem Cannabis scheint es bisher nicht zu geben.** Das *Instituto de regulación y control de Cannabis* (IRCCA) stellt auf seiner Website verschiedene Leitfaden für Lizenzen für professionelle Aktivitäten mit Cannabis zur Verfügung. Aus demjenigen für Lizenzen für den Transitverkehr in Freizonen und anderen Zollgebieten geht jedenfalls hervor, dass das IRCCA Anträge auf Lizenzen prüft und, sofern es dies für notwendig erachtet, auch Rücksprache mit anderen staatlichen Einrichtungen nimmt. Darüber hinaus kann das IRCCA mit Anmerkungen zum Antrag auf die antragstellende Person zurückkommen, welche sodann 90 Tage hat, um die Anmerkungen auszuräumen.[57]

Tatsächlich scheint Uruguay auch erst im Jahre 2019 damit angefangen zu haben, **Cannabis zu exportieren**.[58] In den Jahren 2020 und 2021[59] hat Uruguay mit rund 48 % in erster Linie **Cannabis-Blumen mit einem THC-Gehalt unter 1 % zu nicht-medizinischen Zwecken** exportiert und dies fast ausschliesslich in die Schweiz. An zweiter Stelle stand mit rund 21 % der Export von **Cannabis-Blumen mit einem**

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52 Sects. 205 (Import), 214 (Export) Cannabis Act.

53 Art. 2 Ley 19172.

54 Zu nennen sind hier insbesondere Decreto Nr. 246/021 (Reglamentación de la Ley 19.172, relativo a la regulación y control del cannabis. Derogación del Decreto 46/015 y arts. 16 y 17 del Decreto 454/976) vom 28.07.2021, verfügbar unter https://www.impo.com.uy/bases/decretos/246-2021 (21.12.2023).

55 Decreto Nr. 282/020 (Reglamentación del Decreto Ley 14.294 y Ley 19.172, en lo relativo a la regulación y control de operaciones logísticas con productos de cannabis medicinal terapéutico en depósitos aduaneros) vom 05.10.2020, verfügbar unter https://www.impo.com.uy/bases/decretos/282-2020 (21.12.2023).

56 Decreto Nr. 372/014 (Reglamentación de la Ley 19.172 relativa a la regulación y control del cannabis) vom 16.12.2014, verfügbar unter https://www.impo.com.uy/bases/decretos/372-2014 (21.12.2023).

57 IRCCA, Instructivo para solicitud de Licencias de Operación en tánsito dentro de zonas francas y otras áreas aduaneras, verfügbar unter https://ircca.gub.uy/wp-content/uploads/2023/08/Instructivo-para-solicitud-de-Licencias-de-zonas-francas.pdf (16.01.2024), S. 5 f.; siehe hierzu auch Decreto Nr. 282/020 (Reglamentación del Decreto Ley 14.294 y Ley 19.172, en lo relativo a la regulación y control de operaciones logísticas con productos de cannabis medicinal terapéutico en depósitos aduaneros) vom 05.10.2020, verfügbar unter https://www.impo.com.uy/bases/decretos/282-2020 (21.12.2023).

58 ZEIT ONLINE, Uruguay exportiert erstmals kommerziell Marihuana, 24.09.2019, verfügbar unter https://www.zeit.de/gesellschaft/zeitgeschehen/2019-09/cannabis-marihuana-uruguay-legalisierung-export-australien (21.12.2023).

59 Die folgenden Angaben über Exporte in den Jahren 2020 und 2021 basieren auf dem Bericht von 2021 der Uruguay XXI Investement, Export and Country Brand Promotion Agency für den Cannabis Sektor in Uruguay. Der Folgebericht aus dem Jahre 2023 (verfügbar unter https://www.uruguayxxi.gub.uy/uploads/informacion/71964b4c2a6c090a2fecedd50f541a8e23a27431.pdf, 22.12.2023) enthält eine ähnliche Tabelle für die Jahre 2021 und 2022. Vergleicht man die Werte für 2021 in den beiden Berichten, so stimmen die Werte in der Spalte «Net KG», auf welche sich die Angaben im vorliegenden Text stützen, nicht vollständig überein.

THC-Gehalt über 1 % zu medizinischen Zwecken an Israel, Portugal, Deutschland und die USA. Rund 14 % und rund 13 % der Ausfuhren Uruguays betrafen **Biomasse mit einem THC-Gehalt unter 1 %** an die Schweiz sowie **Samen** an die USA. Bei unter 1 % der Exporte handelte es sich um **Medikamente**[60] an Peru, Brasilien und Argentinien.[61]

2. Rules relating to state-owned monopolies and state-owned enterprises

2.1. UN Convention on Narcotic Drugs (Single Convention)

Legal requirements for state-owned monopolies and/or state-owned enterprises when legalising cannabis under the UN Convention on Narcotic Drugs (esp. Arts. 23 e) and 28)

While excluding the cultivation of the cannabis plant exclusively for industrial purposes (fibre and seed), Article 28 (Control of Cannabis) of the Single Convention calls for parties to take necessary measures to prevent the misuse of and *illicit* traffic in, the leaves of the cannabis plant.[62] Furthermore, Article 28(1) provides that,

> If a Party permits the cultivation of the cannabis plant for the production of cannabis or cannabis resin, it shall apply thereto the system of controls as provided in article 23 respecting the control of the opium poppy.

Where a state decides to allow for the cultivation of cannabis, Article 23 requires that that one or more government agencies be established to carry out certain functions.[63] In particular, the agency (or agencies) is (are) responsible for: designating the land upon which cultivation may take place (Article 23(2)(a)); licensing cultivators (Article 23(2)(b-c)); and taking physical possession of the product from those growers (Article 23(2)(d)). Moreover, the agency (or agencies) has "the exclusive right" of importing, exporting and wholesale trading (Article 23(2)(e)).

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60 Epifractan.

61 Uruguay XXI Investement, Export and Country Brand Promotion Agency, Cannabis Sector in Uruguay, 2021, verfügbar unter https://www.uruguayxxi.gub.uy/uploads/informacion/3b20ff3e845d9596cb12b594c46be20975cb415c.pdf (21.12.2023), S. 9.

62 For context, there are a number of definitions in Article 1 of the Convention that bear on the understanding of the cited Articles, including:
"Cannabis" means the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops) from which the resin has not been extracted, by whatever name they may be designated.
"Cannabis plant" means any plant of the genus Cannabis,
"Cannabis resin" means the separated resin, whether crude or purified, obtained from the cannabis plant.
"Cultivation" means the cultivation of the opium poppy, coca bush or cannabis plant.
"Illicit traffic" means cultivation or trafficking in drugs contrary to the provisions of this Convention.
"Production" means the separation of opium, coca leaves, cannabis and cannabis resin from the plants from which they are obtained.
"Import" and "export" mean in their respective connotations the physical transfer of drugs from one State to another State, or from one territory to another territory of the same State.

