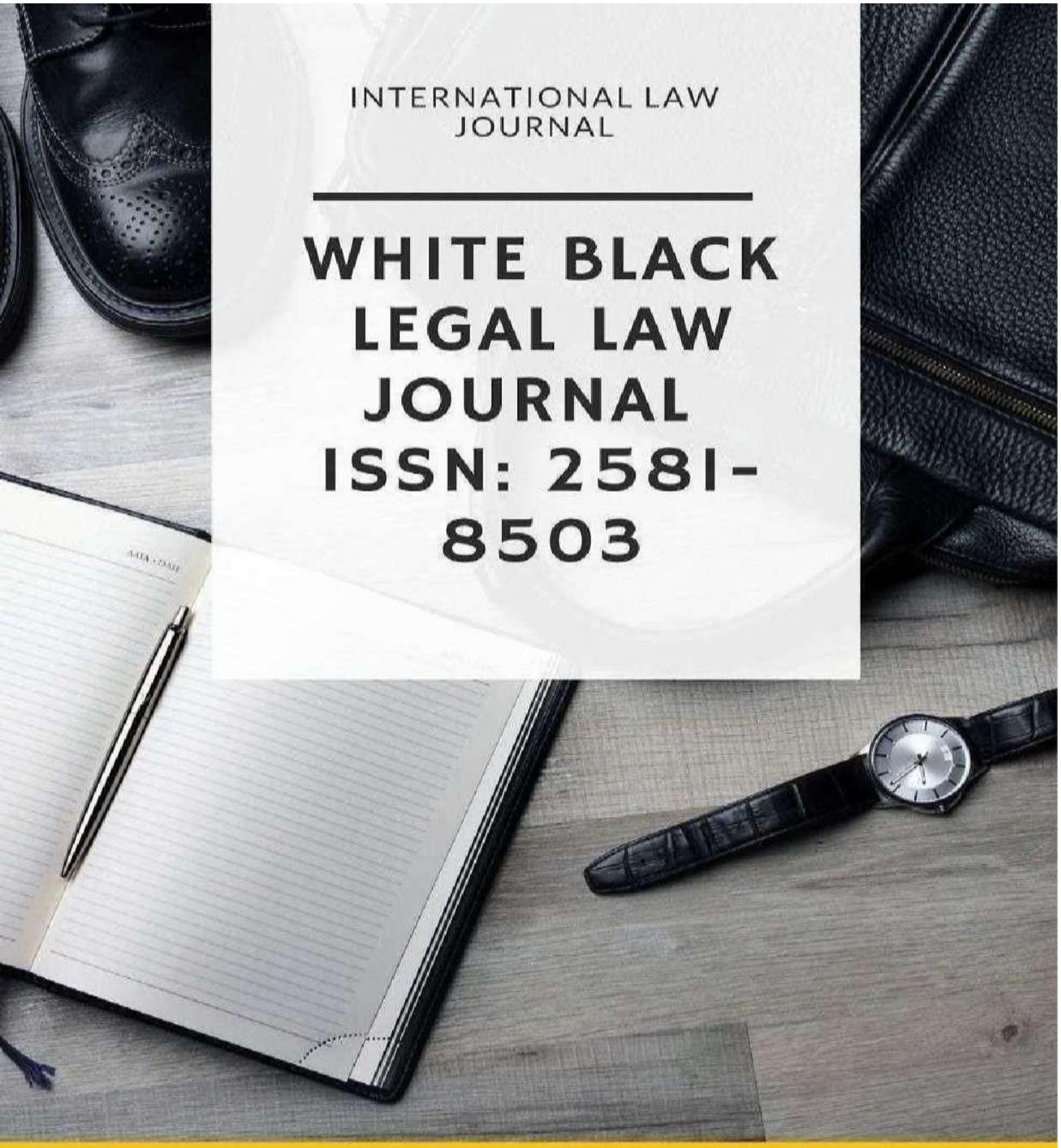

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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

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DIGITAL ASSETS, CRYPTOCURRENCIES & THEIR STANCE IN THE INTERNATIONAL INVESTMENT LAW

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Assets are beneficial & advantageous items or properties which are of great value for a particular person. Assets may include money, riches, estates, properties, capital, resources & other valuables. However, these are assets which are in physical form. In the current times, many kinds of assets are available in digital form and are in a non-physical form. They can be data, documents, manuscripts etc. These are called digital assets. Besides data and documents, digital assets also include cryptocurrencies.

