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IN CONVERSATION WITH PROF (DR.) PRABHASH RANJAN

Editor's Note: Mr. Prabhash Ranjan is an Associate Professor with the Faculty of Legal Studies at the South Asian University. He has also been serving as a Professor and Vice Dean at the Jindal Global Law School. He graduated from Delhi University in 2003 and pursued his LL.M at SOAS University, London. He holds a PhD in law from King's College, London. He is an International Fellow at the National Institute of Military Justice, Washington DC. He has been a Visiting Scholar at Brookings India and a Visiting Fellow at the Lauterpacht Centre for International Law, Cambridge University. He was also a member of the team that drafted the 260th report of the Law Commission of India on the 2015 draft Model Indian bilateral investment treaty.

Editorial Board (EB): Your involvement in international trade and investment law has showcased interdisciplinary dimensions by integrating fields like environmental law and intellectual property rights (IPR) law. From your experience, how interconnected do you find these areas, and what guidance would you offer to a student interested in exploring such interdisciplinary perspectives in research?

Prabhash Ranjan (PR): My research work is focussed on international trade and investment law. I have also tried to look at how they have interacted with other areas of law like intellectual property. I think that this is very useful as I often find students unable to build bridges between different subjects they study. Students studying an area like investment arbitration may think of it in silos, unconnected to any area, for instance, commercial arbitration. However, that is not the case. Likewise, International trade law is connected to international investment arbitration. Though the connection may not be very strong, you do have several investment related clauses in WTO and TRIPS agreements. In fact, recently, there is a quest to create an investment facilitation agreement in the WTO committee.

There has to be a connection that has to be drawn. I believe that the reason students are unable to draw such connections is because they have been taught to study the subjects in silos. For instance, when teachers teach trade law, they should be able to draw from economics,

international relations, among others. The students will see links being drawn and that would serve as an example for students to draw connections.

Let me give you an example- Let's say India issues a compulsory license on a medical patent and the company wants it challenged under expropriation. So, under this you have IPR, international trade and investment law in one umbrella. If all this is taught in one class, where linkages are drawn, the student will also be able to draw such linkages. My advice/guidance to students would be to not study subjects in silos. The onus is on the academics to draw such connections, and on the students to pick them up.

Being an academician myself, I understand the pressures of completing the syllabus. But, that cannot be a justification for a failure to demonstrate linkages. Academics can always give extra readings to students. Any student interested in them will definitely benefit from them.

For students, the best way would be to choose a topic and get 3 different perspectives through 3 different people. The experts would talk on the same topic but through a different lens. Students could explore the topics through dimensions different from law. For instance, trade law has economic dimensions. Students interested in trade law could read upon what economists have contributed to the topic, that is one way to go about it.

A student who wants to explore this should see if there's a dimension different from the specific law and find literature on it through data bases. You all have a legal methods course and should follow what is taught there. Identify the topic, find available sources and literature and identify interlinkages amongst streams.

EB: The WTO MC 13 took place recently, and in light of the failed negotiations at Abu Dhabi, how tenable is the affirmation of the Ministerial Declaration in terms of reviving the Dispute Settlement Body?

PR: The crisis at WTO is that the Appellate Body does not exist. It is largely the doing of one country. But that country happens to be the most influential player. The mandate is to have an effective and functional dispute settlement body by the end of 2024. This was reiterated in the Abu Dabhi Ministerial Declaration. To be honest, I do not see the appellate body coming back. As I tell my students, the appellate body is dead. The reason for this is that the US is moving towards "dejudicialization" of international trade relations. It does not want their regulatory conduct (which affects trade) to be scrutinized by any international body.

Interestingly, the WTO was created in a world when neoliberalism was on the high. At that point, it was established that there was only one, unchallenged hegemon, which had just defeated the USSR in the cold war. The belief was that this is how it would go on for a very long period of time. But this got disturbed by the rise of China. As a result, the US does not want its trade actions to be scrutinized. That is the reason the US does not want a functioning appellate body. Therefore, practically speaking, I do not see the dispute settlement body being revived.

EB: What are the alternatives?

PR: One distinct possibility is that there would be a multi-party interim arbitration arrangement ["**MPIA**"], as proposed by the EU, with 20-24 States having currently accepted it.

The other option, which I wrote about, in a paper co-authored by Ms. Anuradha RV (Partner at Clarus Law), is a diluted appellate body, A body without compulsory jurisdiction. Only countries who want to opt for the jurisdiction would be subject to it. Whether this would be acceptable to all countries, I am not sure.

India's opinion is that "If you cannot take US to the appellate body then what's the point of the appellate body?" For some, the MPIA will become popular. For others, it might just be the panel and an appeal into the void. That again, cannot go on for long. So, it will be an unstable and uncertain world.

