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## LET'S SELL DRUGS

How the home-State of an investment can upset investment  
protections in the cannabis industry

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Hail Satan and megustalations, reader.

## List of Abbreviations

BIT	Bilateral Investment Treaty
ECT	Energy Charter Treaty
EU	European Union
FET	Fair and Equitable Treatment
ICSID	International Centre for the Solution of Investment Disputes
IIA	International Investment Agreement
ISDS	Investor-State Dispute Settlement
MFN	Most Favoured Nation
POCA	Proceeds of Criminal Activity Act (UK)
TFEU	Treaty on the Functioning of the European Union
US(A)	United States (of America)
UK	United Kingdom of Great Britain and Northern Ireland
VCLT	Vienna Convention on the Law of Treaties

## 0. INTRODUCTION

In recent years 26 US States, Uruguay and Canada have legalised the production and retail of recreational marijuana, with many other jurisdictions relaxing their medical cannabis standards<sup>1</sup>, and announced plans for Germany to fully regulate the recreational market (with huge implications for Europe),<sup>2 3</sup> and (just a week before this essay is completed) Thailand announcing the free distribution of one million plants to celebrate the legalization of the domestic growth of the plant for domestic use<sup>4</sup>.

Cannabis is already a big business worldwide, and therefore, thoroughly attractive to international investors who would – reasonably – seek to develop their business in cannabis friendly jurisdictions but, more so than many investments, this one carries with it a certain risk: Many influential and capital-exporting states are reticent to legalise cannabis for themselves<sup>5</sup> and many times even criminalise any and all cannabis-related activities<sup>6</sup>.

This essay, it must be made clear, is not about the trade realities of legalisation and commercialization of cannabis (sorry to disappoint the most highly motivated readers), but the influence of the home-State of an investor, that has not legalised medical/recreational cannabis, towards the investment protections afforded to the investor.

I started this project asking myself: *Can a party to a BIT deny investment protection to its nationals if the activities they are investing in does not align with their own municipal legislation or policy?* Seen from afar, this question makes sense, since the agreement of the parties would have to align with said parties' common intent and it would be contrary to that intent to violate municipal laws. But, as it quickly became clear, the investment protections ARE the common intent of the parties,

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<sup>1</sup> (HALL, et al., 2019)

<sup>2</sup> (SABAGHI, 2022)

<sup>3</sup> A recent study from the University of Dusseldorf estimates the creation of 27000 jobs and a tax revenue increase of €4.7 millions [<https://www.dice.hhu.de/startseitennews/studie-cannabislegalisierung-bringt-dem-staat-jaehrlich-47-milliarden-euro-rund-27000-legale-arbeitsplaetze-wuerden-entstehen>]

<sup>4</sup> <http://Cnn.it/39epUgB>

<sup>5</sup> Vid. American Controlled Substance Act (1970) section II or, most generally, the United Nations International Drug Control Conventions, all of which include cannabis

<sup>6</sup> (Thomson, 2020)

and the commitment to grant them to foreign investors comes from the eventual host to the investment<sup>7</sup>.

That seemed like a short essay, so I wondered: *Could a State – if it tried hard enough – deny, or at the very least upset, the investment protections granted to its nationals investing in legal cannabis? What is then, if not, the prosecution of foreign investors threatened by the American DEA and the UK's Anti-Money Laundry legislation (specially the Proceeds of Criminal Activities Act of 2002)? And, if so, what defence could the investor use to protect themselves from these actions on the part of their home-state?* Seen in detail, the questions turn out to be less obvious, but still allows for an investigation into the prospective analysis of the defences against the intervention of the home-State regarding investment in cannabis (or any other investment that might go against the home-State municipal laws or their international public policy).

In this essay, therefore, I will analyse the source of the investment protections granted to the investors and comment on them [Chapter 1], analyse the source of the measures issued by the home legislations that upset the investment protections (such as extraterritorial prescriptive jurisdiction [Chapter 2.1], or universal jurisdiction [Chapter 2.2] or common international obligations by the parties to the BIT), and propose a – hopefully – reasonable argument for why this upsetting measures should not be issued [Chapter 3].

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<sup>7</sup> As per Article 18 of the Vienna Convention

# 1. PROTECTIONS GRANTED TO INVESTORS

## 1.1. Who grants the protections to Investors?

In International Investment law there is a general understanding that the host-State is the main responsible entity for ensuring that investor get certain rights guaranteed by the IIA.

As Behn et al. point out:

*«[T]he current version of international investment law is built on a network of 2,901 signed bilateral investment treaties (BITs), 384 signed regional and bilateral free trade agreements with investment chapters (FTAs) and seven multilateral investment treaties (MITs) that provide private foreign investors with beneficiary rights aimed at the protection of their investments abroad. While each IIA is a stand-alone treaty with considerable textual diversity, agreements typically include similar standards of investment protection, [...] »<sup>8</sup>*

These similar standards of investment protection include Substantive Standards of Protection as well as Investor-State Dispute Settlement [ISDS] Provisions to guarantee the realization of said standards. Parties to an IIA will commonly agree to provide foreign investment from the other signatory States with substantive rights like Fair and Equitable Treatment [FET], National Treatment, Full Protection and Security, proper Compensation in Case of Expropriation, and most importantly for this essay, Free Transfer of Monied Assets and Returns on Investment. Consequently, if these rights are violated, the IIA will allow the investor to bring claims straight against the host State through the Investment Dispute Settlement system<sup>9</sup>. Both of these elements work in conjunction so, in case of violation of any of the substantive standards of treatment, the investor can – independently of the public policy position of their home-State – start dispute resolution proceedings according to the procedural rights stipulated in the IIA.

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<sup>8</sup> (BEHN, FAUCHALD, & LANGFORD, 2022, pp. 42-3)

<sup>9</sup> (Bonnitcha, 2014, p. 3) and (BEHN, FAUCHALD, & LANGFORD, 2022) refer here specifically to Investment Treaty Arbitration, but it must be kept in mind that the Washington Convention which regulates ICSID (§ 28) allow for the parties or **nationals of a party to the treaty** to request the start of conciliation proceedings, and ICSID offers also a Mediation system, therefore, although not as popular as arbitration, these means of investment dispute resolution should not be ignored, forming a system.



Relevant for this work is the “*independence from the public policy position of their home-State*” part. In the previous regime of investment protections (referred to as *diplomatic protection*<sup>10</sup>), the protection of investment of their subjects was a power of the State, and therefore, it had an enormous say in what companies and investments got said protection and how<sup>11</sup>.

It must be kept in mind that, originally, the current system was conceived in a somewhat similar fashion: The current IIAs system famously has its starting point with the Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, signed 25 November 1959 (entered into force 28 April 1962), but this treaty did not include open access to ISDS.

Not even the Washington Convention of 1965 (that established the International Centre for Settlement of Investment Disputes) contemplated that possibility: article 25(1) of the Convention establishes that «*The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State [...] and a national of another Contracting State, **which the parties to the dispute consent in writing to submit to the Centre***», and the Report of the Executive Directors that accompanied the approval of the text of the Convention specifies:

*«Consent may be given, for example, in a clause included in an investment agreement, providing for the submission to the Centre of future disputes arising out of that agreement, or in a compromis regarding a dispute which has already arisen. Nor does the Convention require that the consent of both parties be expressed in a single instrument. Thus, a host State might in its investment promotion legislation offer to submit disputes arising out of certain classes of*

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<sup>10</sup> The PCIJ affirmed the principle in (The Mavrommatis Palestine Concession, 1924, p. 2) at 12: «*It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another state, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law*»

<sup>11</sup> (Miles, 2013, pp. 47-8) mentions that: «*A breach of [investment protection rules] entailed international state responsibility and enlivened a right of intervention by the home state. [...] The response elicited from the home state varied, [...] from diplomatic protest to military intervention. **However, the ultimate method of enforcement chosen by a government depended on the political and economic issues involved in the matter. If the home state decided to take no action, the investor was left with no avenue for recovery of any losses***» [emphasis added]

*investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing.»<sup>12</sup>*

From that, seems reasonable to conclude that access to ISDS would be granted in a case-by-case basis by a specific agreement between the State and the investor or by a unilateral act of the host-State (most notably, Foreign Investment Laws), giving particular control of what would be disputed to the host-States.

The honour of incorporating the first open offer to arbitrate disputes directly with foreign investors falls on the Italy – Chad BIT of 11 June 1969<sup>13</sup>. With this change, we witness a shift in the power to determine what investments would be decided, from the States (“the capital-P parties” in an IIA) to the investors and the arbitral tribunal. That means that the Parties to the IIA have significantly less input into what investments get protected.

Naturally, the shift did not import an immediate change (it would take almost 20 years for the first BIT-related case be initiated<sup>14</sup>), but it did eventually become clear that the investor could deal with the host-State without the authorization of their home-State.

