

Whether ‘Looted Artefacts’ Are Covered Under the Definition of ‘Investment’ Under BITS Or Not?

Ayushi Lakshmi Verma¹, Kavya Maheshwari²

¹Advocate, Patna High Court

²Research Scholar, Dpt. Of Law, N.A.S. (P.G.) College, Ch. Charan Singh University, Meerut

Abstract

This paper examines whether looted artefacts can fall within the definition of “investment” under Bilateral Investment Treaties (BITs) and international investment law. While traditional mechanisms governing cultural property—such as UNESCO conventions, restitution claims, and diplomatic negotiations—have faced enforcement and jurisdictional limitations, this study explores an alternative legal lens by situating looted cultural artefacts within the evolving jurisprudence of investment treaty protection. Through a doctrinal analysis of BIT definitions, ICSID jurisprudence, and landmark arbitral decisions such as *Fedax v. Venezuela*, *Salini v. Morocco*, *Biwater v. Tanzania*, and *Malaysian Historical Salvors v. Malaysia*, the paper traces the evolution of the concept of “investment” from rigid, criteria-based tests to broader, asset-oriented interpretations. It argues that looted artefacts, as movable assets possessing economic, historical, and revenue-generating value, may satisfy the essential characteristics of an investment under expansively drafted BITs. Moreover, since illicit transfers of cultural property are void ab initio, ownership arguably remains with the state of origin, allowing such artefacts to be conceptualized as foreign investments subject to treaty protection. The paper contends that recognizing looted artefacts as investments could transform restitution from a purely moral or diplomatic issue into a structured, enforceable legal mechanism under international investment law. However, it emphasizes the need for careful balancing between investor protections, host-state sovereignty, cultural heritage preservation, and international humanitarian law. The study concludes by recommending that future BITs explicitly address cultural assets, adopt nuanced definitions of investment, and incorporate safeguards to prevent excessive state liability while promoting cooperation, foreign direct investment, and the protection of cultural heritage.

Keywords: Investment, BITS, looted artefacts, international law, investor protection

1. INTRODUCTION

The area of international law that regulates relationships between states and foreign investors is known as international investment law. There is no central convention or organisation governing foreign investment law. There are numerous bilateral investment treaties (BITs) and investment chapters in preferential trade agreements in this field of law. These agreements are followed by others. Unlike local

¹ Advocate, Patna High Court

² Research Scholar, Dpt. Of Law, N.A.S. (P.G.) College, Ch. Charan Singh University, Meerut.

legislation on foreign investment, which may provide sufficient safeguards and incentives to foreign investors but are subject to change with a change of government, no state has the authority to unilaterally change international law or BIT provisions. The structured protections and assurances that BITs offer for non-commercial risks have served as an invitation to potential investors as well as a valuable reassurance to those who already have investments in signatory states. As a result, when it comes to encouraging foreign investment, states have looked towards international law and bilateral investment treaties (BITs) for additional protections and guarantees.

PURPOSE OF BILATERAL INVESTMENT TREATIES

Ever since the “Friendship, Commerce and Navigation Treaty” was signed between Germany and Pakistan way back in 1959, bilateral investment treaties have increased manifold.

Earlier, there was no concept of a private investor bringing in an action against a State in case of violation of his rights. The same has been reiterated by the International Court of Justice in *Barcelona Traction* case wherein it was held that:

“...within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law...”³

Today however, more than 2,500 similar treaties have been entered into, over 2,000 of which have been signed since 1990 alone.⁴ Bilateral investment treaties (hereinafter referred to as **BITs**) are defined as “agreements that establish the terms and conditions for investments by nationals and companies of one country in the jurisdiction of another.”⁵

The primary goal of BITs has been to establish consistent international legal rules and effective compliance mechanisms to protect the citizens' investments in foreign countries. The rules and compliance mechanisms of the treaties are aimed to supplant local laws and institutions thereof, as well as to prevent any disputes about the substance and applicability of customary international law. Most BITs give foreign investors more security than is required under international law. “The essence of this protection is to defend the investment and the investor from exercises of state power by host governments with respect to such matters as expropriation, treatment, transfer of currency abroad, and restrictions on operations”.⁶

Thus, BITs are a source of substantive rights for the investors wherein they are ensured that they would not be discriminated against either the citizens of the host state or the citizens of a third country. Their rights also impose a simultaneous duty on the host State to ensure a stable investment climate in its territory and the duty to provide full protection and security to the assets of the investors in cases of armed conflict.

