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Antonia Eliason

University of Mississippi School of Law

Robert Howse

NYU Law School

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A HIGHER AUTHORITY: CANADA'S CANNABIS LEGALIZATION IN THE CONTEXT OF INTERNATIONAL LAW

*Antonia Eliason and Robert Howse**

INTRODUCTION

Recreational cannabis¹ is being decriminalized, deregulated, and even legalized across a growing number of jurisdictions throughout the world.² This article addresses the international law and policy implications of this trend, examining three international law frameworks: (1) the drug control and anti-trafficking framework of the United Nations (the “UN”) drug conventions; (2) international human rights law; and (3) the international economic law regime, in which the World Trade Organization (the “WTO”) is central. As we shall explain, there is no consistency and dialogue between

* Antonia Eliason is Assistant Professor at the University of Mississippi School of Law. Robert Howse is Lloyd C. Nelson Professor of International Law at NYU Law School. The authors are grateful for helpful comments and suggestions from the participants at the Rethinking Trade and Investment Law conference on an early version of this research, as well as for the insights of, among others, Chantal Thomas, Greg Schaffer, Rob Wai, Kerry Rittich, David Kennedy, and Judge Dennis Davis. They would also like to thank their excellent research assistants, particularly James Kelly at the University of Mississippi and Arpit Guru, LL.M. (NYU). Simon Lester read a very early version of the manuscript and offered pointed and helpful criticism, as well as enthusiasm for the project. Howse presented a related paper at the NYU Law School summer faculty workshop and received useful comments and criticism from, among others, Kevin Davis, Rick Pildes, and Dick Stewart.

1. Recreational cannabis is physically identical to medical cannabis, however medical cannabis has been legalized in a number of countries and U.S. states and is available by prescription in those jurisdictions to people suffering from certain medical conditions. Cannabinoids are chemicals found in cannabis, with tetrahydrocannabinol (THC) being the main ingredient that results in the “high” feeling from consuming both recreational and medical cannabis. For medical purposes, cannabidiol or CBD is also of particular interest in reducing pain and inflammation since it does not result in intoxication. Medical cannabis tends to have higher levels of CBD and lower levels of THC than recreational cannabis. *What Is the Difference Between Medical and Recreational Marijuana?*, DOCMJ (June 5, 2017), <https://docmj.com/2017/06/05/difference-medical-recreational-marijuana/>.

2. Throughout this paper we have opted to use the term ‘cannabis’ rather than the more colloquial term ‘marijuana’ as cannabis encompasses a broader range of products and is more scientifically accurate. See *About cannabis*, GOV’T OF CANADA (Feb. 28, 2019), <https://www.canada.ca/en/health-canada/services/drugs-medication/cannabis/about.html>; Sean Williams, *These 30 Countries Have Legalized Medical Marijuana in Some Capacity*, THE MOTLEY FOOL (July 21, 2018), <https://www.fool.com/investing/2018/07/21/these-30-countries-have-legalized-medical-marijuan.aspx>; German Lopez, *Marijuana is legal for medical purposes in 32 states*, VOX (Nov. 14, 2018), <https://www.vox.com/identities/2018/8/20/17938366/medical-marijuana-legalization-states-map>.

these three regimes, and each has a distinctive impact on the legality of cannabis legalization.

On October 16, 2018, Canada legalized recreational cannabis.³ Canada's move represents an important event because of its stature in the international community. Canada is a significant economic power, a member of the Organisation for Economic Co-operation and Development (the "OECD") and G7, and a state that has a major commitment to the international legal order. In this Article, we use Canada's legal regime for cannabis liberalization as a case study that illuminates the tensions and the unexplored complementarities between the different international legal regimes or orders that affect cannabis legalization.

Mounting scientific evidence shows that cannabis, when responsibly used, is less harmful than other legal substances such as tobacco and alcohol.⁴ In addition to raising complex domestic legal and regulatory questions, legalization also raises issues of international law, which have been less prominently discussed or explored either in policy debate or in academic literature. First and most obvious is the United Nations international legal and regulatory framework for drug control and anti-trafficking, which encompasses the International Drug Control Conventions as well as activities of the World Health Organization (the "WHO").⁵ This framework is generally viewed as highly unfavorable to the legalization of recreational drugs, including cannabis.⁶

Another international legal regime that is increasingly implicated is international human rights law. At the domestic level, courts frequently invoke domestic constitutional norms of human rights to strike down laws that

3. Dan Bilefsky, *Legalizing Recreation Marijuana, Canada Begins a National Experiment*, N.Y. TIMES (Oct. 17, 2018), <https://www.nytimes.com/2018/10/17/world/canada/marijuana-pot-cannabis-legalization.html>.

4. See Philip M. Boffey, *What Science Says About Marijuana*, N.Y. TIMES (July 30, 2014), <https://www.nytimes.com/2014/07/31/opinion/what-science-says-about-marijuana.html>.

5. The International Drug Control Conventions consist of three major treaties. Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 151, *as amended* by the 1972 Protocol Amending the Single Convention on Narcotic Drugs, Mar. 24, 1972, 26 U.S.T. 1439, 976 U.N.T.S. 3 [hereinafter Single Convention]; Convention on Psychotropic Substances, Feb. 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175 [hereinafter 1971 Convention]; United Nations Convention Against Illicit Traffic in Narcotic Drugs in Psychotropic Substances, Dec. 20, 1988, 1582 U.N.T.S. 95 [hereinafter 1988 Convention].

6. See, e.g., Damon Barrett, The Int'l Harm Reduction Ass'n, *'Unique in International Relations?': A Comparison of the International Narcotics Control Board and the UN Human Rights Treaty Bodies*, 8-9, (2008) (criticizing the International Narcotics Control Board ("INCB"), its secrecy, and its role as an obstacle to drug treatment and HIV prevention programs); Roojin Habibi & Steven J. Hoffman, *Legalizing Cannabis Violates the UN Drug Control Treaties, but Progressive Countries like Canada Have Options*, 49 OTTAWA L. REV., 427, 432 (2017) (highlighting criticisms of the regime as "the product of a bygone era and out of step with contemporary norms and public health research.").

criminalize cannabis use.⁷ In addition to personal liberty and privacy, human rights are invoked in connection to the violence and inequitable use of the criminal justice system often associated with the war on drugs. International norms—for example, in the International Covenant on Civil and Political Rights (the “ICCPR”) and the International Covenant on Economic, Social and Cultural Rights (the “ICESCR”)—often parallel and reinforce domestic constitutional rights.

Finally, and least discussed in existing literature, is the framework of international economic law as exemplified by the WTO. As the Appellate Body of the WTO emphasized in a recent case concerning Colombia, “illicit trade” is not exempt from WTO disciplines.⁸ Overall, the WTO legal framework permits member countries to ban trade in products that are also prohibited domestically. Where a country that is a WTO Member legalizes cannabis *domestically*, however, its justifications for restricting *international* transactions may well be closely scrutinized under WTO law, whether on the basis of protection of health or public morals. Such measures may include restrictions on advertising and packaging, the subject of a recent high-profile WTO dispute concerning tobacco.⁹

It is difficult to explore in depth the three legal frameworks and their interaction with respect to recreational cannabis legalization without supposing a concrete model for legalization, which may be one reason that international legal scholarship is scarce or highly speculative. Canada’s federal government and provinces have, however, adopted a comprehensive legal and regulatory scheme in recent months for the distribution, sale, and use of recreational cannabis.¹⁰ This Article uses the Canadian regime as an opportunity to systematically explore the international legal challenges of cannabis liberalization.

The first country to legalize recreational cannabis on a national level was Uruguay in 2013.¹¹ While a growing number of countries have legal-

7. See, e.g., Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 25/8/2009, “Arriola, Sebastián y otros / Recurso de Hecho”, Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (2009-332-1965) (Arg.). We are grateful to Ruti Teitel for informal translations of the Spanish text of this judgment. See also *Minister of Justice and Constitutional Development v. Prince*, [2018] ZACC 30 (CC) at 55, ¶ 100 (S. Afr.).

8. Appellate Body Report, *Colombia—Measures Relating to the Importation of Textiles, Apparel and Footwear*, ¶¶ 5.41–45, WTO Doc. WT/DS461/AB/R (adopted June 22, 2016).

9. See Panel Report, *Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R [hereinafter *Australia—Plain Packaging*].

10. Cannabis Act, S.C. 2018, c 16, § 7 (Can.); Cannabis Regulations, SOR/2018-144 (Can.).

11. GOVERNMENT OF CAN., A FRAMEWORK FOR THE LEGALIZATION AND REGULATION OF CANNABIS IN CANADA: THE FINAL REPORT OF THE TASK FORCE ON CANNABIS LEGALIZATION AND REGULATION 10 (2016) [hereinafter TASK FORCE REPORT].

ized and regulated medical cannabis,¹² the Canadian Cannabis Act is the most ambitious liberalization effort yet of any state with a large presence in the international community and global economy.¹³ Countries recognized that Canada's move represented a significant shift in how countries would view cannabis use. Even before the Canadian regime was implemented, Russia argued that Canada's legalization violated international law and threatened to bring a complaint before the United Nations.¹⁴ In this Article, we examine the Canadian law and its supporting regulations in light of the United Nations drug control and anti-trafficking framework; the international human rights regime; and the international economic law regime. We draw conclusions as to the kind of domestic legal and regulatory approaches that are most likely to create tensions with international law, on the one hand, or exploit complementarities with international law, on the other hand. We also pose questions as to the necessity of better integrating or addressing tensions between these three international legal frameworks in order for international law to guide the phenomenon of recreational cannabis legalization in a coherent way for the good of the international community.

Part I of this Article provides an overview of some of the key terms and provisions of Canada's Cannabis Act. Part II looks at the Cannabis Act in the context of the International Drug Conventions, examining how the various convention provisions might apply, looking first at the Single Convention and then at the 1988 Convention and how that convention fits with Canadian constitutional provisions. Part III focuses on the international human rights framework and how the Cannabis Act might be viewed as compatible with international human rights law even where incompatible with the International Drug Conventions. This Part also offers a look at some of the cannabis-related human rights jurisprudence that arose in various jurisdictions. Finally, Part IV analyzes the Cannabis Act in light of the international economic law framework, providing an in-depth overview of how various WTO provisions might affect the Cannabis Act as drafted.

12. Amanda Erickson, *Mexico Just Legalized Medical Marijuana*, WASH. POST (June 21, 2017), https://www.washingtonpost.com/news/worldviews/wp/2017/06/21/mexico-just-legalized-medical-marijuana/?utm_term=.acee545488d2; Jon Sharman, *Poland Legalises Medical Cannabis*, INDEPENDENT (Nov. 4, 2017, 5:39 PM), <https://www.independent.co.uk/news/world/europe/poland-legalise-medical-marijuana-cannabis-pharmacy-a8037681.html>.

13. *See generally*, Rob Crilly, *Canada Is First Major Economy to Vote to Legalise Recreational Cannabis Use*, TELEGRAPH (June 20, 2018, 9:33 AM), <https://www.telegraph.co.uk/news/2018/06/20/canada-votes-legalise-recreational-cannabis-use/>; Chelsea Cox, *The Canadian Cannabis Act Legalizes and Regulates Recreational Cannabis Use in 2018*, 122 HEALTH POL'Y 205 (2018).

14. Jason Lemon, *Russia Says Canada Weed Legalization is a 'Breach' of International Legal Obligations*, NEWSWEEK, (June 25, 2018, 3:31 PM), <https://www.newsweek.com/russia-condemns-canada-decision-legalize-weed-994690>.

I. CANADA'S CANNABIS ACT

In 2001, Canada decriminalized medical cannabis.¹⁵ In April 2017, Canada released a first draft of its proposed regulation expanding the legalization of cannabis to cover recreational as well as medical purposes.¹⁶ The law was passed on June 21, 2018, incorporating several proposed amendments, and came into effect on October 17, 2018. Bill C-45, also known as the Cannabis Act (the “Act”), authorizes the Canadian government to enact further regulations in addition to amending the Controlled Drugs and Substances Act and several other related acts.¹⁷ The Act delegates authority over several important matters to the Minister of Justice and Attorney General of Canada (the “Minister”) to address through regulation.

Key terms in the Act include “produce,” which is defined in relation to cannabis as “to obtain it [cannabis] by any method or process.”¹⁸ Such methods include manufacturing, synthesis, chemical or physical alteration, cultivating, propagating, or harvesting it or any living thing from which it can be extracted or otherwise obtained.¹⁹ One of the main goals the Act sets out is to provide “for the licit production of cannabis to reduce illicit activities in relation to cannabis”²⁰ Other goals include protecting public health and safety.²¹ Additionally, the Act is meant to “deter illicit activities in relation to cannabis through appropriate sanctions and enforcement measures” as well as to “provide access to a quality-controlled supply of cannabis”²² These objectives speak directly to cannabis as a good and implicate international trade law in the conceptual framework of the Act.

The Act further prohibits possession of cannabis for purposes of selling it where not authorized under the act²³ as well as prohibiting the sale of cannabis or anything held out to be cannabis to any individual, whether over or under 18 years of age, or to any organization if not authorized to sell cannabis under the Act.²⁴ This would seemingly criminalize the sale of oregano being passed off as cannabis by unauthorized cannabis dealers. The Act also abstains from fully regulating cannabis distribution and sale implicitly because aspects of these activities fall within provincial jurisdiction under the

15. Mohammad Hajizadeh, *Legalizing and Regulating Marijuana in Canada: Review of Potential Economic, Social, and Health Impacts*, 5 INT’L J. HEALTH POL’Y & MGMT. 453, 453 (2016).

16. Cannabis Act, S.C. 2018, c 16, § 7 (Can.).

17. *Id.* § 139(1).

18. *Id.* § 2.

19. *Id.*

20. *Id.* § 7(c).

21. *Id.* § 7.

22. *Id.* § 7(d), (f).

23. *Id.* § 10(1).

24. *Id.* § 10(2).

Constitution Act of 1867. Moreover, the Act continues to approach cannabis regulation as primarily a criminal law matter.²⁵

The Act directly addresses the import and export of cannabis, stating simply that, “[u]nless authorized under this Act, the importation or exportation of cannabis is prohibited.”²⁶ Possession for purposes of exportation is similarly prohibited.²⁷ The Act does not provide more detail, leaving the specifics of importation/exportation to further legislative measures authorized under the Act.

The Act limits home cultivation to four plants in a home at any given time, irrespective of the number of residents in the home.²⁸ Critics of the Act suggest that this would potentially expose minors to cannabis, which would run contrary to several of the stated objectives of the Act—to protect young persons from inducement to use cannabis as well as protecting the health of young persons by restricting their access to cannabis.²⁹

The Act further limits advertisement, stating that, unless authorized under the Act, promotion of cannabis, cannabis accessories, or services related to cannabis is prohibited, including the communication of information concerning price or distribution,³⁰ unless the promotion is directly addressed to an individual over 18 years of age.³¹ This appears to contrast with U.S. domestic regulations concerning promotion of cannabis, where, despite recreational cannabis only being legal in a few states, periodicals such as Cannabis Now explicitly advertise a variety of cannabis products and accessories to purchasers of the magazine, even in states where cannabis is illegal. The Canadian prohibition extends to publications originating outside of Canada, which would include such American periodicals.³² Additionally, the Act prohibits individuals, events, activities, and facilities from sponsoring cannabis or cannabis accessory producers.³³

The Act requires cannabis to be sold in accordance with the regulations on packaging and labeling; the key here is that the packaging cannot glamorize cannabis or associate it with any persons. The aim of this restriction is

25. Jeremy de Beer & Alyssa Gaffen, *Intellectual Property Rights in the Recreational Cannabis Market: Craft or Commodity*, 50 U.B.C. L. REV. 621, 624 (2017).

26. Cannabis Act, S.C. 2018, c 16, § 11(1) (Can.).

27. *Id.* § 11(2).

28. *Id.* § 12(4)–(5). (“Dwelling-house,” the term used for home in the Act, is defined according to the Criminal Code definition, as “the whole or any part of a building or structure that is kept or occupied as a permanent or temporary residence,” including mobile homes. *Id.* § 2; Criminal Code, R.S.C. 1985, c C-46 § 2 (Can.).

29. Ryan Maloney, *Liberal Pot Bill Could See Kids Recruited as ‘Drug Mules’ by Dealers, Tories Argue*, HUFFINGTON POST CAN. (May 31, 2017), http://www.huffingtonpost.ca/2017/05/31/liberal-pot-bill-marilyn-gladu-rob-nicholson_n_16896582.html; see also Cannabis Act, S.C. 2018, c 16, § 7(a)–(b) (Can.).

30. Cannabis Act, S.C. 2018, c 16, § 17(1)(a) (Can.).

31. *Id.* § 17(2)(a).

32. *Id.* § 20.

33. *Id.* § 21.

in part to reduce inducements for youth to use cannabis.³⁴ Similarly, cannabis accessories cannot be labeled or packaged in ways that would make them appealing to young persons or that would glamorize the use of cannabis.³⁵ The Act additionally forbids provision or offers to provide cannabis or cannabis accessories “without monetary consideration”³⁶ or in exchange for services rather than money.³⁷ The Act also prohibits the use of games, lotteries, and raffles as an inducement for the purchase of cannabis or cannabis accessories.³⁸

The Canadian government created the Task Force on Cannabis Legalization and Regulation (the “Task Force”) to review key challenges relating to the legalization of recreational cannabis and to provide recommendations to the government in advance of its drafting of the Act.³⁹ In its final report, after receiving input from various constituents with an interest in the potential legalization of recreational cannabis, the Task Force discussed possible options for structuring the market. With respect to wholesale distribution, the Task Force recommended regulation by the provinces and territories rather than by the federal government since the existing provincial alcohol distribution networks could be applied to the distribution of cannabis.⁴⁰ For the retail market, the Task Force recommended that provinces and territories regulate such sales in collaboration with municipalities, seeing benefit in both the government-run model and the private-enterprise model.⁴¹ While some constituents felt that a government monopoly similar to that used by most provinces and territories in relation to alcohol sales was the best model, others advocated for private enterprise models more akin to the retail market in Colorado and other U.S. states that have legalized recreational cannabis.⁴² Both models, the Task Force found, could adequately serve customers as long as there is no co-location of alcohol or tobacco and cannabis sales.⁴³

The Cannabis Act proposes legalization through licensing and gives broad discretion to the Minister in charge of implementing the Act to establish a legal regime to grant licenses.⁴⁴ In addition to the Cannabis Act, the Canadian government published the Cannabis Regulations, which came into effect on October 17, 2018. The regulations help initiate the Cannabis Act

34. *See id.* § 26(a).