Cryptocurrencies are an important form of digital asset. It is a form of computerised currency that is not in physical form. The most popular and first cryptocurrency was Bitcoin. The value of cryptocurrencies, unlike traditional currency notes is not fixed by the government but is rather decided by the public. As a result, the general public is more inclined towards investing on cryptocurrency because it is less dependent upon the government and other financial institutions.

Due to the rising popularity of cryptocurrencies in current times and the growth of investors purchasing cryptocurrency, this is where the scope of investment law comes into picture. India being a developing country focuses on attracting foreign investors in order to surge its economic growth. Thus, India focuses on framing effective investment laws so as to protect the interest of investors from being prejudiced. Due to digitalization, it is the need of the hour to strengthen the framework of investment laws.

The international investment laws focus on ensuring that investment in digital assets such as cryptocurrencies is safe, secure and well protected. A number of international treaties are involved in regulating the international investment laws. Thus, the member States to these treaties need to keep in mind that the cryptocurrencies and other digital assets follow the international standards for investment law.

Digital Assets & their rise

Digital assets contain e-currencies, electronic documents such as videos, books etc. Globalization and technological advancements have given rise to a widespread digitalization of various things. One of these digitalized things are digital assets. The reason for the rapid growth in popularity of digital assets is their quick and easy accessibility. They are easier to handle and are more safe and secure than physical assets. They are also cost-effective. All these factors have led investors to focus more on digital assets in comparison to physical assets.

Cryptocurrencies, also known as virtual currencies which are highly encrypted have grabbed the attention of the public since the year 2009 when the first crypto currency Bitcoin was launched. Cryptocurrency involves digital encryption and its value is decided as per the discretion of the public. A process of asymmetric cryptography is used for encrypting the digital currency.

People were more lured towards buying crypto currencies as they were free from the control of government unlike physical currency notes. The legal stance of cryptocurrencies is different in different countries. There are still many countries where the investing in cryptocurrencies is not permitted.

Legality of Cryptocurrencies in India

There was a huge debate regarding whether the trade of cryptocurrencies should be permitted in India or not. The Reserve Bank of India feared that these digital currencies could be used illegally.

In the year 2018, India's Central bank RBI (Reserve Bank of India) proscribed the trading of cryptocurrency. However, the Internet and Mobile Association of India challenged this order of the RBI before the Supreme Court of India. The Supreme Court discarded the decision of the RBI & permitted the buying and selling of cryptocurrency in India.[i] Currently various tax regimes have been inculcated so as to impose tax on profits incurred while trading cryptocurrencies.

Being an unregulated virtual asset cryptocurrency is currently in a quite uncertain and ambiguous position in India. Therefore, in the future we can expect many SEBI regulations,

Bills passed by the Parliament and other regimes in order to regulate the legality of crypto currencies in India. This will make the trading of cryptocurrencies more transparent and clearer.

International Investment laws

International investment laws include a wide range of treaties, conventions and agreements. Those countries or States who form a part of these treaties or agreements are called member states and are bound by all the clauses and rules mentioned in the treaty or agreement to which they have consented. The signatories to any investment treaties cannot go beyond the clauses of the treaty which he or she had agreed to at the time of signing the treaty. The States which become part of these treaty are independent & sovereign states.

Cross border investments are investments made by a national of one country in a business or venture of another foreign country. Since cross border investments are quite common nowadays, a strict international law regime is the need of the hour in order to protect the affairs of the persons making cross border investments.

Treaties can be multilateral or bilateral.

Bilateral Investment Treaty (BIT)

Bilateral means involving two persons or two States or two countries. It is a major treaty which controls foreign investment under the international investment law. It ensures that the investors receive fair treatment and their rights are not prejudiced. The prospective investors need to be aware while investing in the cryptocurrency of any foreign State because every State has different rules and regulations regarding the trade of cryptocurrency. If any cryptocurrency is banned in any State and an investor invests in the same then such investment shall not be covered under the BIT.[ii] So before claiming any kind of protection or taking any kind of action, the investor must ensure that the particular cryptocurrency is protected under the BIT.