³Case Concerning the *Barcelona Traction, Light and Power Co. Ltd. (Belgium v. Spain)*, (1970) I.C.J. Reports, 3 ¶ 78.

⁴John Beechey & Anthony Crockett, *New Generation of Bilateral Investment Treaties: Consensus or Divergence in Contemporary Issues in International Arbitration and Mediation* (Arthur Rovine ed., Brill, 2009)

⁵Zachary, Simmons & Guzman, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000*, U. III. L. REV. 265 (2008).

⁶Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries* 24 THE INTERNATIONAL LAWYER 655, 661 (1990)

2. REVIEW OF LITERATURE

Stacey Falkoff (2007)⁷ in her paper titled **“Mutually-Beneficial Repatriation Agreements: Returning Cultural Patrimony, Perpetuating the Illicit Antiquities Market”** has distinguished and evaluated which is more desirable and right choice in course of action of cultural property disputes- ‘repatriation of cultural property’ or the ‘mutually-beneficial repatriation agreements (MBRA)’? She argues that repatriation is desirable over MBRA (a variation to the ‘pure’ repatriation) as repatriating cultural patrimony is like ‘comporting with morals’ wherein the source nation may be able to derive and enjoy the economic benefits of the cultural artefact rather than the illicit antique market where it is sold illegally. Secondly, repatriation displays ‘positive social effect’ which enables to foster friendly relations and encourage future collaborations. MBRA’s on the other hand, “include a promise on the part of source nations to loan future works to the repatriating institutions.” She concludes that MBRA are not desirable as medium to resolve cultural property disputes as they further ‘perpetuate illicit antiquities trade’ and encourage museums to continue to acquire “works of questionable provenance.” Also, they tend to detract from establishing the required foundation for international legal framework.

Valentina Sara Vadi (2008)⁸ in her paper titled **“Cultural Heritage and International Investment Law: A Stormy Relationship”** has investigated the relationship between the protection of cultural heritage and the International Investment law which is still unexplored. The primary issue addressed by her were- Firstly, Whether the investment agreements are compatible with the host state’s obligation towards protection of cultural heritage? Secondly, whether the national laws are providing a mechanism to address the foreign investor’s claim challenging the internal measures aimed at culture heritage protection. The research methodology adopted was an empirical analysis of the recent arbitral jurisprudence in connection with cultural heritage. She concluded that jurisprudential balancing of conflicting interests between investment treaty provisions and national cultural policies may provide inadequate cultural heritage protection. This can be addressed by including cultural exceptions in the investment agreements itself.

Claudia Annacker (2011)⁹ in her paper titled **“Protection and Admission of Sovereign Investment under Investment Treaties”** has discussed the applicability of the protection safeguarded under the investment treaties to ‘sovereign investors’. The paper highlighted that the sovereign investor can derive benefit from investment treaty protection only if it is expressly included in the definition of ‘investor’ and ‘investment’ under the BITs. The paper addresses the problem faced by sovereign investors under the circumstances wherein the definitions are silent or ambiguous with respect to the coverage. The paper concluded that the sovereign investor can may enforce the substantive protection through the investor-state arbitration mechanism. The point of importance is that they should not be expressly disqualified or barred and should be given protection under the investment treaties at least when they do not act “jure imperii”.

Amanda Blunt (2012)¹⁰ in her article titled **“Wrecked but Salvageable: Current Governance of Underwater Cultural Heritage and the New Framework of International Investment Law”** has

⁷ Stacey Falkoff, *Mutually-Beneficial Repatriation Agreements: Returning Cultural Patrimony, Perpetuating the Illicit Antiquities Market*, 16 J.L. & POL’y 265 (2007)

⁸ Valentina Sara Vadi, *Cultural Heritage and International Investment Law: A Stormy Relationship*, 15 IJCP 1 (2008)

⁹ Claudia Annacker, *Protection and Admission of Sovereign Investment under Investment Treaties*, 10 CHINESE J. INT’L L. 531 (2011).