35. *Id.* § 27.

36. *Id.* § 24(1)(a).

37. *Id.*

38. *Id.* § 24(1)(b).

39. TASK FORCE REPORT, *supra* note 11, at 1.

40. *Id.* at 33.

41. *Id.* at 34–35.

42. *Id.* at 33.

43. *Id.* at 35.

44. *See Cannabis Act*, S.C. 2018, c 16, § 61(1) (Can.).

and detail what rules apply for the production, distribution, sale, importation, and exportation of cannabis, particularly with respect to licensing.⁴⁵

The Canadian medical cannabis system already operated through a licensing regime prior to the enactment of the Cannabis Act. The Access to Cannabis for Medical Purposes Regulation, which governed medical cannabis in Canada until its repeal in 2018,⁴⁶ was replaced by the broader Cannabis Regulations.⁴⁷ These Regulations contemplate the import and export of medical cannabis and provide detailed procedures that licensed producers who import or export medical cannabis must follow to obtain import or export licenses.⁴⁸ For an import permit, for instance, the licensed producer must provide information regarding, amongst other things, a description of the product, its intended use, its quantity, its Tetrahydrocannabinol (“THC”) content, the name and address of the exporter, the port of entry into Canada, the address of the customs office to which the product will be delivered, and the modes of transportation used, including whether or not there is transshipment.⁴⁹ The Minister of Justice must then review the information and, if applicable, approve the permit.⁵⁰ Under the Cannabis Act, import and export licenses for cannabis “may be issued only in respect of cannabis for medical or scientific purposes or in respect of industrial hemp.”⁵¹ In other words, there is to be no import/export of recreational cannabis.

II. CANADA’S ACT IN LIGHT OF THE INTERNATIONAL DRUG CONVENTIONS

There can be no discussion of the legalization of cannabis without a comprehensive account of the UN drug control and anti-trafficking framework, which consists of three treaties and the various institutional arrangements that implement them. The key UN drug treaties are the Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol (the “Single Convention” or “1961 Convention”), the 1971 Convention on Psychotropic Substances (the “1971 Convention”), and the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the “1988 Convention”).⁵² The International Narcotics Control

45. See Cannabis Regulations, *supra* note 10.

46. Access to Cannabis for Medical Purposes Regulation, SOR/2016-230 (Can.).

47. Cannabis Regulations, *supra* note 10.

48. See Cannabis Regulations, *supra* note 10, pt. 10.

49. Cannabis Regulations, *supra* note 10, §205. THC is the main psychoactive component in cannabis and is responsible for the “high” that consumers of cannabis experience. See *What Is the Difference Between Medical and Recreational Marijuana?*, *supra* note 1.

50. *Id.* § 206.

51. Cannabis Act, S.C. 2018, c 16, § 62(2) (Can.).

52. U.N. Office on Drugs and Crime, *The International Drug Control Conventions* (2013), https://www.unodc.org/documents/commissions/CND/Int_Drug_Control_Conventions/Ebook/The_International_Drug_Control_Conventions_E.pdf.

Board (the “INCB”) and the Commission on Narcotic Drugs operate together to enforce the drug treaties.⁵³ The WHO offers technical expertise to the United Nations on the scheduling of substances under the drug conventions,⁵⁴ while the Commission on Narcotic Drugs takes decisions regarding scheduling.⁵⁵

The 1988 Convention requires parties to criminalize the “cultivation of opium poppy, coca bush or cannabis plant for production of narcotic drugs.”⁵⁶ It further “[r]equires countries to criminalize possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption” when those substances are prohibited by the Single Convention or the 1971 Convention.⁵⁷ The Single Convention provides limited opportunities to export cannabis, prohibiting states from knowingly permitting the export of drugs except as authorized by the country of destination and within the limits specified to the INCB for scientific or medical research purposes or as required for the manufacture of other drugs.⁵⁸ It also requires the establishment of government agencies to control cannabis regulation.⁵⁹ The main accomplishment of the 1988 Convention is that it extends controls to the entire market chain, from precursors at the beginning of the chain⁶⁰ to anti-money laundering measures at the end of the chain.⁶¹

53. Single Convention, *supra* note 5, art. 5 (“The Parties, recognizing the competence of the United Nations with respect to the international control of drugs, agree to entrust to the Commission on Narcotic Drugs of the Economic and Social Council, and to the International Narcotics Control Board, the functions respectively assigned to them under this Convention.”).

54. *Id.* art. 3, ¶ 1.

55. The International Drug Control Conventions, *supra* note 52, at 1.

56. 1988 Convention, *supra* note 5, art 3, ¶ 1(a)(ii).

57. *Id.* art. 3 ¶ 2.

58. See Single Convention, *supra* note 5, art. 31 (referring in part to art. 19, ¶ 2).

59. *Id.* art. 28.

60. See 1988 Convention, *supra* note 5, at pmbl. A precursor is a substance involved in a chemical reaction to produce one or more other substances. In the context of psychoactive substances for example, acetic anhydride is a substance that is essential in the refinement of morphine to heroin. See *Heroin drug profile*, EUR. MONITORING CTR. FOR DRUGS AND DRUG ADDICTION (Jan. 8, 2015), <http://www.emcdda.europa.eu/publications/drug-profiles/heroin>.

61. *Id.* art. 3, ¶ 1(b)(i) (requiring parties to adopt measures establishing as criminal offenses under domestic law acts including “[t]he conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph (a) of this paragraph. . . .”); see also *id.* art. 3, ¶ 1(a)(i) (referring to offences relating to the “production, manufacture, extraction; preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention”); *id.*, at pmbl. (“Recognizing also the importance of strengthening and enhancing effective legal means for international co-operation in criminal matters for suppressing the international criminal activities of illicit traffic.”).

This Part will further analyze each of these treaties and their institutions in order to draw out the facets of Canada's domestic legal and regulatory approaches most likely to create tension or exploit complementarities with international drug law. At the same time, this Part highlights some of the flaws that exist in the treaties, including issues with the classification of cannabis.

A. *The Single Convention*

Article 4(c) of the Single Convention reads: "The parties shall take such legislative and administrative measures as may be necessary . . . subject to the provisions of this Convention, to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs."⁶² Article 3(2) of the 1988 Convention reinforces this obligation:

Subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention.⁶³

At the same time, Article 25 of the 1988 Convention states: "The provisions of this Convention shall not derogate from any rights enjoyed or obligations undertaken by parties to this Convention under the 1961 Convention[.]"⁶⁴ In other words, to the extent that there any limits or flexibilities in the Single Convention with respect to the obligation to prevent production, sale, possession, and use of cannabis for non-medical and non-scientific purposes, the "rights" would also apply to limit the obligations in Article 3(2) of the 1988 Convention.

Additionally, the Single Convention contains a codified medical and scientific purposes exemption in the form of Article 2(5)(b) that states, in relation to Schedule IV drugs, that:

[a] Party shall, if in its opinion the prevailing conditions in its country render it the most appropriate means of protecting the public health and welfare, prohibit the production, manufacture, export and import of, trade in, possession or use of any such drug except for amounts which may be necessary for medical and scientific research only, including clinical trials therewith to be conducted under or subject to the direct supervision and control of the Party.⁶⁵

62. Single Convention, *supra* note 5, art. 4(c).

63. 1988 Convention, *supra* note 5, art. 3, ¶ 2.

64. *Id.* art. 25.

65. Single Convention, *supra* note 5, art. 2, ¶ 5(b).

The UN drug conventions improperly classify certain substances, including cannabis, into schedules based on outdated information. Schedule IV drugs are a subset of Schedule I drugs and include cannabis and cannabis resin but not cannabis extracts and tinctures, which are included in Schedule I.⁶⁶ Schedule IV contains those drugs that are deemed most harmful and prone to abuse, including heroin and cocaine. These drugs are viewed as lacking therapeutic value.⁶⁷ The classification system for the big three—heroin, coca, and cannabis—relies on outdated scientific evidence; heroin’s status was last reviewed in 1949, and cannabis and the coca leaf were last reviewed in 1965.⁶⁸ As is clear from the wealth of medical and scientific research since then, cannabis has considerable medical benefit as well as limited potential for abuse.⁶⁹ To further complicate matters, cannabis is scheduled under the Single Convention on Narcotic Drugs, while THC, the psychoactive ingredient responsible for the “high” experienced by cannabis users, is scheduled under the 1971 Convention on Psychotropic Substances.⁷⁰ The incorrect scheduling of cannabis based on outdated information further complicates efforts to move toward legalization of cannabis and suggests that this scheduling needs to be reviewed.

66. The Single Convention established the four schedule: Schedule I, which contains drugs that are liable to significant abuse but which have potential therapeutic uses; Schedule II, which includes drugs such as codeine that have lower abuse potential than Schedule I drugs; Schedule III, which lists exempt preparations of drugs in Schedules I and II; and Schedule IV, which contains Schedule I drugs that are particularly liable to abuse with no therapeutic offset. *See* Single Convention, *supra* note 5, art. 2, ¶ 5.

67. *Id.* art. 3, ¶¶ 3–5 (Article 3, ¶ 5 states that if the WHO finds that a Schedule I drug “is particularly liable to abuse and to produce ill effects . . . and that such liability is not offset by substantial therapeutic advantages not possessed by substances other than drugs in Schedule IV,” the drug may be placed in Schedule IV.).

68. CHRISTOPHER HALLAM ET AL., SCHEDULING IN THE INTERNATIONAL DRUG CONTROL SYSTEM 4 (2014), https://www.tni.org/files/download/dlr25_0.pdf.

69. *See, e.g.*, Hajizadeh, *supra* note 15, at 453 (noting that cannabis has been used medicinally and recreationally for thousands of years, and that proponents of recreational legalization highlight the lower danger of overdose and addiction with cannabis). This is not to say that cannabis has no potential for abuse – like alcohol, there are negative consequences of heavy cannabis use. As Jean-François Crépault has argued with respect to Canada’s cannabis legalization, this is potentially problematic in the context of public health and legalization of cannabis as “individuals are encouraged to consume. Our society requires, as all capitalist societies do, healthy, consuming bodies in order to function and flourish.” Jean-Francois Crépault, *Cannabis Legalization in Canada: Reflections on Public Health and the Governance of Legal Psychoactive Substances*, FRONTIERS IN PUB. HEALTH (Aug. 6, 2018), <https://www.frontiersin.org/articles/10.3389/fpubh.2018.00220/full>. *See also* Dirk W. Lachenmeier & Jürgen Rehm, *Comparative risk assessment of alcohol, tobacco, cannabis and other illicit drugs using the margin of exposure approach*, 5 SCI. REP., no. 8126, Jan. 2015, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4311234/pdf/srep08126.pdf>; Benedikt Fisher et al., *Lower-Risk Cannabis Use Guidelines: A Comprehensive Update of Evidence and Recommendations*, 107 AM. J. OF PUBLIC HEALTH e1 (2017), <https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2017.303818>; THE HEALTH EFFECTS OF CANNABIS AND CANNABINOIDS (2017).

70. HALLAM ET AL., *supra* note 68, at 7.

Recognizing that the classification of cannabis reflects outdated information, the WHO recently recommended that whole-plant marijuana and cannabis resin be removed from Schedule IV in addition to moving THC and its isomers from the 1971 Convention on Psychotropic Substances to Schedule I of the Single Convention.⁷¹ The proposal also recommends that CBD should not be scheduled within the drug conventions.⁷² The proposal will be presented to the UN Commission on Narcotic Drugs, which will then have to vote on it. Should the proposal pass, this will have a significant impact in demonstrating a global shift in attitude toward cannabis—though the legal impact will be limited as legalization of recreational cannabis would still be precluded under a strict interpretation of the treaties.

The INCB explicitly stated its view that Canada's scheme for legalizing recreational cannabis is a violation of Article 4(c) of the Single Convention. According to the INCB,

[w]hile other provisions of the international drug control conventions may lend themselves [to] flexible interpretation, leaving the modalities of implementation to the discretion of States, the obligation contained in Article 4 c) [sic] of the Single Convention . . . is absolute and unequivocal in nature. Article 4 (c) is a peremptory norm for which implementation is a *sine qua non* of compliance with the international legal drug control framework.⁷³

Further, according to the INCB, Canada's scheme is "also inconsistent with Canada's obligations as a Party to the 1988 United Nations Convention Article 3(2), which requires parties to establish as a criminal offence the intentional possession, purchase, or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention."⁷⁴

Despite its importance as an oversight body for the United Nations drug control and anti-trafficking framework, the INCB is not the final authority for interpreting the drug conventions. Both the Single Convention and the 1988 Convention give that authority to the International Court of Justice (the "ICJ").⁷⁵ Since both Conventions are treaties within the meaning of the Vienna Convention on the Law of Treaties (the "VCLT"), in interpreting the

71. Tom Angell, *World Health Organization Recommends Reclassifying Marijuana Under International Treaties*, FORBES (Feb. 1, 2019), <https://www.forbes.com/sites/tomangell/2019/02/01/world-health-organization-recommends-rescheduling-marijuana-under-international-treaties/#60030c3b6bcc>.

72. World Health Org. Director-General, Letter dated Jan. 24, 2019 from the World Health Org. to the Secretary-General.

73. Int'l Narcotics Control Bd., *Brief on the Conformity of Bill C-45, An Act Respecting Cannabis and to Amend the Controlled Drugs and Substances Act, the Criminal Code and Other Acts, as Passed by the House of Commons, November 27, 2017*, ¶ 15, (Apr. 11, 2018).

74. *Id.* ¶ 17.

75. 1988 Convention, *supra* note 5, art. 32, ¶ 2; Single Convention, *supra* note 5, art. 48, ¶ 2.

rights and obligations of the Single and 1988 Conventions, the ICJ will undoubtedly apply the interpretive principles set out in Articles 31 and 32 of the VCLT.⁷⁶ Article 31 underlines the importance of giving the ordinary meaning to words in the text of the treaty, and, as some international tribunals have noted, it is important to give meaning to *all* the words that are present in a particular treaty provision under consideration. A treaty interpreter is required to interpret a treaty in light of its purpose, object, and context.⁷⁷ Thus, for example, one must evaluate the consistency of Canada's scheme not only with Article 4(c) but together with its obligations to prevent drug abuse under Article 38. The language of 4(c) itself establishes a hierarchy or priority between the obligation to take measures to prevent non-medical and non-scientific uses and other provisions of the Convention. As noted, that obligation is "subject to" other provisions of the Convention. Canada may therefore modify or even derogate from its obligation under 4(c) to the extent that this is necessary to fulfill its obligation under Article 38 to "take all practicable measures for the prevention of abuse of drugs."

Furthermore, according to Article 31(3)(c) of the VCLT, the treaty interpreter must apply any other relevant rules of international law that are binding between the parties. This may include human rights norms, the provisions of WTO treaties, or the international law frameworks considered in the next sections of this Article. Article 38 of the Statute of the ICJ sets out the sources of international law, which include treaty, custom, general principles, and, secondarily, decisions of international and domestic courts and tribunals and the views of distinguished authorities in public international law.⁷⁸

76. See Vienna Convention on the Law of Treaties arts. 31–32, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 ("Article 31 General Rule of Interpretation: 1. A treaty shall be interpreted in good faith 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. . . . 3. There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) Any relevant rules of international law applicable in the relations between the parties. . . . Article 32 Supplementary Means Of Interpretation: Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.").

77. *Id.* art. 31, ¶ 1.

78. Statute of the International Court of Justice art. 38, ¶ 1, *opened for signature* June 26, 1945, 3 U.S.T. 1153 ("The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b) international custom, as evidence of a general practice accepted as law; c) the general principles of law recognized by civilized nations; d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.").

Despite the INCB's assertion that the obligation in the Single Convention to prohibit non-medical and non-scientific use of cannabis is unequivocal, a close reading of the Single Convention employing the principles of the VCLT suggests a much more complex picture.⁷⁹ The exact wording of Article 4(c) of the Single Convention directs parties to take necessary legislative and administrative measures to control and regulate drugs: "Subject to the provisions of this Convention, to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs."⁸⁰ The INCB largely relies on this text while ignoring the lead-in words "subject to the provisions of this Convention." These words, however, are essential to understanding the scope and limits of the obligation that follows to take measures to prohibit non-medical and non-scientific use of cannabis. The words "subject to the other provisions of this Convention" mean that, in fact, the prohibition is not unequivocal; to the contrary, it may be circumscribed by "other provisions." The French version of the Single Convention underlines the limiting nature of this phrase through its rendering of this clause as "[s]ous réserve des dispositions de la présente Convention" (under reservation of the provisions of the present Convention).⁸¹

A first step in determining the consistency of Canada's scheme for legalizing cannabis with the obligation in Article 4(c) would therefore be to consider *other provisions* of the Single Convention that might qualify or delimit the obligation to take measures to prohibit non-medical and non-scientific use of cannabis. In our view, several provisions are relevant.

First, Article 28 ("Control of Cannabis") of the Single Convention clearly envisages that, under some circumstances, a Party to the Convention may permit "the cultivation of the cannabis plant for the production of cannabis or cannabis resin." Article 23, however, subjects cultivation to a "system of controls" aimed at "respecting the control of the opium poppy."⁸² Article 23 also provides that growing cannabis shall be exclusively under the control of a government agency, which will license growers, acquire production, and retain the exclusive rights of importing, exporting, and wholesale trading.⁸³ Canada's scheme (admittedly) does not conform in exact detail to the "system of controls" that Article 23 envisages.⁸⁴ Allowing individuals to cultivate a small number of plants for their own use is the

79. See Habibi & Hoffman, *supra* note 6.

80. Single Convention, *supra* note 5, art. 4(c).

81. Convention Unique sur les Stupéfiants de 1961, Telle que Modifiée par le Protocole de 1972 Portant Amendement de la Convention Unique sur les Stupéfiants de 1961 art. 4(c) August 8, 1975, 976 U.N.T.S. 105 (emphasis added).