The principle of national treatment is followed in almost all Bilateral Investment Treaty wherein if any investor of one State wants to buy a cryptocurrency in another State (host state) who is also a member of the treaty, then the host state shall treat the investor as a national, which means, he shall be treated as if he is the citizen of the host state and shall have the same rights & responsibilities which the citizen of the host state shall have.

One example of BIT is the German Model BIT, Article 1 of which states that investment includes 'every kind of assets'[iii]. Thus, we can say that cryptocurrency and digital assets are also protected under this BIT. The list of assets is usually non-exhaustive.

The Bahrain- Mexico BIT consists the following definition of investment:
"Real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes[iv]". From this we can ascertain that cryptocurrency can also be included within this definition because it is also an intangible asset and is quite economically beneficial for the person who invests in it.

It is now clear and evident that certain BITs have not resorted to directly include cryptocurrency in the definition of 'investment', but it can be deemed from the wordings of the definition itself that cryptocurrency is inclusive in the definition.

Multilateral Investment Treaties (MITs)

In multilateral treaties, there are more than 2 countries who become signatories to the treaty. These treaties also serve the same purpose as bilateral investment treaties which protect a member State from being exploited by any other member state during the course of investment or while trading a cryptocurrency.

These treaties like bilateral treaties protect the interest of foreign investors. They also follow the principle of national treatment, where a foreign investor is treated as a national while investing in the host state.

Many multilateral investment treaties such as NAFTA (North American Free Trade Agreement) contain the definition of investment. NAFTA was a trade agreement between the United States, Canada and Mexico. It was signed by these three countries in the year 1992 and became operative from the year 1994[v]. No such specific mention has been made regarding cryptocurrency under this treaty. NAFTA was later altered into United States-Mexico-Canada Agreement (USMCA) in the year 2020 so as to refine some of its earlier provisions. Chapter 14 of the USMCA states that "investment" contains both tangible and intangible movable property.[vi]

CONCLUSION

Digitalization is slowly evolving and changing many anachronistic things. Cryptocurrency and several other digital assets are perfect examples of such changes which are an outcome of digitalization. Adapting to change takes time. Slowly moving from the traditional currency system to digitalized currency is a gradual and slow process. Thus, we can clearly see that it is quite debatable and challenging that whether the Bilateral Investment Treaties include cryptocurrencies or not. Many questions have arisen regarding the protection of digital assets and cryptocurrency under the BITS.

In many treaties the definition of investment does not directly include cryptocurrency. However, as per my opinion the wordings of the treaty must clearly mention that cryptocurrency is protected under BITs. Another important thing to be noted is that the foreign investors need to be well aware about the investment laws in the host country. It can thus be concluded that in the present times it cannot be said that cryptocurrencies are fully protected under the international investment treaties. There are still many changes required to be made so as to entirely grant protection to the cryptocurrencies and the investors.

[i] Internet & Mobile Association of India v. RBI AIR 2021 SC 2720
[ii] Are Investments in Cryptocurrencies protected under the BIT regime? available at: https://www.law.georgetown.edu/ctbl/blog/are-investments-in-cryptocurrencies-protected-under-the-bit-regime/ (last visited on May 16, 2025)
[iii] German Model Treaty 2008, available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2865/download (last visited on May. 22, 2025)
[iv] Bahrain-Mexico BIT, available at: https://edit.wti.org/document/show/0de0f878-f9e3-4a7d-9ec1-7aeaa46c8f4c (last visited on Feb. 3, 2025)
[v] US CUSTOMS AND BORDER PROTECTION, available at: https://www.cbp.gov/trade/north-american-free-trade-agreement#:~:text=North%20American%20Free%20Trade%20Agreement%20(NAFTA)%20established%20a%20free%2D,produced%20by%20the%20signatory%20nations (last visited on May. 22, 2025)
[vi] USMCA Chapter 14, available at: https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/14-Investment.pdf (last visited on May 23)