¹⁰ Amanda Blunt, *Wrecked but Salvageable: Current Governance of Underwater Cultural Heritage and the New Framework of International Investment Law*, 24 GEO. INT’L ENVTL. L. REV. 195 (2012)

explored the application of newly evolved International Investment law to underwater cultural property, as established by “Malaysian Historical Salvors v. Malaysia” case. This case made it plausible for the governance of underwater cultural property by categorizing ‘commercial contracts as salvage contracts as investments’ and granting ‘subsequent protection’ to foreign investors. This article encourages and promotes the application of international investment law to underwater cultural heritage to regulate its commercial salvage value due to two-fold reasons. Firstly, the current regime of underwater cultural heritage is inadequate, and secondly, international investment law regime will provide diverse opportunities for negotiations for evaluating an ‘alternative regulatory vehicle’.

The European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs (2016)¹¹ commissioned the conduct of research on “**Cross-border restitution claims of art looted in armed conflicts and wars and alternatives to court litigations**” wherein they throw a light on the lingering issue of restitution of looted artifact and other properties during armed conflicts. They have addressed the difficulty in enforcing the claim of restitution in foreign states and domestic courts owing to procedural hurdles and why parties are more inclined towards alternate dispute resolution (ADR)- such as arbitration, mediation, conciliation and negotiation. This study proposes ‘uniformity of solutions’ either at the initial stage of determination of applicable law or at the national level legislations or through effective implementation mechanisms at international level in order to overcome these problems and achieve just and fair solutions.

Wenhua Shan and Lu Wang (2019)¹² in their article titled “**The Definition of “Investment”**: Recent Developments and Lingering Issues” have extensively dealt with the evolution of the definition of ‘investment’ in International Investment law. They have examined and evaluated the traditional and modern definitions of ‘investment’ by making references to recent developments in arbitral jurisprudence and investment treaty-making laws. They have concluded that in lieu of controversies generated by the broader, open -ended and asset-based definition of ‘investment’, the newer definitions have opted for the narrower, close-ended and enterprise-based definitions which provides for inclusion of certain “characteristics of investment” or by explicitly excluding certain categories of asset from the purview of ‘investment’ itself.

Nikita Lalwani (2020)¹³ in her essay titled “**State of the Art: How Cultural Property Became a National-Security Priority**” describes looting of ancient and cultural artefacts as an unwanted problem in the coming years with potential threats of attracting violent threats amongst nations as with the advent of social media and online market places have made it easier for their illicit transactions. She highlighted how the United States’s attitude towards the protection of cultural heritage has evolved over the recent years where it was initially hesitant to fully implement the UNESCO convention as the resultant law was relatively weak, to ultimately a combative move for its perceptive foreign policy while considering cultural property as part of ‘national security sphere’. She concluded that US in light of national security

¹¹European Parliament, Policy Department for Citizens’ Rights & Constitutional Affairs, *Cross-Border Restitution Claims of Art Looted in Armed Conflicts and Wars and Alternatives to Court Litigations* (Study, Directorate-General for Internal Policies, 2016), available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2016/556947/IPOL_STU\(2016\)556947_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/556947/IPOL_STU(2016)556947_EN.pdf).

¹² Wenhua Shan and Lu Wang, 'The Definition of “Investment”’: Recent Developments and Lingering Issues', in Jean Engelmayr Kalicki and Mohamed Abdel Raouf (eds), *Evolution and Adaptation: The Future of International Arbitration*, ICCA Congress Series, Volume 20 (© Kluwer Law International; International Council for Commercial Arbitration/Kluwer Law International 2019) pp. 169 - 197

¹³Nikita Lalwani, *State of the Art: How Cultural Property Became a National-Security Priority*, 130 YALE L.J. F. 78 (2020-2021).

priorities should consider into entering bilateral treaties and invite for peaceful negotiations in order to deter the looting of cultural heritage which can serve as a blockade to terrorist attack fundings and establish friendly relations with other countries.

Paige Tenkhoff (2020)¹⁴ in his note titled **“Artistic Justice: How the Executive Branch Can Facilitate Nazi-Looted Art Restitution”** assesses and critically evaluates the divergent interpretations of the expropriation exceptions with the issue pertaining to the commercial activities of foreign sovereign’s agencies or instrumentalities showcasing stolen art works in museums is liable to attract legal cause of action and confer locus standi on the foreign sovereign itself. He argued that the executive wing should create a series of executive agreements that pave path for ‘arbitration or compensation through a trust foundation for the Nazi-looted art claims’. He concluded that these executive agreements could facilitate the U.S. foreign policy and abate the foreign policy blunders of the U.S. federal court litigation.

