



# Designing an Optimal Structure for a Nutraceutical Industry in Jamaica: A Preliminary Assessment

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## Introduction

A nutraceutical is a food or part of a food that is held to provide health or medical benefits in addition to its basic nutritional value. Examples of nutraceutical include ginger and garlic. In Jamaica, the spot light has been turned to the recent restricted decriminalisation of another nutraceutical, the marijuana plant. In 1913, Jamaica passed legislation to prohibit the cultivation and importation of the plant (see <http://www.economist.com/blogs/americasview/2014/06/marijuana-jamaica>) but numerous reports suggest that marijuana was being traded illegally during the period of prohibition (see <http://www.jamaicaobserver.com/news/Jamaica-remains-largest-illicit-producer-and-exporter-of-marijuana-in-Caribbean>). In fact, marijuana has been classified as contraband globally until quite recently. In Jamaica, the legal basis towards legalising the trade of marijuana for medicinal and religious purposes was established with the passing of the Dangerous Drugs (Amendment) Act 2015.

## Demand Side Considerations

Much has been said in public about the demand side of this “new” industry. In particular, individuals who have in their possession less than two ounces of marijuana or are documented members of the Rastafarian community will not face criminal sanctions. The largest demand for marijuana would be most likely derived from business customers seeking to produce derivative products of the plant. Derivative products include medicine, textiles, building materials, food, paint, detergent, varnish, oil, ink, and fuel.<sup>1</sup>

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<sup>1</sup> See [http://www.hempcar.org/untoldstory/hemp\\_2.html](http://www.hempcar.org/untoldstory/hemp_2.html) (accessed July 29, 2015)

## Supply Side Considerations

There has been little public discussion in Jamaica on the structure of the supply chain that would support this industry.

### 1. Regulating the Industry

For the industry to be effectively regulated, monitoring costs must not be prohibitive. The Cannabis Licensing Authority (CLA) has been established in Jamaica to regulate the industry. It is responsible for, among other things, making regulations treating with procedures and criteria for applying for and retention of licences, permits and other authorisations for cultivation, processing, distribution, sale and other handling of ganja for medicinal, scientific and therapeutic purposes.<sup>2</sup> There is also another key responsibility of the CLA which is likely to impact the structure of the industry. In particular, the CLA is required to ensure that ganja produced by licence holders does not find its way into the illegal trade of the product. To the extent that this illegal trade is extremely lucrative, a considerable amount of resources will be required to deter marijuana grown by licence holders from being diverted to the illegal trade. There are at least two means of reducing the average costs of safeguarding the operations of legitimate marijuana farms: (i) farming larger plots of lands; and (ii) clustering farm lands. If costs are to be borne by the licence holders, there will be some minimum acreage of land required for businesses to exploit economies of scale to be profitable. If the costs are to be borne by the CLA, it would more likely be cost-effective for the CLA to monitor only a few license holders at any given point in time. Further, clustering of license holders would be an efficient means of monitoring the farms as it would be cheaper for the CLA to monitor one license holder cultivating a farm area of 10 acres than it would be to monitor 10 licence holders each with farms of 1 acre dispersed across the island. Irrespective of how the costs will be shared among stakeholders, therefore, it is likely that industry will comprise only a few licensed holders with clustered operations farming relatively large plots of land. Although only a few licenses issued would be issued, the number of individuals participating in the industry could be arbitrarily increased by use of subletting agreements regulated by the CLA.

### 2. Legal Trade Restrictions to International Trade

As mentioned earlier in the document, the domestic industry is unlikely to be sustained exclusively from domestic trade. The viability of the domestic industry depends critically on the international trade of the product. Despite amendments to domestic laws regarding possession of marijuana, the fact that marijuana is still considered contraband in many jurisdictions globally could pose an impediment to accessing international markets.

Deregulation and a policy approach favouring domestic and export sales of marijuana presumes that there is a legal framework consistent with this objective.

It may be contemplated that the product may be sold as a controlled substance, whether or not for medicinal purposes, or may be included as ingredients in other products, or there may be service industries prompted by the deregulation.

