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International Commercial and Investment Treaty Arbitration Conference, organized by Jafa & Javali, Advocates at the India Habitat Centre, New Delhi on 21st January, 2017.

**DEVELOPMENTS & CHALLENGES**

**IN**

**INTERNATIONAL COMMERCIAL**

**&**

**INVESTMENT TREATY ARBITRATION**

**Session's Title :-**

**"Rise in Investment Treaty Arbitration : A Discussion"**

I am grateful to the organizers - Jafa & Javali, Advocates for inviting me to be a part of the present Conference on "Developments & Challenges in International Commercial & Investment Treaty Arbitration.

The objectives as stated in the brochure points out to India being an attractive destination for foreign investment and is the fastest growing economy in the world. The foreign investors entering the Indian market prefer a strong dispute resolution mechanism i.e. an international standard arbitral institution for resolution of their disputes.

Since, the conference is focused on increasing relevance and impact of international arbitration in India, the organizers have very thoughtfully made an addition of a special session on the Investment Treaty Arbitration.

We are invited to give some practical and useful suggestions with an aim to provide global perspective to the Indian business community.

The topic for this sessions is "Rise in Investment Treaty Arbitration".

The growth in Investment Treaty Arbitration is a source of discussion world over today.

There is a strong belief that the practice of Investment Treaty Arbitration will evolve over a period of time after all Oliver Wendell Holmes said and I quote, "Life of every law is experience".

Despite dissatisfaction and confusion, the use of Investment Treaty Arbitration is growing by leaps and bounds.

The growth in number of investment arbitration cases co-relates to the signing of the first international investment agreement which goes back to about 25 years.

Through mid 2014 approximately 550 known Investment Treaty Arbitrations have been initiated. Cases not involving ICSID arbitration, if not brought to the notice of the public, may even escape their knowledge and therefore, the number may be even larger.

Although, it is difficult to keep international dispute a secret, but there is a good chance that this may happen. Therefore, from 100 odd known investment disputes initiated prior to 1990 there has lately been a significant jump.

It will also be important to mention that the success rate in resolving investment disputes is nearly 67%.

There are a lots of differences between international commercial arbitration and settlement of investment disputes by arbitration. As stated earlier, the investment arbitration became a widely used field of international disputes settlement only when the first bilateral investment treaties were included starting from 1959 and when the World Bank initiated [International Centre for Settlement of Investment Disputes](https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwiQw9LRxNDRAhWCpY8KHdJoA-MQFggZMAA&url=https%3A%2F%2Ficsid.worldbank.org%2F&usg=AFQjCNE85ZA2ZJNBvp9CXg86XhhQN82uYQ&bvm=bv.144224172,d.c2I) (ICSID) Convention in 1965 the major difference between the framework of international commercial arbitration and investment arbitration is that in investment arbitration various treaties of public international law provide the fundamental framework including bilateral investments and multi lateral treaties like ICSID Convention, Energy Charter Treaty, regional instruments like North American Free Trade Agreement (NAFTA) and [Central America Free Trade Agreement (CAFTA)](http://www.citizen.org/Page.aspx?pid=1046).

In investment arbitration the usual issues which arise are somewhat limited. Since the BITs or multilateral treaties contain almost similar protection clauses dealing with expropriation, fair and equitable treatment, discrimination, contracts by umbrella clause. The expertise required by the Arbitrators is acute knowledge of public international law particularly applicable to such protection. Issues like jurisdiction have created a host of opinion in the minds of many of us after learning results of many of decided cases under investment arbitration.

With special reference to India, I need to mention that it was a late entrant into the Investor-State Dispute Settlement (ISDS) mechanism and joined only in 1990s upon the liberalization of its economy India thereafter has actively adhered to the ISDS mechanism as a manner to increase the much required foreign direct investment. India, therefore signed around 83 BITs since 1994 out of which only about 72 were in forced till sometime back. When India entered into the ISDS regime, the ICSID created by the Washington Convention was in existence and had successfully disposed of numerous cases. ICSID is considered as a leading international instrument that deals with international investment arbitration, yet India has consistently taken a stand of not becoming a part of the ICSID regime.