It is the host-State who guarantees the investors FET. It is the host-State who guarantees that itself will not impose on the investor rules more stringent than the ones it applies to its own nationals. It is the host-State who guarantees the full protection and security of investment and investors, and to properly compensate them in case of expropriation. And such is the commitment of the host-State to offer these guarantees that it is willing to be sued in a neutral forum and offer its own public treasure to compensate the costs generated by the violation of any of these substantial rights.

This is relevant since the onus of preserving the investment now relies entirely on the host-jurisdiction sovereign and voluntary acts, and therefore, its own commitment to the IIAs it voluntarily entered and its own municipal legislation, which would determine what activities are legal for foreigners to invest<sup>15</sup>.

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<sup>12</sup> (ICSID, 1962, p. 1077)

<sup>13</sup> (Suarez Anzorena, 2009, p. 65) citing (Newcomb & Paradell, 2009)

<sup>14</sup> (Asian Agricultural Products Ltd. v. Sri Lanka, 1990)

<sup>15</sup> Which can also reveal some of the complexities of neo-colonial relationships between modern States. V.g. «*Some coca cultivation is still permitted in Peru, where coca leaves have been both*

Specifically, procedural protections in ICSID are granted *ratio personae* only « [...] *between a Contracting State [...] and a national of another Contracting State*», which creates a de facto limitation under ICSID as to whom can be sued in Investment Arbitration. Yet, keeping in mind the difference between substantive rights and procedural rights granted by the IIA, the position by ICSID does not mean that the obligation of protecting the investment does not fall on the home-State. Just that the procedural rights cannot be exercised against the home-State of the investor under ICSID.

That, nevertheless, creates the issue we are concerned with in this essay: Can a host-State determine that an activity is legal to invest in within its borders that would be illegal in the home-State of the investor? Specially if that activity's profits are *per se* a crime in the home-jurisdiction of the investor? And what does that mean to the substantial right of free transfer of assets and returns? What happens when the host-jurisdiction and the home-jurisdiction of the investor are subject to a particular treaty on the matter deemed criminal by one of them? In this essay, of course, we are focused on these questions pertaining to cannabis-related activities, but it can be brought to a wide spectrum of things: what if an American investor wants to legally set up a (legal) brothel in Argentina? What if the investment is not on a brothel, but on medical insurance that does not discriminate against sex-workers? What if the investment is made in development of microfinancing apps, that eventually help procure finance for legal coca plantations in Bolivia? Could these investors freely transfer their assets and returns between jurisdictions?

## 1.2. Free Transfer of Liquid Assets and Returns

As it was mentioned before<sup>16</sup>, IIAs usually contain rules pertaining to the free transfer of liquid assets: *funds, profits, royalties, returns on investment*, etcetera; the language of the IIA might vary to include some or all of these, with the idea of

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*chewed and brewed into teas for centuries. However, the United States has been pressuring Peru and other countries to eradicate the plant and substitute other crops [except for] 56 metric tons to 588 metric tons a year [used in the production of flavouring for Coca-Cola].» (May, 1988) read in conjunction with Art. 27(1) of the Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol: «1. The Parties may permit the use of coca leaves for the preparation of flavouring agent, which shall not contain any alkaloids, and, to the extent necessary for such use, may permit the production, import, export, trade in and possession of such leaves.»*

<sup>16</sup> Vid. supra § 1.1

making the movement of monies necessary to set up the investment available to the investors, and allowing them to send back payment for any loans, interest or other financial obligations generated<sup>17</sup> (at the same time giving them peace of mind guaranteeing the possibility of liquifying their assets and converting/moving the funds to other – possibly more stable – currencies/jurisdictions without impediment)<sup>18</sup>. It is because of that that the Free Transfer of assets clause has been widely associated with other substantive rights granted typically by IIAs, like FET<sup>19</sup>, National Treatment and MFN.

Yet, this freedom is not absolute and, in *Rusoro Mining Limited v. the Bolivarian Republic of Venezuela* the tribunal established that – outside of the explicit text of the IIA – the host-State enjoys ample powers to regulate their exchange control regime<sup>20</sup>, thus reinforcing the idea that the substantial right of free movement of liquid assets and returns is not an unlimited guarantee.

More so, although, it is *generally accepted* that the assets must be liquidated, in *Karkey Karadeniz v. Pakistan*<sup>21</sup> the arbitral tribunal found that the language of the Pakistan – Turkey BIT<sup>22</sup> was vague enough to include non-liquidated assets (in this case a vessel)<sup>23</sup> and argues that, even if it were not, the detention of an asset makes

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<sup>17</sup> (*Continental Casualty v. Argentine Republic*, 2008, p. para. 239) establishes that: «[t]his type of provision is a standard feature of BITs: the guarantee that a foreign investor shall be able to remit from the investment country the income produced, the reimbursement of any financing received or royalty payment due, and the value of the investment made, plus any accrued capital gain, in case of sale or liquidation, is fundamental to the freedom to make a foreign investment and an essential element of the promotional role of BITs», but also pointed out that «the Treaty terms show that such freedom is not without limit.»

<sup>18</sup> This was the argument – rejected – in (*Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, 2008) where the plaintiff claimed that the actions of the State lead to the nullification of the value of its shares.

<sup>19</sup> E.g. (*AES Corporation and Tau Power B.V. v. Kazakhstan*, 2013)

<sup>20</sup> The tribunal in (*Rusoro Mining Limited v. Bolivarian Republic of Venezuela*, 2016, p. para. 577) opined that: «[p]rovided that this triple guarantee is complied with [that the funds be transferred without delay in a convertible currency, and at the rate of exchange prevailing at the date of transfer], the BIT does not impose restrictions on the manner in which Contracting States decide to regulate their exchange control regime. States have the choice of abolishing all exchange control restrictions, of establishing certain limits or of submitting all foreign currency transactions to administrative control».

<sup>21</sup> (*Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, 2017)

<sup>22</sup> Article IV(1) Pakistan–Turkey BIT (1995): Each Party shall permit in good faith *all transfers related to an investment* to be made freely and without unreasonable delay into and out of its territory.’.

<sup>23</sup> (*Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, 2017, p. para. 654): « [...] The definition of “investment” under Article I(2) of the Treaty includes “movable and immovable property”. Moreover, the provision only lists examples of transfers in a non-exhaustive way (“... Such transfers ... include: ...”) »

its sale impossible, which makes its trade impossible and thus, the transfer of its civil fruits is hampered by the host-State<sup>24</sup>.

Therefore, although the decisions in *Rusoro* and *Karkey* are contradictory in the matters, they both address the same issue relevant for this essay: Free Transfer Clauses – as is often the case – are highly dependent on the precise text of the IIA and, because of that, can create exceptions to the powers of the host-State or limits to the rights of the investor beyond the generally accepted. So, what do these clauses say?

#### 1.2.1. Content of Free Transfer Clauses

Since the relevance of the variations in the text of the Free Transfer Clause was established, it is essential to review here some of the most used formulae and comment on how is that relevant to the object of the essay.

As mentioned before, the free transfer of liquid assets to the host-State is essential to the setting up of the investment: to make an investment is necessary to bring an amount of money to the host-State. It is the literal definition of an investment “*to commit money in order to earn a financial profit*”<sup>25</sup>, and thus, the free in-bound transfer of monies is a requirement of investments, protected since the first of the modern IIAs<sup>26</sup>, to the point that some IIAs do not contemplate the free transfer of in-bound liquid assets<sup>27</sup>. It is generally understood that the clause also protects the in-bound transfers of money related to the investment due to the fact that the host-State is in a better position (and certainly has a significantly bigger incentive) to hold that money in once it has entered its economy<sup>28</sup>.

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<sup>24</sup> Ibid. para. 655: « [...] even accepting for the sake of discussion the literal interpretation that Pakistan wants to give to Article IV(1) of the Treaty, it is not disputable that by detaining the [vessel], Pakistan made its sale impossible and thus did not allow the transfer of any proceeds resulting thereof.»

<sup>25</sup> (Merriam-Webster, 2022)

<sup>26</sup> Germany – Pakistan BIT Article 4: ‘[e]ither Party shall in respect of all investments guarantee to nationals and companies of the other Party the transfer of the invested capital, of the returns therefrom and in the event of liquidation, the proceeds of such liquidation’.

<sup>27</sup> Such is the case in Article 6(1) of the Belgium/Luxembourg–Hong Kong (China) BIT (1996): ‘Each Contracting Party shall in respect of investments guarantee to investors of the other Contracting Party the unrestricted right to transfer their investments and returns abroad.’ And, as it will be discussed later, with the People’s Republic of China – Republic of Korea BIT (1992).