EB: How do we navigate India's recent inability to successfully enter into BITs with States like the USA and Canada, considering that there are concerns that the current Model BIT is skewed in favour of the host State's regulatory powers? What suggestions would you, as an expert in the field, provide for India to adopt in negotiations of new trade agreements to keep future claims at a minimum?

PR: India's model BIT was adopted in late 2015/early 2016. Eight years have passed and India has managed to sign BITs with Brazil, Belarus, Kyrgyzstan, Taiwan and UAE very recently. The India-Brazil BIT is mostly based on Brazilian model. The rest are not investors in India. This basically means that India has been unable to sign any significant BIT with any significant investors. India knows that its model is not acceptable to most of its treaty partners but I do not think it wants to do anything about it. Unless India departs from its model, I do not think even the UK-India BIT or the EU investment protection agreement would be signed.

India's model is very state centric. It needs to scale down on those. It offers very little protections to investors. You need to give something to the investors. For instance, inclusion of MFN provisions, a provision on Fair and equitable treatment, etc. If these reforms are made, India might be able to sign BITs with significant countries.

The Government believes that "we are the best, everyone will come to us," If it were true, the FDI inflows would not have fallen. The kind of incentives we have to give someone to just assemble, not even build, phones in India, shows how the narrative may not even be true. If it is such a great place to invest, people would come on their own. There would be no need to give such incentives. There is always a difference between a narrative that you build and actual investment. These treaties play a role in bridging the gap. In India, the belief is that even without the treaties, the investment will come. This needs some reality check.

While it is not the investment treaties alone which bring in investments, they play a crucial role. Two empirical studies have shown that India's decisions to unilaterally terminate treatise led to rerouting of investments through countries which already had BITs with India.

EB: In the past, there have been legitimate concerns around arbitrary regulatory action by the Indian Executive. Does India's termination of existing BITs, absent safeguards against such arbitrary actions in its new model, reflect a flawed view of sovereignty?

PR: The fact that you signed a treaty is also an exercise of sovereignty. When you sign a treaty, you surrender to the treaty voluntarily. You may think that this exercise of sovereignty did not yield us the returns we expected, but to call it an encroachment into one's sovereignty would be a different argument. You have voluntarily ceded to ISDS to decide a claim against you. When ISDS does it, you cannot call is an encroachment upon your sovereignty. You cannot have it both ways. To be fair, India is not the only country that has reacted to the ISDS.

India's decision to review its BITs was a good decision, but the manner in which it went about reviewing them was not. What India should have done was that it should have started to renegotiate its BITs with all these countries and then replace the new text with the existing text, rather than unilaterally terminating them and hoping that the investors would sign again.

Now, we are in a vacuum because of this. For instance, if any investment comes from the UK, we have no treaty protection. If any investment goes to the UK, we have no treaty protection.

EB: Given your upcoming chapter on the intersection of BITs and environmental matters, could you provide some insights into your research on this topic?

PR: Investment law and environment are clearly interlinked. There are several disputes under the energy charter treaty, where fossil fuel companies have brought claims against European countries for their climate change related regulatory measures. In my paper, which will appear as a chapter in a book published by Oxford University Press ["**OUP**"], I have looked at India's investment treaties and whether they contain provisions for protecting the environment. Therein, I have divided India's investment treaties into 2 periods – Before 2015 and After 2015.

While I have been critical of the model BIT, one thing it got right is that it contains provisions which allow states to take measures for protection of the environment. If India decides to shut down a coal-based power plant involving a foreign investor, and the investor brings a claim before ISDS – If the claim were to be heard under the older generation (Before 2015) investment treaties, then India would be on a shaky wicket because we do not know how the tribunal would interpret environment protection into the treaty. Those treaties do not have any provisions which recognize India's right to regulate for protection of the environment. But the Model BIT and some of the newer BITs, including the investment chapters in some of India's FTA with Singapore, Malaysia, Korea, etc recognize environment as a legitimate ground for India to deviate from its treaty obligations. In this chapter, what I have tried to show is that the newer treaties provide for better regulatory freedom for environment protection. This becomes very important in light of the Paris Agreement and other international environmental obligations.

EB: What is your opinion on the intricate balance between fair and equitable treatment and the exception of public purpose in international investment arbitration? How do you perceive this equilibrium being maintained, and what factors contribute to its evolution in the context of the contemporary global investment landscape?

PR: If we were to compare the ISDS jurisprudence in the early 2000s and the ISDS jurisprudence in the last eight years, we find a very interesting shift in the jurisprudence on fair and equitable treatment. In early 2000s, any minor regulatory change by the state was presumed to be a violation of the investors' legitimate expectations. This was obviously an onerous burden on the States, in a way asking states to freeze their legal and regulatory systems.