However, recent developments in the field of investment arbitrations show that after the decision of the Tribunal in the case of *White Industries Australia Ltd v. The Republic of India*[[1]](#footnote-2) in the year 2011 where damages were awarded to the Claimant, it caused a big backlash, in terms of a revision of the existing Indian Bilateral Investment Treaty (BIT) model.

In the White Industries Vs. India case, Tribunal held that, pursuant to Most Favoured Nation (MFN) clause in the India-Australia BIT, White Industries could take advantage of the "effective means of investment" obligation found in the subsequent BIT which India had entered into with Kuwait. The Law Commission of India in its 260th Report referring to the amendments to the Arbitration and Conciliation Act, 1996 in August, 2014 also circulated a draft Indian Model Bilateral Investment Treaty after forming a sub-committee a report was presented.

The Law Commission of India showed an opposing view on the BITs within India. Several suggestions on clauses were made and finally a new model BIT was drafted which is a major departure from earlier models as it seeks to provide protection to foreign investors in limited circumstances. It is also true that similar experience as in India were being felt in many other counties South Africa, for instance, has replaced its BIT regime with a domestic law. Ecuador and Indonesia have unilaterally terminated several of their treaties. It is in public domain that, India is seeking to terminate BITs with ABOUT 72 countries, including United Kingdom, France, Germany, Spain and Sweden where notices have been served and the BITs if not already expired will expire soon by March, 2017.

India also suffered a big setback when Permanent Court of Arbitration ruled against Government of India in the case annulment of S-Band Spectrum lease contract between Devas Multimedia Vs. Antrix Corporation (ISRO). The Award held India's expropriation of investment in BIT between India and Mauritius.

As already noted earlier with the experience in White Industries and now in the case against Antrix Corporation, number of foreign investors have served arbitration notices under BITs to Government of India in all about 17 notices have been received against Supreme Court of India's cancellation of 2G Spectrum Licences. Another notice in the case of Vodafone and Cairn Energy with regard to challenge of retrospective decision has also been received.

The following data may be interesting since India was one of the most sued countries in the year 2015. Total number of BITs - 83, total number of known cases - 17, out of which 07 are still pending and 09 are settled. One case has been lost by India. It is also important to note that currently 03 cases are pending where India is home State of the Claimants but since Arbitrations are kept a secret, there may be more.

Therefore, now India is more cautious in extending substantive and safeguards under a new Model BIT. In the new BITs, India seems to be moving from assets based definition of investment to enterprise based one. The rational seems to be to afford protection to only those investments that have an enduring value or benefit and have substantial impact upon Indian economy. There are certain other aspects which India is making an effort to set in like exhaustion of local remedies rule, conspicuous absence of MFN clause and in my opinion the new model BIT is a bit of knee jerk reaction as it will first lower the investor's confidence, secondly, it will pose a road block to negotiation with trading partners. It will impair the protection available to India investors abroad exposing them to highhanded policies of foreign States.

### In conclusion, I wish to state that losing parties will always see fault in the system rather than in their own conduct as said by leading authority of Investment Arbitration namely [Karl-Heinz Böckstiegel. Political](https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwiC0I_d4tDRAhWMQ48KHeVWAsQQFggZMAA&url=https%3A%2F%2Fde.wikipedia.org%2Fwiki%2FKarl-Heinz_B%25C3%25B6ckstiegel&usg=AFQjCNGUq-feHhgXevyOdXCjj-ANK-jDxw&bvm=bv.144224172,d.c2I) and economic changes continuously occur world over, but there is going to be a continuous growth worldwide in investments. Therefore, the investment arbitration is here to stay and grow. There may be more rules and institutions in the future but law firms and Arbitrators will be kept busy in the future whether it is commercial or it is investment arbitration.

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1. *White Industries Australia Ltd. v. The Republic of India*, UNCITRAL, Final Award (30 November 2011) [↑](#footnote-ref-2)