63 While paragraph 1 of Article 23 envisages "one or more governmental agencies" be established, paragraph 3 stipulates that the required functions "shall be discharged by a single government agency if the constitution of the Party concerned permits it".

2.2. International trade law (esp. GATT)

Rules provided by international trade law specifically relating to the establishment and function of state-owned monopolies and/or state-owned enterprises (esp. Art. XVII of the GATT)

2.2.1. GATT

Article XVII of the GATT provides rules relating to the establishment and function of "State Trading Enterprises" (STEs). Article XVII does not prohibit the use of STEs in the context of trade, but it sets out rules for their operation because of their potential to distort the conditions of competition facing foreign competitors.

Before discussing what these rules are, it is important to note that there is some ambiguity about what constitutes a "state trading enterprise"[64], in part because there is no definition provided in the GATT's legal text. GATT Article XVII.1(a) provides a general sense of what might constitute a "state-trading enterprise", even without providing a precise definition. In short, STEs include: (i) state-owned enterprises; (ii) enterprises granted privileges by the state (e.g., through a subsidy) and (iii) enterprises granted exclusive privileges (i.e., a monopoly in the production, consumption or trade of certain goods). The underlying concern appears to be one of preventing the state from affecting trade indirectly through an entity that appears to be a private actor but in fact has a special status in the market.

STEs are, for the most part, subject to the same rules as private enterprises under GATT rules. That is, STEs are expected to be guided by commercial considerations in their decision-making. However, like their state owners, they are to abide by non-discrimination obligations set forth the GATT. This latter point was affirmed in the Appellate Body's decision in *Canada-Wheat Board*, which held that the references to general non-discriminatory treatment in Article XVII:1 prohibit WTO Member States from using state trading enterprises as a means of discriminating "in ways that would be prohibited if undertaken directly by Members." Moreover, GATT Article XVII:4 requires that Members notify the WTO of the products which are imported into or exported from their territories by STEs.[65]

2.2.2. GATS

Among Switzerland's GATS obligations, is a commitment to abide by national treatment obligations with respect to wholesaling, distribution and/or retailing. As such, Article VIII on 'Monopoly Service Providers' likely bears upon the establishment of such entities in these sectors. Like GATT Article XVII, GATS requires that notice be provided to the Council for Trade in Services no later than three months before the intended implementation of the grant of monopoly rights (see Article VII:4). Also similar to GATT Article XVII is the fact that monopoly service providers must act consistently with the MFN commitments of the Member and must also adhere to the specific commitments that have been scheduled.

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64 See https://www.wto.org/english/tratop_e/statra_e/statra_info_e.htm.

65 Interestingly, the WTO advises that notice be provided even if the STE has not engaged in trade. The WTO opines that:

> All State trading enterprises (that fall within the working definition of "State trading enterprise" in paragraph 1 of the Understanding) in existence in the Member are to be notified, as well as all the products over which they have any authority. Products are to be identified by their HS tariff numbers, at an appropriate level of specificity. This must be done even if the STE in question has not effected any imports or exports during the reporting period.

See, https://www.wto.org/english/tratop_e/statra_e/statra_info_e.htm.

Howse and Eliason outline some of the potential impacts of GATS Article VIII in the context of Canada, stating,

> This means that, where the monopoly obtains services such as testing or research and development, it must conform to the obligations of the GATS with respect to quantitative restrictions and national treatment. Since licenses and permits are generally required for the performance of such functions, the possibility that federal licenses and permits may be denied simply on the basis that an economic entity is established outside of Canada or because an individual 'is not normally a resident of Canada' would be inconsistent with the obligations of any provincial monopoly under Article VIII of the GATS.[66]

2.3. Interaction between The Single Convention and GATT Article XVII

The dictates of the UN Convention on Narcotic Drugs (as discussed in response to question 2.1.) as complementary or in conflict with those advanced by international trade law, particularly in the context of legalised cannabis markets

Before examining whether there is a specific conflict between the Single Convention and the WTO Agreements where state run monopolies are concerned, it is worth examining the extent to which a conflict is likely to be found between a WTO Agreement on the one hand, and an extraneous (Non-WTO Agreement) treaty, on the other. A few conclusions will be drawn from this more general discussion: First, if an international dispute were to be initiated, it would most likely be in the WTO dispute settlement context. This would impact upon the potential influence a non-WTO-based-treaty might have on the proceedings. Second, while a WTO dispute settlement proceeding would primarily focus on whether one or more WTO rules had been violated, adjudicators are required to appeal to any other relevant international legal sources (e.g., the Single Convention). Third, adjudicators will endeavour, wherever possible, to find harmony between treaties.

Unlike many other international treaty dispute settlement mechanisms, the jurisdiction of the WTO's dispute settlement mechanism is both compulsory[67] (WTO Members must use the WTO's own mechanism to resolve their trade disputes) and exclusive[68] (WTO Members may not use non-WTO mechanisms to resolve their trade disputes) over issues contained in the WTO Agreements. Members also appear to have a higher affinity for using the WTO dispute settlement mechanism relative to other international tribunals. [69] This increases the likelihood that disputes related to both trade and other international obligations would be first brought within the confines of the WTO.

Once a case is initiated within the WTO system, the potential influence of an agreement other than a WTO treaty (e.g., the Single Convention) is limited. This is primarily due to the fact that a challenge raised in the context of WTO dispute settlement will almost always relate to an alleged breach of a

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66 Eliason and Howse, at P. 378.

67 Article 6.1 of the DSU states: If the complaining party so requests, a panel *shall be* established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB' s agenda, unless at that meeting the DSB decides by consensus not to establish a panel. (emphasis added).

68 Article 23.1 DSU (Members seeking redress for breaches of the WTO Agreements "shall have recourse to, and abide by, the rules and procedures" of the DSU).

69 This view is supported by the data, which shows a prolific use of the WTO dispute settlement system (over 600 disputes have been initiated since the WTO's creation in 1994) relative to other international tribunals. During that time, almost 250 panel reports have been issued and roughly 150 Appellate Body reports have been approved by the Dispute Settlement Body. This stands in stark contrast to the usage rates of other international tribunals. For example, the International Court of Justice (ICJ), which has been in existence for 50 years longer, has issued only about a quarter of the judgements. Similarly, the International Tribunal on the Law of the Sea, which is also older than the WTO dispute settlement system, has heard less than 30 cases.

provision of one of the WTO Agreements. Thus, the legal question(s) that a panel will address will center on one or more WTO rules.

This limited influence also stems from the way in which treaties are interpreted. WTO dispute resolution bodies rely on Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) which directs judges to examine a contested treaty provision in "accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The 'context' that WTO adjudicators use to frame their understanding of the ordinary meaning of the disputed provision is quite often limited to immediately adjacent provisions and/or provisions in the WTO Agreements that use similar language.