<sup>28</sup> (Reinisch & Schreuer, 2020, p. 981)

But on the other hand, it could be argued that interpreting the protection of in-bound assets in a Free Transfer of assets clause that does not specifically refer to it would be reading too much into the text, and therefore, granting the investor rights that the Parties to the IIA did not intend to grant them. In that sense Gallagher & Shan<sup>29</sup> point out

« There are certain BITs that cover the flows of investment both into and out of the host state. The new-generation Finland BIT contains an express reference to free transfers ‘into and out of its territory ...’ (emphasis added). The recent Mexico BIT also specifically refers to all payments related to an investment which can be transferred ‘into and out of its territory’. In contrast **other treaties expressly refer only to outward transfers**. The Republic of Korea BIT refers to the transfer ‘out of the territory ...’. Given this express language it would be hard to argue that free inward transfers were also intended to be covered. »<sup>30</sup> (emphasis added)

It must be made clear, though, that here the authors refer to the People’s Republic of China – Republic of Korea (1992) BIT, which was replaced in 2007 including certain modifications such as a wider Free Transfer of assets clause that encompasses in-bound and out-bound funds, which either reinforces their position or shows their misreading of the original intention of the parties. The first position finds itself aligned with the decisions in *Rusoro* and *Karkey*, that establish that the exact text of the clause is the limit to the Free Transfer of assets obligation. The second position would imply a sort of pro-investor interpretation from the context, object and purpose of the Free Transfer of assets clause in the Treaty, which might be hinted by article 31 the VCLT<sup>31</sup>.

#### 1.2.2. Where do the assets go to?

To a degree, it is also relevant for this research to determine where does the investor transfer the money through the usage of the Free Transfer of assets, since some Free Transfer of assets clauses specify the destiny of the assets, and that variance can create a substantive difference in regard to the obligations of the (capital P) Parties concerning the assets.

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<sup>29</sup> (Gallagher & Shan, 2009, p. 183)

<sup>30</sup> Ibid.

<sup>31</sup> By saying exactly that.

As pointed out by Gallagher & Shan<sup>32</sup>:

« [...] *The Myanmar BIT, for example, is wide in scope, covering transfer of investments and returns. However, the heading of the transfer provision is ‘Repatriation of Investments and Returns’ which seems to indicate that the party’s intention was to cover only transfers of payments out of the host state.*»

Similar situation to article 6 of the People’s Republic of China – Myanmar BIT (2001), occurs in the case of the Austria – Republic of Korea BIT (1991), which titles its article 5 – concerning the free transfer of assets – ‘*Repatriation and transfer of capital and returns*’, and article 6 of the UK – Albania (1994) BIT, “*Repatriation of investments and returns*”. Following the logic presented by the authors, those cases would point to the intention of the parties to guarantee the out-bound movement of assets only to the home-State of the investor<sup>33</sup>. And yet, the content of neither of the articles under comment specifically refers to the home jurisdiction<sup>34</sup>.

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<sup>32</sup> Vid. Supra footnote 28

<sup>33</sup> Of similar opinion (Reinisch & Schreuer, 2020, p. para. 29) and (Salacuse, 2015, p. 286)

<sup>34</sup> Article 5 of the Austria – Republic of Korea BIT (1991) states:

(1) *Each Contracting Party shall guarantee without undue delay to investors of the other Contracting Party free transfer in freely convertible currency of payments in connection with an investment, in particular but not exclusively, of*

- a) the capital and additional amounts for the maintenance or extension of the investment;*
- b) amounts assigned to cover expenses relating to the management of the investment;*
- c) the returns;*
- d) the repayment of loans; e) proceeds from total or partial liquidation or sale of the investment;*
- f) compensation according to Article 4 paragraph (1) of the present Agreement.*

(2) *The transfers referred to in this Article shall be effected at the exchange rates prevailing on the day of the transfer.*

(3) *The rates of exchange shall be determined by the respective banking system in the territory of each of the Contracting Parties. The bank charges shall be fair and equitable.*

While article 6 of the Agreement between the Government of People’s Republic of China and the Government of the Union of Myanmar on the promotion and protection of Investments (2001) establishes:

#### Article 6 REPATRIATION OF INVESTMENTS AND RETURNS

1. Each Contracting Party shall, subject to its laws and regulations, guarantee to the investors of the other Contracting Party the transfer of their investments and returns held in its territory, including:

- (a) profits, dividends, interests and other legitimate income;
- (b) proceeds obtained from the total or partial sale or liquidation of investments;
- (c) payments pursuant to a loan agreement in connection with investments;
- (d) royalties in relation to the matters in Paragraph 1 (d) of Article 1;
- (e) payments of technical assistance or technical service fee, management fee;
- (f) payments in connection with contracting projects;

The same authors later comment:

*«The Chile BIT has a slightly different approach to the scope of the transfer clause. It guarantees freedom of payments ‘between the territories of the two Contracting parties as well as between the territories of such other Contracting Party and of any third state’. This provision clearly envisages the movements of capital to and from the host state and other states»<sup>35</sup>*

Apparently confirming that the titles and names attributed by the Parties to the clauses of the IIA are of little relevance to the interpretation of the article without outright regulation of the situation<sup>36</sup>.

### 1.3. Exceptions to “Free Transfer of Liquid Assets” clauses

It has been mentioned before in this essay that the freedom to transfer liquid assets outside of the host-State is not absolute, specifically in the context of the regulations that the host-State can impose on the movement of currency<sup>37</sup>, so as to keep its monetary and economic internal policies<sup>38</sup>. But the clauses per se usually include a series of limits to the free transfer of assets. These exceptions usually concern issues related to the exercise of the host-State’s own jurisdictional sovereignty, allowing for the equitable and non-discriminatory exceptions to the free transfer on the basis of obligations such as bankruptcy (avoiding the investor’s obligations within the jurisdiction by removing their assets from the host-State’s territory), criminal

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(g) earnings of nationals of the other Contracting Party who work in connection with an investment in its territory.

2. Nothing in Paragraph 1 of this Article shall affect the free transfer of compensation paid under Article 4 of this Agreement.

3. The transfer mentioned above shall be made in a freely convertible currency and at the prevailing market rate of exchange applicable within the Contracting Party accepting the investments and on the date of transfer.

And Article 6 of the Agreement Between the Government of the United Kingdom and Northern Ireland and the Government of the Republic of Albania for the Promotion and Protection of Investments (1994) posits:

ARTICLE 6 Repatriation of Investments and Returns

Each Contracting Party shall in respect of investments guarantee to nationals or companies of the other Contracting Party the unrestricted transfer of their investments and returns. Transfers shall be effected without delay in the convertible currency in which the capital was originally invested or in any other convertible currency agreed by the investor and the Contracting Party concerned. Unless otherwise agreed by the investor transfers will be made at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force.

<sup>35</sup> Vid. Supra. footnote 28

<sup>36</sup> Similar to the interpretative principle of “irrelevance of nomen iuris” (in Common Law literature referred to the “smell of the rose” rule)

<sup>37</sup> (Continental Casualty v. Argentine Republic, 2008)

<sup>38</sup> (Bonnitcha, 2014, p. 979) and (Dolzer & Stevens, 1995, p. 85)



offences (where the assets might be essential to the determination or the result of criminal activities), and adjudicatory proceedings.

As an example, NAFTA's article 1109 § 4 establishes:

*«Notwithstanding paragraphs 1 and 2, a Party may prevent a transfer through the equitable, non-discriminatory and good faith application of its laws relating to:*

*(a) bankruptcy, insolvency or the protection of the rights of creditors;*

*(b) issuing, trading or dealing in securities;*

*(c) criminal or penal offenses;*

*(d) reports of transfers of currency or other monetary instruments; or*

*(e) ensuring the satisfaction of judgments in adjudicatory proceedings.»*

Similarly Article 9(4) of the Austrian Model BIT (2008):

*«Notwithstanding paragraphs (1) to (3) and without prejudice to measures adopted by a Contracting Party in pursuance of its international obligations as mentioned in Article 3(4), a Contracting Party may also prevent a transfer through the equitable, non-discriminatory and good faith application of laws and regulations on bankruptcy, insolvency or the protection of rights of creditors, on the issuing, trading and dealing in securities, futures, options and derivatives, on reports or records of transfer, on the prevention of money laundering or terrorist financing, or in connection with criminal offences and orders or judgements in administrative and adjudicatory proceedings, provided that such measures and their application shall not be used as a means of avoiding the Contracting Party's commitments or obligations under this Agreement.»*

It is not a coincidence that the exceptions listed in both IIAs are mostly aimed at protecting the rights of creditors and respect for the judicial decisions of the host-State, as long as the latter is applied in an equitable, non-discriminatory and good-faith manner. Yet, these measures are still dependent on the law of the host-State.