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<sup>2</sup> See Jamaica Observer, "Cannabis Licensing Authority to Regulate Ganja Industry," Thursday, January 22, 2015.

In the context of international trade, whether marijuana may be traded across borders depends on the nature of existing measures affecting its trade. In the main, as is known, the product is regarded as contraband whereby production and consumption is prohibited within countries. Some countries have, however, taken steps at deregulation and controlled use largely for medicinal purposes.<sup>3</sup>

However, while deregulation and controlled usage takes place in some countries, there may be no comprehensive overhaul of the legal regime delisting marijuana as contraband for example in the case of existing customs laws. This may result in the development of a domestic market in other countries to the exclusion of suppliers in other countries being able to supply the product to these countries.

In such a case, the prevailing question is whether existing trade rules could be invoked to facilitate trade in marijuana. In addressing this question, one distinguishes between border measures (such as customs laws) and internal measures (such as measures affecting sale of a product once it is imported).

In the case of border measures, it is suggested by some that General Agreement on Tariffs and Trade (GATT) Article XI regarding the prohibition against quantitative restrictions would be available against those countries that trade the product internally while banning its importation.<sup>4</sup> It is also suggested that GATT Article III on national treatment can be invoked to counter discriminatory treatment as between domestic and foreign suppliers of the product.<sup>5</sup>

Since in most instances the prohibition or restriction applies to domestic production and consumption, Article III and not Article XI would be the applicable GATT provision and such measures would only be in breach of this provision if they are discriminatory,<sup>6</sup> unless justified under any of the exceptions under Article XX of GATT.

For GATT provisions such as Article III to apply to marijuana as a tradeable product, there need not be tariff concessions or a Harmonised Code (HMS) designation, since in principle GATT applies to all goods, and Article III of GATT goes beyond protection of tariff concessions.

As the Appellate Body noted in *Japan-Taxes on Alcoholic Beverages II*:

*The broad purpose of Article III of avoiding protectionism must be remembered when considering the relationship between Article III and other provisions of the WTO Agreement. Although the protection of negotiated tariff concessions is certainly one purpose of Article III, the statement in Paragraph 6.13 of the Panel Report that 'one of the main purposes of Article III is to guarantee that WTO Members will not undermine through internal measures their commitments under Article II' should not be overemphasized.*

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<sup>3</sup> See, for example, Paul Armentano, Marijuana Legalization Is Inevitable And It's Time For The Feds To Admit It, available at <http://www.businessinsider.com/marijuana-legalization-is-inevitable-2013-8#ixzz3h6ewFzxZ>, pointing out that some states in the US have now allowed non-medicinal production and retail sales of marijuana.

<sup>4</sup> See, for example, Tim Wu, World Weed, the WTO-The stoner's new best Friend' available at [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2005/03/world\\_weed.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2005/03/world_weed.html)

<sup>5</sup> Ibid.

<sup>6</sup> See, Ad Note to Article III of GATT which states that: 'Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.'

*The sheltering scope of Article III is not limited to products that are the subject of tariff concessions under Article II. The Article III national treatment obligation is a general prohibition on the use of internal taxes and other internal regulatory measures so as to afford protection to domestic production. This obligation clearly extends also to products not bound under Article II. This is confirmed by the negotiating history of Article III.*<sup>7</sup>

While in principle GATT applies to all goods, it does not apply to goods that GATT Members did not intend to trade and do not trade. Contraband and other illegal goods fall into this category. There is of course no explicit GATT provision in support of this proposition. However, the presumption of nullification and impairment of benefits arising from a breach of a GATT provision, as stipulated in the DSU, would, arguably, be in respect of nullification and impairment of benefits in the contemplation of GATT contracting parties.

On this view, if contraband and other illegal goods are not intended to be traded and are not traded, there would be no breach of Article XI of GATT if the importation of such goods is banned. Similarly, there would be no breach of Article III of GATT since there is either no domestic production or consumption (i.e. legal production and sale under the domestic legal regime) or the restriction on domestic production and consumption applies equally to the imported good with no discrimination. On the other hand, in the event goods formerly designated as contraband or illegal goods are traded as legal goods or there is some deregulation permitting controlled sale and usage GATT provisions are applicable. In this event, either Article XI of GATT or Article III of GATT could be applicable.