82. Single Convention, *supra* note 5, art. 28, ¶ 1.

83. *Id.* art. 23, ¶¶ 1, 2(b), (e).

84. Article 23, ¶ 2(a) of the Single Convention requires, for instance, that the government agency designate the areas in which and the plots of land on which cultivation can take place.

most prominent example of where Canada's scheme departs from a strict interpretation of Article 23's "system of controls."⁸⁵ But, overall, from licensing and permit provisions to strict limitations on trade, Canada's scheme constitutes a highly managed, government-controlled system for legal recreational cannabis.

This system supports the object and purpose of the controls envisaged by Article 23, which is to prevent *domestic* production and trade in cannabis from creating negative externalities or spillover effects for other states. Such spillovers would occur if lax or non-existent domestic controls were to facilitate the entry of cannabis into the stream of illicit *international* commerce.⁸⁶ As the preamble states, the premise of the Single Convention is the need for "co-ordinated and universal action" or "international co-operation," that is, so that the policies of one country do not undermine the drug control policies of other countries. Hence, the Single Convention is really an elaboration of the norms in earlier conventions which focused on international trade and trafficking of narcotics.⁸⁷

The 1988 Convention refers to "illicit trafficking" in its title. The Single Convention's aim to limit "such drugs to medical and scientific use" implies the same goal of preventing illicit trafficking. But it would be erroneous to interpret the Single Convention as requiring state parties to altogether prohibit non-medical and non-scientific use of the identified drugs under domestic law. Rather, the Single Convention stipulates that states cooperate with each other to ensure that any elements of permissiveness in their domestic regimes do not undermine the efforts of other states to restrict use to medical and scientific purposes. This can be gleaned from the Single Convention's identification of "international co-operation" as the means to achieve its goal.⁸⁸ The duties of the Single Convention are duties of international cooperation—not those of domestic legal harmonization. In both the Single Convention and the 1988 Convention there is a clear contrast between the unequivocal obligations that relate directly and indirectly to the

85. See Cannabis Act, S.C. 2018, c 16, § 12(4)–(5) (Can.).

86. Int'l Narcotics Control Bd., Training Material: 1961 Single Convention on Narcotic Drugs, at 10–11, U.N. Doc. E/INCB/2005/NAR_1 (2005).

87. The first international drug convention was the 1912 Hague International Opium Convention, which covered opium, morphine, cocaine and heroin. U.N. OFFICE OF DRUGS & CRIME, 2008 WORLD DRUG REPORT, at 188, U.N. Sales No. E.08.XI.1 (2008). The 1912 Hague Convention included restrictions on the import and export of opium. *Id.* at 190. This was followed by the 1925 International Opium Conventions, which extended the scope of control to cannabis. *Id.* at 193. The 1931 Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs built further on this, restricting manufacturing and introducing the notion of drug scheduling, *id.* at 195, although it did not explicitly discuss cannabis. The 1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, while explicitly addressing extradition over drug-related crimes committed abroad, failed to gain much traction as many states failed to sign it, including the United States, which viewed it as not far-reaching enough. *Id.* at 196.

88. Single Convention, *supra* note 5, at pmbl.

aim of preventing trafficking and the requirements that concern a state's control of the use and abuse of drugs by its own nationals. These latter requirements are qualified by respect for domestic "constitutional principles" and basic legal concepts and contain significant discretion to determine the precise nature of criminal offenses and any defenses (which could be read to include justifications and excuses) to those offenses.

While the restrictive or prohibitive provisions of the Single Convention can be understood, overall, as designed to require that states cooperate to outlaw and prevent international trade or trafficking in drugs, the obligations of member states with respect to addressing the problem of drug abuse *within their own countries* are of quite a different character. As Article 38 of the Single Convention ("Measures Against the Abuse of Drugs") states, "[t]he Parties shall give special attention to and *take all practicable measures* for the prevention of abuse of drugs and for the early identification, treatment, education, after-care, rehabilitation and social reintegration of the persons involved and shall coordinate their efforts to these ends[.]"⁸⁹ The Convention notably does not limit what counts as "practicable measures" to only those that entail outright criminalization of cannabis. Thus, state parties have latitude to explore other means to achieve the treaty's purpose.

Canada's experience with the failure of criminalization of possession and use to counter drug abuse is well-documented in the studies and reports underpinning Canada's new approach.⁹⁰ The objective of curbing drug abuse through an alternative system with a narrow path for legal possession and use, where the circumstances of sale are determined and controlled by the government, seems justified under the provisions of the drug conventions. Indeed, the relationship between the obligation in 4(c) of the Single Convention and the obligation to prevent drug abuse and related human harms in Article 38 of the Single Convention would necessarily have to be read in light of five decades of experience with criminalization of possession and use as a means of dealing with the harm from drug abuse. A large body of evidence has accumulated, showing how criminalization of possession and use have in fact made the "early identification, treatment, educa-

89. Single Convention, *supra* note 5, art. 38 (emphasis added).

90. See generally TASK FORCE REPORT, *supra* note 11. The Task Force recommended the regulation of wholesale distribution as well as retail sales of cannabis by provinces and territories, with various limitations. *Id.* at 4. Importantly, the Task Force noted: "Despite enforcement efforts under these treaties, cannabis remains the most widely used illicit drug in the world. Although the ultimate aim of the drug treaties is to ensure the 'health and welfare of humankind,' there is growing recognition that cannabis prohibition has proven to be an ineffective strategy for reducing individual or social harms, including decreasing burdens on criminal justice systems, limiting negative social and public health impacts, and minimizing the entrenchment of illicit markets, which in some cases support organized crime and violence." *Id.* at 10.

tion, after-care, rehabilitation and social reintegration of the persons involved” in drug abuse more difficult.⁹¹

Without a real-world experiment such as Canada’s, it would be almost impossible to determine whether an alternative approach to the criminalization model could be more effective in addressing the social costs of cannabis use. The exception for scientific research in Article 2(5)(b) of the Single Convention suggests that more and better information is a valuable tool in understanding drug use and its prevention and promotes the aims of the Convention. The ICJ accepted in a different context in the *Whaling in the Antarctic* case that, in principle, a scientific research purpose might be invoked, even if the conduct in question has additional purposes beyond scientific research.⁹²

In this sense, the goal of progress in understanding the means of effectively dealing with drug abuse and collateral human harms is served by Canada’s experiment. This does not mean that we advocate such a broad meaning for the scientific research exception in the Single Convention that could fully justify Canada’s departure from basic obligations of the Conventions. Rather, the search for more effective approaches to the social harms from cannabis use is a goal that is consistent with the aims of the Conventions. As such, the various flexibilities for deviation from a criminalization model should be interpreted generously in Canada’s case, as it is not seeking to undermine the drug conventions. As the WTO Appellate Body observed in the *EC-Hormones* case, there are instances where the science required to inform policy can only be taken in “the real world where people

91. See, e.g., NIAMH EASTWOOD ET AL., *A QUIET REVOLUTION: DRUG DECRIMINALISATION ACROSS THE GLOBE* (2016). Eastwood et al. point out that simple possession offenses account for around 83 per cent of all drug-related offences globally. *Id.* at 6. The report further notes that drug-enforcement policies do not correlate to levels of drugs use, with jurisdictions that criminalize more harshly seeing some of the highest rates of drug use. *Id.* at 38; see also Commission of Narcotic Drugs Res. 55/12, U.N. Doc. E/2012/28-E/CN.7/2012/18, at 30–33 (March 16, 2012) (recognizing that alternatives to imprisonment have “for some Member States, provided a successful means of promoting social reintegration with full respect for human rights,” while at the same time acknowledging that “for some Member States the application of alternative measures to prosecution and imprisonment of drug-using offenders is not provided for in national legislation and so is not applicable . . .”). This equivocation highlights the tensions between different domestic approaches to drug control, a tension that is at the heart of the debate over cannabis legalization. See U.N. OFFICE OF DRUGS & CRIME, *WORLD DRUG REPORT 2018 –EXECUTIVE SUMMARY*, at 27, U.N. Sales No. E.18.XI.9 (2018) (stating that “[t]he flexibility inherent in the international drug control conventions should, to the maximum extent possible, be used to offer individuals (men, women and children) with drug use disorders the possibility to choose treatment as an alternative to conviction or punishment.”). In particular, women face additional challenges when incarcerated for drug-related offenses.

92. *Whaling in the Antarctic* (Austl. v Japan), Judgment, 2014 I.C.J. Rep. 226, ¶ 97 (Mar. 31).

live and work and die.”⁹³ Many countries are currently rethinking their approach to cannabis and to drug abuse more generally.⁹⁴ In these circumstances, Canada’s experiment has the possibility of providing indispensable information about the kinds of real-world effects that might emerge from a regulated legal access alternative.

B. *The 1988 Convention and Canadian Constitutional Principles*

We now turn to the 1988 Convention, which we consider on its own terms while taking into account the above observations concerning the Single Convention where they are directly relevant. We must always bear in mind that (as already noted) Article 25 of the 1988 Convention provides that the 1988 Convention is not to be interpreted so as either to diminish or add to any of the rights and obligations in the Single Convention.

Article 14(4) of the 1988 Convention states, “[t]he Parties shall adopt appropriate measures aimed at eliminating or reducing illicit demand for narcotic drugs and psychotropic substances, with a view to reducing human suffering and eliminating financial incentives for illicit traffic.”⁹⁵ As has been previously observed, there is a wide variety of evidence and increasing recognition by many states parties to the drug conventions that traditional criminalization approaches are ineffective in this regard. Rather, these approaches perversely sustain demand for illicitly traded drugs and increase human suffering from the collateral criminal activities and organizations sustained through a criminalization approach. As Canada’s federal government indicated, the objectives of the cannabis legalization scheme are, in significant measure, to address the ineffectiveness and perverse consequences—“human suffering”—of a criminalization model for fighting drug abuse.⁹⁶

93. Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, ¶ 187, WTO Doc. WT/DS26/AB/R; WT/DS48/AB/R, (adopted Feb. 13, 1998).

94. See generally GLOB. LEGAL RESEARCH CTR., LAW LIBRARY OF CONG., DECRIMINALIZATION OF NARCOTICS (2016), <https://www.loc.gov/law/help/decriminalization-of-narcotics/decriminalization-of-narcotics.pdf> [hereinafter DECRIMINALIZATION OF NARCOTICS].

95. 1988 Convention, *supra* note 5, art. 14, ¶ 4.

96. Cannabis Act, S.C. 2018, c 16 § 7 (Can.) (“The purpose of this Act is to protect public health and public safety, and, in particular, to : (a) protect the health of young persons by restricting their access to cannabis; . . . (d) deter illicit activities in relation to cannabis through appropriate sanctions and enforcement measures; (e) reduce the burden on the criminal justice system in relation to cannabis; (f) provide access to a quality-controlled supply of cannabis”); see also TASK FORCE REPORT, *supra* note 11, at 2 (“In taking a public health approach to the regulation of cannabis, the Task Force proposes measures that will maintain and improve the health of Canadians by minimizing the harms associated with cannabis use.”); *id.* at 10 (“While it is not part of the Task Force’s mandate to make recommendations to the Government on how to address its international commitments, it is our view that Canada’s proposal to legalize cannabis shares the objectives agreed to by member states in multilateral declarations, namely: to protect vulnerable citizens, particularly youth; to implement

Under the 1988 Convention, a member state is only required to provide criminal penalties for possession and use of cannabis “[s]ubject to its constitutional principles and the basic concepts of its legal system”⁹⁷ Article 3(4)(c) provides that, “in appropriate cases of a minor nature, the Parties may provide, as alternatives to conviction or punishment, measures such as education, rehabilitation or social reintegration”⁹⁸ Article 3(11) further provides: “Nothing contained in this article shall affect the principle that the description of the offences to which it refers and of legal defences thereto is reserved to the domestic law of a Party and that such offences shall be prosecuted and punished in conformity with that law.”⁹⁹ Taken together, these three provisions reflect a significant amount of discretion for each state Party to balance criminal law-based approaches with other methods of addressing the social harms from cannabis.

With this observation in mind, we now examine whether, under Article 3(2) of the 1988 Convention, Canada’s “constitutional principles and the basic concepts of its legal system” provide a basis for Canada to deviate from criminal penalties for possession and use of cannabis. One important source for Canada’s “constitutional principles and the basic concepts of its legal system” is the public and constitutional jurisprudence of its highest court, the Supreme Court of Canada.

In order to appreciate the nature of “constitutional principles” in Canada, it is necessary to appreciate the nature of Canadian constitutionalism and the relationship of the courts to the legislative branch of government in particular.

The Supreme Court has repeatedly held that Canadian “constitutional principles” include not only written provisions of the Canadian constitutional document—the Constitution Act of 1982—but also unwritten principles that are deep structural features of the Canadian constitutional system, such as federalism and the rule of law.¹⁰⁰ The contours and meaning of the Constitution—including constitutional rights in the Charter of Rights and Freedoms, an integral part of the Constitution Act of 1982—are determined by the interaction of judicial interpretation with the legislative branches.¹⁰¹ Under Section 1 of the Charter of Rights and Freedoms, rights are guaranteed subject to “such reasonable limits prescribed by law as can be demonstrably

evidence-based policy; and to put public health, safety and welfare at the heart of a balanced approach to treaty implementation.”).

97. 1988 Convention, *supra* note 5, art. 3, ¶ 2.

98. *Id.* art. 3, 4(c).

99. 1988 Convention, *supra* note 5, art. 3, ¶ 11.

100. *See, e.g.*, Peter W. Hogg & Cara F. Zwibel, *The Rule of Law in the Supreme Court of Canada*, 55 U. TORONTO L.J. 715, 723–26, 726 n.50 (2005).

101. *See* ALTA. CIVIL LIBERTIES RESEARCH CTR., STRIKING THE RIGHT BALANCE: IMPLICATIONS OF EXPANDING EXECUTIVE POWERS FOR CANADIAN DEMOCRACY (2016).

justified in a free and democratic society.”¹⁰² Thus, in applying the Charter of Rights and Freedoms, the Supreme Court considers first of all whether a constitutional interest is engaged under one of the specified rights in the Charter—for example, Section 7, which includes “security of the person.” If the Court does find a constitutional interest that is affected by the law in question, it will then go on to consider whether the law may nevertheless be upheld as a justified limit to rights, including under the general limitations clause, Section 1.

Canada’s “constitutional principles” are articulated not only through judicial review but also through the practice of the legislative branch, particularly in adapting legislation to the requirements of the Charter of Rights and Freedoms as social circumstances and beliefs in Canada evolve. Brian Slattery articulates a theory of the Charter that has been highly influential:

[t]he proposition that governments and legislatures are bound to advert to *Charter* standards in their activities does not mean that they have to proceed in the same manner as courts. We have to banish the notion that the only proper mode of applying the *Charter* is the judicial one, characterized by a slow and deliberate adversarial process featuring arguments by the parties affected and a reasoned decision. Such a process may be neither possible nor desirable in the case of many governmental actors.¹⁰³

In setting out the government’s agenda in embarking upon reform of cannabis laws in Canada, the 2015 Speech from the Throne refers to the objective, inter alia, of “protecting our cherished *rights and freedoms*[,]” arguably an allusion to the Charter of Rights and Freedoms, and related instruments for the protection of rights and freedoms at the provincial level of government.¹⁰⁴

In a trio of 2003 cases, *R. v. Clay*,¹⁰⁵ *R. v. Caine*,¹⁰⁶ and *R. v. Malmo-Levine*¹⁰⁷ (the cannabis trilogy), a majority of the Supreme Court of Canada held that criminalization of possession of cannabis with the possibility of incarceration engaged the constitutional interest in Section 7 of the Charter of “life, liberty and security of the person.” However, in addition to being limited by Section 1, the right to life, liberty, and security of the person is

102. Canadian Charter of Rights and Freedoms, § 1, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c.11 (U.K.).

103. Brian Slattery, *A Theory of the Charter*, 25 OSGOODE HALL L.J. 701, 719 (1987) (italicization in original).

104. Governor Gen. David Johnston, Making Real Change Happen: Speech from the Throne to Open the First Session of the Forty-second Parliament of Canada (Dec. 4, 2015), <https://www.canada.ca/en/privy-council/campaigns/speech-throne/making-real-change-happen.html> (emphasis added).

105. *R. v. Clay*, [2003] SCC 75 (Can.).

106. *R. v. Caine*, [2003] SCC 74 (Can.).

107. *R. v. Malmo-Levine*, [2003] SCC 74 (Can.).

limited within Section 7 itself; the state may deprive an individual of this right where doing so is “in accordance with the principles of fundamental justice.” In the 1993 Canadian Supreme Court case *Rodriguez v. British Columbia (Attorney General)*, Justice Sopinka defined fundamental justice in his dissent in the following terms: “[principles of fundamental justice] are ‘fundamental’ in the sense that they would have general acceptance among reasonable people.”¹⁰⁸ The majority in *R. v. Caine* and *R. v. Malmø-Levine* cited that definition, finding that:

The requirement of “general acceptance among reasonable people” enhances the legitimacy of judicial review of state action, and ensures that the values against which state action is measured are not just fundamental “in the eye of the beholder *only*.” In short, for a rule or principle to constitute a principle of fundamental justice for the purposes of s[ection]. 7, it must be a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.¹⁰⁹

For the majority in the cannabis trilogy, criminalizing cannabis possession and use with the threat of incarceration did not offend the Canadian social consensus on justice as the Court understood Canadian community standards in 2003. The dissenters, by contrast, conceived of the harm principle—that is, the notion that an individual should not be subject to penalty for an act that does no harm to others—as part of the conception of “fundamental justice” in Section 7 of the Canadian Charter of Rights and Freedoms. A key element in the approach of the majority is its understanding of the proper relationship of the Court to the legislative branch in the functioning of Section 7. According to the majority, the legislative branch has a large role in gauging social consensus concerning justice—that is, fundamental justice—and thus in determining the contours of the right to life, liberty, and security of the person under Section 7 of the Charter of Rights and Freedoms. Further, while laws that are arbitrary and irrational will violate Section 7, Parliament has a large role in determining what is justified on the evidence and what is thus, in the constitutional sense, not arbitrary or irrational: “Members of Parliament are elected to make these sorts of decisions, and have access to a broader range of information, more points of view, and a more flexible investigative process than courts do.”¹¹⁰

108. *Rodriguez v. B.C. (Att’y Gen.)*, [1993] 3 S.C.R. 519, 607 (Can.) (Sopinka, J., dissenting).