And so, the question of this section of the essay remains: Does the substantial right to freely transfer/repatriate assets generate a responsibility only on the host-State? A good foil for the generally accepted idea that the responsibility lies only on the

host-State comes from (of all places) the text of the Treaty Between United States of America and The Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (1991) which in its article V establishes that:

*«1. **Each Party shall permit all transfers related to an investment to be made freely and without delay into and out of its territory.** Such transfers include: (a) returns; (b) compensation pursuant to Article IV; (c) payments arising out of an investment dispute; (d) payments made under a contract, including amortization of principal and accrued interest payments made pursuant to a loan agreement directly related to an investment; (e) proceeds from the sale or liquidation of all or any part of an investment; and (f) additional contributions to capital for the maintenance or development of an investment.» [emphasis added]*

A similar formula can be found in the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) article 8.13:

*« **Each Party shall permit all transfers relating to a covered investment to be made without restriction or delay** in a freely convertible currency and at the market rate of exchange applicable on the date of transfer. Such transfers include:*

*(a) contributions to capital, such as principal and additional funds to maintain, develop or increase the investment;*

*(b) profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance and other fees, or other forms of returns or amounts derived from the covered investment;*

*(c) proceeds from the sale or liquidation of the whole or a part of the covered investment;*

*(d) payments made under a contract entered into by the investor or the covered investment, including payments made pursuant to a loan agreement; (e) payments made pursuant to Articles 8.11 and 8.12;*

*(f) earnings and other remuneration of foreign personnel working in connection with an investment; and*

*(g) payments of damages pursuant to an award issued under Section F.» [emphasis added]*

That formula appears to point to a two-way street approach to the obligations derived from the Free Transfer of assets clause, in which the host-State has to let the investor retire their assets from its jurisdiction, and conversely, the home-State has to “*freely and without delay*” allow such assets into its own jurisdiction, which is much more relevant in the case of CETA, since has legalised cannabis related activities since 2018.

Now, both of these examples refer to Substantive rights only, since the Procedural rights (access to ISDS) are limited *ratio personae* in both IIAs to an investor from *another* Contracting Party, and it is *generally accepted* that arbitration concerning investment protections is only reachable in these specific circumstances: Foreign investor (claimant) v. host-State (respondent). Any challenges against the home-State intervention would necessitate judicial protection in said home-State, but that escapes from the confines of this essay.

Even if it were not so, the small number of times in which arbitral tribunals have issued decisions exploring the nature of Free Transfer of assets clauses<sup>3940</sup> means there has not been an extensive interpretation of it, and, to the point of this essay, it has not been explored if the substantive right of an investor to freely transfer/repatriate their assets could be construed as an obligation on all Parties to the IIA.

#### 1.4. Is Cannabis an illegal investment?

This is a complex question, but not necessarily a hard one: Cannabis is not a generally accepted drug in most jurisdictions as tobacco or alcohol might be. The discussion about the hypocrisy or morality of this is better dealt with in other works by better authors.

According to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substance (1988) article 3:

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<sup>39</sup> (Reinisch & Schreuer, 2020, p. 976): ‘*To date, transfer clauses have been infrequently invoked in investment arbitration and there is even less practice by tribunals actually applying and deciding on the interpretation of such clauses*’

<sup>40</sup> And, in the cases against Argentina it has been brought up more than once, which is not much, but it is peculiar that it happened more than once.

«1. Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally:

(a) (i) *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;*

(ii) *The cultivation of opium poppy, coca bush or cannabis plant for the purpose of the production of narcotic drugs contrary to the provisions of the 1961 Convention and the 1961 Convention as amended;*

[...]

(b) (i) *The 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, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions;*

[...]

(c) *Subject to its constitutional principles and the basic concepts of its legal system:*

(i) *The acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such offence or offences;*

[...]

4. (a) *Each Party shall make the commission of the offences established in accordance with paragraph 1 of this article liable to sanctions which take into account the grave nature of these offences, such as imprisonment or other forms of deprivation of liberty, pecuniary sanctions and confiscation. [...]*»

Thus, most jurisdictions penalize, in some way or another, the production, commercialization and profiting from cannabis. But, in recent years some jurisdictions have legalised these activities for their internal markets, transforming a former crime into a multimillion-dollar business, to the point where cannabis companies in the US and Canada began listing in Nasdaq and the New York Stock

Exchange in 2018, despite the fact that in the US, cannabis remains a controlled substance and profiting from it remains a federal crime.

Nevertheless, that does not an illegal investment make.

In International Investment Law, illegality of an investment is determined by the law of the host-State, which retains control of the legal activities to develop within its borders, as a natural manifestation of its sovereign powers, and control over the denial of investment protections to activities that do not comply with said law<sup>41</sup>, specifically since the substantive protections afforded to investors in IIAs have been construed as being offered by the host-State, and not by the parties in conjunction.

In some cases, illegality of an investment has been tied to the presence of “*In accordance with host-State law*” clauses which States include in different sections of the IIA<sup>42</sup>. But even when the IIA does not include this requirement, arbitral tribunals are generally opposed to granting protection to investments contrary to host-State or international law. E.g. in *Plama*<sup>43</sup> and in *Phoenix Action Ltd.*<sup>44</sup> both arbitral tribunals argue that the lack of an “*according to host-State law*” clause in their respective IIAs (ECT and the Israel – Czech Republic BIT [1997]) does not mean that all types of investments are protected under the IIA «[...] *including those contrary to domestic or international law*».

Two relevant conclusions from these decisions are the – widely commented – presence of an implicit “according to the host-State law” clause in IIAs that condition the granting of investment protections to the following of the domestic laws of the host-State, on the one hand, and on the other, the subjection of the investment to “*international law*”. *Plama*, quotes the Chairman’s statement at the adoption of ECT referring to “*generally recognized rules and principles*” and referencing the VCLT; reference ECT’s own article 26(6) which charges the

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<sup>41</sup> (Kreibaum, 2010, p. 310)

<sup>42</sup> That type of clause can be found in the preamble (e.g. Australia – Argentina BIT [1995]), in the definition of investments (e.g. Germany – Philippines BIT [1997], Lithuania – Ukraine BIT [1994], Bangladesh – Italy BIT [1990], Spain – Mexico BIT [2006] and the Oman – Yemen BIT [1998]), in the provisions on admission and establishment of investments (e.g. Netherlands – Czech Republic BIT [1991], Bolivia – Netherlands BIT [1994]), even in the sections granting procedural protections (e.g. Macedonia – Czech Republic BIT [2001]).

<sup>43</sup> (*Plama Consortium Limited v. Bulgaria*, 2008)

<sup>44</sup> (*Phoenix Action, Ltd. v. Czech Republic*, 2009)

tribunal with deciding the issues « [...] *in accordance with this Treaty and applicable rules and principles of international law.* »; whilst *Phoenix* points out:

« [...] *the ICSID Convention's jurisdictional requirements – as well as those of the BIT – cannot be read and interpreted in isolation from public international law, and its general principles. To take an extreme example, nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs.* »<sup>45</sup>

Both cases refer to principles of international law to determine that an investment was illegal and therefore, should not be afforded the protections of the IIA, based on rules and principles of international law. This argument, though, could hardly be used to deny rights to an investor in cannabis, since those investments hardly equate to torture, genocide, slavery, or trafficking of human organs<sup>46</sup>.

Therefore, investment in cannabis is not intrinsically an illegal investment. That will depend on the laws of the host-State, even if there is no explicit clause stating that. But, there ARE several international agreements aimed at limiting the production, usage, and commercialization of cannabis and other ancestral medicines, as well as the profits generated from it. Then, even though the cannabis related investment could be legal “according to the host-State law” it is still a significant risk to invest in it due to the restrictions set by the home-State law or the international community.

Could there be an argument for the home-State or the international community to determine the illegality of an investment? If the protection of Human Rights can trump the investment protections granted, could cannabis production be equated to torture genocide or slavery? After all, an argument could be made that the protection of human rights is the ultimate object of the anti-drug international legislation. On the other hand, if investment protections could not be granted to investments made in violation of human rights there would be no ECT<sup>47</sup>. This issues still lack clarity,

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<sup>45</sup> (*Phoenix Action, Ltd. v. Czech Republic*, 2009, p. para. 78)

<sup>46</sup> And also, most of them seem to be legal in their home-State (e.g. [https://en.wikipedia.org/wiki/United\\_States\\_war\\_crimes](https://en.wikipedia.org/wiki/United_States_war_crimes))

<sup>47</sup> Vid supra footnote 45, also (Miles, 2013)

but this essay reasonably concludes that only the most conservative of fun-adverse arbitrators would equate cannabis related investments to human trafficking or genocide; which unfortunately does not particularly limit the pool.