#### Marijuana as a tradable product under GATS

Unlike GATT, the provisions of the General Agreement on Trade in Services (GATS) are applicable with respect to committed sectors and not to all service sectors. Since service industries arising from deregulation of laws governing production and sale of marijuana are likely to exist,<sup>8</sup> the extent to which such service industries can supply their services depend on the commitments made under GATS.

Typical restrictions may be in respect of the modes of supply (i.e. cross border, consumption abroad, commercial presence, and presence of natural persons), in respect of the sectors committed, in respect of restrictions relating to national treatment and MFN for committed sectors, and in respect of limitations or restrictions regarding additional commitments.

An examination of a WTO Member's Services Schedule is therefore important to determine the commitments made in services sectors and the extent to which service sectors arising from marijuana as a deregulated product would be implicated.

It bears noting, however, that GATS permits WTO Members to institute new domestic regulations to govern service industries in their domestic economy, notwithstanding commitments made in sectors under GATS.<sup>9</sup>

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<sup>7</sup> *Japan-Taxes on Alcoholic Beverages II*, AB Report, 110. Emphasis added.

<sup>8</sup> For example, there are companies in the US providing search engine services connecting marijuana suppliers to potential buyers of the product.

<sup>9</sup> See, for example, the preamble to GATS, stating in part '*... Recognizing the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries*

This flexibility permitted to WTO Members would include renegotiation regarding committed sectors and the restrictions or limitations scheduled to the extent that new domestic regulations are inconsistent with commitments made in a WTO Member's schedule of concessions.

In addition, MFN restrictions or exemptions on services scheduled at the time of GATT 1994 are subject to review<sup>10</sup> and these must be consulted to determine restrictions on committed sectors under GATS.

### **Product Characteristics**

Anecdotal evidence suggests that the marijuana cultivated in Jamaica is more potent than marijuana cultivated outside of Jamaica. This should be documented scientifically with the intention of securing a geographical indication for locally cultivated product. This would allow local cultivators to command a higher price in the export market.

### **Marketing and Promotion**

A decision must be taken on the degree to which there will be restrictions on the extent to which marijuana and its derivatives could be marketed and promoted domestically.

### **Greater Support to Health and Educational Sector**

The increased usage of marijuana product is likely to put pressure on other sectors of the economy such as health and education. The potential for this to happen was seen on the very day marijuana was decriminalised when and a few students were rushed to the hospital with symptoms of psychosis after smoking the product (<http://jamaica-gleaner.com/article/lead-stories/20150416/students-taken-hospital-symptoms-psychosis-after-allegedly-smoking>). This means that policymakers should establish a fund from the proceeds of the industry to provide the additional resources that would be needed for these sectors. Such a fund is contemplated in the Dangerous Drugs (Amendment) Act 2015.

### **Antitrust Oversight**

The Fair Trading Commission should have oversight responsibilities over this sector. The Fair Competition Act should be amended to include explicit provisions for reviewing mergers if Jamaica is to extract the full benefit of this new industry.

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*existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right;...'*

<sup>10</sup> Paragraph 6 of the Annex on Article II exemptions in GATS provides that in principle exemptions should not exceed ten years. However, some WTO Members have listed MFN exemptions to last beyond ten years. In addition exemptions granted for a period of more than five years are reviewed after five years by the Council for Trade in Services. (See, para. 3 and 4 of the Annex on Article II Exemptions).

## **Conclusion**

Jamaica stands to reap significant economic benefits from commercialising the cultivation and distribution of marijuana and derivative products. Such benefits are contingent, however, on our ability to trade the products on the international market. To the extent that the domestic trade of the product is unlikely to sustain the industry, our initial assessment suggests that the greatest threat to sustaining this industry may be current rules on the international trade of a product which is largely regarded as contraband in foreign markets. The FTC suggests that more work is required to determine whether and the extent to which these rules pose an impediment to accessing international markets.