Thomas C. Hildebrand II (2021)¹⁵ in his paper titled **“The Fighting's Done, Now Pay Me: Investment Treaties, War, And State Liability”** has highlighted the major and over-extensive state liability towards foreign investors that follows any armed conflict under the bilateral investment treaties. He argues that any bilateral investment treaty should be interpreted ‘to create a lex specialis regime’ limiting the compensation provided to investors. The Arbitral Tribunal are not bound by the precedents evolved in the international law regime which is why they have refused to apply ‘war-loss clauses in this manner’. This liability can be detrimental to the host country’s potential to recover from losses incurred during armed conflicts. He proposes to overcome this difficulty by firstly, outlining the war-loss clauses in general terms and to be plausibly interpreted in terms of Vienna Convention on the Law of Treaties (VCLT) in order to create a regime to limit state’s liability towards investors. Secondly, the war-loss clauses in the future BITs need to be more comprehensive and transparent. Thirdly, it proposes for special ‘multilateral instruments’ which could be invoked during armed conflicts and replace/ supersede the bilateral investment treaties.

Tobias Ackerman (2022) in his book titled **“The Effects of Armed Conflict on Investment Treaties”** has examined and analysed the multi-faceted and detrimental effects of armed conflicts on investment treaties in greater depth and breadth. The contentions offered forms the solid foundation for the continuity of investment treaties even during armed conflicts and rather rebuts the common association of termination or suspension of treaties in the garb of ‘supervening impossibility’ or ‘changed factual circumstances’ or ‘force majeure’. The book argues in support of the application of international humanitarian law (IHL) and public interest doctrine which heavily influence the determination, application and interpretation of investment protection protocols and standards. The book examines the substantive investment treaty standards which is inclusive of circumstances of both the physical destruction to foreign investments and the other armed-conflict induced restrictions along with the defence mechanisms adopted by the host state in cases of investment disputes. The concluding remarks of the book emphasised the relevance of IHL and investment treaties as key player to remain effective during the armed conflicts and to insure harmonization of conflicting interests between the investor and public interests. It recommends and demonstrates how the contextual and systematic interpretation, compliance with reasonable internal actions and measures, and carefully drafted treaty policies can

¹⁴Paige Tenkhoff, *Artistic Justice: How the Executive Branch Can Facilitate Nazi-Looted Art Restitution*, 73 VAND. L. REV. 569 (2020).

¹⁵Thomas C. Hildebrand II., *The Fighting's Done, Now Pay Me: Investment Treaties, War, And State Liability*, 54 VAND. J. TRANSNAT'L L. 995 (2021).

encourage and assure the objectives and purpose of investment treaties continue to be achieved in compliance with legal standards and procedures even during the armed conflicts.

The research scholars and academicians have highlighted and critically examined the lingering issues of repatriation of cultural property and protection of cultural heritage under the traditional UNESCO convention, extrajudicial measures, ADR mechanism and other international instruments which are comparatively weak from the enforcement point of view as they detract from formulation of precedent in the international legislative sphere. They have engaged in debates and criticized the Arbitral jurisprudence which has further complicated the already complex issue of ‘over-extensive state liability’ towards investors for recovery of war-losses during armed conflict. The core focus areas of the research are restricted to exploring various clauses and amenities of the BITs under which maximum protection can be guaranteed to foreign investors during armed conflict and without much compromising the internal measures of the host state. They have mostly limited themselves to an “all or nothing” approach when dealing with repatriation or treaty obligations fulfilments.

The existing legislative framework has not been able to culminate the ‘restoration of looted artefacts’ predominantly. Rather the total scope was ‘broader’, ‘vague’ and ‘ambiguous’ as discussed by Amanda Blunt and Valentina Vadi in their scholarly articles while dealing with cultural heritage protection and international investment law concurrently. Our paper exclusively focuses on the possibility of whether the artefacts come under the purview of the definition of ‘investment’ under the modern model BITs. If established as ‘investment’, the economic, cultural and intrinsic value attached with it, may result in attracting foreign direct investment and additionally foster the friendly relations and cooperation among the countries.