With that said, the obligations of an extraneous treaty may still impact the interpretation of a WTO Agreement. Indeed, Article 31(3)(c) of the VCLT *requires* that a treaty interpreter "take into account" any "relevant rules of international law that applicable in the relations between the parties". Importantly, however, WTO law would not permit an adjudicator to use the other international law rules so as to alter the WTO rules. Marceau, for example, has noted that WTO law prohibits an adjudicator from 'adding to or diminishing the rights and obligations of WTO Members'.[70]

Given the narrow definition of a "conflict" of treaty provisions recognized in international law,[71] it is very unlikely that there will be a conflict determined to exist between a WTO Agreement and another treaty.

A specific comparison between Articles 28 and 23 of the Single Convention on the one hand, and the requirements of GATT Article XVII and GATS Article VIII, on the other reveals little to suggest that the two are *necessarily* incompatible. Neither of the WTO provisions prohibit the creation of the type of agency contemplated by Article 23 of the Single Convention and the functions that Article 23 demands of the agency responsible for controlling cannabis are not facially invalid from a WTO standpoint. Rather, a country liberalizing its cannabis market would have to make sure that the agency was motivated by commercial factors in its market activity (buying, selling, etc) and that it would not discriminate against WTO Member in a way proscribed by, *inter alia*, Articles I, III or XI of GATT.

2.4. National laws dealing with requirements under international trade law and/or the UN Convention on Narcotic Drugs

State-owned monopolies and/or state-owned enterprises in Canada and Uruguay

2.4.1. Canada

Der in ganz Kanada geltende **Cannabis Act** gibt lediglich die **Rahmenbedingungen für den Verkauf von Cannabis** vor. Für die genaue Ausgestaltung verweist er auf die **in der jeweiligen kanadischen Provinz**

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70 Marceau, Gabrielle. "Conflicts of Norms and Conflicts of Jurisdictions the Relationship between the WTO Agreement and MEAs and other Treaties." Journal of World Trade 35.6 (2001).

71 Wilfred Jenks, *The Conflict of Law-Making Treaties*, The British Yearbook of International Law (BYIL) 1953, at p. 7 ("A conflict of law-making treaties arises only where simultaneous compliance with the obligations of different instruments is impossible…There is no conflict if the obligations of one instrument are stricter than, but not incompatible with, those of another, or if it is possible to comply with the obligations of one instrument by refraining from exercising a privilege or discretion accorded by another…The presumption against conflict is especially reinforced in cases where separate agreements are concluded between the same parties, since it can be presumed that they are meant to be consistent with themselves, failing any evidence to the contrary").

geltenden regionalen Gesetze.[72] Die zehn Provinzen und drei Territorien dürfen dabei jedoch lediglich strengere Regeln erlassen und die Befugnisse zum Verkauf von Cannabis im Vergleich zu den Vorgaben des Cannabis Act[73] nicht ausweiten. Zu der Frage, ob lediglich staatliche oder staatlich geführte oder beauftragte Einrichtungen Cannabis verkaufen dürfen und ob daher ein Monopol für den Verkauf bestehen soll, geht der Cannabis Act nicht ein. Es steht den zehn Provinzen und drei Territorien also frei, dies selbst zu entscheiden.

Ein **Monopol für rein staatliche Verkaufseinrichtungen** gibt es demnach jedenfalls in New Brunswick,[74] Nova Scotia[75], Prince Edward Island[76] und Québec[77].

Nach unserer Recherche innerhalb des Gesetzgebungsprozesses auf Bundesebene[78] scheinen **Aspekte des internationalen Rechts bei den Diskussionen um ein staatliches Monopol beim Verkauf von Cannabis nicht thematisiert worden zu sein**. Zwar wurden die Vor- und Nachteile von Monopolen bei verschiedenen Gelegenheiten diskutiert,[79] jedoch wurde dabei nicht auf die Vereinbarkeit von Monopolen oder von privaten Verkaufsstellen mit den Drogenkontrollübereinkommen der Vereinten Nationen oder mit internationalen Handelsverträgen thematisiert.

In einer Sitzung erwähnt ein als Gast geladener Anwalt im Rahmen der Diskussion «***treaties***», also Staatsverträge, gegen welche Kanada «technisch gesehen verstösst, **seit es angefangen hat, Marihuana zu verkaufen, indem es dieses nicht durch private Unternehmen beschaffte, mindestens seit 2005». Kanada verstosse gegen «all diese Verträge»**.[80] Der Abgeordnete bezieht sich dabei jedoch auf das Drogenkontrollsystem der Vereinten Nationen, da dieses im Rahmen derselben Sitzung näher erläutert und diskutiert wurde.[81] Der Hinweis auf das Jahr 2005 scheint sich auf den Zeitpunkt zu

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72 Subsect. 69(1) Cannabis Act.

73 Diese finden sich in Subsect. 69(3) Cannabis Act.

74 Subsect. 3(d.1) New Brunswick Liquor Corporation Act, verfügbar unter https://laws.gnb.ca/en/document/cs/2016,%20c.105?langCont=en# (18.12.2023).

75 Subsect. 9(1)(a) in Verbindung mit Subsect. 3(d) Cannabis Control Act, verfügbar unter https://nslegislature.ca/sites/default/files/legc/statutes/cannabis%20control.pdf (18.12.2023).

76 Sect. 9 in Verbindung mit Subsect. 1(b) Cannabis Control Act, verfügbar unter https://www.princeedwardisland.ca/en/legislation/cannabis-control-act (18.12.2023).

77 Sect. 25 in Verbindung mit Sects. 26, 27 Loi encadrant le cannabis, verfügbar unter https://www.legisquebec.gouv.qc.ca/fr/document/lc/C-5.3 (18.12.2023).

78 Für diese Recherche haben wir alle auf der Website des Gesetzgebungsverfahrens für den Cannabis Act (verfügbar unter https://www.parl.ca/legisinfo/en/bill/42-1/C-45, 18.12.2023) zur Verfügung gestellten Dokumente durchgesehen sowie den Bericht und die Auskunft des Standing Senate Committee on Foreign Affairs and International Trade zum Thema (siehe zu diesen unter Punkt 1.4.1.). Aufgrund der Länge der jeweiligen Dokumente haben wir grösstenteils mit einer Stichwortsuche gearbeitet, um eventuell einschlägige Passagen zu finden. Hierbei handelte es sich in erster Linie um die Stichworte «*mono*» (für «*monopoly*» oder «*monopolies*») und «*state-*» (für «*state-run/-controlled/-owned/etc*»).

79 Siehe insbesondere Standing Committee on Health, Nr. 066, 13.09.2017, verfügbar unter https://www.ourcommons.ca/documentviewer/en/42-1/HESA/meeting-66/evidence, Rn. 1130, 1420-1425, 1535-1540, 1620, 1700, 1725; dasselbe, Nr. 067, 14.09.2017, verfügbar unter https://www.ourcommons.ca/documentviewer/en/42-1/HESA/meeting-67/evidence, Rn. 0850, 1815, 1825, 1905-1935; dasselbe, Nr. 068, 15.09.2017, verfügbar unter https://www.ourcommons.ca/documentviewer/en/42-1/HESA/meeting-68/evidence (alle 18.12.2023), Rn. 1355, 1440-1445, 1515.