109. *Malmø-Levine, Caine*, [2003] SCC 74, ¶ 113 (citation omitted) (emphasis in original).

110. *Id.* ¶ 133.

Given the Supreme Court of Canada's notion of "fundamental justice" under the Constitution as a matter of "social consensus" or contemporary community standards, and given the large role it assigns to the legislative branch in determining the justification for lawmaking that may result in deprivation of life, liberty, and security of the person, it would be difficult to conclude that the Canadian government's decision to proceed with a scheme for legalization of recreational cannabis under government control is irrelevant to "constitutional principles" within the meaning of the 1988 Convention.¹¹¹

Simply put, the social consensus on justice discerned by the majority in the cannabis trilogy in 2003 has evolved such that "fundamental justice" today—as understood in Canadian society—is largely inconsistent with criminal penalties for possession and use of cannabis. The extensive consultation and polling¹¹² and bipartisan,¹¹³ provincial government support for a legalization scheme arguably reflect a shifting of the social justice norm such that Canada's constitutional principles, particularly the principle of "fundamental justice," do indeed limit the continuing commitment under the 1988 Convention to criminal penalties for possession and use.

The various flexibilities or limitations with respect to a state's approach to use of cannabis by its own citizens discussed above, as well as the object and purpose as revealed by, for example, the preamble of the Single Convention, may not be sufficient to make every aspect of Canada's cannabis scheme compatible with the drug conventions. But they are surely adequate to establish that Article 4(c) of the Single Convention in particular is neither absolute in nature nor is a preemptory norm as asserted by the INCB. As the obligation is "subject to" other provisions of the Single Convention and, accordingly, is far from being of a preempting or trumping character, the obli-

111. See, e.g., Andrew D. Hathaway, *Charter Rights of Canadian Drug Users: A Constitutional Assessment of The Clay Trial and Ruling*, 16 CAN. J.L. & SOC'Y 29, 37–39, 41–42 (2001).

112. See, e.g., NAVIGATOR, CANNABIS IN CANADA 2 (2018) (based on an online poll of 1200 Canadians, 42% supported the legalization of cannabis); ORACLEPOLL RESEARCH & COLIN FIRTH, CANADIAN CANNABIS REPORT: WHAT'S THE BUZZ? REPORT OVERVIEW (2017) (according to a telephone poll of 5000 Canadian residents, 57% supported the federal government's decision to legalize cannabis, 53% had a positive opinion of medical marijuana, and 26% currently consume cannabis products); see also Jen Skerritt, *Why the World Is Watching Canada's Pot Legalization*, BLOOMBERG (Sept. 6, 2018, 12:01 AM), <https://www.bloomberg.com/news/articles/2018-09-06/why-the-world-is-watching-canada-s-pot-legalization-quicktake>; Jesse Tahirali, *7 in 10 Canadians Support Marijuana Legalization: Nanos Poll*, CTV NEWS (June 30, 2016, 10:00 PM), <https://www.ctvnews.ca/canada/7-in-10-canadians-support-marijuana-legalization-nanos-poll-1.2968953>.

113. Canada's cannabis legalization bill was passed in November 2017 by the House of Commons by a vote of 200 to 82. It was passed by the senate on June 19, 2018 with a vote of 52 to 29 with two abstentions. See Rachel Aiello, *Timeline of Key Events in Marijuana Bill's Passage Through Parliament*, CTV NEWS (June 4, 2018, 2:35 PM), <https://www.ctvnews.ca/politics/timeline-of-key-events-in-marijuana-bill-s-passage-through-parliament-1.3958662>.

gation is subordinate to and conditioned by other provisions in the Convention. With respect to the 1988 Convention, the very fact that the obligation to impose penal sanctions on possession and use of cannabis is subject to domestic “constitutional principles” and basic legal concepts illustrates that this obligation is not a *sine qua non*, or preemptory norm.

The considerations advanced above put into serious question the notion that Canada is unequivocally violating a *sine qua non* of the UN Conventions by moving to a regulated legal use model for recreational cannabis. At the same time, it is far from clear that every aspect of Canada’s scheme could be upheld under the Single Convention and/or the 1988 Convention. For instance, Canada might have moved to an alternative system of “light” or “soft” penal sanctions, eschewing imprisonment and creating the kind of offense that does not entail the stigma of a criminal record instead of moving to fully legalized, albeit regulated, recreational use. The alternative of “soft” penal sanctions might be more in accord with the flexibilities of the Conventions than the approach chosen by Canada. As an experiment in effective alternatives to criminalization, Canada could have chosen a more limited regime with provisions for review after a defined time period (for instance, limited distribution of cannabis without a medical prescription to adults). Instead, Canada’s scheme foresees significant investments of a long-term nature in businesses for the growth, distribution, and sale of recreational cannabis.

Yet, rather than engaging in a dialogue with Canada concerning its approach to legalization, the INCB largely remained aloof and generally failed to engage constructively with other countries developing approaches that deviate from the criminalization model. At the same time, Canada’s government did not attempt a full-scale justification for its cannabis scheme through the considerations discussed above. Instead, the government moved ahead with an approach that it acknowledges in some ways creates tensions with the international conventions.¹¹⁴

Accordingly, Canada seems to be preparing itself to denounce (withdraw) from UN Conventions or perhaps may be hopeful that, in a not unrea-

114. See, for example, the response of Minister Chrystia Freeland during Senate Question Period in March 2017 to a question regarding concerns by the Minister of the Health that Canada would be in contravention of the international drug conventions upon legalization: “As for our government’s plan to legalize marijuana and the impact of this decision on our international treaties, my colleague, the Minister of Health, is quite right.” 150 DEBS. OF THE S. 2488 (March 8, 2017) (Can.), https://sencanada.ca/en/content/sen/chamber/421/debates/102db_2017-03-07-e#52; see also *Hearing on Bill C-45, An Act Respecting Cannabis and to Amend the Controlled Drugs and Substances Act, the Criminal Code and Other Acts Before the Standing S. Comm. on Foreign Affairs and Int’l Trade Evidence*, 42nd Parliament (2018) (statement of Mark Gwozdecky, Assistant Deputy Minister, Int’l Security & Political Affairs, Glob. Affairs Can.) (Can.) (“As Minister Freeland acknowledged in early March 2017, during Senate Question Period, the government recognizes that Canada’s proposed approach to cannabis will result in Canada being in contravention of certain obligations related to cannabis under the UN drug conventions.”), <https://sencanada.ca/en/Content/SEN/Committee/421/aefa/53882-e>.

sonable period of time, a change in attitude will lead to cannabis being de-scheduled from the Conventions. In the case of medical cannabis, the UN, through the WHO, already began the process of reviewing cannabis, which may eventually lead to its removal from the schedule of Class 1 drugs (those to which the most restrictive treatment applies under the Conventions).¹¹⁵ In 2011, Bolivia denounced the Single Convention then rejoined the Convention with a reservation for coca leaf consumption “for cultural and medicinal purposes.”¹¹⁶ The Single Convention allows reservations upon acceding to the Convention and thus Canada could attempt the same strategy of denouncing then filing a reservation for cannabis as it rejoined the Convention. Under Article 50(3) of the Single Convention, a reservation shall be accepted by the states parties as valid, unless objected to by at least one-third of the state parties.¹¹⁷

By presenting Canada’s cannabis scheme as an unequivocal violation of a *sine qua non* of the 1961 Single Convention, the INCB may be attempting to foreclose the approach of denunciation then re-accession by reservation by arguing that Article 4(c) is an obligation not susceptible to reservation. This, however, is contrary to the plain text of Article 50(3), which provides a list of provisions that may not be subject to reservations but does not include Article 4(c) as one of the provisions of the Convention subject to reservations. Article 19(c) of the Vienna Convention on the Law of Treaties provides that a reservation may not be made that is “is incompatible with the object and purpose of the treaty.” But, as we have argued extensively above, Canada’s scheme is in many respects compatible with the various purposes of the 1961 Single Convention and the 1988 Convention. Canada has moved to the legalization of recreational cannabis through a system of government-controlled and government-overseen production, sale, and consumption precisely in order to more effectively address the social costs of cannabis use, and especially the illicit commerce in cannabis. By prohibiting import and export of recreational cannabis, Canada ensures that legalization will not create avenues by which cannabis can enter into the stream of illicit

115. Scott Gacek, *WHO Takes First Steps to Reclassify Medical Cannabis Under International Law*, MED. JANE (Jan. 1, 2017), <https://www.medicaljane.com/2017/01/01/who-takes-first-steps-to-reclassify-medical-cannabis-under-international-law/>.

116. See MARTIN JELSMA ET AL., *BALANCING TREATY STABILITY AND CHANGE: INTER SE MODIFICATION OF THE UN DRUG CONTROL CONVENTIONS TO FACILITATE CANNABIS REGULATION* 30–31 (2018).

117. Single Convention, *supra* note 5, art. 50, ¶ 3 (“A State which desires to become a Party but wishes to be authorized to make reservations other than those made in accordance with paragraph 2 of this article or with article 49 may inform the Secretary-General of such intention. Unless by the end of twelve months after the date of the Secretary-General’s communication of the reservation concerned, this reservation has been objected to by one third of the States that have ratified or acceded to this Convention before the end of that period, it shall be deemed to be permitted, it being understood however that States which have objected to the reservation need not assume towards the reserving State any legal obligation under this Convention which is affected by the reservation.”).

international commerce, undermining the different drug control policies of other countries contrary to the Conventions' objectives of international cooperation and coordination.

III. CANADA'S ACT IN LIGHT OF THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK

A. *International Human Rights Framework*

So far, we have considered the UN drug control and anti-trafficking frameworks as reflected in the Conventions as a "self-contained regime"¹¹⁸ of international law, considering only the interpretation of the rights and obligations of this regime in relation to domestic law. However, as already noted, under the VCLT, a treaty interpreter must also examine the provisions of a treaty being interpreted in light of other relevant rules of international law applicable between the parties.¹¹⁹

Even beyond this canon of treaty interpretation, there is a growing body of scholarly literature that insists that the UN drug framework and the UN human rights framework are both part of the UN legal system as a whole. As such, UN drug and UN human rights law ought to be interpreted in a consistent manner so as to avoid tension between the rights and obligations of the two regimes. Further, some scholars argue on the basis of references to human rights in the UN Charter that the human rights framework has a higher legal status than the drug framework. Therefore, where there is inconsistency between the frameworks, the human rights one must prevail.¹²⁰ United Nations practice supports this view; numerous General Assembly resolutions and other (admittedly, non-binding) statements of the UN human rights bodies indicate that the UN drug regime must be interpreted in favor of human rights law.¹²¹

While there is no question that the UN Charter provides that the legal obligations of the Charter would take precedence over conflicting require-

118. See Int'l Law Comm'n, Rep. on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, at 68, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) ("In a narrow sense, the term is used to denote a special set of secondary rules under the law of State responsibility that claims primacy to the general rules concerning consequences of a violation. In a broader sense, the term is used to refer to interrelated wholes of primary and secondary rules, sometimes also referred to as 'systems' or 'sub-systems' of rules that cover some particular problem differently from the way it would be covered under general law.")

119. Vienna Convention on the Law of Treaties, *supra* note 76, art. 31, ¶ 3(c).

120. Barrett, *supra* note 6, at 29.

121. See generally Rep. of the U.N. High Comm'r for Human Rights, *Study on the Impact of the World Drug Problem on the Enjoyment of Human Rights*, ¶ 5, U.N. Doc. A/HRC/30/65 (Sept. 4, 2015); G.A. Res. 69/201, International Cooperation Against the World Drug Problem, ¶ 2 (Feb. 21, 2015).

ments in an ordinary treaty,¹²² the Charter only refers to human rights in a general manner.¹²³ Specific human rights obligations are themselves contained in the Universal Declaration of Human Rights and the two main human rights treaties: The International Covenant on Civil and Political Rights (the “ICCPR”) and the International Covenant on Economic, Social and Cultural Rights (the “ICESCR”). While there are a few human rights that are generally considered to establish peremptory norms of international law, such as the prohibitions on torture and on genocide,¹²⁴ these are not relevant to the question of the international legality of Canada’s legalization of recreational cannabis. The most persuasive reading of the legal sources and UN practice is that both the drug and human rights frameworks are UN treaty regimes and that the drug framework should be interpreted and applied consistently or harmoniously with the human rights framework to the extent permitted by the legal requirements of both frameworks.

Canada is bound by both of the UN treaties on human rights.¹²⁵ These treaties require the states bound by them ensure that the rights in question become part of their basic domestic law. Article 2.2 of the ICCPR reads:

Where not already provided for by existing legislative measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.¹²⁶

As is clear from this provision, Canada, as a state bound by the Covenant, is required to make the rights in the Covenant part of its domestic legal system. Thus, in our view, what is most relevant in assessing the international legality of Canada’s scheme for legal recreational cannabis is that, by virtue of its obligations under the ICCPR, the human rights in the ICCPR are to be considered basic concepts of Canada’s legal system within the meaning of the 1988 Convention. Thus, Canada’s obligation under the Single and 1988 Conventions to establish penal sanctions for non-medical and non-scientific use of cannabis is “subject to” its international human rights obligations under the ICCPR. A similar situation exists with respect to the ICESCR, which

122. U.N. Charter art. 103 (“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”).

123. U.N. Charter art. 13(1)(b), for instance, mentions human rights generally in the context of General Assembly recommendations.

124. See generally Dire Tadić (Special Rapporteur), *First Rep. on Jus Cogens*, ¶ 57, U.N. Doc. A/CN.4/693 (Mar. 8, 2016).

125. *International Human Rights Treaties to Which Canada is a Party*, DEP’T JUST., <http://www.justice.gc.ca/eng/abt-apd/icg-gci/ihrl-didp/tcp.html> (last updated Nov. 14, 2016).

126. International Covenant on Civil and Political Rights art. 2, ¶ 2, Dec. 19, 1966, T.I.A.S. No. 92-908, 999 U.N.T.S. 171.

contains the right to health, although the obligation to implement in domestic law is qualified by the capacities of the particular state at the time in question.¹²⁷

Uruguay, which legalized recreational cannabis prior to Canada, has resorted largely to the invocation of international human rights obligations in order to justify legalization as a departure from the otherwise applicable requirements of the UN drug conventions.¹²⁸ In defending its legalization in UN bodies, Uruguay has referred to the threats to human life, security, and health that come from the consequence of continuing to pursue a criminalization strategy: the human costs of the war on drugs and the operation of the drug market by organized crime are well known in Latin America.¹²⁹ Canadian officials and legislators also considered these costs in deciding to adopt an alternative scheme.¹³⁰ The UN High Commissioner for Human Rights has previously condoned the liberalization of drug laws as contributing to human rights obligations in at least one instance, that of Portugal.¹³¹ The decriminalization—though not legalization¹³²—of drugs covered by the UN framework in Portugal was found by the High Commissioner as contrib-

127. International Covenant on Economic, Social and Cultural Rights art. 12, Dec. 16, 1966, 993 U.N.T.S. 3 (“The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”); *see also* ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A LEGAL RESOURCE GUIDE, at xix (Scott Leckie & Anne Gallagher eds., 2006) (“While the norms found in the Covenant on Economic, Social and Cultural Rights may or may not be directly subject to a complaint procedure within domestic law, this text must still play a significant role in the application and interpretation of domestic law. At a minimum, the judicial bodies of States parties should consider international human rights law as an interpretive aid to domestic law and ensure that domestic law is interpreted and applied in a manner consistent with the provisions of international human rights instruments to which a State is bound. Judges should ensure that any decisions they issue do not result in the relevant government violating the terms of a treaty which it has ratified.”).

128. *See* John Walsh & Geoff Ramsey, *Uruguay’s Drug Policy: Major Innovations, Major Challenges*, BROOKINGS, <https://www.brookings.edu/wp-content/uploads/2016/07/Walsh-Uruguay-final.pdf> (last visited Mar. 10, 2019).

129. *See* John Hudak et al., *Uruguay’s Cannabis Law: Pioneering a New Paradigm*, BROOKINGS (Mar. 2018), https://www.brookings.edu/wp-content/uploads/2018/03/gs_032118_uruguay28099s-cannabis-law_final.pdf; *see also* *Marihuana: Uruguay se Defendió ante ONU*, MONTEVIDEO PORTAL (Mar. 13, 2014, 9:24 PM), <http://www.montevideo.com.uy/Noticias/Marihuana-Uruguay-se-defendio-ante-ONU-uc228901?planta=1391>.

130. TASK FORCE REPORT, *supra* note 11, at 68–69 (“The Canadian Centre on Substance Abuse estimated that, based on 2002 data, public costs associated with the administration of justice for illicit drug use (including police, prosecutors, courts, correctional services) amounted to approximately \$2.3 billion annually.”); *see also* S. SPECIAL COMM. ON ILLEGAL DRUGS, 37TH PARLIAMENT, CANNABIS: OUR POSITION FOR A CANADIAN PUBLIC POLICY 30, (Sept. 2002) (Can.) (estimating that the cost of law enforcement and the justice system relating to cannabis in Canada was between \$300–500 million per year).

131. U.N. High Comm’r for Human Rights, *supra* note 121, ¶ 30.

132. Decriminalization without legalization can involve the replacement of criminal law sanctions with softer penalties that do not carry the stigma of a criminal record, or exceptions for possession and use of very small quantities, while possession and use, as well as buying and selling, remain generally illegal.

uting to the right to health. By avoiding the stigmatization and other harms associated with criminal convictions and penalties, the revictimization of those with existing drug dependencies is also avoided.¹³³

Another human rights issue is that Canada's criminal justice system, like the United States', disproportionately charges vulnerable minority groups with cannabis possession offenses. In the Canadian case, this is systematically true for black and indigenous people.¹³⁴ This inequity in law enforcement arguably engages the right of non-discrimination under the ICCPR. Reform of the criminal justice system is necessary to address and reduce discrimination in law enforcement. Removing possession and use of cannabis from the criminal justice system, as Canada has done, is arguably, in the short term, a more effective remedy to discrimination in relation to drug possession than attempting to alter the culture of law enforcement across the country, which is a much larger and more difficult task, albeit one that might be imperative from a human rights point of view. While cannabis-related offenses are by no means the only area where discrimination in law enforcement exists, police typically are able to exercise a wide range of discretion with respect to when and against whom cannabis-related charges are laid.