#### 1.5. Conclusions to the Chapter

There is a general understanding that, when entering an IIA, the host-State is offering to the investor the protections listed therein regarding Substantive and Procedural standards. That understanding might go unchallenged for a long while since the host-State is effectively in control of most of them. Nevertheless, with the difference in jurisdictions and in particular of the legal status of certain investments, the question might rise about the investment protections granted by the home-State in defence of the economic interest of their nationals, and in particular, the right to repatriate their assets when those can come in conflict with their municipal laws.

Free Transfer of Liquid Assets clauses are supposed to prevent the retention by the host-State of the liquid assets of the investor but, the rights protected by them are not without limit, and those are highly dependent on the text of the clause itself, which in some cases might imply responsibilities from the home-State as well.

Given the particular risks presented by the municipal laws of the home-State, the legality of an investment – which usually relies on the host-State – might be endangered by the laws of the home-State, and thus, the investor might also need protection and assurances from their own jurisdiction for the repatriation of their assets. That opens the question of whether the investment guarantees are a one-way or a two-way street, which in turn might open up a bigger debate, but that escapes the limits of this essay.

## 2. HOME-STATE'S EXTRATERRITORIAL JURISDICTION

The previous section explored the investment protections granted to investors through IIAs, trying to understand who grants the substantive rights there and what is the role of the home-State in that situation, particularly, to explain why and how the home-State could establish standards of behaviour contrary to the investment patterns of its national. It showed that, save for the eventually very-broad “free transfer of liquid assets”-clause that could (but has not yet been tried) create the obligation on the home-State of receiving the liquid assets “*without undue delay*”<sup>48</sup>, there is no grounds for a particular influence of the home-State’s legislation to be applicable to the investor. And yet, some capital-exporting countries seem to be dead-set on restricting the investment patterns of its nationals. To understand that phenomenon, this chapter will look at the measures available to those home-States, particularly focusing on the United States, the United Kingdom and the European Union and (hopefully) determine what are the grounds for those measures.

### 2.1. Measures against cannabis related investment

As I mentioned in the introduction to this essay, 26 USA states have legalised the commercial production and distribution of recreational cannabis, while 37 (plus their colonial territories Guam, Puerto Rico, and the US Virgin Islands) allow for medically authorised trade of the plant.

Although cannabis has been part of traditional medicine and culture of many of those lands, the successful push for legalisation is quite recent and, to some degree, it could be tracked to the cultural influence of the USA in conjunction with Colorado’s Amendment 64 (2012), which legalised the purchase of cannabis for recreational use up to 57g per purchase. The fact that this amendment was not fought by the Federal Government of the USA in their own Courts<sup>49</sup> indicated at the time that there might be a successful legalisation push in the future for the USA. Soon after (2013) Uruguay became the first country to legalise recreational cannabis, and since then several other jurisdictions have taken similar approaches, most notably two of the three members of NAFTA (Canada in 2018<sup>50</sup> and Mexico

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<sup>48</sup> Like the US- Argentina BIT (1994)

<sup>49</sup> “The Cole Memorandum” (Cole J. M., 2013)

<sup>50</sup> (House of Parliament, 21)



as a consequence of a series of judicial decisions affirming the right to medicinal and recreational cannabis<sup>51</sup>).

Yet, the remaining member of NAFTA and several other jurisdictions in the economic north<sup>52</sup> remain opposed to legalisation (although many of them opting for decriminalisation), which could be due, among other reasons, to trading concerns and the possibility of the actions of their trading partners<sup>53</sup>.

These fears are not particularly unfounded, since the USA and the UK have legal measures in place that are read by many trading partners as threats towards their investments, and in the case of the USA, many federally regulated business (such as banks, insurance companies, et cetera) refuse to work with or invest in cannabis related business for fear of prosecution.<sup>54</sup>

#### 2.1.1. The United Kingdom

In the UK, the production or trade of cannabis is a crime punishable by up to 14 years in prison<sup>55</sup>. Under the UK's anti-money-laundering legislation, property can become criminal property if it is the result of "criminal conduct", and criminal conduct, under the same legislation, refers to conduct that either (a) constitutes an offence in the UK or (b) would constitute an offence if it occurred there<sup>56</sup>.

As pointed out by Thompson:

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<sup>51</sup> Consecutive Court rulings in this issue have come from decisions from the Supreme Court in 2015, 2018, and 2021, and, although legislation is still in place until the Mexican Senate clear the penal inconsistencies in the Federal Penal Code, criminal penalties cannot be judicially enforced. At this point and since June 2021, cannabis is an unregulated activity under the Mexican legal system.

<sup>52</sup> E.g. Here: Sweden

<sup>53</sup> Of a similar position vid. (Mangen, et al., 2020) and (Rychert, Emanuel, & Wilkins, 2021)

<sup>54</sup> The American SEC and Department of Justice have consistently maintained that: "[T]he Controlled Substances Act ("CSA") makes it illegal under federal law to manufacture, distribute, or dispense marijuana. Many states impose and enforce similar prohibitions. Notwithstanding the federal ban, as of the date of this guidance, 20 states and the District of Columbia have legalized certain marijuana-related activity". (SEC, 2014) and (Department of Justice of the USA, 2014)

<sup>55</sup> Misuse of Drugs Act 1971, s.4(2)(a) or (b) – Production of a controlled drug (14 years to Life in prison), Misuse of Drugs Act 1971, s.6(2) – Cultivation of cannabis plant (14 years in prison)

<sup>56</sup> Proceeds of Crime Act 2002, s.340 §2 (a) and (b) –

(2) Criminal conduct is conduct which—

(a) constitutes an offence in any part of the United Kingdom, or

(b) would constitute an offence in any part of the United Kingdom if it occurred there.

« In other words, under the dual criminality test, what matters is whether the production or supply of cannabis is lawful in the UK. If not, then proceeds generated by a cannabis business may constitute criminal property, and dealing with or becoming concerned in an arrangement involving those proceeds could give rise to an AML offence under POCA, irrespective of whether the cannabis was produced or supplied in another jurisdiction where it was lawful»<sup>57</sup>

That reading opens the door to prosecution against not only the investors, but also for companies that provide services for these investments, some of them essential to international investment, such as the previously commented financial and insurance services, which may not even be implicated in the cannabis production activities at all, but solely providing capital and services necessary to the development of legal investments “according to the host-State law”, and although the law does carve an exception for activities that are legal in the place of origin of the activity (the so-called “Spanish Bullfighter” defense) this applies only to activities that carry a lesser than 12-months sentence<sup>58</sup>.

This remains the crux of the matter in this essay: if IIAs protect the flow of assets and investments regardless of what those investments are? It was observed in *Phoenix*<sup>59</sup> that there are limits to what investments are granted protection through the IIA, but can those investments be protected from the home-State’s jurisdiction as well? Specially if those assets are the product of activities that are illegal in the home-State. Furthermore, it would be relevant to the investment protections issue to question whether that means that an arbitral award resulting from compensation for an investment in cannabis related activities could be successfully challenged in the UK as a result of their *order public*.

### 2.1.2. The USA

The USA is particularly relevant when discussing capital exporting countries.

Being one of the biggest economies in the world<sup>60</sup>, the possibility of its nationals and their companies to invest and finance ventures outside of its jurisdiction is

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<sup>57</sup> (Thomson, 2020)

<sup>58</sup> (Norton Rose Fullbright, 2018) and (Stephen, O'Donnell, & Reeves, 2019)

<sup>59</sup> (Phoenix Action, Ltd. v. Czech Republic, 2009)

<sup>60</sup> As of 2020, the United States of America’s GDP raised to 20,807.27 billion USD, according to (ResearchFDI, 2021)

significant, and with the number of IIAs to which it is a Party to<sup>61</sup>, is almost certain that an investment field will have at least some participation of USA nationals.

Yet, with cannabis remaining federally illegal implies the possibility of prosecution in a similar fashion to the one pointed out in the UK. In January 2018, the office of the Attorney General of the United States issued a Memorandum for all United States Attorneys<sup>62</sup> reversing the policy established by the Cole Memorandum (2013)<sup>63</sup> and pointing out:

*«In the Controlled Substances Act, Congress has generally prohibited the cultivation, distribution, and possession of marijuana. 21 U.S.C. § 801 et seq. It has established significant penalties for these crimes. 21 U.S.C. § 841 et seq. These activities also may serve as the basis for the prosecution of other crimes, such as those prohibited by the money laundering statutes, the unlicensed money transmitter statute, and the Bank Secrecy Act. 18 U.S.C. §§ 1956-57, 1960; 31 U.S.C. § 5318. These statutes reflect Congress' s determination that marijuana is a dangerous drug and that marijuana activity is a serious crime.»*

This policy has not been reversed so far.