80 Standing Committee on Health, Nr. 067, 14.09.2017, verfügbar unter https://www.ourcommons.ca/documentviewer/en/42-1/HESA/meeting-67/evidence (18.12.2023), Rn. 1935, 1950; Übersetzung durch das Institut.

81 Standing Committee on Health, Nr. 067, 14.09.2017, verfügbar unter https://www.ourcommons.ca/documentviewer/en/42-1/HESA/meeting-67/evidence (18.12.2023), Rn. 1805-1815, 1840-1850, 1900, 1925, 1935, 1950.

beziehen, ab welchem es privaten Unternehmen gestattet war, medizinisches Cannabis an Privatpersonen zu verkaufen.[82]

Kanada hat die **Welthandelsorganisation** im Juni 2022 über einige **staatliche Verkaufseinrichtungen** auf Bundes- und auf Provinzebene **notifiziert**.[83] Darin stellt Kanada auch die zuvor genannten Verkaufseinrichtungen in New Brunswick, Nova Scotia, Prince Edward Island und Québec vor, welche den Verkauf von Cannabis in den jeweiligen Provinzen monopolisiert betreiben. Jedoch betrifft die Notifizierung **ausschliesslich den Vertrieb von Alkohol und nicht denjenigen von Cannabis**, obwohl die betreffenden Verkaufseinrichtungen in New Brunswick und in Nova Scotia sowohl für Alkohol als auch für Cannabis zuständig sind.[84]

2.4.2. Uruguay

Uruguay hat Cannabis durch Artikel 2 des **Ley 19172** legalisiert, dabei jedoch auch einer strengen staatlichen Kontrolle unterstellt. Demnach «[…] **übernimmt der Staat die Kontrolle und Regulierung der Tätigkeiten** im Bereich der Einfuhr, Ausfuhr, Pflanzung, des Anbaus, der Ernte, Produktion, des Erwerbs in jeglicher Eigenschaft, der Lagerung, Vermarktung und des Vertriebs von Cannabis und seinen Derivaten oder gegebenenfalls von Industriehanf durch die von ihm rechtmässig mandatierten Einrichtungen […]».[85] Als solche Einrichtung dient das IRCCA.[86]

In Uruguay dürfen lediglich **Apotheken** mit einer entsprechenden **Lizenz durch das IRCCA** Cannabis an Privatpersonen verkaufen.[87] Derzeit gibt es 23 solcher Apotheken.[88]

Unsere Recherche hat **keine Informationen** dazu ergeben, **inwiefern diese staatliche Kontrolle mit den Vorgaben des Drogenkontrollsystems der Vereinten Nationen sowie des internationalen Handelsrechts vereinbar sind**. Hierfür haben wir in den Sitzungsprotokollen und anderen Dokumenten zum Gesetzgebungsprozess,[89] in internationalen juristischen Datenbanken[90] sowie auf verschiedenen einschlägigen Websites[91] gesucht. In rechtlicher Hinsicht wurde der zitierte Artikel 2 des Ley 19172 im

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82 Standing Committee on Health, Nr. 067, 14.09.2017, verfügbar unter https://www.ourcommons.ca/documentviewer/en/42-1/HESA/meeting-67/evidence (18.12.2023), Rn. 1950.

83 World Trade Organization, Dokument G/STR/N/19/CAN vom 22.06.2022, verfügbar unter https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/STR/N19CAN.pdf&Open=True (21.12.2023).

84 World Trade Organization, Dokument G/STR/N/19/CAN vom 22.06.2022, verfügbar unter https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/STR/N19CAN.pdf&Open=True (21.12.2023), S. 18 (New Brunswick), 19 (Nova Scotia), 20 (Prince Edward Island), 21 (Québec).

85 Art. 2 Ley 19172.

86 Siehe hierzu die Website des IRCCA, verfügbar unter https://ircca.gub.uy/organizacion/ (22.12.2023).

87 Art. 5(G) Ley 19172. Das Decreto Nr. 120/014 (verfügbar unter http://www.impo.com.uy/bases/decretos/120-2014, 22.12.2023) enthält sodann detailliertere Regelungen hierzu.

88 Instituto de regulación y control del cannabis, Farmacias adheridas, verfügbar unter https://ircca.gub.uy/vias-de-acceso/lista-de-farmacias-adheridas/ (22.12.2023).

89 Mittels der Suchmaske der Website des uruguayischen Parlaments (verfügbar unter https://parlamento.gub.uy/documentosyleyes/busquedaAvanzada, 22.12.2023) konnten wir rund 90 Dokumente aus den Jahren 2012-2014 ausfindig machen, die das Wort «Cannabis» enthielten. Aufgrund der Länge der jeweiligen Dokumente haben wir jeweils eine Stichwortsuche durchgeführt mit den Begriffen «*export*» für *exportación*, «*oms*» für die spanische Abkürzung der Welthandelsorganisation, sowie «mercosur», «aladi» und «gatt» für die verschiedenen Handelsabkommen.

90 Wir haben die beiden englischsprachigen Datenbanken Westlaw Classic und HeinOnline mit den Schlagworten «*Uruguay Cannabis WTO*» durchsucht.

91 Dies betrifft insbesondere die Websites des Staates Uruguay (verfügbar unter https://www.gub.uy/), des uruguayischen Instituto de regulación y control del cannabis (verfügbar unter https://ircca.gub.uy/)

Rahmen der Sitzungen des Gesetzgebungsverfahrens lediglich auf seine verfassungsmässigen Konsequenzen hin hinterfragt.[92] Grund hierfür ist, dass für die Einrichtung eines Monopols eine höhere Zustimmungsquote erforderlich ist, um ein entsprechendes Gesetz zu erlassen.[93]

3. Health and safety standards for legalised cannabis markets

3.1. Requirements under international trade law

The extent to which international trade rules require products to adhere to international health and safety standards

Two of the WTO Agreements give specific attention to international standards: the Agreement on Technical Barriers to Trade (TBT) and the Agreement on Sanitary and Phytosanitary Measures (SPS). The TBT is likely to be more relevant than the SPS due to the types of measures foreseen in the legalization of the cannabis market.

3.1.1. Standards under the SPS

The SPS is likely only relevant to the discussion of a liberalized cannabis market insofar as there is an 'edibles' portion of that market. This is because the definition of a 'sanitary or phytosanitary measure' generally refers to measures taken to prevent the establishment or spread of pests or diseases and/or protect against risks associated with 'additives, contaminants or toxins' in food or beverages.[94]

To the extent that the SPS governs a given measure, WTO Members are encouraged to use international health and safety standards, guidelines and recommendations, where they exist. If they do so, they are relatively immune from challenge under the SPS. However, Members may use measures which result in higher standards if there is scientific justification. Moreover, Members can, under some

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sowie der Suchemaske für Notifikationen an die Welthandelsorganisation (verfügbar unter https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S003.aspx, alle 22.12.2023) mit dem Stichwort «Cannabis» für den Vertragsstaat Uruguay.