3. DEFINITION OF ‘INVESTMENT’ IN BILATERAL INVESTMENT TREATIES

Under any BIT or International Investment Agreement, what is protected are the investments of the investors. Historically, only those investors who had made or were making an investment benefited from the security provided by BITs. However, a recent trend in many BITs and FTAs appears to involve even those investors who are attempting to make an investment, thus acknowledging potential investors' pre-establishment rights in the host countries.¹⁶ For example, in the US Model BIT of 2004, the term "investor" is defined as follows:

“Investor of a Party’ means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party...”¹⁷

The term ‘investment’ defines the scope of protection offered to the investors under the respective investment treaty. The protection which is granted under the BITs such as non-discrimination, fair and equitable treatment and compensation for expropriation are restricted to those investments which are covered under the definition of ‘investment’ in the BIT. The definition of investment varies from country to country as there is no uniform definition of the same. The ICSID Convention stipulates that “the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment”¹⁸, however, it does not define what constitute an investment. Most investment treaties contain the provision that “investment” means “every kind of assets...”, thereby suggesting that the word

¹⁶SURYA P SUBEDI, INTERNATIONAL INVESTMENT LAW-RECONCILING POLICY AND PRINCIPLE 58 (2008).

¹⁷Article 1, US Model BIT 2004.

¹⁸*Supra* note 10, at 144-145.

encompasses everything of monetary value without any restriction. As an illustration we have Art. 1 of the UK Singapore BIT which provides that: “(a) ‘investment’ means every kind of asset and in particular, though not exclusively, includes...”¹⁹

What follows such asset-based definitions, is a non-exhaustive list of assets to be protected. Usually, the classes of assets include both “movable and immovable property, interests in companies, contractual rights, intellectual property rights, and business concessions.” In contrast, there are certain BITs which include lesser categories of assets under the definition of ‘investment’. The China-Poland BIT of 1988, for example, has only four categories:

1. “movable and immovable property and other rights in rem;
2. shares in companies or other form of interest in such companies;
3. a claim to money or to any performance having an economic value;
4. copyrights, industrial property rights, know-how and technical process.”

What is important to note here is that the categories of investment given in the various treaties are simply used as illustrations to help explain the nature of protected assets. Since assets of "every sort" are included, an asset or interest in question that does not fall into one of the mentioned categories may nonetheless be regarded as a covered "investment.”²⁰

SCOPE OF DEFINITION OF ‘INVESTMENT’

Most of the BITs consist of a wide definition of investment. For example, the Model Indian BIT defines investment as:

“Every kind of asset established or acquired including changes in the form of such investment, in accordance with the national laws of the Contracting Party in whose territory the investment is made and in particular, though not exclusively, includes:

1. movable and immovable property as well as other rights such as mortgages, liens or pledges;
2. shares in and stock and debentures of a company and any other similar forms of participation in a company;
3. rights to money or to any performance under contract having a financial value;
4. intellectual property rights, in accordance with the relevant laws of the respective Contracting Party;
5. business concessions conferred by law or under contract, including concessions to search for and extract oil and other minerals.”²¹

In *CMS Gas Transmission Company v. Argentina*²² it was held by the tribunal that the claimant who was a minority shareholder in an Argentine company could bring a claim under the U.S.-Argentina BIT because “the definition of investment even included a company or shares of stock or other interests in a company or interests in the assets thereof”. The Australia-India BIT contains such a wide definition of ‘investment’ that in the *White Industries* case, it was interpreted by the Court to include an award²³. Although the Indian party wanted to refute the claim on the basis of the *Salini test*²⁴, the argument was refuted by the Tribunal. Apart from relying on the *Salini test*, India also relied on the writings of

¹⁹Art. 1 of the UK Singapore Bilateral Investment Treaty (BIT) (1975).

²⁰ *Supra note 10*, at 144.

²¹Ministry of Finance, Model Indian BIT, Art. I(b), available at: http://finmin.nic.in/the_ministry/dept_eco_affairs/icsection/Indian%20Model%20Text%20BIPA.asp

²²*CMS Gas Transmission Company v. Argentina* (Decision on Objections to Jurisdiction), ICSID Case No. ARB/01/8 (2003).

²³ *White Industries Australia Ltd v India*, Final award, IIC 529 (2011), 30th November 2011.

²⁴ *Salini Construttori v. Morocco*, ICSID Case No. ARB/00/4, (July 23, 2001), 42 ILM 609, (2003).