As the Sessions Memorandum specifies, prosecution for cannabis (which is there referred to by the racist term “marijuana”) offenses is a function of the Attorneys general offices, which in the American legal system refers to a power and responsibility of the office, meaning that AGs are under the obligation of prosecuting activities relating to cannabis cultivation, distribution, possession and profit-making<sup>64</sup> by any United States person<sup>65</sup> within or outside of the territory of

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<sup>61</sup> 47 BITs, 70 Treaties with Investment Provisions and 33 Investment Related Instruments as of 2020 according to (UNCTAD, 2022)

<sup>62</sup> (Sessions, 2018)

<sup>63</sup> (Cole J. M., 2013)

<sup>64</sup> 18 US Code 1957 (f) (2): «the term “criminally derived property” means any property constituting, or derived from, proceeds obtained from a criminal offense; and

<sup>65</sup> 18 US Code § 3077 (2):

(2) “United States person” means—

(a) a national of the United States as defined in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(b) an alien lawfully admitted for permanent residence in the United States as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20));

(c) any person within the United States;

(d) any employee or contractor of the United States Government, regardless of nationality, who is the victim or intended victim of an act of terrorism by virtue of that employment;

the United States of America<sup>66</sup> which would mean that under USA law the AG could exercise its jurisdiction extraterritorially (*ratio personae*) to prosecute the results of the cannabis related activities and the repatriation of assets resulting from legal investments.

Moreover, the US has attempted this extraterritorial control of his nationals' activities in other recent cases: famously, mercenary Erik Prince has been investigated for money laundering for trying to repatriate the returns of his investment in mercenary-brokering and arm-dealing activities outside of the US<sup>67</sup>, and although no prosecution has ever resulted from those investigations, just the investigation *per se* might be seen as disruptive enough to deter most investments in that field<sup>68</sup>, even when mercenary brokering is not a crime under Hong Kong law (where the company had its headquarters) or Azerbaijan (where the services were to be provided).

More than that, in the US the doctrine of civil forfeiture allows federal law enforcement agencies (like the Drug Enforcement Agency) to capture and appropriate assets that are suspected of being involved in illegal activities, without having to prove if those activities are illegal indeed. Not only does the onus of proving the legal origin of the assets switch, but the law enforcement agency does not have to raise charges against the expropriated. Therefore, federal law-enforcement agencies from the US can appropriate assets from investors if they suspect the activities that produced the profits (and that were conducted in a State

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- (e) a sole proprietorship, partnership, company, or association composed principally of nationals or permanent resident aliens of the United States; and
  - (f) a corporation organized under the laws of the United States, any State, the District of Columbia, or any territory or possession of the United States, and a foreign subsidiary of such corporation;

<sup>66</sup> 18 US Code § 1957 (d):

(d) The circumstances referred to in subsection (a) are—

- (1) that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States; or
- (2) that the offense under this section takes place outside the United States and such special jurisdiction, but the defendant is a United States person (as defined in section 3077 of this title, but excluding the class described in paragraph (2)(D) of such section).

<sup>67</sup> (Cole & Scahill, 2016)

<sup>68</sup> Even when the US is not party to the 1989 International Convention Against the Recruitment, Use, Financing and Training of Mercenaries

where they were legal) are not federally legal in the US; thus, upsetting the balance of the investment.

This, once again, leads to the question of the legal protections granted to the investor under IIA, and if those are mandatory to all of the parties or only to the host-State.

### 2.1.3. The European Union

In the case of the EU, although not a State and certainly much more flexible in its policy regarding cannabis, the question remains if it would be possible to limit the protections granted to the investor when this clashes with the internal public policy of the Union.

The EU is no stranger to the regulation of legal situations that might affect the internal functioning of the EU, and thus, exercising its jurisdiction extraterritorially.

It has been stated before in this essay the potential issue that the Canadian policy regarding cannabis might raise regarding investment protection to EU investors given by CETA and its particular language, specifically regarding its Free Transfer of Liquid Assets clause<sup>69</sup>, which might indicate that CETA's protection does include profits made from the legal sell of recreational and medical cannabis as well as cannabis related paraphernalia.

It is worth remembering that, according to their own reports, Canada is one of the biggest investment-exporters in cannabis, with Canadian corporations like CanopyGrowth holding licenses for cultivation and production in Europe (Denmark

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<sup>69</sup> To remind the reader, CETA's Free Transfer of Liquid Assets clause states that:  
« Each Party shall permit all transfers relating to a covered investment to be made without restriction or delay in a freely convertible currency and at the market rate of exchange applicable on the date of transfer. Such transfers include:  
(a) contributions to capital, such as principal and additional funds to maintain, develop or increase the investment;  
(b) profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance and other fees, or other forms of returns or amounts derived from the covered investment;  
(c) proceeds from the sale or liquidation of the whole or a part of the covered investment;  
(d) payments made under a contract entered into by the investor or the covered investment, including payments made pursuant to a loan agreement; (e) payments made pursuant to Articles 8.11 and 8.12;  
(f) earnings and other remuneration of foreign personnel working in connection with an investment; and  
(g) payments of damages pursuant to an award issued under Section F.»

– since 2018, but only for medical cannabis<sup>7071</sup>) and South America (Colombia), and recently elapsed ones in South Africa and the Kingdom of Lesotho (2020); Cronos Group operating in countries in five continents (including Israel, Colombia and Australia), Aurora being present in 25 countries; and Aphria (merged with Tilray in 2020) operating in at least ten countries<sup>72</sup>.

Moreover, there is a precedent for the reversal of treaties by European courts when such treaties grant protections that are contrary to the public policy of the EU, specifically in case of free movement of liquid assets: Commission v. Sweden<sup>73</sup>, Commission v. Austria<sup>74</sup>, and Commission v. Finland<sup>75</sup>, all of them deal with the possibility of having IIAs signed by the States that grant the specific protection to investors from foreign States to move their liquid assets freely, against article 56(1)<sup>76</sup>, 57(2)<sup>77</sup>, 59<sup>78</sup>, 60(1) and 307<sup>79</sup> of the Treaty on the Functioning of the European Union [TFEU].

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<sup>70</sup> <https://www.newcannabisventures.com/canopy-growths-spectrum-cannabis-denmark-receives-production-license/>

<sup>71</sup> Although, investigative journalist Jonathan Gornal (Gornall, 2020) discovered a link between the pro medical-cannabis access campaigns and companies pushing for recreational markets for cannabis in the UK, the results of which can be extrapolated.

<sup>72</sup> (Rychert, Emanuel, & Wilkins, 2021)

<sup>73</sup> (Commission v Sweden, 2009)

<sup>74</sup> (Commission v Austria, 2009)

<sup>75</sup> (Commission v Finland, 2009)

<sup>76</sup> Now article 63(1), stating that: *“Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.”*

<sup>77</sup> Now article 64(2), stating that: *“Whilst endeavouring to achieve the objective of free movement of capital between Member States and third countries to the greatest extent possible and without prejudice to the other Chapters of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt the measures on the movement of capital to or from third countries involving direct investment – including investment in real estate – establishment, the provision of financial services or the admission of securities to capital markets.”*

<sup>78</sup> Now article 66, stating that: *“Where, in exceptional circumstances, movements of capital to or from third countries cause, or threaten to cause, serious difficulties for the operation of economic and monetary union, the Council, on a proposal from the Commission and after consulting the European Central Bank, may take safeguard measures with regard to third countries for a period not exceeding six months if such measures are strictly necessary.”*

<sup>79</sup> Now article 351, stating that: *“The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.”*

*To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.*

In those cases, the ECJ found that some treaties that granted investors from States outside of the EU the freedom of movement for liquid assets without consultation to the Community which, according to the TFEU, was not allowed. Therefore, the ECJ found that the States had failed to fulfil their obligations regardless of the situation not having materialised where they had to enact the guarantees established in the IIAs.

If we look at that situation in addition to the content of article 168(1)<sup>80</sup>, there would be a solid argument in favour of limiting the movement of liquid assets resulting from investments made in recreational cannabis, when these assets derive from BITs signed by the States before accession. But one should question if this means that, due to the fact that Canada has legalised investments in recreational cannabis and CETA was signed by the EU and Canada, there is an acknowledgement of the legality of such investments and therefore, due to the formula used in their Freedom of Liquid Assets clause, could a European investor facing “undue delays” in the repatriation of their assets resulting from recreational cannabis investments sue a EU-member-State. This essay has dealt with the UK issuing such delaying/upsetting regulation (in the previous heading) while it was still a member-State of the EU, but Canadian legalisation came about after the so-called BREXIT vote, and so, examples are lacking with regards to the position of many EU member-States on the delaying/upsetting-regulation issue, and must wait until it is brought up in the IDR System to analyse precedents, but, the fact that, so far, it has not been an issue, and that even with the reigning precedent of the ECJ deciding on prospective cases, seems to add to the implication that, in the EU, recreational

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*In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under the Treaties by each Member State form an integral part of the establishment of the Union and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.”*

<sup>80</sup> *“A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.*

*Union action, which shall complement national policies, shall be directed towards improving public health, preventing physical and mental illness and diseases, and obviating sources of danger to physical and mental health. Such action shall cover the fight against the major health scourges, by promoting research into their causes, their transmission and their prevention, as well as health information and education, and monitoring, early warning of and combating serious cross-border threats to health.*

*The Union shall complement the Member States' action in reducing drugs-related health damage, including information and prevention.”*

cannabis investments are legal, and the repatriation of liquid assets resulting from those investments, although contrary to municipal laws and even to article 168(1) of the TFEU is allowed under CETA.