92 Siehe insbesondere Cámara de Senadores, Nr. 261, 10.12.2013, verfügbar unter https://parlamento.gub.uy/documentosyleyes/documentos/diarios-de-sesion/5282/SSN (22.12.2023), Rn. 19, 21, 23.

93 Art. 85(17) Constitución de la República, verfügbar unter https://www.impo.com.uy/bases/constitucion/1967-1967 (22.12.2023).

94 According to the Agreement, a sanitary or phytosanitary measure is any measure applied:
(a) to protect animal or plant life or health within the territory of the Member from risksarising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;
(b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
(c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or
(d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.
Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, inter alia, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.

circumstance (particularly where little information about safety exists), apply the "precautionary principle" to deal with scientific uncertainty.[95]

Before moving on to a discussion of the TBT Agreement, it is worth highlighting two points concerning the way in which the SPS Agreement interacts with the GATT and the TBT, respectively. First, SPS Article 2.4 states that measures which conform to the SPS are presumed to conform to GATT XX(b). This means that those measures that have been successfully defended under the SPS will also provide justification for deviations from GATT obligations. Second, Article 1.5 of the TBT Agreement states that the TBT does not apply to SPS measures. Thus, to the extent that a measure qualifies as an SPS measure, the TBT regime will not apply to the measure.

Given that the SPS would most likely apply only to the 'edibles' market in a liberalized cannabis framework, SICL conducted a search of the *Codex Alimentarius* – the principal standardizing document relating to food additives – to determine whether standards have been published. However, this search did not reveal standards for cannabis, nor did our search reveal any mentions of THC content limits in the context of additives to food.[96]

3.1.2. International standards under the TBT

For the TBT to apply to a measure, the measure must be either a technical regulation, a standard or a conformity assessment procedure (CAP). The most litigated aspects of the TBT focus on "technical regulations", which Annex 1.1 of the TBT Agreement defines as a:

> Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

Importantly, the last sentence represents a *non-exhaustive* list of possible technical regulation types. Moreover, the explicit inclusion of "related processes and production methods" is exceptional in the WTO rules – which generally focus on finished products – and broadens the scope of the TBT's coverage.

In the context of legalized cannabis market (and particularly one in which a recreational cannabis market is an aspect or feature), there are many pathways for technical regulations and CAPs supporting those technical regulations to be instrumental in a legalization effort. For example, the establishment of maximum THC-levels might be considered a technical regulation – assuming the setting of such levels would constitute the 'laying down' of a 'product characteristic'. Similarly, regulations relating to packaging and labelling would fit within the definition.

In the event that a Member institutes a technical regulation, it must not only conform to the non-discrimination provision (2.1) and the obligation relating to trade restrictiveness (2.2), it must also take into account any international standards that exist in the area of regulation. Article 2.4 of the TBT Agreement provides that:

> Where technical regulations are required and relevant international standards exist or their completion is imminent, Members ***shall use them***, or the relevant parts of them, *as a basis* for their technical regulations ***except*** when such international standards or relevant parts

95 Article 5.7 of the SPS allows temporary "precautionary" measures.

96 A copy of the "General Standard for Food Additives" can be found online at: https://www.fao.org/fao-who-codexalimentarius/sh-proxy/en/?lnk=1&url=https%253A%252F%252Fworkspace.fao.org%252Fsites%252Fcodex%252FStandards%252FCXS%2B192-1995%252FCXS_192e.pdf.

> would be an *ineffective* or *inappropriate* means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.[97]

The general rule provided by Article 2.4 is that a country must abide by the relevant international standards in connection with their technical regulations, to the extent such standards exist. A "standard", according to Annex A.2 of the TBT is a:

> Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

In any given context, one must then necessarily ask whether there is a 'relevant international standard'. Such a standard is "relevant", according to the Appellate Body, if it 'bears upon' or 'relates to' the matter in hand.[98] While 'relevance' relates to the underlying subject matter of the standard, the question of whether a standard is "international" does not. Rather, the Appellate Body found in *US – Tuna II (Mexico)* that it is primarily the characteristics of the entity approving a standard that makes a standard an 'international' standard. In brief, a standard is an international standard if it is approved by an international standardizing body, which is a body that is both open to all WTO members (although not necessarily that all WTO Members participate) and that has an established reputation for establishing product standards.[99]

Relevant to the current discussion is the *Australia-Plain Packaging* dispute, where the validity of Australia's labelling and packaging requirements were alleged to violate the TBT and the TRIPS Agreement. The panel deciding the case found that the guidelines on implementation of the Framework Convention on Tobacco Control did not constitute "international standards" within the meaning of Article 2.5 (and by extension, 2.4).[100] This ruling is notable as it seems to preclude reliance on any guidelines that might have been issued in connection with the Single Convention; at least those established by a body that does not typically engage in such (standardizing) activity.[101]

In the context of cannabis, the SICL found a potentially relevant set of documents published by the International Standardization Organization (ISO). In fact, the ISO published three pieces under the heading "Safety, security and sustainability of cannabis facilities and operations". The first (ISO IWA 37-1:2022) sets out "Requirements for the safety of cannabis buildings, equipment and oil extraction operations". [102] The second (ISO IWA 37-2:2022) establishes "requirements for the secure handling of

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97 Emphases added. Note that Article 5.4 of the TBT Agreement provides a similar dictate for the CAPs.

98 Appellate Body Report, *EC-Sardines*, paras. 229 - 230.

99 For the purposes of TBT Article 2.4, an "international standardizing body" is, according to the Appellate Body, in *US – Tuna II (Mexico)* (2012), a 'legal or administrative entity that has specific tasks and composition' that 'should be open on a non-discriminatory basis to relevant bodies of at least all WTO Members'. Additionally, said body must have 'recognized activities in standardization'.

100 Article 2.5 of the TBT Agreement affords Members the opportunity to request an explanation regarding the justification of a given technical regulation. The panel emphasized that the use of terms in 2.4 and 2.5 (i.e., to international standards) should be read consistently.

101 Similarly, the definition of a "standard" in Annex 1.2 of the TBT Agreement notes that a standard is "not mandatory". Many of the obligations in the UN drug conventions – and particularly those related to trafficking or trade – permit little flexibility.

102 See https://www.iso.org/standard/84023.html. Please note that SICL has not gained access to, and therefore has not reviewed the substance of, ISO documents mentioned. However, ISO is, unquestionably, an international standardizing body.

cannabis and cannabis products".[103] The third (ISO IWA 37-3:2022) provides guidance on "Good production practices (GPP)".[104] In promoting these publications, the ISO states that "[t]aken as a whole, these documents provide invaluable direction to legislative bodies and emerging companies and help to create a safe, legal market for adults who use cannabis."[105]

Note that even though these documents are published by the ISO, it is not certain that they would be considered relevant international standards in the current context. Moreover, even if the ISO documents do set forth an 'international standard', there may still be justification for not adhering to it (in whole or in part). Indeed, Article 2.4 of TBT provides that, even when international standards exist, Members are not compelled to follow them if they are not relevant or if they would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued.[106]

In the event that there is no international standard in a given area, Members are required to publish a notice with Members about their proposed technical regulation (see Article 2.9 of the TBT).