B. *Cannabis and International Human Rights Jurisprudence*

The cannabis-related decisions of a range of international and domestic tribunals have incorporated international human rights principles and related concepts in domestic constitutional and human rights law. As noted in the previous Section of this Article, Article 38 of the ICJ Statute indicates that decisions of domestic and international tribunals are secondary or supplementary sources of international law.

In the *Prince v. South Africa* case, the United Nations Human Rights Committee considered the claim of a Rastafarian that use of cannabis was a tenet of his religion and that South Africa's laws against possession of cannabis violated his exercise of that right.¹³⁵ The UN Committee held that the prohibition of the possession and use of cannabis was a "limitation on [the claimant's] freedom to manifest his religion," which was protected under Article 18 (1) of the ICCPR. However, the Committee went on to find that this *limitation* of the right was justified as a measure prescribed by law "to protect public safety, order, health, morals or the fundamental rights and

133. U.N. High Comm'r for Human Rights, *supra* note 121, ¶ 30.

134. Rachel Browne, *Black and Indigenous People are Overrepresented in Canada's Weed Arrests*, VICE NEWS (Apr. 18, 2018), https://news.vice.com/en_ca/article/d35eyq/black-and-indigenous-people-are-overrepresented-in-canadas-weed-arrests (citing police statistics from across the country, obtained through freedom of information requests to the relevant authorities).

135. *Prince v. S. Afr.*, Communication No. 1474/2006, U.N. Human Rights Committee, ¶ 3.1, U.N. Doc. No. CCPR/C/91/D1474/2006 (Nov. 14, 2007).

freedoms of others, based on the harmful effects of cannabis.”¹³⁶ The Committee gave considerable deference to South Africa’s determinations concerning what is necessary to protect public safety, order, health, morals, or the fundamental rights and freedoms of others, as well as the state’s determination concerning the harmful effects of cannabis.¹³⁷

In *Arriola, Sebastien y Otros*, the Supreme Court of Argentina held that the country’s criminal prohibition of cannabis possession and use violated Argentina’s constitution.¹³⁸ In its analysis, the Supreme Court followed the doctrine that human rights protections under the UN Covenants and the American Convention of Human Rights (the latter of which Canada is not a party to) were part of Argentina’s constitutional order. The country’s criminal prohibition of possession and use violated, for example, “the right to be free of arbitrary or abusive interference with private life” found in Article 17.1 of the ICCPR.¹³⁹ The Argentina Court also referred to the notion of human dignity in the Preamble of the ICCPR when questioning whether targeting mere consumers of cannabis in the war against illicit trafficking of drugs was compatible with the conception of human dignity underpinning the ICCPR, which implies that human beings must not be simply used as means to ends.¹⁴⁰

More recently, the Constitutional Court of South Africa upheld in large part a decision of the High Court of Cape Town, which found that South Africa’s criminalization of possession and use of cannabis that extended to private places violated the right to privacy in South Africa’s constitution. The Constitutional Court further found that the harmful effects of cannabis were not such as to justify criminalization of possession and use as a reasonable limit on the right to privacy prescribed by law.¹⁴¹ The South African Constitutional Court did not refer explicitly to the right in the ICCPR to be free of arbitrary or abusive interference with private life. Yet the finding that criminalization of possession and use could not be justified under law as a reasonable limit on rights has a bearing on the interpretation of the ICCPR. Interference with private life is much more likely to be “arbitrary or abusive” if it cannot be justified as a reasonable limit on privacy prescribed by law.

Canada has undertaken binding international human rights obligations and is required to implement these as basic concepts of the domestic legal

136. *Id.* ¶ 7.3.

137. *See* RICHARD LINES, DRUG CONTROL AND HUMAN RIGHTS IN INTERNATIONAL LAW 156 (2017).

138. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 25/8/2009, “Arriola, Sebastián y otros / Recurso de Hecho”, Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (2009-332-1965) (Arg.).

139. *Id.* ¶ 17.

140. *Id.* ¶ 18.

141. Minister of Justice and Constitutional Development v Prince, [2018] ZACC 30 (CC) (S. Afr.).

system. Thus, Canada can circumscribe or limit the criminalization of possession and use of cannabis in accord with such basic concepts. The question still remains whether Canada's deviation from the requirement of penal sanctions (with certain flexibilities) in the 1988 Convention is broader than that justified by the human rights concerns discussed above. In response to such concerns, other jurisdictions have, either through constitutional jurisprudence (as in the cases of Argentina and South Africa discussed above) or through legislative reform, reduced penalties from criminal to civil or administrative sanctions, which do not carry the stigma of a criminal record, or provided the possibility of use in private spaces such as an individual's home or particular cafes or clubs (the Netherlands, for example).¹⁴² Besides Canada, Uruguay is the only other sovereign state that has a fully legal, albeit highly controlled and regulated, path for personal possession and use (such paths exist in some U.S. states, but these are still complicated by the retention of criminalization at the federal level in the United States, albeit with tolerance for the practice of the states).

In contrast with the lesser deviations from criminalization typical of most sovereign states' reforms, the regulated scheme of recreational possession and use (controlled by permits and licenses) established by Canada shifts control over the cannabis economy from organized crime into the hands of government. Canada may well argue—with some persuasiveness—that other countries' reforms, while protecting consumers of cannabis from the stigma and other risks of criminal sanction, do not address the human rights violations that result from the violence or other risks to life and health attendant upon the trade in drugs, including sale to consumers for personal use, arising from control on the part of criminal organizations. By taking these functions out of the hands of organized crime, Canada is arguably improving human rights for all of its citizens.

In all of this discussion of legalization and decriminalization, it is necessary to consider how previous drug convictions will be handled in a legalized regime. The handling of criminal records arising from cannabis-related infractions is a significant human rights concern. An initial problem with Canada's scheme was that Canada had yet to undertake the removal of criminal records of persons who, in the past, have been stigmatized through criminal conviction with considerable harmful social consequences.¹⁴³ While the Canadian government has made some progress in this area, the current scheme only *pardons* people convicted for possession of up to 30 grams of cannabis rather than automatically expunging their record.¹⁴⁴ Such a pardon

142. See generally DECRIMINALIZATION OF NARCOTICS, *supra* note 94.

143. Daniel LeBlanc, *Canadians Convicted of Simple Cannabis Possession Will Soon be Able to Apply for a Pardon*, GLOBE & MAIL (Oct. 17, 2018), <https://www.theglobeandmail.com/cannabis/article-amnesty-program-for-canadians-convicted-of-simple-cannabis-possession/>.

144. *Id.*

is in fact merely a ‘record suspension,’ wherein the original conviction remains on the record and falls far short of a full amnesty.¹⁴⁵

Under Canadian law, there is a waiting period before convicted criminals may apply for a pardon (between three to ten years after the conviction) as well as an application fee of C\$631. Recognizing that these are onerous requirements, and in light of the complete legalization of the substance possession of which gave rise to the convictions, the Canadian government has opted to waive these requirements.¹⁴⁶ Nevertheless, by requiring convicted offenders to apply for a pardon rather than automatically offering an expungement, the most vulnerable and discriminated-against members of communities in Canada continue to be disenfranchised.¹⁴⁷ With more than 500,000 Canadians having criminal convictions for possession of 30 grams or less of cannabis, empirical evidence shows that, across Canadian cities, black and indigenous people are overrepresented in possession-related arrests.¹⁴⁸

A bill currently before the Canadian parliament would amend this procedure to allow for full expungement of certain cannabis related convictions.¹⁴⁹ The proposed bill explicitly acknowledges the disproportionate conviction of marginalized and racialized communities in its preamble.¹⁵⁰ It also clarifies that expungement will mean that “the person convicted of the offence is deemed never to have been charged with and convicted of that offence.”¹⁵¹ The proposed bill does continue to require that convicted individuals apply for an expungement order but specifies that no fee may be imposed for such an application.¹⁵² Compared to the system of pardons currently in place, the proposed bill would make significant strides in addressing the continued discrimination against minorities in Canada who were disproportionately affected by the previous criminalized cannabis regime. Until this bill or some iteration of it is passed, the continued possibility of victimization of parties who are often amongst the most discriminated-against and vulnerable populations in Canada is in tension with some of the most compelling human rights arguments for decriminalization. The human

145. See Benjamin Kates & Pam Hrick, *Pardons Don't go Far Enough. Convictions for Cannabis Possession Must Be Expunged*, CBC (Oct. 29, 2018, 4:00 AM), <https://www.cbc.ca/news/opinion/cannabis-convictions-1.4876783>. The authors of this piece are involved with Campaign for Cannabis Amnesty, the Canadian organization driving the movement for granting amnesty.

146. Amanda Connolly, *Canadians with Past Pot Convictions Won't Have To Pay or Wait To Apply for a Pardon*, GLOBAL NEWS (Oct. 18, 2018, 10:48 AM), <https://globalnews.ca/news/4563182/cannabis-pardon-marijuana-legalization-ralph-goodale/>.

147. See Kates & Hrick, *supra* note 145.

148. *Id.*

149. An Act to Establish a Procedure for Expunging Certain Cannabis-Related Convictions, Bill C-415, 42nd Parliament (2018) (Can.).

150. *Id.*, at pmb1.

151. *Id.*, art. 5, ¶ 1.

152. *Id.*, art. 7, ¶¶ 1, 3.

rights dimension to cannabis legalization is, as the above discussion suggests, complex and multifaceted and offers an alternative justification for legalization that can coexist and potentially preempt the legal prescriptions enshrined in the international drug conventions. How cannabis legalization interacts with international economic law is a somewhat different question, giving rise to technical legal problems that exist alongside and as a consequence of the international drug conventions and the international human rights regime.

IV. CANADA'S ACT IN LIGHT OF THE INTERNATIONAL ECONOMIC LAW FRAMEWORK

As discussed in the previous Part, while the relationship of the international human rights framework to the UN drug control and anti-trafficking framework is the subject of significant commentary,¹⁵³ the international economic law framework animates considerably less discussion in relation to drugs—and cannabis legalization in particular. This framework, in which the World Trade Organization (the “WTO”) occupies a central role, consists of numerous bilateral and regional agreements on trade and investment, including the North American Free Trade Agreement (the “NAFTA”), to which Canada is a party along with the United States and Mexico. Canada, the United States, and Mexico recently negotiated a successor agreement to the NAFTA, the United States Mexico Canada Agreement (the “USMCA”), which still awaits approval by the U.S. Congress.¹⁵⁴ In this Article, we consider the rules of the WTO as exemplary of the international economic law framework and do not attempt the complex task of considering the implications of bilateral and regional agreements, which nevertheless usually duplicate in key aspects the legal disciplines of the WTO.¹⁵⁵

153. See, e.g., Saul Takahashi, *Drug Control, Human Rights, and the Right to the Highest Attainable Standard of Health: By No Means Straightforward Issues*, 31 HUM. RTS. Q. 748 (2009); see also Robert Howse & Makau Mutua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization*, in HUMAN RIGHTS IN DEVELOPMENT YEARBOOK 1999/2000, at 51 (Hugh Stokke & Arne Tostensen, eds., 2001).

154. See M. ANGELES VILLARREAL & IAN F. FERGUSSON, CONG. RESEARCH SERV. NO. R42965, THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA) (2017), <https://fas.org/sgp/crs/row/R42965.pdf>. NAFTA came into effect on January 1, 1994, replacing the U.S.-Canada Free Trade Agreement. On September 30, 2018, the United States, Mexico and Canada came to an agreement on a revised trade deal (the United States, Mexico, Canada Agreement or USMCA) that if approved, will replace NAFTA. See Katie Lobosco, Donna Borak & Tami Luhby, *What's New in the US, Canada and Mexico Trade Deal?*, CNN (Oct. 1, 2018, 3:42 PM), <https://www.cnn.com/2018/10/01/politics/nafta-usmca-differences/index.html>.

155. For instance, WTO Members notify the WTO about regional trade agreements into which they enter. Many of the regional and bilateral trade agreements refer explicitly to the WTO and its agreements. See, e.g., Comprehensive and Progressive Agreement for Trans-Pacific Partnership art. 1.1, <https://www.mfat.govt.nz/assets/CPTPP/Comprehensive-and-Progressive-Agreement-for-Trans-Pacific-Partnership-CPTPP-English.pdf> (incorporating by

A. *The Relationship Between International Economic Law and the
UN Drug Regime*

The WTO is a multilateral organization governing trade among nations based upon obligations its Member States undertake through a series of multilateral and plurilateral treaty instruments.¹⁵⁶ The purpose of the WTO is “the substantial reduction of tariffs and other barriers to trade and . . . the elimination of discriminatory treatment in international trade relations.”¹⁵⁷ More controversially, the WTO has become a vehicle for limiting regulatory diversity in some areas of policy that are thought to affect the real value of the market access created by the removal of direct barriers to trade.¹⁵⁸ The WTO has a complex legal regime regulating international trade, and countries that are members of the WTO must abide by these rules. If they do not, they can be brought before the WTO’s dispute settlement body for violating WTO rules by other Member States.¹⁵⁹

A fundamental, and indeed primary, purpose of the UN drug conventions is to place obligations on states to prevent, prohibit, and punish drug trafficking. In doing so, the conventions classify trade in drugs covered under their various schedules as “illicit traffic.”¹⁶⁰ In one of the only treatments of the relationship between the international trade and drug control regimes, published over twenty years ago, Kal Raustiala observed possible tension between, on the one hand, the objective of freer trade reflected in provisions of international economic law and, on the other, the implied obligations in the UN drug regime to maintain strict customs measures to prevent drug smuggling and related practices such as money laundering. According to Raustiala:

reference the Consolidated Trans-Pacific Partnership Agreement, which expressly refers to the GATT and the WTO).

156. *Principles of the Trading System*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Mar. 10, 2019).

157. Marrakesh Agreement Establishing the World Trade Organization pmbl., Apr. 15, 1994, 1867 U.N.T.S. 154.

158. See Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 EUR. J. INT’L L. 9, 23 (2016).

159. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

160. The 1988 Convention is titled in full United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Resolution I to the Single Convention expresses “the hope that adequate resources will be made available to provide assistance in the fight against the illicit traffic.” 1988 Convention, *supra* note 5. Article 28 of the Single Convention states that “[t]he Parties shall adopt such measures as may be necessary to prevent the misuse of, and illicit traffic in, the leaves of the cannabis plant.” Single Convention, *supra* note 5, at art. 28. Article 35 of the Single Convention is titled “Action against the illicit traffic.” Single Convention, *supra* note 5, at art 35; see also RICHARD LINES, DRUG CONTROL AND HUMAN RIGHTS IN INTERNATIONAL LAW 108–125 (2017).

There are at least five ways in which economic liberalization facilitates drug trafficking. Liberalization lowers the prices of legal inputs in drug production. It improves the infrastructure of trade, lowering transport costs and expanding access and distribution for all goods. Liberalization increases the volume of goods in commerce, providing more hiding places for drugs. By so doing, it also overtaxes customs officials, thereby decreasing the time and effort available for drug interdiction. Finally, by facilitating money laundering and legal investment, financial liberalization permits traffickers to hide, clean, and enjoy their profits.¹⁶¹

Despite these tensions between the general policies of free trade (and their effects) and the policies of the UN drug regime, only fairly recently have there been rulings in the WTO dispute settlement system that address the relationship of international economic law norms to drugs and illicit trade. In the *EC–Tariff Preferences* case, India challenged the practice of the European Union in giving preferred market access to a subset of developing countries that were deemed to be addressing problems with trafficking in or production of narcotic drugs.¹⁶² The EU participated in a WTO-authorized scheme (the Generalized System of Preferences or “GSP”) to provide lower tariffs to developing countries in general. The question was whether measures in the war on drugs could be a justification for giving some of the countries in the scheme more favorable terms of market access to assist them, or incentivize them, to take measures against drug trafficking.¹⁶³

The EU argued that its practices were a reasonable means to facilitate “alternative development,” which encourages other means of economic activity as alternatives to drug production.¹⁶⁴ The EU claimed its measures were reasonable because, first, encouraging alternative economic activities was an important dimension of drug control policy acknowledged in the UN drug regime, and second, there was additional market access for alternatively-created, licit products from the designated countries.¹⁶⁵ Referring, *inter alia*, to the 1988 Convention, the WTO panel accepted that this could, in principle, be a basis for limiting the EU’s obligation under the GSP scheme not to discriminate between developing countries.¹⁶⁶ But the departure from non-discrimination obligations was not justified, according to the panel, because “alternative development” could be encouraged by measures such as

161. Kal Raustiala, *Law, Liberalization & International Narcotics Trafficking*, 32 N.Y.U. J. INT’L L. & POL. 89, 116 (1999).

162. Panel Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶ 1.5, WTO Doc. WT/DS246/R (adopted Apr. 20, 2004).

163. *Id.* ¶¶ 2.2–8.

164. *Id.* ¶ 7.184.

165. *Id.*

166. *Id.* ¶¶ 7.204–06.

financial and technical assistance that deviated less from the rules of the game for the GSP scheme.¹⁶⁷

The Appellate Body decided the case against the EU on the more limited grounds that the EU scheme neither contained nor applied objective criteria to determine which countries were eligible for special treatment on grounds of their efforts against drug trafficking.¹⁶⁸ The Appellate Body found that an objective link or nexus is required between the preferential treatment and the development needs of the developing countries being offered that treatment.¹⁶⁹ This was the first explicit encounter between the international economic regime and the drug regime. And this encounter shows that, at least on first impression, the mere pursuit of objectives and policies under the auspices of the UN drug regime does not excuse deviation from WTO obligations.