Douglas²⁵, an authority on this point of law, but the same were rejected on the ground that Indians acknowledged the right in personam contractual rights to be within the ambit of ‘investment’ in the treaty. The issue appeared to be the treaty's vague language and disregard for definitional nuances.

In contrast to the 2014 Draft Model BIT, the 2016 Model BIT has a broader definition of "investment" and does not impose ownership and control requirements on investors. However, it stipulates that some fundamental qualities must exist in investments. According to a reading of Article 1.5, the word "investor" should continue to exclude enterprises that do not have significant business operations in the home state, either directly or through holding companies.

Analysis

Since the definition of ‘investment’ has not been codified in any legal document, it gives the parties to a BIT to include and exclude any transaction as they deem fit. While a wide definition of investment is beneficial for the investors, it exposes the host State to unwanted obligations and risks, as demonstrated by arbitration practices. Also, keeping in mind that the arbitral claims and awards impose huge monetary burdens on the host States as they run into millions of dollars, many States have renegotiated their BITs in order to narrow down the scope of ‘investment’.

It should also be noted that the categories of ‘investment’ enlisted in the treaties are simply used as illustrations to help explain the nature of protected assets. Since assets of "every sort" are included, an asset or interest in question that does not fall into one of the mentioned categories may nonetheless be regarded as a covered ‘investment’.²⁶ Henceforth, more recent investment treaties have started using strategies to restrict access to investor State dispute settlement (ISDS) mechanisms and to the range of covered investments.

4. EVOLUTION OF THE CONCEPT OF INVESTMENTS: FROM FEDAX DECISION TO SALINI TEST TO THE PRESENT

The first case in which the jurisdiction was challenged on the grounds that the underlying transaction did not qualify as an “investment” under the ICSID Convention was *Fedax v. Venezuela*. The issue in this case was whether purchasing government-issued promissory notes could be regarded as a “investment.” The tribunal decided that “they were protected investments as they met the five basic features of an investment, which included a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host State's development”.²⁷

Following the *Fedax* decision, many tribunals adopted the five criteria in order to determine whether an investment existed or not for jurisdictional purposes, subject to certain variations. The *Salini v. Morocco* case, which produced the “Salini test”, was a landmark case particularly in the jurisprudence on the definition of “investment” in investment treaty arbitration history.

The fundamental question that arose in this case was whether the underlying transaction which was a highway construction contract fit into the definition of ‘investment’. Following the ratio laid down in *Fedax*, the Court in this case laid down the ‘dual test’, wherein the question that whether the Court had

²⁵ E. Douglas, Nothing if not Critical for Investment Treat *Methanex: Occidental, Eureka and Methanex*, 22 *ARBITRATION INTERNATIONAL* 27, 28 (2006).

²⁶ Danilo Ruggero Di Bella, *Repatriation of Artworks throughout Investment Arbitrations*, *CAMBRIDGE INTERNATIONAL LAW JOURNAL* (2021).

²⁷ *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3.

jurisdiction or not depended on “the existence of an investment within the meaning of both the Bilateral Treaty as well as that of the Convention”.

The tribunal then set out five “elements” of investment, which later became the famous Salini test:

“The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction...In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.”

It then assessed the case against the five elements one by one, and like Fedax, arrived at a conclusion confirming its jurisdiction. The Salini approach has been followed in various decisions in order to arrive at the conclusion as to whether a transaction was an ‘investment’ or not. It was only in the case of Biwater and MHS that the strict requirement of all the five criteria was challenged and done away with.

WHETHER LOOTED ARTEFACTS FALL UNDER THE DEFINITION OF ‘INVESTMENT’?

The act of taking something from someone against their will and in violation of the law is referred to as looting.²⁸ This generally occurs during periods of political and military unrest. It may take place with the support of the State or without any involvement from it. During a war or an armed conflict there are large scale destructions which have a direct bearing on the investors and their investments. Many a times, their properties are destroyed, looted by the insurgents or held as hostages. The question thus arises as to whether any such property taken away falls under the definition of investment.