3.2. Definition of cannabis under national law

Definition of "cannabis" in Canada and Uruguay

3.2.1. Canada

Gemäss dem Cannabis Act meint der Begriff des «**Cannabis**» jedenfalls Cannabis-Pflanzen. Zudem umfasst der Begriff aber auch alle in Schedule 1 des Cannabis Act genannten Pflanzenteile, sofern sie keines der in Schedule 2 genannten Pflanzenteile beinhalten.[107]

Schedule 1 zählt die folgenden Punkte auf:

- Jeder Teil der Cannabis-Pflanze, einschliesslich des von ihr produzierten Phytocannabinoids, unabhängig davon, ob der Teil verarbeitet wurde,
- Jede Substanz oder jedes Substanzgemisch, das einen Teil einer Cannabis-Pflanze beinhaltet oder auf sich hat,
- Jede Substanz, die identisch ist mit Phytocannabinoid, das von einer Cannabis-Pflanze produziert oder in ihr gefunden wird, unabhängig davon, wie diese Substanz erhalten wurde.[108]

Um vom Begriff des Cannabis erfasst zu werden, darf es sich jedoch nicht um eines der folgenden, in **Schedule 2** genannten Pflanzenteile handeln:

- Ein nicht lebensfähiger Samen einer Cannabis-Pflanze,
- Ein ausgewachsener Stängel einer Cannabis-Pflanze ohne jegliche Blätter, Blüten, Samen oder Zweige,
- Fasern eines solchen Stängels,
- Wurzeln einer Cannabis-Pflanze oder jeglicher Teil einer solchen Wurzel.[109]

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103 See https://www.iso.org/standard/84024.html.

104 See https://www.iso.org/standard/84025.html.

105 See https://www.iso.org/contents/news/2022/10/standards_safe_legal_cannabis.html.

106 The Appellate Body in *EC – Sardines* ruled that it is for the complainant to demonstrate that the international standard in question is both an effective and an appropriate means to fulfil the legitimate objective. In the same case, the Appellate essentially found that an international standard is 'effective' if it has the capacity to accomplish the objective(s) pursued, and it is 'appropriate' if it is suitable for the fulfilment of said objective(s).

107 Subsect. 2(1) Cannabis Act.

108 Nr. 1-3 des Schedule 1 des Cannabis Acts.

109 Nr. 1-4 des Schedule 2 des Cannabis Acts.

Bestimmungen zum **THC-Gehalt** von Cannabis finden sich nicht im Cannabis Act, sondern in den **Cannabis Regulations**. Bei der Berechnung der dortigen Angaben soll **sowohl der THC-Gehalt als auch das Potenzial berücksichtigt werden, THCA in THC umzuwandeln**. Einige dieser Vorgaben werden im Folgenden dargestellt:

Demnach darf eine **Einzeldosis** (*unit*) höchstens einen THC-Gehalt von 10 mg haben.[110] Handelt es sich um ein Cannabis-Produkt, welches nicht in Einzeldosen angeboten wird, das jedoch den Anschein macht, als könne es in Einzeldosen aufgeteilt werden, so muss der THC-Gehalt in einer Einzeldosis mindestens 75 % und höchstens 125 % des THC-Gehalts in den anderen Einzeldosen betragen.[111] Dasselbe gilt für den CBD-Gehalt[112] sowie für Untereinheiten einer Einzeldosis.[113]

Eine abweichende Regelung gilt für **essbares Cannabis** (*edible cannabis*). Auch hier darf der THC-Gehalt in der Primärverpackung 10 mg nicht überschreiten.[114] Gleichzeitig muss der THC- oder CBD-Gehalt bei essbarem Cannabis zwischen 85 % und 115 % der auf der Packung angegebenen Menge enthalten, wenn dort mehr als 5 mg angegeben wurden. Beträgt der Gehalt laut Verpackungsangaben mehr als 2 mg, aber nicht mehr als 5 mg, so muss der tatsächliche THC- oder CBD-Gehalt zwischen 80 % und 120 % der angegebenen Menge betragen. Bei einer Gehaltsangabe von höchstens 2 mg muss sich der tatsächliche THC- oder CBD-Gehalt auf zwischen 75 % und 125 % der angegebenen Menge belaufen.[115]

Cannabis-Extrakt (*cannabis extract*) sowie **topisch angewandtes Cannabis** (*cannabis topical*) darf einen THC-Gehalt von 1'000 mg pro Primärverpackung nicht überschreiten.[116]

Eine Substanz, die eine höhere THC-Konzentration hat als 3 % gilt als **Cannabis-Konzentrat** (*cannabis concetrate*). Handelt es sich um essbares Cannabis, das dazu bestimmt ist, getrunken zu werden, und das eine höhere THC-Konzentration als 3 % aufweist, ist ein **Cannabis-Getränk** (*cannabis beverage*).[117]

3.2.2. Uruguay

Das uruguayische Ley 19172 definiert **psychoaktives Cannabis** (*cannabis psycoavtico*) als die blühenden Spitzen mit oder ohne Frucht der weiblichen Cannabis-Pflanze. Dies umfasst auch ihre Öle, Extrakte, Zubereitungen zur möglichen pharmazeutischen Verwendung sowie Sirupe und ähnliches mit einem THC-Gehalt von mindestens 1 %. Ausgenommen vom Begriff des psychoaktiven Cannabis sind jedoch die Samen und die vom Stängel abgetrennten Blätter.[118]

Als **Industriehanf** (*cannabis de uso no psicoactivo* (*cáñamo*)), also als Cannabis zu nicht psychoaktiven Zwecken, bezeichnet das Gesetz Pflanzen oder Pflanzenteile der Gattung Cannabis sowie Blätter und Blütenspitzen mit einem THC-Gehalt von bis zu 1 %, einschliesslich der Derivate solcher Pflanzen und Pflanzenteile. Industriehanf-Samen dürfen einen THC-Gehalt von 0.5 % nicht überschreiten.[119]

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110 Subsect. 96(1) Cannabis Regulations.
111 Subsect. 97.1(1)(a) Cannabis Regulations.
112 Subsect. 97.1(1)(b) Cannabis Regulations.
113 Subsects. 97.1(2)(a)-(b) Cannabis Regulations.
114 Sect. 102.7 Cannabis Regulations.
115 Subsects. 97(2)(a)-(c) Cannabis Regulations.
116 Sect. 101.2 Cannabis Regulations.
117 Subsect. 1(1) Cannabis Regulations.
118 Art. 3(B) Ley 14294 in der Fassung des Art. 5 Ley 19172, verfügbar unter https://www.impo.com.uy/bases/decretos-ley/14294-1974/3 (22.12.2023).
119 Art. 3(C) Ley 14294 in der Fassung des Art. 5 Ley 19172.