The WTO more recently reinforced this logic in a dispute concerning anti-money laundering measures in Colombia.¹⁷⁰ Colombia implemented a special approach to tariffs that deviated from normal WTO practice, justifying the special approach as targeting artificially low-priced imports that actually concealed money laundering. The WTO Appellate Body held that the fact that Colombia's government was addressing what Colombia considered to be "illicit trade" did not suspend the operation of WTO rules; instead, Colombia would have to justify its anti-money laundering measures under a specific exception provision in the relevant WTO Agreement—in this case, the General Agreement on Tariffs and Trade (the "GATT").¹⁷¹

The implication of this ruling is that there is no general carve-out from WTO rules where trade is deemed "illicit." Therefore, with recreational cannabis, the disciplines of the WTO treaties still apply to Canada's law. There are also defined exceptions to these rules, however, that might justify certain aspects of Canada's law that would otherwise run afoul of WTO disciplines. Accordingly, in the discussion below, we consider both the most relevant disciplines as well as any applicable exception and limitation clauses. As a general matter, legalizing a good domestically has important implications for a Member's WTO obligations. As will be explained in the discussion that follows, the GATT, the main WTO treaty on trade in goods, generally does not allow Members of the WTO to ban imports or exports of

167. *Id.* ¶¶ 7.220–22.

168. Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶¶ 188–91, WTO Doc. WT/DS246/AB/R (adopted Apr. 7, 2004).

169. *Id.* ¶ 164; see also Robert Howse, *Mainstreaming the Right to Development into the World Trade Organization*, in *REALIZING THE RIGHT TO DEVELOPMENT: ESSAYS IN COMMEMORATION OF 25 YEARS OF THE UNITED NATIONS DECLARATION ON THE RIGHT TO DEVELOPMENT* 249, 256 (2013).

170. Appellate Body Report, *Colombia—Measures Relating to the Importation of Textiles, Apparel and Footwear*, ¶¶ 6.1–3, WTO Doc. WT/DS461/AB/R (adopted June 22, 2016) [hereinafter *Colombia—Textiles*].

171. *Id.* ¶¶ 5.41–45.

goods (Article XI). However, where a ban on imports and/or exports is an integral part of a scheme that also bans the production, distribution, and/or use of a product domestically, the ban may be permissible if it does not discriminate against imports (Article III). In other words, the requirement is one of evenhandedness between the treatment of domestic products and that of imported like products. What this means is that Canada, having now legalized domestic recreational cannabis, is subject to scrutiny under WTO rules for its continued prohibition of imports of recreational cannabis, which may well be unjustifiable.

A. *Banning Import and Export of Cannabis as a Product*

As noted in the first Part of this Article, Canada's scheme contains an absolute ban on the import and export of cannabis for recreational use. This ban enhances the arguments developed in Part II concerning the broad compatibility between Canada's scheme and the central anti-trafficking goals of the UN drug control and anti-trafficking framework. Canada has sought to legalize recreational use through a scheme of government control and regulation, while at the same time strictly preventing its legalization decision from exacerbating the phenomenon of drug trafficking in any way. The Regulations enacted pursuant to the Cannabis Act further reinforce this balance by prohibiting persons with a background in drug trafficking or organized crime from participating in the legal Canadian cannabis industry.¹⁷²

In contrast to recreational cannabis, medical cannabis is imported and exported across international borders. Prior to its scheme for legal recreational cannabis, Canada actively participated in international trade of medical cannabis, especially as an exporter. There is international trade in medical cannabis, with Uruguay, for instance, planning to export medical cannabis to Canada, Chile, and Israel.¹⁷³ As legalization of recreational cannabis in other jurisdictions progresses, there is every reason to believe that Canadian producers would want to exploit export opportunities for recrea-

172. "The Minister may, at any time, conduct checks that are necessary to determine whether an applicant for, or the holder of, a security clearance poses a risk to public health or public safety, including the risk of cannabis being diverted to an illicit market or activity. Such checks include (a) a check of the applicant's or holder's criminal record; and (b) a check of the relevant files of law enforcement agencies that relate to the applicant or holder, including intelligence gathered for law enforcement purposes." Cannabis Regulations, *supra* note 10, § 52.

"Grant of security clearance (1) Before granting a security clearance, the Minister must, taking into account any licence conditions that he or she imposes under subsection 62(10) of the Act, determine that the applicant does not pose an unacceptable risk to public health or public safety, including the risk of cannabis being diverted to an illicit market or activity." *Id.* § 53. The section goes on to provide an extensive list of factors that may be taken into account in making that determination.

173. Patricia Rey Mallén, *Uruguay To Export Marihuana To Canada, Chile, Israel For Medical Purposes*, INT'L BUS. TIMES (Jan. 8, 2014, 5:46 AM), <https://www.ibtimes.com/uruguay-export-marihuana-canada-chile-israel-medical-purposes-1530930>.

tional in addition to medical cannabis. Conversely, Uruguay—and other countries as they liberalize their domestic markets—might well wish to pursue opportunities to export recreational cannabis to Canada. These possibilities are clearly precluded by the Cannabis Act, setting up a significant difference between the treatment of medical and recreational cannabis in Canada with respect to international trade.

Article XI of the GATT prohibits quantitative restrictions. It states:

No prohibitions or restriction 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.¹⁷⁴

That Canada's cannabis scheme restricts the issuance of import and export licenses to cannabis used for medical purposes is a clear violation of Article XI, as it imposes quantitative restrictions—in the form of a ban on import and export licenses—on the importation and exportation of cannabis used for recreational purposes. 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.”¹⁷⁵ At the same time, a WTO Member State that banned both the import and the domestic production of cannabis would not be in violation of the WTO rules on quantitative restrictions. This is because its import ban would be regarded as an integral part of its domestic regime, provided that the ban is applied equally to domestic and imported products, thus falling under Article III(4) rather than Article XI of the GATT.¹⁷⁶

174. General Agreement on Tariffs and Trade 1994 art. XI, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 190 (1994) [hereinafter GATT].

175. Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 7.11, WTO Doc. WT/DS332/R (adopted Dec. 17, 2007).

176. See Panel Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶¶ 8.83–100, WTO Doc. WT/DS135/R (adopted Apr. 5, 2001). The unadopted *Tuna–Dolphin* GATT report is especially instructive for the purposes of the present case. In that case, the United States Marine Mammals Protection Act involved two measures. The first was a regulation governing the fishing practices of national tuna fishermen. Secondly, it also imposed an import ban on tuna or tuna-based products where the commercial fishing techniques used had the incidental effect of killing or severely injuring a greater number of marine mammals than the norms set by the United States. The Panel Report stated in general terms that: “This suggests that Article III covers only measures affecting products as such. Furthermore, the text of the Note Ad Article III refers to a measure ‘which applies to an imported product and the like domestic product and is collected or enforced, in the case of the imported product, at the time or point of importation’. This suggests that this

B. *Participation of State Enterprises in Canada's Cannabis Scheme*

As previously discussed, Canada's cannabis scheme operates in accordance with the practice of federalism in the country. Within the legal parameters set by the federal Cannabis Act, the provinces determine the modalities for the distribution and sale of recreational cannabis within the boundaries of their province. As a general matter, Canada is responsible for measures of provincial governments complying with WTO rules. For example, provincial practices with respect to government distribution and sale of alcoholic beverages have been a subject of dispute settlement dating back to the pre-WTO days of the original GATT.¹⁷⁷ A number of provinces either enacted laws or published regulatory plans that would involve participation of provincial monopolies or government enterprises in the distribution and sale of recreational cannabis. In British Columbia, for instance, similar rules will be applied as currently exist for regulating liquor, with the British Columbia Liquor Distribution Branch acting as the wholesale distributor of recreational cannabis.¹⁷⁸ In Québec, only the Société québécoise du cannabis (the "SQDC") is authorized for the retail sale of cannabis.¹⁷⁹

Note covers only measures applied to imported products that are of the same nature as those applied to the domestic products, such as a prohibition on importation of a product which enforces at the border an internal sales prohibition applied to both imported and like domestic products." Panel Report, *United States—Restrictions on Imports of Tuna*, ¶ 5.11, WTO Doc. WT/DS21/R-39S/155.

Even more nuanced licensing regimes, like that in *China-Raw Materials*, have been found impermissible, with the panel in that case stating that "if a licensing system is designed such that a licensing agency has discretion to grant or deny a licence based on unspecified criteria, this would not meet the test we set out above in order to be permissible under Article XI:1." Panel Report, *China—Measures Related to the Exportation of Various Raw Materials*, ¶ 7.921, WTO Doc. WT/DS398/R (adopted Feb. 22, 2012). Similarly, in *US-Shrimp*, a ban on importing certain shrimp on the basis of the method by which the shrimp were harvested was found to be in violation of Article XI. Panel Report, *United States—Import Prohibitions of Certain Shrimp and Shrimp Products*, ¶ 7.16, WTO Doc. WT/DS58/R (adopted Nov. 6, 1998). In both of these cases, as well as in *Brazil-Tyres*, the quantitative restrictions were more limited than the total import/export ban in the Cannabis Act. In light of the prohibition on quantitative restrictions, it would theoretically be less problematic for a country to legalize domestic cannabis cultivation exclusively for export while maintaining a legal regime that criminalized domestic cannabis consumption.

177. See, e.g., Panel Report, *Canada—Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, DS17/R GATT BISD (39th Supp.), at 27 (1992) [hereinafter *Canada-Alcohol*].

178. *Cannabis*, B.C., <https://www2.gov.bc.ca/gov/content/safety/public-safety/cannabis> (last visited Mar. 12, 2019) (in British Columbia, the British Columbia Liquor Distribution Branch (LDB) "will operate the public retail stores, and Liquor Control and Regulations Branch (LCRB) will be responsible for licensing private stores and monitoring the retail sector.").

179. *The Legislation on Cannabis in Brief*, QUÉBEC, <https://encadrementcannabis.gouv.qc.ca/en/loi/cadre-legal-en-bref/> (last visited Mar. 10, 2019).

The GATT permits the operation of monopolies and state trading enterprises subject to the requirement in Article XVII that they make purchases and sales on a commercial basis and observe the non-discrimination norms of the GATT in their operations.¹⁸⁰ As the Appellate Body in *Canada–Wheat Board* held, 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.”¹⁸¹ Given that the federal import/export ban just discussed makes it legally impossible for provincial state enterprises and monopolies to consider imports for their purchases of cannabis or to contemplate export opportunities, Article XVII may be largely moot as far as provincial government activity in the cannabis market is concerned. However, an issue may arise where domestically-grown cannabis nevertheless contains inputs from abroad such as bioengineering, know-how with respect to growing, or chemicals or processes designed to enhance the product. In such instances, Article XVII would preclude a provincial government enterprise or monopoly from discriminating against domestically produced cannabis on the basis of foreign inputs in the product. Such inputs are not as such covered by the recreational import ban.¹⁸² An important jurisprudential question is whether such inputs would be regarded as traded “services” rather than content of goods. We will return to this issue below when we consider Canada’s commitments under the WTO General Agreement on Trade in Services (the “GATS”).

Article XVII is rarely invoked in WTO jurisprudence but is addressed in several GATT-era panel reports. In the *Korea–Beef* GATT panel report, the panel clarified that state-granted exclusive import monopolies were legal but they would still need to conform to other GATT requirements, including Article XI’s prohibition on quantitative restrictions.¹⁸³ In other words, being a state-trading enterprise does not excuse such parties from treating domestic economic actors and economic actors of other WTO Members in an evenhanded fashion.

180. GATT, *supra* note 174, art. XVII, ¶ 1(a)–(b); see Steve McCorrison & Donald MacLaren, *State Trading, the WTO and GATT Article XVII*, 25 *WORLD ECON.* 107, 109–10 (2002).

181. Appellate Body Report, *Canada—Measures Relating to Exports of Wheat and Treatment of Imported Grain*, ¶ 98, WTO Doc. WT/DS276/AB/R (adopted Sept. 27, 2004). This position was later reiterated by the panel body. Panel Report, *Canada—Certain Measures Affecting the Renewable Energy Generation Sector*, ¶ 7.143, WTO Doc. WT/DS412/R (adopted May 24, 2013).

182. Subsection 62(2) of the Cannabis Act states that “Licences and permits authorizing the importation or exportation of cannabis may be issued only in respect of cannabis for medical or scientific purposes or in respect of industrial hemp.” Cannabis Act, S.C. 2018, c 16, § 62(2) (Can.).

183. Report of the Panel, *Republic of Korea—Restrictions on Imports of Beef*, ¶¶ 114–15, L/6503 GATT BISD (36th Supp.), at 268 (1989).

Most relevant for our purposes are the two GATT panels concerning Canada's provincial liquor monopolies. The first GATT panel resulted from a complaint by the European Communities that the provincial liquor monopolies were discriminating against European alcohol through a combination of discriminatory markups on imported alcohol as well as through unfavorable access to retail markets.¹⁸⁴ Canada argued that Article XVII:1(b) exempted state trading enterprises from having to strictly follow the national treatment and non-discrimination requirements of Article III:4. Nevertheless, the panel found a violation of Canada's GATT obligations. It stated that it "saw great force in the argument that Article III:4 was also applicable to state-trading enterprises at least when the monopoly of the importation and monopoly of the distribution in the domestic markets were combined[.]" as was the case here.¹⁸⁵ The second GATT panel relating to the Canadian provincial liquor monopolies was a result of a complaint brought by the United States concerning the importation of beer.¹⁸⁶ At issue was Canada's implementation of the ruling against it in the earlier EC GATT case; the United States argued that Canada failed to implement the ruling, continuing to subject beer to discriminatory practices. Here again, the panel found that Canada could not justify its actions under Article XVII.¹⁸⁷

In order to operate a state trading enterprise, the country must inform the other WTO Member States of the products that are imported into or exported from the country by such state trading enterprises.¹⁸⁸ Article XVII takes a broad view of state trading enterprises, including not only enterprises that are state-owned or state-controlled by definition but also enterprises that are granted "exclusive or special privileges" by the state.¹⁸⁹ This latter category appears to include private enterprises that operate on the basis of licenses granted by the state, as would be the case with the recreational cannabis industry in some Canadian provinces.¹⁹⁰ Ontario is one such example.¹⁹¹

184. Report of the Panel, *Distribution and Sale of Alcoholic Drink by Canadian Provincial Marketing Agencies*, ¶ 3.1, L/6304 GATT BISD (35th Supp.), at 37 (1988) [hereinafter *Canada-Alcohol* (1988, GATT)].

185. *Id.* ¶¶ 3.34, 4.26.

186. *See Canada-Alcohol*, *supra* note 177, ¶¶ 4.3, 4.7.

187. *Id.* ¶ 5.15.

188. GATT, *supra* note 174, art. XVII, ¶ 4.

189. *Id.* art. XVII, ¶ 1(a).

190. Adam Jones, *Ontario Moves to Allow Private Cannabis Retailers*, MKT. REALIST (Sept. 27, 2018), <https://marketrealist.com/2018/09/ontario-moves-to-allow-private-cannabis-retailers>. *See generally* Robert Howse, *State Trading Enterprises and Multilateral Trade Rules: The Canadian Experience*, in STATE TRADING IN THE TWENTY-FIRST CENTURY 181 (Thomas Cottier et al. eds. 1998).

191. Jones, *supra* note 190.

C. *Potential Justifications Under the GATT for
Canada's Import/Export Ban on Recreational Cannabis*

Article XX is the general exception provision of the GATT and allows for an affirmative defense to violations of the principal GATT obligations. Some parties have successfully used it as a justification for quantitative restrictions in a number of situations, including in *EC–Asbestos* and *US–Shrimp (21.5)*.¹⁹² A successful Article XX defense requires two steps: first, demonstrating that the measure in question falls under one of the specific enumerated exceptions in Article XX; and second, proving that the measure is consistent with the chapeau of Article XX.¹⁹³

Differentiating between recreational and medical cannabis in a legal regime wherein only medical cannabis is legal poses no real trade law issues. Article XX of the GATT offers countries that have only legalized medical cannabis three main avenues to justify the exclusion of the importation of recreational cannabis: under Article XX(a) as being necessary for the protection of public morals; under Article XX(b) on the basis that the ban is necessary to protect human, animal, or plant life or health; or under Article XX(d) on the basis that the ban is necessary “to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement,” in particular the international drug conventions.¹⁹⁴

As long as there is no legal recreational cannabis, quantitative restrictions on the importation of cannabis for non-medical purposes seem justifiable, even though the products are arguably identical. Indeed, as discussed above, under the GATT, a complete ban on importation and/or exportation of non-medical cannabis might be regarded as a measure to be considered under Article III:4 of the GATT, not Article XI, where such a ban operates in tandem with the prohibition of domestic marketing and sale of non-medical cannabis.

Canada has, however, legalized recreational cannabis while banning any importation or exportation of such product. While the same possible justifications for the ban could be used as would exist in a situation where recreational cannabis were illegal (justified through Article XX(a) and the protection of public morals, Article XX(b) and the protection of human life or health, or Article XX(d) and compliance with laws or regulations), such a defense is unlikely to succeed in a legal regime that approves recreational use of domestically grown cannabis.

192. Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc. WT/DS135/AB/R (adopted Apr. 5, 2001); Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products Recourse to Article 21.5 of the DSU by Malaysia*, WTO Doc. WT/DS58/AB/RW (adopted Nov. 21, 2001).

193. See Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, at 22, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996) [hereinafter *US–Gasoline*].

194. GATT, *supra* note 174, art. XX(a), (b), (d).

Where domestically illegal, recreational cannabis would likely be viewed as against public morals. WTO jurisprudence has made it clear that panels are generally unwilling to look too closely into Article XX(a) (or the analogous Article XIV(a) of the GATS) justifications, leaving considerable leeway for Members to determine for themselves what issues impact public morals.¹⁹⁵ What constitutes a matter of public morals is strongly intertwined with questions of national sovereignty. Judgment by international panelists on whether a ban on certain types of publications (as was the case in *China–AV*), for instance, in fact constituted a genuine ground for a public moral exception would likely be viewed as unduly invasive.¹⁹⁶ In a case where recreational use of cannabis is legalized, however, an argument for imposing an import/export ban on the basis of public morals would not survive even the minimal scrutiny that a WTO panel would exercise. There is no moral difference between the consumption of domestic and imported recreational cannabis where such recreational cannabis is produced in a similarly legal environment in both the domestic market and the other WTO Members' markets and where there is little or no concern that illicit criminal gangs are influencing the production. As such, there cannot reasonably be an argument justifying a complete ban on importation and exportation of recreational cannabis on the basis of public morals.