## 2.2. Public international law approach to extraterritorial jurisdiction

Under public international law there are two generally accepted approaches to the question of jurisdiction: The first one proposed by the Permanent Court of International Justice (PCIJ) in the *Lottus* case (1927)<sup>81</sup>, and a second one derived from international custom and practice that relies in the territoriality principle and specific permissive principles like personality (active and passive), protective and universality principles. To the purpose of this essay, the difference between those positions will be very little, since both rely on the territoriality principle, but switch the *onus probandi* between States depending on which position the Parties find themselves in, but nevertheless carving exception for the regulations of the State's nationals abroad.

### 2.2.1. The *Lottus* Case

In *Lottus*, the PCIJ established a distinction between enforcement and prescriptive jurisdiction, from which it follows that, although a State could not enforce its laws in another States territory, it could not be stopped from setting rules concerning events outside its own and enforcing them territorially in an extemporary manner:

*« [T]he first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention [...]*

*It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have*

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<sup>81</sup> (SS Lotus (France v Turkey), 1927)



*taken place abroad, and in which it cannot rely on some permissive rule of international law »<sup>82</sup>*

This quote perfectly illustrates the potential of the UK (through POCA) and the US (through the application of the Sessions' Memorandum) towards investments in legal cannabis: «[...] a State [...] exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law».

#### 2.2.2. International Customary Law

In the words of Ryngaert<sup>83</sup>: « Under the customary international law of jurisdiction, as historically developed, extraterritorial prescriptive jurisdiction is arguably prohibited in the absence of a permissive rule»; but this permissive rules include the regulation of the behaviour of its own nationals while abroad (which would include the control of the home-State over the “legality” of activities related to an investment) due to the nationality principle, the effects that the activity considered criminal under the home-State legislation might have in the home-State's territory (effects principle and protection of sovereignty principle), and the universality of the jurisdiction in regards to (vaguely defined) serious crimes<sup>84</sup>. Therefore, if the home-State prescribes that profiting from activities that are considered felonies in their jurisdiction is also a criminal offense, they would be enabled to prosecute (and therefore generate *delay* in the repatriation of the assets) by the active nationality principle. The same would happen with the forfeiture of the assets, and several other potential situations due to the nationality principle<sup>85</sup>.

Moreover, the “*effects doctrine*” (the doctrine according to which a State can apply their jurisdiction extraterritorially if the effects of the criminal activity will be detrimental to the State and its sovereignty – which might include its policies –)

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<sup>82</sup> *ibid*

<sup>83</sup> (Ryngaert, 2008, p. 27)

<sup>84</sup> (Ryngaert, 2008, pp. 101-2) points that: «Some States also provided in their criminal codes for unilateral, although usually uncontroversial, universal jurisdiction over sexual offences, immigration offences, corruption, offences involving nuclear energy, explosions or radiation, traffic in human beings, distribution of narcotics, distribution of pornography, counterfeiting, or subsidy fraud.» which partially overlaps with the “international community” limits to investment protections set up in (*Rusoro Mining Limited v. Bolivarian Republic of Venezuela*, 2016).

<sup>85</sup> (Ryngaert, 2008, pp. 88-91)

could also be considered as an enabling principle of extraterritorial jurisdiction applicable to the circumstance<sup>86</sup>.

Finally, the universality principle would be another enabling principle relevant to the matters of this essay: Defined as «[...] *the right of a State to institute legal proceedings and to try the presumed author of an offence, irrespective of the place where the said offence has been committed, the nationality or the place of residence of its presumed author or of the victim*»<sup>87</sup>, the principle could be, although not exclusively, the grounds for extraterritorial exercise of jurisdiction in the case of production and distribution of cannabis. Particularly since cannabis is listed as a controlled substance in the United Nations International Drug Control Conventions [UNIDCC], one could arguably state that the UNIDCC reflects a universal push to fight against cannabis that would allow the exercise of jurisdiction “*irrespective of the place where the said offence has been committed*”, and therefore should be an enabling circumstance for the implementation of the prescriptive jurisdiction in the way described for the UK and the Proceeds of Criminal Activities Act allow.

Therefore, the measures listed in this section taken by capital-exporting States would be legitimate exercises of extraterritorial prescriptive jurisdiction with either approach by Public International Law, so the home-State would be within its right to use these measures to control the investments of its nationals outside of its borders, although (according to *Lottus*) it could only enforce the proceedings within its territory (possibly through procedural delays on the repatriation efforts of profits from a “*home-criminal*” activity).

### 2.2.3. The VCLT

The Vienna Convention on the Law of Treaties contains several rules that, although not saying much about extraterritorial exercise of jurisdiction, do limit the activities that the States can take when part of IIA.

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<sup>86</sup> As the European Union did in the (Woodpulp Case, 1988), where the Court decided to apply Community Law to investors who had their headquarters outside of the EU, due to the effects of their price coordination in the Community’s market.

<sup>87</sup> Brussels Principles Against Immunity and for International Justice, Principle 13

The application of these rules would trump the application of internal legislation to impede or delay the repatriation of liquid assets or in any other way (e.g. threats of prosecution) discourage investments in specific areas, as long as there is a IIA.

These rules are articles 18<sup>88</sup>, 26<sup>89</sup> and 27<sup>90</sup> of the VCLT and refer to the good faith mandatory in the implementation of Treaties. In the case of IIAs, this means not defeating the object or purpose of the Agreements (in most cases, the promotion and protection of investments) signed, even if they have not been ratified yet – according to article 18 –, the interpretation in good faith of the obligations derived from the IIA, which, depending on the formulae of the text, might include the obligation of not frustrating or delaying the repatriation of the liquid assets – according to article 26 –, and the prohibition of referring to their own internal law to frustrate the objectives of the Treaty.

These articles, read in conjunction, could form the basis for a defence against action taken by the State that creates the risk of frustrating the investment.

### 2.3. Conclusions to the Chapter

In this chapter I observed the specific rules that elicited this research: the possibility that a home-State's jurisdiction neutralises the investment of a national in another State, thus influencing their decision to invest, where and in what.

The specific case of cannabis related activities and the threat of prosecution from three notably capital-exporting States (or State-like entity in the case of the EU), helps to frame the gravity of the issue; and the fact that there seems to be no recourse against the action of these capital-exporting States should make us question the legitimacy of the system, especially since the permissive principles for extraterritorial jurisdiction (behaviour of nationals, effects and gravity of the

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<sup>88</sup> « A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.»

<sup>89</sup> « Every treaty in force is binding upon the parties to it and must be performed by them in good faith. »

<sup>90</sup> « A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.»

activities and international acknowledgment) falls – in one way or another – within the sphere of influence of the capital-exporting (and therefore influential) States<sup>91</sup>.

If capital-exporting States can upset an investment protected under an IIA, they should share the responsibility of protecting the investor's interests (as seems to be the case with the EU), particularly when an IIA's formula establishes the guarantee of investor's rights as a bilateral/multilateral obligation. But even if the text of the IIA does not make it explicit that the home-State should not frustrate the objective or purpose of the IIAs, the VCLT does harbour specific rules that can be used to create the obligation not to frustrate the objective or purpose of the IIA, which would include not frustrating the repatriation of assets or specific investments, even if these are against the home-State's internal law.

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<sup>91</sup> Particularly in the matter of influence, it must be kept in mind that the exceptions to the principle of territoriality would be all highly contingent on the political and sociological situation at the time and the (im)balance of power and concepts of morality of influential States: For an example we can look, once again, to the Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol, which in article 49°(1) allows for transitional reservations for ancestral use of certain medicines and plants; and in article 49°(2) (e) establishes that: «*Coca leaf chewing must be abolished within twenty-five years from the coming into force of this Convention [...]* » actually setting up a timeline for a cultural genocide/eradication.

### 3. CONCLUSIONS AND RECOMMENDATIONS

This chapter will present the conclusions of the research and make certain recommendations for dealing with the issue of investment protections granted to cannabis related investments.

As announced in the intro of this document, this is a brief work. Especially because it was aimed to question a general assumption of International Investment law: That is solely the host-State that grants the investment protections to the economic activities protected under the IIA.