In **Apotheken** können registrierte Nutzer Cannabis der gemischten Sorten ALFA und BETA **kaufen**, welche jeweils einen THC-Gehalt von bis zu 9 % aufweisen, sowie GAMMA mit einem Gehalt von bis zu 15 %. ALFA besteht grösstenteils aus der Gattung Indica und BETA grösstenteils aus der Sorte Sativa.[120]

3.3. Labelling requirements under national law

Labelling requirements in Canada and Uruguay

3.3.1. Canada

Gemäss dem Cannabis Act dürfen Cannabis-Produkte **nicht so etikettiert werden, dass sie für junge Menschen ansprechend wirken**. Das Etikett darf auch keine Zitate oder Aufrufe enthalten und keine realen oder fiktiven Personen, Charaktere oder Tiere darstellen.[121] Detaillierte Vorgaben finden sich sodann im Einzelnen in den Cannabis Regulations, insbesondere in den Sections 123 ff. Demnach muss ein Cannabis-Produkt grundsätzlich mindestens mit den folgenden Angaben ausgewiesen werden:

- Kontaktdaten der lizenzinnehabenden Person,
- Cannabis-Klasse,
- Markenname,
- Losnummer,
- Empfohlene Aufbewahrung,
- Datum der Verpackung,
- Verfallsdatum, sofern es sich nicht um eine Cannabis-Pflanze, entsprechende Samen oder ein essbares Cannabis-Produkt handelt,
- Warnhinweis «FÜR KINDER UNZUGÄNGLICH AUFBEWAHREN»,
- Gesundheitswarnhinweis,[122]
- Standardisiertes Cannabis-Symbol bei einem THC-Gehalt von mehr als 10 µg/g,
- Hinweis, dass das Produkt das Äquivalent von […] g getrockneten Cannabis enthält.[123]

3.3.2. Uruguay

Das IRCCA stellt auf seiner Website zwei **Modelle für Etiketten** zur Verfügung.[124] Demnach müssen auf einer Verpackung die folgenden Angaben enthalten sein:

- Name des Produktes
- Identifikation der herstellenden Firma,
- Sorte
- Rechtliche Aspekte
- Verwendungshinweise
- Verwendungsempfehlungen
- Logo der IRRCA
- Verwendungsart

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120 Instituto de regulación y control del cannabis, Variedades de cannabis dispensadas en farmacias, verfügbar unter https://ircca.gub.uy/vias-de-acceso/cuales-son-las-variedades-de-cannabis-que-se-dispensan-en-las-farmacias/ (22.12.2023).

121 Sect. 26 Cannabis Act.

122 Gemäss den *Cannabis Health Warning Messages*, verfügbar unter https://www.canada.ca/en/health-canada/services/drugs-medication/cannabis/laws-regulations/regulations-support-cannabis-act/health-warning-messages.html (18.12.2023).

123 Subsects. 123(1)(a)-(g) Cannabis Regulations.

124 IRCCA, ¿Cómo son y qué información tienen los envases?, verfügbar unter https://ircca.gub.uy/vias-de-acceso/como-son-y-que-informacion-tienen-los-envases/ (22.12.2023).

- Losnummer und Verfallsdatum
- QR-Code zur Website des IRCCA
- Informationen über die Reinheit des Produktes
- THC- und CBD-Gehalt
- Warnhinweise als Piktogramme
- Ursprungsland und Nettogewicht
- Barcode
- Verkaufsbedingungen
- Barcode der Stempelmarke zur Nachverfolgung.[125]

IV. CONCLUSIONS

1. Import and export of cannabis: Trade law generally

1.1. While much depends upon the way in which a given cannabis legalization framework is actually structured, there are many WTO treaties that could apply to a liberalized cannabis market, including, but not limited to, the GATT, TBT and GATS. The section makes a number of observations about the rules.

- The WTO Agreements are generally silent about the treatment of specific products in the context of importation/exportation. For example, the Agreements do not set forth specific requirements relating to whether seeds, seedlings, source materials or other precursors for commercial production of cannabis can be imported/exported. Similarly, the WTO Agreements do not provide specific mandates relating to whether importation of ‘ready-to-use’ cannabis products by a wholesalers or sale outlets should be (dis)allowed.
- Rather, WTO law is focused on discrimination that may result from a country's decision to (directly or indirectly) restrict importation/exportation of a product. For example, WTO Member states have obligations which, *inter alia*, prohibit (i) discrimination between/among “like” products (e.g. GATT Article I and TBT Article 2.1); (ii) discrimination against “like” products (GATT Article III and TBT Article 2.1) and “like” services (though only in services sectors in which a Member has agreed to accept national treatment obligations (GATS Article XVII)). Additionally, there are rules that prohibit measures that limit the amount of goods entering or leaving a market (GATT Article XI) and similar rules against imposing quantitative restrictions in services sectors where the Member has agreed to abide by such market access commitments (GATS Article XVI).
- The concept of “likeness” frequently plays an important role in determining whether there is inconsistency with the rules. In assessing whether two or more products are ‘like’, adjudicators will generally compare (i) the physical characteristics of the products; (ii) the end uses of the products; (iii) the tariff classification of the products; and (iv) the consumer tastes and habits with respect to the products.

1.2. Whether inconsistencies between aspects of cannabis legalization programs and specific WTO rules represent a significant challenge to the durability of the former depends upon, *inter alia*, the likelihood of a challenge being raised against one or more measures and the availability of legal exceptions. With regard to the latter, GATT and GATS each feature exceptions that can potentially serve to justify otherwise GATT-inconsistent or GATS-inconsistent measures. For example, both Agreements allow for measures that are ‘necessary to protect public morals’ (XX(a) of GATT and XIV(a) of GATS) or ‘necessary to protect human, plant or animal life or health’ (XX(b) of GATT and XIV(b) of GATS). However, the case law indicates that an invocation

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125 IRCCA, ¿Cómo son y qué información tienen los envases?, verfügbar unter https://ircca.gub.uy/vias-de-acceso/como-son-y-que-informacion-tienen-los-envases/ (22.12.2023).

of a legal exception does not necessarily lead to a justification of the underlying measure. Indeed, the applicability of a given exception depends on a complex analysis that considers, among other things: the overall trade restrictiveness of the measure, the extent to which the measure fulfils a legitimate governmental objective (in the sense of pursuing an aim advanced by an exception; such as protecting human, animal or plant life or health under XX(b) of GATT and/or XIV(b) of GATS) and the availability of other, less trade-restrictive, measures.

1.3. The potential tensions that exist between the Articles 71-73 of the Schengen Agreement and the WTO Agreements would ostensibly centre around the notion of 'illicit'; where the latter agreements might find non-discrimination violations or market access violations where the line drawn between 'licit' and 'illicit' has the effect of criminalizing/banning a product while simultaneously erecting a legal market for, what it takes to be, a 'like' product.