Unlike Article XX(a), Article XX(b) presents a more viable justification for an import/export ban. Under Article XX(b), it may be argued that recreational cannabis is an intoxicant and that there may be long-term health consequences from recreational use and, therefore, an import/export ban is justified in the interest of protecting human life and health. In a situation where domestic recreational cannabis is illegal, this would likely justify a complete import/export ban.

However, the domestic legalization of recreational cannabis undermines most arguments in favor of this position; if the health consequences were so significant, a less trade disruptive alternative would be to continue to prohibit all recreational cannabis possession, cultivation, distribution, and consumption. One possible justification relates to the relatively unregulated na-

195. See, e.g., Panel Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications And Audiovisual Entertainment Products*, WTO Doc. WT/DS363/R (adopted Jan. 19, 2010) [hereinafter *China–AV*], ¶ 7.759; Panel Report, *European Communities—Measures Prohibiting The Importation And Marketing of Seal Products*, WTO Doc. WT/DS400/R, WT/DS401/R (adopted June 18, 2014), ¶ 7.630–39; Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/RW (adopted Apr. 20, 2005), ¶ 6.457–74.

196. In *China–AV*, China argued that certain reading materials and AV products constituted “cultural goods” that might have a negative impact on public morals. *China–AV*, *supra* note 195, ¶ 7.751. The United States, who was challenging the measures, significantly did not argue that the measures were not measures to protect public morals, but rather that the means chosen by China were not necessary. *Id.* ¶ 7.756. The panel cited the panel in *US–Gambling*, which found in relation to Article XIV(a) of the GATS that Members should be allowed deference to define what constitute public morals to them. *Id.* ¶ 7.759.

ture of the international cannabis trade. Even in countries where recreational cannabis is legal, regulations concerning THC levels, as well as the additives that may be used in the product, may not be as clear as in the proposed Canadian legislation. In such an environment, it could be argued that an import ban is justified to protect recreational cannabis users from exposure to poorly regulated cannabis from other countries. This is because Article XX(b) permits WTO Members to determine the level of risk they are willing to accept in relation to the protection of human, animal, or plant life or health.

The ban on the issuance of licenses for the exportation of recreational cannabis, however, would not be justifiable under this rationale, as the draft Canadian regulation envisions clear labeling requirements for THC content and other aspects of the cannabis product. Additionally, this argument would have less force where the producers of imported products were able and willing to satisfy Canadian regulatory standards and to abide by any laws and regulations to ensure that Canada's health and related public policy goals are met.

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.¹⁹⁷ Arguably, the international drug conventions prohibit Canada from importing or exporting cannabis for recreational purposes, as will be discussed in a later section. In light of this, Canada could possibly argue that the blanket import/export bans on recreational cannabis are justified by Article XX(d) since the treaties constitute laws or regulations that are not inconsistent with the GATT.

Much of the WTO jurisprudence relating to Article XX(d) focuses on compliance with *domestic* laws and regulations that are consistent with the GATT.¹⁹⁸ The question of whether international treaties can constitute laws or regulations in the context of Article XX(d) has been less thoroughly examined, although two decisions provide some insight on this point: *Mexico–Soft Drinks* and *India–Solar Cells*. While *Mexico–Soft Drinks* looked at NAFTA in the context of interstate obligations, *India–Solar Cells* focused on the relationship between international treaties and domestic law.

In *Mexico–Soft Drinks*, Mexico argued that the NAFTA constituted a law or regulation as specified in Article XX(d) and that its measures were "necessary to secure compliance" by the United States with its obligations under the NAFTA.¹⁹⁹ The panel disagreed, finding that compliance relates to the relationship between the state and its subjects rather than interstate relations; there is no concept of private action against a state that would justify a

197. GATT, *supra* note 174, art. XX(d).

198. See, e.g., Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶¶ 152–158, WTO Doc. WT/DS161/AB/R, WT/DS169/AB/R (adopted Jan. 10, 2001); *Colombia—Textiles*, *supra* note 170, ¶¶ 5.137–53.

199. Panel Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, ¶ 8.162, WTO Doc. WT/DS308/R (adopted Mar. 24, 2006).

countermeasure such as the one in question under the guise of enforcement.²⁰⁰ As such, the panel held that Article XX(d) was intended to address “action at a domestic rather than international level.”²⁰¹ The Appellate Body upheld the panel’s findings, holding that Article XX(d) relates to “rules that form part of the domestic legal system” of a WTO Member State (that is, those that have direct effect).²⁰²

In the case of compliance with the international drug conventions, however, the obligations vis-à-vis criminalization of cannabis extend from the international treaties into domestic law. The recent *India–Solar Cells* dispute provides some clarification of how this might work in practice. The cumulative requirements of Article XX(d) are that there must be laws or regulations, that these must not be inconsistent with the provisions of the GATT, and that the measures in question are meant to secure compliance with those laws and regulations.²⁰³ India here argued that the international conventions (in particular, the United Nations Framework Convention on Climate Change) that it was invoking had direct effect on the domestic Indian legal system and thus were laws or regulations under Article XX(d).²⁰⁴ The panel disagreed, finding that implementing legislation was necessary for international law obligations to take effect under Indian law.²⁰⁵ The Appellate Body further clarified that a determination of whether an international instrument

operates 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’, must be carried out on case-by-case basis, taking into account all the other relevant factors relating to the instrument and the domestic legal system of the Member.²⁰⁶

The difficulty here for Canada is the test “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.” As discussed at length in the previous sections of this Article, Canada, in legalizing recreational cannabis, has modified some of the main obligations of the UN conventions to respond to its own legal imperatives. As argued above, this modification may be a permissible accommodation under the 1988 Convention. Nevertheless,

200. *Id.* ¶ 8.178.

201. *Id.* ¶ 8.179.

202. Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, ¶ 70, WTO Doc. WT/DS308/AB/R (adopted Mar. 24, 2006).

203. Panel Report, *India—Certain Measures Relating to Solar Cells and Solar Modules*, ¶ 7.267, WTO Doc. WT/DS456/R (adopted Oct. 14, 2016).

204. *Id.* ¶ 7.295–96.

205. *Id.* ¶ 7.298.

206. Appellate Body Report, *India—Certain Measures Relating to Solar Cells and Solar Modules*, ¶ 5.141, WTO Doc. WT/DS456/AB/R (adopted Oct. 14, 2016).

Canada has fallen short of simply translating the conventions into rules of conduct in domestic law.

For a measure to be justifiable under Article XX(a), (b), or (d), it must not only meet the criteria of the subsection but must also be necessary. In *Colombia-Textiles*, the Appellate Body stated that the “necessity analysis involves a process of ‘weighing and balancing’ a series of factors, including the importance of the societal interest or value at stake, the contribution of the measure to the objective it pursues, and the trade-restrictiveness of the measure.”²⁰⁷ In the context of the Canadian import ban, a blanket import/export ban on recreational cannabis would seem to be more trade restrictive than necessary to address potential concerns with protecting human life or health. Less trade restrictive alternatives could include clear labeling requirements on imported products that would be comparable to Canadian labeling regulations.

Even where a panel finds that a measure falls under one of the subsections of Article XX, however, it must still meet the requirements of the chapeau, or preambular paragraph, of Article XX. The chapeau requires the country invoking Article XX as an affirmative defense to show that the measure is applied in a non-discriminatory, non-arbitrary way and that it does not operate as a disguised restriction on international trade.²⁰⁸ As laid out by the Appellate Body in *US-Shrimp*, there are three requirements that must be met for a measure to constitute “arbitrary or unjustifiable discrimination”: (1) application of the measure must result in discrimination; (2) discrimination must be arbitrary or unjustifiable in character; and (3) discrimination must occur between countries where the same conditions prevail.²⁰⁹

The import/export ban in the Cannabis Act is unlikely to meet the requirements of the chapeau. Since the act permits licensed individuals and entities to produce and sell recreational cannabis, a ban on imports of recreational cannabis results in discrimination against foreign producers in favor of Canadian producers.²¹⁰ This is arbitrary and unjustifiable in nature since there is no justification for treating foreign producers of recreational cannabis differently than domestic ones, particularly where importation of medical cannabis is permitted under the Act. Central to the arbitrary and unjustifiable analysis is whether the policy is rationally related to the policy

207. *Colombia-Textiles*, *supra* note 170, ¶ 5.102.

208. GATT Article XX’s chapeau reads: “Subject to the requirement that such measures 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, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . .” GATT, *supra* note 174, art. XX.

209. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 150, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998).

210. *See, e.g., id.* ¶¶ 175–76.

objectives used to justify the measure.²¹¹ One of the policy objectives of the Canadian act is to decrease illegal trade in cannabis.²¹² Banning legal imports of recreational cannabis would appear to be contrary to this aim. Reports suggesting that legalization of cannabis in Canada could in fact result in a temporary shortage of legal domestically grown cannabis raise concerns that the illicit trade in cannabis will continue.²¹³ If this were indeed the case, then the import ban on recreational cannabis would seem to particularly counteract the stated goal of the Act in reducing illicit trading in cannabis, supporting the argument that this is unjustifiable.

On the basis of this analysis, it is unlikely that an affirmative defense based on Article XX to a challenge against Canada regarding the import/export ban on recreational cannabis would withstand scrutiny, particularly since the burden of proving that the measure is not arbitrary and unjustified is on the country invoking the Article XX defense.²¹⁴ Here, it is helpful to consider how the WTO Appellate Body considered a GATS Article XIV defense that the United States mounted in order to justify prohibitions on Internet gaming. At issue in the *US–Gambling* case were provisions of the GATS that closely parallel those of Article XI of the GATT.²¹⁵ The Appellate Body was prepared to accept that there were distinctive moral arguments for singling out Internet gambling as opposed to gaming as such (easier for young people to avoid age restrictions, money laundering risks, etc.). Nevertheless, it still found a violation of the chapeau in the one instance where the restriction (the Interstate Horseracing Act) clearly allowed provision of the gambling services in question by domestic U.S. economic actors.²¹⁶ It was not clear that the Interstate Horseracing Act would allow the provision of Internet gambling services by other WTO Members, specifically those of the complainant, Antigua. Thus, the Appellate Body came to a conclusion of unjustifiable discrimination under the chapeau.²¹⁷

211. Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 5.306, WTO Doc. WT/DS400/AB/R; WT/DS401/AB/R (adopted June 18, 2014).

212. Cannabis Act, S.C. 2018, c 16, § 7(c) (Can.).

213. Dianne Buckner, *Don't Delete Your Dealer's Number Yet—Legal Cannabis Shortage Looms*, CBC (Oct. 3, 2018, 4:00 AM), <https://www.cbc.ca/news/business/legal-cannabis-shortage-looms-1.4845816> (noting that estimates suggest that Canadian producers will only be able to supply one third of customer demand in the first year, giving rise to concerns that illegal trade in cannabis will continue).

214. *US–Gasoline*, *supra* note 193, at 22–23.

215. Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 216, WTO Doc. WT/DS285/AB/R (adopted Apr. 20, 2005) [hereinafter *US–Gambling*].

216. *Id.* ¶ 368.

217. *Id.* ¶ 369.

D. *The TBT Agreement and International Standards*

In addition to the GATT, the WTO encompasses two other specialized agreements that address regulations and standards affecting trade in goods: the Technical Barriers to Trade Agreement (the “TBT”) and the Sanitary and Phytosanitary Measures Agreement (the “SPS”), the latter concerning measures that relate to the health and safety of food and agricultural products. With the exception of “edibles,” where cannabis could be regarded as a “toxin” in food, Canada’s ban on trade in cannabis appears to fall outside the definition of a measure covered by the SPS Agreement.²¹⁸

Because Canada has taken a prohibitive approach, simply excluding importation and exportation of recreational cannabis, the analysis under TBT would not be much different than under the GATT, focusing on justification for this highest degree of trade restrictiveness. One important difference, however, is that the TBT Agreement provides for a presumption of legality in the case of regulations that conform to or that are in accord with international standards.²¹⁹ For example, while the TBT Agreement requires that regulations not constitute “an unnecessary obstacle to trade” (that is, not be more trade restrictive than necessary to achieve a legitimate objective, such as health),²²⁰ Article 2.5 provides in relevant part: “Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade.”²²¹ Since the UN drug conventions clearly require a prohibitive approach to the trade of recreational cannabis as a product, the question arises as to whether they would be considered “international standards” under the TBT Agreement. If so, this would go a long way toward justifying Canada’s trade ban on recreational cannabis under the standard in Article 2.5 of the TBT Agreement.

218. The definition is as follows: ‘1. Sanitary or phytosanitary measure - Any measure applied: (a) to protect animal or plant life or health within the territory of the Member from risks arising 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.’ Agreement on the Application of Sanitary and Phytosanitary Measures Annex A 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493.

219. Agreement on Technical Barriers to Trade, art. 2.5, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120 [hereinafter TBT Agreement].

220. *Id.* art. 2.2.

221. *Id.* art. 2.5.

In the case of the TBT Agreement, the meaning of “international standards” was recently addressed in the *Australia–Plain Packaging* dispute, where Australia’s labeling and packaging requirements for cigarettes were challenged both under the TBT Agreement and the WTO Agreement on Trade and Intellectual Property (the “TRIPS”).²²² In that case, the WTO panel rejected Australia’s argument that guidelines to implementation of the Framework Convention on Tobacco Control constituted “international standards” within the meaning of Article 2.5 of the TBT Agreement.²²³ The panel applied criteria for determining the meaning of international standardization under TBT that was developed by the TBT Committee in the WTO. The Appellate Body adopted these criteria as an appropriate legal approach in the *US–Tuna II* dispute, including the standards as those of a “recognized body.”²²⁴ The panel also placed considerable emphasis on the definition of a standard in general in Annex 1.2 of the TBT Agreement; a standard, according to this provision, is a document “that provides rules, guidelines or characteristics for products or related processes and production methods.”²²⁵

However, another dimension of the definition of a standard in Annex 1.2 of the TBT Agreement is that it be “not mandatory.”²²⁶ This is at odds with the nature of the obligations in the UN drug conventions with respect to trafficking or trade in scheduled drugs, which are, as discussed in an earlier section of this Article, regarded as the most unconditional legal requirements of the Conventions and permit almost no flexibility. That being said, it is far from clear that the definition of a standard in Annex 1.2 of the TBT Agreement is the appropriate benchmark for applying the notion of international standards as justificatory under Article 2.5 of the TBT Agreement. This is an issue that goes beyond the scope of analysis of this Article. However, it seems that, even if the general definition is useful in addressing standards of a kind often used by *private economic actors* in the production of products, it would be perverse to allow *states* a justification for their measures in the case of non-mandatory international guidelines while not allowing them a justification where international norms are fully binding, as in the UN drug conventions. On the other hand, Canada’s cannabis scheme, as previously discussed, has been branded as a deviation from the UN drug conventions in its legalization of possession and use of recreational cannabis. This would raise the issue of whether the scheme is fully in accordance

222. *Australia–Plain Packaging*, *supra* note 9, ¶¶ 1.1, 7.17.

223. *Id.* ¶¶ 7.326–30.

224. *Id.* ¶¶ 7.278, 7.330ff.

225. *Id.* ¶¶ 7.335–40.

226. TBT Agreement, *supra* note 219, Annex I. The definition of standard is: “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.”

with the drug conventions and whether full compliance would be required for the UN drug conventions to be invoked as “international standards” within the meaning of Article 2.5 of the TBT Agreement. Without guidance from the WTO Appellate Body, it is unclear how this issue might be resolved.

E. Cannabis Legalization and the Trade In Services

A major achievement of the Uruguay Round of multilateral trade negotiations that created the WTO was the extension of basic norms such as prohibition of quantitative restrictions and non-discrimination against imports (National Treatment) to trade through a new agreement, the GATS.²²⁷ In the GATS, the obligations on quantitative restrictions and National Treatment (Articles XVI and XII respectively) apply only to those services sectors or sub-sectors of services activity that are specified by individual WTO Members. The GATS also contains provisions on monopolies and state enterprises (Article VIII) and on licensing and professional qualifications (Article VI). Finally, the GATS has a general public policy exception (Article XIV) that includes an exception for public morals and public order.²²⁸

It is clear that the UN drug conventions view “international trade” as the movement of a scheduled drug itself across international borders.²²⁹ If one is to analyze cannabis in contemporary supply chain²³⁰ or value chain²³¹

227. See *The General Agreement on Trade in Services (GATS): Objectives, Coverage and Disciplines*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm (last visited Mar. 10, 2019).

228. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 (1994) [hereinafter GATS]. Article XIV reads as follows: “Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: (a) necessary to protect public morals or to maintain public order.” *Id.*

229. See, for example, Article 30 of the Single Convention, which is titled “Trade and Distribution” and exclusively addresses “trade in and distribution of drugs.” Single Convention, *supra* note 5, art. 30, ¶ 1 (emphasis added).

230. “A supply chain consists of all stages involved, directly or indirectly, in fulfilling a consumer’s request. The supply chain not only includes the manufacturers and suppliers, but also transporters, warehouses, retailers and customers themselves.” Martin Hart et al., *Contemporary Supply Chain Trends and World’s Freight Traffic*, in DEVELOPING OF TRANSPORTATION FLOWS IN 21ST CENTURY SUPPLY CHAINS 99, 101, https://www.ue.katowice.pl/fileadmin/_migrated/content_uploads/7_M.Hart_X.Lukoszova_J.Rasner_Contemporary....pdf (last visited Mar. 10, 2019).