#### 3.1. Conclusions

##### 3.1.1. Who grants the investment protections?

The essay has dealt with this matter particularly due to the generalised perception that investment protections are only granted by the host-State, which is not an unfair presumption in light of the control that the host-State exercises over the assets relevant to the investment, and to the fact that procedural investment protections can (usually) only be used against the host-State of the investment, but a presumption that can be dismantled depending on the formula used by the IIA.

Whenever the IIA does not limit the granting of substantial rights to the host-State (and even more when it includes “all Parties”) it would be improper for the tribunal or court to exclude the home-State from these obligations.

Of course, this means that the answer to the title question is the typically legal answer: “It depends”, in this case, on the formula used by the IIA to grant the investment protection to the investor.

##### 3.1.2. Is investment in cannabis legal?

That will depend (in most cases) on the municipal legislation of the host-State. In some cases, though, that decision can be left to the sensitivities of the arbitral tribunal or deciding body, to determine if profits derived from cannabis, which is a controlled substance under the UN drug Control Conventions, would be contrary to “*principles of international law*”.

Therefore, investment in cannabis is not *per se* an illegal investment. Can be prohibited by the host-State, or considered against “*principles of international law*” by arbitrators who equate a happy brownie to the Holocaust, but this group is certainly limited.

The municipal laws of the home-State to the investor should be irrelevant, and yet, profiting from cannabis can be investigated, prosecuted and the profits might be expropriated as a result of forfeiture proceedings that might upset the balance of the investment, thus affecting the objective of most IIAs.

### 3.1.3. Can home-States exercise their jurisdiction extraterritorially?

The prescriptive jurisdiction of a State can be exercised extraterritorially, under specific enabling circumstances like (active or passive) nationality, the protection of national sovereignty, *et cetera*. Enforcement, though, is limited by the territoriality principle. Yet prescriptive jurisdiction can affect the specific situation this essay deals with: a municipal law that deals with the legality of an activity realised abroad, but the results of which can be enforced in the home-State, creating an “*undue delay*” to the repatriation of the assets, and therefore influencing the willingness of its nationals to invest in this type of activities.

Because of that, the answer here is “*yes, in a limited way and under certain circumstances states can exercise its jurisdiction extraterritorially*”, but more relevant to this essay, that exercise might influence the activities their nationals invest in, and thus upset not only the objectives and purposes of the IIAs that the State might have signed, but also affect more basic principles of international public law such as non-intervention and the sovereign equality of States.

### 3.1.4. Can home-States impede or upset the repatriation of cannabis-investment related liquid assets?

Because of the answer in the previous section, we know there are factual measures that can be taken by the home-State that can upset the returns on investment generated from cannabis related activities. The home-State can take measures that factually affect the investment, generating an undue delay in the repatriation of liquid assets or making it risky or overly expensive to repatriate the returns on

investment due to their origin as a result of an activity considered illegal according to the home-State's internal law.

Now, it is the position of this essay that, according to the VCLT, those situations should not crystalise, since the home-State has a general obligation of not frustrating the objective and purpose of the treaties, and that includes allowing the repatriation of liquid assets, but still the instruments for the frustration of the investment are there to see and that presence, *per se* represent a risk that might drive investors and curb investments away from the cannabis field, which already affects the involvement of their nationals in specific fields and host-States, and once again, threatens not only the objective and purposes of the IIAs, but the principle of non-intervention and the sovereign equality of States.

#### 3.1.5. Do home-States bear any power over the legality of an investment realised in the host-State?

As it has been pointed out before, home-States should not bear any power over the legality of an investment. The determination of the legality of an investment comes from either explicit or implicit "according to host-State law" clauses, which condition the investment protections granted by the IIA to the legal behaviour of the investor/investment according to the law of where the activity is developed.

Yet, the essay also showed that there are legitimate actions that the home-State can deploy which bear control over the investment and its related activities. The home-State could prosecute the activities considered legal in the host jurisdiction and the fear of that criminalization can curb the interests and enthusiasm for an investment or a destination, which in turn does become a powerful tool.

Therefore, home-States do not bear any power to turn a legal investment into an illegal one but do hold power to criminalise the activities and/or profits from the investment within their territory, which does hold power over the investor/investment if they find themselves under the jurisdiction of that State.

### 3.1.6. Can cannabis-investments related assets be detached from their origin?

One of the possible explanations for why profits from cannabis-related investments should remain untouched (unprosecuted, undelayedly, et cetera) is because money (and I am going to be using money as a stand for “*assets*” or “*liquid assets*”) by itself is not a crime. Profits are fairly neutral and are not necessarily connected to the activities criminalised in the home-State. Everybody loves money.

So, does that mean that we do not care about the origin of money? Clearly, that is not the case. The *Phoenix* and *Plama* cases argue that investment guarantees should not be extended “*to investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs*”, and although one might find fault in the naiveté of the tribunals when selecting the investments for their examples, it is true that the activities that produce the profits are quite relevant when determining who gets investment protections. If this was not the case, there would be no consequences for robbing a train in one country and depositing the money in the bank just across the border.

## 3.2. Recommendations

### 3.2.1. Reasonable application of extraterritorial prescriptive jurisdiction

It has been mentioned before in this essay that extraterritorial prescriptive jurisdiction is permitted under international public law. It is, in fact, a legitimate act from a State to regulate the behaviour of its citizens even if that behaviour occurs outside of its territory, be it because of the effects of it or because public policy decisions.

Yet, the specific case of cannabis-related investments shows the limitations of general approaches: it would be unreasonable to ban investments into recreational cannabis, or disincentivise them even, when there is an IIA and the host-State is willing to receive such investments. On the other hand, inaction in the face of mercenary brokering, piracy, arms-dealing, *et cetera*, seems too liberal of an approach in regard to the investments/investors, even when the host-State is willing to receive such investments.

Unfortunately, this is a manner that cannot only be resolved “according to the host-State law” but requires a reasonable application of the home-State’s prescriptive



jurisdiction. If it is agreed that investment protections must be granted by the home-State as well as the host-State of the investment<sup>92</sup>, the laws of both States must be taken into consideration, but a reasonable balance must be struck where the laws of the host-State, where the activities occurred, be given the most weight, while municipal laws of the home-State and the principles of international public law are weighted equally. In any way, as it will be shown in § 3.2.3, the solution might reside on a better ISDS system; one that includes the legal background and ideas of both home and host States to determine the granting of investment protections.

3.2.2. The repatriation of liquid assets as a multilateral obligation in IIAs  
It has been suggested through the essay that, depending on the text of the free transfer of liquid assets clause, the obligation of guaranteeing the repatriation of liquid assets happens without undue delay is multilateral and not limited to the host-State.

This research proposes that the obligation of guaranteeing the free movement of liquid assets (when posed in the alternative formulae that includes both host-State, home-State and other capital-P-Parties) should be understood as a multilateral obligation of all parties to an IIA within their jurisdictions, of course. Thus, the clause can be understood as a commitment from all parties to facilitate the transit of liquid assets into and out of their territories, interpreting the clause in favour of the investor/investment.

This, specially, would create a reasonable solution for the problem posed by extraterritorial jurisdiction: If the Parties share the obligation of facilitating (or at least not impeding) the free transfer of assets, it limits the application of the extraterritorial prescriptive jurisdiction to the situations in which the investment is not legal according to host-State law, while allowing the most serious criminal activities to be disrupted (or even investigated) as such and denied investment protections from a joint position.

3.2.3. Extension of Procedural protections, but maybe not arbitration  
Interestingly, a solution that might work wonderfully to protect investments in cannabis might be a Standing Investment Court.

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<sup>92</sup> Vid. Supra § 3.1.1

As they are right now, it is not possible for investors to sue their own State to protect the right to repatriate the returns of their investment in arbitration, thus being forced to go through the ordinary procedure to challenge undue delays and impediments set upon their repatriation efforts, which leads to think that there is no obligation from the home-State to secure, help or even not-frustrate the objective of the IIAs.

Depending on how it is set up, a permanent Investment Court staffed with representatives of the Parties to the IIA might help balance the legal perspectives of the Parties to determine in a case-by-case basis if an activity considered illegal by the municipal laws of anyone other than the host-State should be granted investment protections and to what degree these protections would be useful.

Unfortunately, the current system offers little precedent as well as little clarity with respect to what would happen to the investors that deal in cannabis in legal jurisdictions, and there is no security that it would be treated as leniently as mercenaryism or human traffic. The main protection so far is provided by the high access costs, which protects the investment through its economic relevance, but that might be a cold comfort for small-time investors, host-States that miss out on larger scale investments despite legalising their recreational cannabis market, or big investors from politically polarised States that find themselves at risk of turning ultra-conservative suddenly and therefore, be prosecuted for their investments in places that consider those investments legal.

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