A cultural property or any property located in a foreign country may indeed meet the requirements of the definition of ‘investment’ under various BITs as they are movable assets. The same has been indicated by ICSID in the case of *Malaysian Historical Salvors v. Malaysia*. The dispute in this case arose out of a contract between the Applicant, a marine salvage company, and the Respondent Malaysia where in accordance with the terms of the contract, the applicant undertook to locate the British ship Diana's wreck and recover her priceless cargo of Chinese porcelain, which had sunk in Malaysian territorial seas in 1817.²⁹ The Tribunal identified several “hallmarks” of an investment which have developed over seven ICSID “cases of importance” in order to determine whether this contract qualified as a “investment” under Article 25(1) of the ICSID Convention and came to the conclusion that the contract did not qualify as an investment under Article 25 because it did not fulfill those ‘hallmarks’, one of them being that “the contract did not provide any lasting benefits to the host state.”³⁰

In appeal the ad-hoc Committee found that the definition of ‘investment’ under the UK-Malaysia BIT has been defined “capaciously, and that the contract would have constituted an investment under that BIT”. It further pointed out that the BIT does not offer an alternative to ICSID's third-party dispute resolution procedures, thus if the ICSID Convention's jurisdictional requirements are not met, the investor has no international recourse. “For these reasons, the Committee found that the Tribunal manifestly exceeded its powers because (a) it failed to take account of the broad and encompassing definition of “investment” under the UK-Malaysia BIT, (b) it elevated the “hallmarks” of an investment to jurisdictional conditions, excluding small contributions and contributions of a cultural and historical nature, and (c) it failed to take into account the travaux, and reached conclusions not consonant with

²⁸Supra note 9, at 9.

²⁹Supra note 10, at 184.

³⁰*Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10.

them.”³¹

The Tribunal in the Biwater case held that:

“There is no basis for a rote, or overly strict, application of the five Salini criteria in every case. These criteria are not fixed or mandatory as a matter of law. They do not appear in the ICSID Convention. On the contrary, it is clear from the travaux préparatoires of the Convention that several attempts to incorporate a definition of ‘investment’ were made, but ultimately did not succeed. In the end, the term was left intentionally undefined, with the expectation (inter alia) that a definition could be the subject of agreement as between Contracting State...”³²

Analysis

It may be argued that in addition to their inherent historical, material, and economic value, which increases with time, cultural items can also generate large revenues via the selling of museum tickets. Therefore, it is appropriate to consider such property to be an investment. Also, since any illegal transfer of ownership is considered null and void from the beginning, stolen cultural property can also be seen as a foreign investment as the ownership of these items remains with the "country of origin." It is also pertinent to note here that the MHS case was one of the rare cases where salvage was regarded as ‘investment’. Additionally, the Salini Test itself poses difficulties because according to the test if the “typical characteristics” of an investment as identified in that decision are elevated into a rigid and inflexible test, and if transactions are to be presumed excluded from the ICSID Convention unless each of the five criteria is satisfied- it runs the possibility of arbitrarily excluding some transaction types from the Convention's purview.

CONCLUSION

The evolution of international investment law reveals a dynamic tension between the broad asset-based definitions and restrictive enterprise-based approaches to defining “investment”. Through systematic analysis of investment treaty jurisprudence and arbitral precedent, the paper demonstrates that the contemporary understanding of what constitutes an “investment” has undergone substantial doctrinal expansion, permitting the inclusion of cultural property as a cognizable category of protected assets and even that cultural property might fit within these parameters when treaties are drafted sufficiently expansively.

The looted artefacts, as moveable assets retaining economic, historical and revenue generating potential through museum exhibitions or cultural tourisms, satisfy core investment characteristics. Additionally, since illicit transfers are void ab initio, ownership remains with the country of origin, positioning such artefacts as potential foreign investments awaiting legitimate state activation. This interpretation aligns with the BIT’s purpose of fostering economic cooperation while facilitating cultural heritage protection. However, the framework demands balancing of interests: investment protections must harmonize with the host state’s cultural preservation obligations and international humanitarian law. The future BITs should explicitly address status of cultural assets, incorporate flexible definitions that recognize their unique value without imposing disproportionate liability, mitigate unwanted obligations and ensure effective dispute resolution mechanism. This would offer most sustainable path and transform restitution of looted artefacts from a ‘zero-sum diplomatic approach’ into a collaborative investment opportunity,

³¹Ibid.

³² Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22.



simultaneously deterring illicit trafficking, promoting FDI, cultural heritage safeguarding, and strengthening inter-state relations through structured, treaty-based mechanisms.