231. “A ‘supply chain’ refers to the system and resources required to move a product or service from supplier to customer. The ‘value chain’ concept builds on this to also consider the manner in which value is added along the chain, both to the product / service and the actors involved. From a sustainability perspective, ‘value chain’ has more appeal, since it explicitly references internal and external stakeholders in the value-creation process. See *What Is a Value Chain? Definitions and Characteristics*, CAMBRIDGE INST. FOR SUSTAINABLE

terms, a significant contribution to the final product comes from services inputs such as research, testing, and agricultural consulting. Cannabis can be grown almost anywhere.²³² The UN drug conventions do not really reflect these kinds of realities and generally assume that what is trafficked is the drug as a final product or as component products, failing to account for the service aspect of cannabis production. In the case of medical cannabis, firms have already circumvented export restrictions by selling know-how through licenses to jurisdictions where the growing and production of medical cannabis products is legal, for instance—the Israeli firm Tikun Olam is a case in point.²³³ The UN drug conventions do not call for criminalization of such activities unless (arguably) they are ancillary to illicit distribution and trafficking of the scheduled drug. The Single Convention does require that states parties control “all persons and enterprises carrying on or engaged in the manufacture of drugs.”²³⁴ It would, however, be a very broad interpretation of that provision to find that any provider of ancillary services, such as biotechnology or agronomy, is engaged in actual manufacturing. Nevertheless, Canada’s scheme contemplates that such persons be licensed and, in a number of cases, have security clearances as well, as we shall discuss below.²³⁵

As discussed in the first Part of this Article, Canada’s scheme leaves the market structure for the production, distribution, and sale of cannabis to the provinces within the general parameters of the federal Cannabis Act. In its schedule of commitments in the GATS, Canada accepted the obligations of the GATS on Market Access (Article XVI) and National Treatment (Article XVII) for wholesaling, distribution, and retailing services.²³⁶ These are, gen-

LEADERSHIP, <https://www.cisl.cam.ac.uk/graduate-study/pgcerts/value-chain-defs> (last visited Mar. 11, 2019).

232. See WORLD WIDE WEED: GLOBAL TRENDS IN CANNABIS CULTIVATION AND ITS CONTROL (Tom DeCorte et al. eds., 2011); Daniel Heilmann, *The International Control of Illegal Drugs and the U.N. Treaty Regime: Preventing or Causing Human Rights Violations?*, 19 CARDOZO J. INT’L. & COMP. L. 237, 260 (2010).

233. *TikunOlam and MedReleaf*, TIKUNOLAM, <https://www.tikunolam.com/article.php?id=1112> (last visited Mar. 12, 2019); see also Kris Krane, *Cannabis Cultivation Will Be a Race to the Bottom*, FORBES (Apr. 25, 2018, 11:30 AM), <https://www.forbes.com/sites/kriskrane/2018/04/25/cannabis-cultivation-will-be-a-race-to-the-bottom/>.

234. Single Convention, *supra* note 5, art. 29, ¶ 2(a).

235. Article 9 of Bill C-45 establishes the parameters for distribution. Cannabis Act, S.C. 2018, c 16, § 9 (Can.). Article 50 of the Regulations to Support Coming into Force of the Cannabis Act details the individuals who must hold a security clearance. Cannabis Regulations, *supra* note 10, § 50.

236. GATS, *supra* note 228, Canada Schedule of Specific Commitments. Under the GATS, WTO Member States are free to negotiate which services sectors they wish to open to foreign participants. Unlike in the GATT, where all of the obligations apply to all goods from all the Member States, the WTO recognizes that services include more sensitive sectors that countries may be reluctant to liberalize. As such, the schedules produced by each Member

erally speaking, analogous to the GATT obligations in Article XI (Quantitative Restrictions) and Article III (National Treatment) discussed above.

Canada's GATS commitments are subject to some limitations and exceptions. Canada has largely or entirely excluded tobacco, alcohol, and pharmaceuticals from its commitments. Obviously, when Canada formulated its schedule in the mid-1990s, a legal market in recreational cannabis was not contemplated. The WTO Appellate Body has interpreted commitments scheduled by WTO Members very broadly. In the *US–Gambling* dispute, for example, the Appellate Body held that gambling came under the United States' commitments with respect to entertainment services, even though gambling was illegal or highly controlled at both the federal and state levels when these commitments were made.²³⁷ Canada's commitments on wholesaling, distribution, and retailing include delivery of these services through the establishment of a commercial presence.²³⁸

Under Article 62(7)(e)(iii) of the Cannabis Act, the Minister of Justice may deny a permit or license on the sole grounds that the applicant is “an organization that was incorporated, formed or otherwise organized outside of Canada.”²³⁹ This seems a clear violation of Canada's obligation of National Treatment in the GATS. Moreover, the mere fact of a service provider being the national of another WTO Member would not lead to a viable basis for a public morals justification or, indeed, a health justification under the Article XIV exception. This is clear from the manner in which the Appellate Body applied the non-discrimination requirement in the chapeau of Article XIV in the *US–Gambling* case: to the extent that some exceptions to the ban on internet gambling applied to certain U.S. service providers (horseracing) but not to the complainant, Antigua, the U.S. measure was discriminatory in a manner that could not be justified under an Article XIV exception.²⁴⁰ Any such attempted justification would be further undermined because Article 62(7)(a) of the Cannabis Act allows the Minister to refuse a license on the grounds of “risk to public health or public safety.” If legitimate public health or public safety concerns were at issue, a license or permit could be denied on the basis of this provision, making the grounds of foreign nationality entirely unnecessary to protect public health and public safety.

The operation of Canada's GATS commitments in cases where the provinces have established or will establish a government monopoly on

State contain their commitments and indicate to what extent and in which sectors those countries are willing to liberalize their trade.

237. *US–Gambling*, *supra* note 215, ¶ 180.

238. All four modes of supply are covered in Canada's schedule for the services in question. These are 1) cross-border supply; 2) consumption abroad; 3) commercial presence; and 4) presence of natural persons. The GATS permits WTO Members to choose, the modes to which its commitments apply for each sector or sub-sector. GATS, *supra* note 228, art. 1, Canadian Schedule of Specific Commitments.

239. Cannabis Act, S.C. 2018, c 16, § 62(7)(e)(iii).

240. *US–Gambling*, *supra* note 215, ¶ 369.

wholesaling, distribution, and/or retailing are also affected by Article VIII of the GATS, which deals with monopolies and exclusive service providers. Article VIII:1 reads: “Each Member shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Member’s obligations under Article II and specific commitments.”²⁴¹ Article VIII:4 provides that the establishment of any new monopolies subsequent to the entry into force of the GATS shall be communicated to “the Council for Trade in Services no later than three months before the intended implementation of the grant of monopoly rights.”²⁴² These provisions suppose that existing but also new monopolies are permitted under the GATS, provided that the monopoly respects GATS provisions in its operations. 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.²⁴³

The GATS further provides, in Article VI:4, that (subject to future negotiations on more specific disciplines) 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.”²⁴⁴ Licensing and qualification requirements under Canada’s cannabis scheme, as reflected in the Cannabis Act and the Regulations, may be in some tension with the provisions in GATS Article VI:4. The case of possible denial of a license based on non-Canadian nationality alone is an obvious one where scrutiny under Article VI:4 would be triggered. In the case of analytical testing, the Regulations stipulate as a requirement for a testing license that the head of a laboratory “possess a degree in a science related to the work to be carried out that is awarded by a Canadian university or, if awarded by a foreign university, that is recognized by a Canadian university or a Canadian professional association.”²⁴⁵ This would create an

241. GATS, *supra* note 228, art. VIII:1.

242. *Id.* art. VIII:4.

243. *Id.* arts. II:1, VIII:1.

244. *Id.* art. VI:4.

245. § 23(2) of the Regulations states that, “The head of laboratory must have sufficient knowledge of the provisions of the Act and these Regulations that apply to the holder of the licence for analytical testing, have knowledge and experience related to the duties of the position and possess a degree in a science related to the work to be carried out that is awarded by a Canadian university or, if awarded by a foreign university, that is recognized by a Canadian

additional burden for some testing service suppliers from other WTO Members. A real question arises, then, as to whether such a condition is “more burdensome than necessary to ensure the quality of the service.”²⁴⁶ With respect to research licenses, security clearances appear to be required in a range of situations. It is unclear whether an individual’s nationality or other non-objective factors within the meaning of GATS Article V might be used to determine the granting of a clearance. It may well be more onerous for a non-Canadian service supplier to obtain a clearance from Canada’s security agencies given the need for cooperation between security services in other jurisdictions.

F. *Intellectual Property and the Canadian Cannabis Scheme*

A significant part of the “value” of cannabis as a product may be traded without the drug itself crossing international borders through services that transmit know-how about growing, cultivation, production, testing, quality control, and so forth. Typically, such know-how is proprietary and is traded through licenses and contracts that require protection of trade secrets and give limited rights to use the intellectual property, for example, patents, of the provider. WTO law requires the recognition and enforcement of intellectual property rights acquired in any WTO Member by every other Member, subject to certain limitations and exceptions.²⁴⁷

While there is some uncertainty regarding whether new strains, or adaptations of strains of cannabis, are appropriately protected by patents,²⁴⁸ or

university or a Canadian professional association.” Cannabis Regulations, *supra* note 10, § 23(2).

246. GATS, *supra* note 228, art. VI:4.

247. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS]. “Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.” *Id.* art. 41; see also CARLOS M. CORREA, TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS: A COMMENTARY ON THE TRIPS AGREEMENT (2007); GRAEME B. DINWOODIE & ROCHELLE C. DREYFUSS, A NEOFEDERALIST VISION OF TRIPS: THE RESILIENCE OF THE INTERNATIONAL INTELLECTUAL PROPERTY REGIME (2012).

248. See Stephanie Curcio, *Protecting Cannabis Strains in Canada: A Growing Concern*, LEXOLOGY (Oct. 26, 2017), <https://www.lexology.com/library/detail.aspx?g=62f25af5-a4f7-47a1-93b0-5b60973acf56> (“Canada has excluded plants and other ‘higher life forms’ from patent eligibility. This differs from the United States, which allows utility patents to be obtained in respect of higher life forms, including various strains of cannabis. Despite cannabis being illegal in most of the United States, there is no prohibition on obtaining a patent for a cannabis plant or a related product, method or process. In fact, the United States Patent and Trademark Office (USPTO) has already issued a patent for a hybrid cannabis plant having certain characteristics that are patently distinguishable from known strains.”).

alternatively plant breeder's rights,²⁴⁹ entities of other WTO Members so far seem to have little difficulty with patent applications in Canada,²⁵⁰ although, as is often noted, these patents have yet to be tested in litigation.²⁵¹ Notably, the UN drug conventions do not provide that obtaining intellectual property rights with respect to scheduled drugs should be prohibited or restricted, and this is consistent with the acceptance of some medical uses of scheduled drugs, albeit tightly controlled ones.²⁵²

In the case of trademarks, there is a distinct possibility of conflict arising between Canada's scheme and the WTO rules on intellectual property rights. The Cannabis Act prohibits packaging or labeling of cannabis that, inter alia, "sets out a depiction of a person, character or animal, whether real or fictional" or "associates the cannabis or one of its brand elements with, or evokes a positive or negative emotion about or image of, a way of life such as one that includes glamour, recreation, excitement, vitality, risk or daring"²⁵³ Article 20 of the WTO TRIPS Agreement provides that "[t]he use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements."²⁵⁴ In the *Australia–Plain Packaging* case, the panel held that the application of Article 20 should be informed by an assessment of three factors:

249. The TRIPS Agreement is permissive of whether WTO Members protect intellectual property in the production of plants through patents or a *sui generis* system such as plant breeder's rights. See TRIPS Agreement, *supra* note 247, art. 27, ¶ 3(b)); see also Keenan Fast, *The Highs and Lows of Patenting Marijuana Strains*, IP Osgoode (Aug. 10, 2018), <http://code-2.osgoode.yorku.ca/2018/08/the-highs-and-lows-of-patenting-marijuana-strains/#more-32032> (discussing Canada's current lack of patent protection for novel plant breeds, stemming from a pair of Canadian Supreme Court cases).

"In the landmark 2002 Supreme Court patent case of *Harvard College v Canada* (Commissioner of Patents), it was decided that 'higher lifeforms', which include plants, could never be subject to a patent protection per the Patent Act. This ruling was complicated two years later in *Monsanto Canada Inc. v Schmeiser*. Schmeiser's ruling decided that, while it was true that a plant itself could not be patented, a man-made gene within a plant could be. If a plant contains such a modified gene then, for all practical intents and purposes, the plant itself could be patented because 'where a defendant's commercial or business activity involves a thing of which a patented part is a significant or important component, infringement is established.'" Id. (quoting *Monsanto Can. Inc. v. Schmeiser*, [2004] 1 S.C.R. 902, 931–32 (Can.)).

250. See Kimberly A. McManus & Erica L. Lowthers, *Legalization of Recreational Marijuana: The Cannabis Industry's Race to the Patent Office*, AIRD BERLIS (June 21, 2017), <https://www.airdberlis.com/insights/publications/publication/legalization-of-recreational-marijuana-the-cannabis-industrys-race-to-the-patent-office>.

251. See John Simpson, *The Green Rush to Register Cannabis Trademarks*, CANADIAN LAW. (Apr. 30, 2018), <https://www.canadianlawyer.com/author/john-simpson/the-green-rush-to-register-cannabis-trademarks-15652/> (noting that there were more than 500 trademark applications pending as of April 2018 relating to "proposed use" claims for cannabis or cannabis-related goods or services that had yet to be examined).

252. See Naomi Burke-Shyne et al., *How Drug Control Policy and Practice Undermine Access to Controlled Medicines*, 19 HEALTH & HUM. RTS. J. 237, 238 (2017).

253. Cannabis Act, S.C. 2018, c 16, § 26(c)–(d) (Can.).

254. TRIPS Agreement, *supra* note 247, art. 20.

- a. the nature and extent of the encumbrance, bearing in mind the legitimate interest of the trademark holder . . . ;
- b. the reasons for which the special requirements are applied, including any societal interests they are intended to safeguard; and
- c. whether these reasons provide sufficient support for the resulting encumbrance.²⁵⁵

As with the case of tobacco plain packaging, Canada's goal of ensuring that consumption of cannabis is not made attractive to young people would likely be accepted as an important "societal interest." However, the vagueness (and arguably obscurity) of the notion "evokes a positive or negative emotion about or image of a way of life" as stated in the Cannabis Act is likely to raise two issues of TRIPS compliance under the approach of the *Australia–Plain Packaging* panel. First, because of the expansiveness of this language, it could conceivably be applied to any trademark or presentation of it that evokes any positive association with the brand of cannabis to which the mark is connected. This could include, for instance, a calm or balanced way of life. This goes to the extent of the encumbrance—its severity (factor (a)).

The second concern is that of "sufficient support" by reasons of the extent of the encumbrance (factor (c)). Article 26(a) of the Cannabis Act prohibits packaging or labeling if "there are reasonable grounds to believe that the package or label could be appealing to young persons."²⁵⁶ This is perhaps a sufficient encumbrance to protect Canada's societal interest, thus putting into question the need for the broad and vague language about negative or positive emotions concerning lifestyles. Instead of this kind of provision, Canada could have chosen to stipulate encumbrances on the use of trademarks in packaging and labeling in terms of the harmful impact to be avoided; for example, prohibiting packaging or labeling, or words or symbols in packaging and labeling, likely to encourage irresponsible or excessive use of cannabis. Moreover, the additional encumbrance, prohibiting packaging or labeling that "sets out a depiction of a person, character or animal, whether real or fictional" seems to have nothing directly to do with Canada's societal interests. It may be discrimination against the only significant existing global cannabis brand associated with a person, Marley Natural brand, which also has a lion in the logo for the brand.²⁵⁷ Such discrimina-

255. *Australia–Plain Packaging*, *supra* note 9, ¶ 7.2430.

256. Cannabis Act, S.C. 2018, c 16, §26(a).

257. Marley Natural is the official cannabis brand of Bob Marley, developed by his estate in conjunction with the private equity firm Privateer Holdings, which develops cannabis industry brands. See MARLEY NATURAL, <https://www.marleynatural.com> (last visited Mar. 12, 2019).

tion against a brand established in another WTO Member would reasonably be viewed as incompatible with a justified encumbrance on the use of trademarks.

CONCLUSION

Canada was not the first country to legalize recreational cannabis, and it will likely not be the last.²⁵⁸ With the trend toward legalization of recreational cannabis likely to continue, the international legal issues encountered will persist unless they are addressed at a global level through coordinated international efforts. While the international drug conventions interact in some ways with the international human rights regime, particularly as countries reevaluate the negative effects of drug criminalization on vulnerable communities within their borders, the international economic law regime remains separate. Yet, as recreational cannabis is legalized in more jurisdictions, questions of goods, services, and intellectual property pertaining to trade will grow in prominence.

The elephant in the room of cannabis legalization is the drug control and anti-trafficking regime, but, as we have demonstrated, there may be ways around the supposedly unequivocal rules laid down by the conventions. Canada is leading the charge and navigating uncharted waters in balancing its obligations under human rights treaties, the drug conventions, and WTO agreements. Perhaps Canada will withdraw from the drug conventions and rejoin them with reservations; perhaps the WHO will convince the Commission on Narcotic Drugs to reschedule cannabis, thus eliminating the INCB's concerns regarding Canada's cannabis legalization regime; perhaps the drug conventions will simply be ignored when it comes to cannabis.

How Canada's recreational cannabis legalization progresses will shape the way other countries approach the question. Of enormous significance will be how Canada addresses the needs of its minority communities who have been most adversely affected by the criminalization of cannabis. Without allowing for the expungement of prior non-violent cannabis-related criminal convictions, Canada will be paving the way for the extremely lucrative cannabis market to be held captive by cannabis entrepreneurs who approach legalized cannabis in the same way that they approach tech innovations. At the same time, multinational tobacco, alcohol, and pharmaceutical companies are looking to diversify into cannabis and are already maneuvering to take advantage of Canada's legalization. Cannabis is a multi-billion dollar industry, and understanding where international law interacts

258. While the United States continues its War on Drugs, for instance, ten states and Washington, D.C., have legalized recreational cannabis, with many more legalizing medical cannabis. This is somewhat ironic, given that the harsh scheduling of cannabis and the general strictness of the criminalization obligations in the drug conventions stemmed from American hysteria, since by allowing individual states to bypass the obligations in the drug conventions, the United States currently only partially complies with the obligations.

with domestic regulations will be key to ensuring that the wrong interests do not capture global cannabis, whether they be illicit drug traffickers or exploitative multinational corporations.