1.4. National law dealing with limitations under international trade law

1.4.1. In Kanada wurde die Vereinbarkeit des Ein- und Ausfuhrverbots mit den Vorgaben des internationalen Handelsrechts im Gesetzgebungsprozess kaum thematisiert. Ein Vertreter des kanadischen Departements für auswärtige Angelegenheiten erklärte jedoch, das Vorhaben sei mit den Verpflichtungen Kanadas unter NAFTA, der WTO und dem CETA vereinbar, ohne dies weiter auszuführen.

1.4.2. Weder im Gesetzgebungsprozess zur Legalisierung von Cannabis in Uruguay noch in anderen einschlägigen Quellen finden sich Hinweise darauf, dass die Auswirkungen der Legalisierung von Cannabis auf Uruguays Verpflichtungen nach dem internationalen Handelsrecht thematisiert worden wären.

1.5. Import and export under national law

1.5.1. In Kanada ist es verboten, Cannabis ein- oder auszuführen, das nicht medizinischen oder Forschungszwecken dient.

1.5.2. In Uruguay regelt und kontrolliert der Staat die Ein- und Ausfuhr von Cannabis. Bisher scheint Uruguay Cannabis lediglich exportiert, jedoch nicht importiert zu haben. Detailliertere Regelungen zum Im- und Export finden sich bisher jedoch nur für Cannabis zu medizinischen oder Forschungszwecken sowie für Industriehanf.

2. State-run monopolies

2.1. Where a state decides to allow for the cultivation of cannabis, a combined reading of Articles 28 and 23 of the Single Convention indicates the creation of an Agency (or agencies) to carry out certain functions, including the designating of land upon which cultivation can take place (Article 23(2)(a)), licensing cultivators (Article 23(2)(b-c)), and taking physical possession of the product from those growers (Article 23(2)(d)). Moreover, the agency (or agencies) has "the exclusive right" of importing, exporting and wholesale trading (Article 23(2)(e)).

2.2. GATT and GATS establish rules for the behaviour for state trading enterprises and monopoly service providers, respectively. In essence, these entities must make market decisions on a commercial basis, and they must abide the non-discrimination obligations codified in the GATT and GATS.

2.3. Conflicts between the WTO Agreements and the Single Convention

2.3.1. Conflicts generally: adjudicators will endeavour, wherever possible, to find harmony between treaties.

2.3.2. Conflicts with The 'Agency' contemplated by the Single Convention: there is little to suggest that Articles 28 and 23 of the Single Convention on the one hand, and the requirements of GATT Article XVII and GATS Article VIII, on the other, are necessarily incompatible. Neither of the latter two articles (nor any other WTO Agreement) prohibit the creation of the type of agency contemplated by Article 23 of the Single Convention. Similarly, the functions that Article 23 demands of the agency responsible for controlling cannabis would not appear to be facially invalid from a WTO standpoint. Rather, a country liberalizing its cannabis market would have to make sure that the agency was motivated by commercial factors in its market activity (buying, selling, etc) and that it would not discriminate against WTO Member in a way proscribed by, inter alia, Articles I, III or XI of GATT.

2.4. National laws

2.4.1. In Kanada entscheiden die Provinzen und Territorien, ob der Vertrieb nur durch ein staatliches Monopol gestattet sein oder auch privaten Anbietern offenstehen soll. In den Provinzen New Brunswick, Nova Scotia, Prince Edward Island und Québec dürfen lediglich rein staatliche Verkaufseinrichtungen Cannabis anbieten. Auf Bundesebene scheint das Verhältnis dieser Frage zum Drogenkontrollsystem der Vereinten Nationen sowie zum internationalen Handelsrecht im Gesetzgebungsprozess kaum thematisiert worden zu sein.

2.4.2. In Uruguay reguliert und kontrolliert der Staat ausser Export und Import auch den Verkauf sowie die Produktion von Freizeitzwecken dienendem Cannabis. Der Verkauf von Cannabis im Inland geschieht durch staatlich lizenzierte Apotheken. Die Vereinbarkeit mit dem Drogensystem der Vereinten Nationen sowie mit dem internationalen Handelsrecht scheint im Gesetzgebungsverfahren nicht thematisiert worden zu sein.

3. International standards

3.1. International standards under the SPS and TBT

3.1.1. SPS

3.1.1.1. The SPS Agreement is likely only relevant to the discussion of a liberalized cannabis market to the extent that there is an 'edibles' portion of that market.

3.1.1.2. To the extent that the SPS governs a given measure, Member countries are encouraged to use international health and safety standards, guidelines and recommendations, where they exist. If they do so, they are relatively immune from challenge under the SPS. However, Members may use measures which result in higher standards if there is scientific justification.

3.1.2. TBT

3.1.2.1. In the context of legalized cannabis market, there are many conceivable pathways for technical regulations and CAPs supporting those technical regulations to be instrumental in a legalization effort.

3.1.2.2. Article 2.4 of the TBT requires that technical regulations be based upon international standards, to the extent those standards exist.

3.1.2.3. The ISO published a series of documents relating to the "Safety, security and sustainability of cannabis facilities and operations", but one cannot definitively say that these would be considered "international standards" within the meaning of the TBT.

3.1.2.4. Even when international standards exist, Members are not compelled to follow them if they are not relevant, or if they would be *ineffective* or *inappropriate* means for the fulfilment of the legitimate objectives pursued.

3.2. Definition of cannabis under national law

3.2.1. In Kanada umfasst der Begriff des Cannabis in erster Linie die Cannabis-Pflanze sowie -Pflanzenteile. Nicht erfasst sind nicht lebensfähige Samen, der ausgewachsene Stängel ohne jegliche andere Pflanzenteile sowie Fasern eines solchen Stängels und die Wurzeln. Eine Einzeldosis Cannabis darf einen THC-Gehalt von höchstens 10 mg haben.

3.2.2. In Uruguay umfasst der Begriff des psychoaktiven Cannabis die blühende Spitze mit oder ohne Frucht der weiblichen Cannabis-Pflanze sowie ihre Derivative mit einem THC-Gehalt von mindestens 1 %. Ausgenommen sind jedoch die Samen und die vom Stängel abgetrennten Blätter. Industriehanf darf eine THC-Gehalt von 1 % nicht überschreiten, für dessen Samen gilt 0.5 % als Schwelle. Das in Apotheken erhältliche Cannabis weist einen THC-Gehalt von bis zu 9 % (ALFA, BETA) oder bis zu 15 % (GAMMA) auf.

3.3. Labelling requirements under national law

3.3.1. In Kanada müssen Cannabis-Produkte mit bestimmten Angaben ausgewiesen werden. Hierzu gehören Angaben insbesondere zur Lizenz, zum Produkt, zur Losnummer sowie verschiedene Warnhinweise.

3.3.2. In Uruguay müssen Cannabis-Produkte mit bestimmten Angaben ausgewiesen werden. Hierzu gehören Angaben insbesondere zur herstellenden Firma, zum Produkt, zur Losnummer, zur Verwendung, verschiedene Warnhinweise sowie ein Barcode der Stempelmarke zur Nachverfolgung.

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