



## **A Giant Puffing Sound: How will NAFTA negotiations affect burgeoning marijuana markets?**

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Ross Perot warned of a "giant sucking sound" when the original NAFTA was signed, but the new NAFTA being negotiated right now may coincide with a giant puffing sound. Marijuana legalization efforts in both Canada and the United States (and Mexico for medical marijuana) will, as with most goods and services these days, become intertwined with complex trade agreement rules on public health, investment, intellectual property and state-owned enterprises.

So will the North American Free Trade Agreement bring us free trade in cannabis? Or will the negotiators kill this buzz by carefully drafting language that excludes marijuana products from the trading system?

A few countries recently began legalizing marijuana for production and sale in their domestic market. But what about international trade? Why not allow consumers in foreign markets where marijuana is also legal to purchase high quality marijuana products from Colorado merchants?

We will get to that place someday, as countries' experiences with these products makes them more comfortable with accepting marijuana products from abroad. But NAFTA is unlikely to achieve anything here, as the issue of legalization is still controversial and sensitive. For now, the Canada/United States and Mexico/United States borders will not see marijuana products flowing freely and legally. Instead, international trade in these products is likely to remain prohibited, with border barriers on these products probably justified under the standard trade agreement exceptions for protection of "public morals" or "public health."

However, modern trade agreements cover more than simple border barriers, and more than two decades of experience with trade agreements after NAFTA was signed have shown us how domestic policy issues can lead to trade controversy and litigation. There are a number of areas in which NAFTA rules may have an impact on the marijuana marketplace as legalization progresses.

First, there is already some cross-border investment in marijuana, with U.S. companies investing in Canada (the company that owns Corona will pay \$190 million for a stake in Canopy Growth Corporation, which sells medical marijuana in Canada and plans to sell recreational pot when it is legalized), and Canadians investing in the United States. These investments will be subject to NAFTA's protections for foreign investment. Foreign investors who believe that domestic regulations on marijuana industry constitute "indirect expropriation" or do not accord "fair and equitable treatment" – two of the key obligations in the investment chapter – can sue the host government for damages in an international tribunal. Domestic regulation in the marijuana sector will be extensive and seems to be carried out in a clumsy manner at times. As a result, there may be opportunities for international lawsuits against these regulations.

Second, trade agreements have detailed protections for intellectual property, and marijuana producers are creating some valuable trademarks and patents. With regard to trademarks, controversial disputes over cigarette packaging have been going on in trade and investment tribunals for years, focusing on so-called "plain packaging" of cigarettes as well as health warnings on these products. Tobacco company Philip Morris has made headlines by bringing investment treaty disputes against the governments of Australia and Uruguay, and several governments challenged Australia's plain packaging regulations at the World Trade Organization.

For similar reasons, the inevitable regulation of marijuana product branding could bump up against NAFTA's trademark rules. And patents are proliferating in the area of cannabis for medical use. Different approaches by Canada and the United States to patent protection could also lead to trade conflict, as was the case already in a NAFTA complaint by pharmaceutical company Eli Lilly.

Third, some Canadian provinces plan on distributing marijuana through the state-controlled entities that currently sell alcohol. For example, the Liquor Control Board of Ontario, a crown corporation that is accountable to the Ontario Ministry of Finance, will oversee the retailing of cannabis across the province through stand-alone stores and an online ordering service. But in recent trade agreements, the United States has pushed for special rules on "state-owned enterprises and designated monopolies" where the activities of those entities "affect trade or investment between Parties within the free trade area." Among other things, these entities must act in a manner that is based on "commercial considerations." Similar rules are likely to be part of the NAFTA, and this could have an impact on Canada's plans for the sales of marijuana products.

These are just a few examples. NAFTA rules on product standards, food safety standards and banking regulations may also give rise to concerns about the trade impact of marijuana regulation.

International trade in marijuana products is good for the same reasons that legalization of marijuana is good: There are considerable benefits from some of these products, prohibition does not work, and any harms can be managed through appropriate regulation. But it might be too

early to expect significant liberalization of marijuana through trade agreements. Getting domestic markets up and running has been controversial enough, and additional negative attention for the industry due to international trade could make things worse.

With all this in mind, the NAFTA negotiators should think carefully about how the various rules and exceptions they are drafting might apply to marijuana products. Free trade in marijuana is probably coming someday, but for now the negotiators' focus should be on crafting rules that keep controversy and litigation to a minimum.

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