More recent arbitral awards have deviated from this stance. They argue that a balance must be struck between the interests of the investors and the State's right to regulate. To achieve this balance, they have come up with a proportionality test. A change in the regulatory structure

alone does not breach the obligations of fair and equitable treatment. As long as the change is proportionate to the benefit the State wants to achieve, it would not breach the obligations.

Interestingly, in the Cairn Energy case against India, which was a case of a retroactive taxation, the tribunal said that even a retroactive change is okay as long as there are justifiable reasons on public policy grounds. So, this test of proportionality is one way to balance public purpose and fair and equitable treatment obligations.

EB: As an academic and policy contributor, you come from a perspective on the intersection of theory and practice in ADR. Could you discuss how your academic research in ADR has influenced your contributions to policy-making, particularly in the context of drafting the 260th Report of the Law Commission of India on the 2015 draft model Indian bilateral investment treaty?

PR: While I do not know if I can call myself a 'policy contributor,' as an academic, because of my research work on India's international and investment law, there have been quite a few occasions where I could make direct intervention in the discourse. Justice AP Shah, who was the chairperson of the law commission at that point in time, was unofficially asked by Mr. Arun Jaitley, who was the finance minister at the time, to look into the draft model BIT. Justice Shah took up the task and he wanted to constitute a team of experts. Generally, in India, academics are not considered 'experts'. I was surprised to receive a call from the office of Justice Shah because he wanted to meet me, after having read my work. He said he wanted a team constituting members beyond simply partners from law firms. He wanted different perspectives, and not simply those of practitioners. That is how I became part of the committee.

I feel that there are several issues which require deep research. Practititoners may know what those issues are but they do not have the time to research on them as deeply as an academic can. Their research is customized to the needs of their client. The academics can research, without focusing on a client's needs.

For instance, India signed a treaty with EFTA countries, which says that the EFTA countries will 'try' to invest 50 billion dollars in India in the next 10 years. This, however, has been sold as EFTA countries 'will' invest those billion dollars in 10 years. But when I read the fine print is when I found that they will only 'try' to invest. It is an obligation, not of result, but of conduct. These are issues, which practitioners perhaps might not be able to catch.

The law commission report is one instance. The other instance which I can tell you is regarding the parliamentary committee on external affairs, which took up a study on India's BITs. I was invited to report on it as an expert witness. There, I was able to give my critical understanding of the model BIT. To be fair to the parliamentary committee, they were quite open to the criticism. They penned it down in the report and actually told the government to change the model BIT. That is another policy intervention that I was able to make based on my research.

The third one that comes to my mind are the dispute settlement negotiations that I have advised the Ministry of commerce on.

My point is that academicians have a very different perspective. The system, however, does not give them many options. In another paper, which is published by the Cambridge International Law Journal, I looked at the people India has nominated to International bodies like the ICJ, ITLOS, ILC, the WTO Appellate Body, etc. Most of them were retired judges or bureaucrats, barring maybe Professor Bimal Patel. There seems to be something in India's mitti which tells the policy makers that academicians are good for nothing. This I think should change.

EB: As an educator, what do you think should be the key elements of ADR education and training for law students who aspire to specialize in international investment law and international investment arbitration? Are there any specific reforms or innovations in ADR that you believe could significantly impact the field of international investment law?

PR: First, I think Investment arbitration should not be taught as just the last chapter in a commercial arbitration book. It should be taught as a separate subject.

Second, since my background is more from a Public International Law ["**PIL**"] perspective, rather than arbitration, I advocate for strengthening the PIL course and curriculum as very important. Most students do not take PIL seriously due to the belief that it will not fetch them jobs. That is a wrong perception to have. No one subject will fetch you a job. They will get their jobs based on their analytical skills and knowledge. Knowledge cannot be restricted to just one topic.

Third, offering more electives on International economic law, where Investment law can be one of them.

So, looking at investment law solely from ADR prism may not be sufficient. It has a life of its own. It needs to be nested within the nest of PIL.

EB: Any specific reform you would suggest?

PR: On reform that comes to my mind is that there were two Delhi High Court decisions stating that Arbitration and Conciliation Act does not apply to investment treaty arbitration. Now, this has a created a controversy relating to which law applies to enforcing an ISDS award in India. Would such award be enforced through the Civil Procedure Code? That would be a nightmare. This reform is very critical. We need a clarification, either through the Supreme Court or an amendment through law that the Arbitration and Conciliation Act applies to investment treaty arbitration. In my opinion, the better reform would be an amendment by the Parliament, adding a separate chapter or section providing that the Act extends to investment treaty arbitrations.

EB: Considering your highly enriching academic contributions in international arbitration alongside international trade and investment law, what advice would you give to a law student who is interested in writing on such niche topics? What is a good starting point for them?

PR: My first advice would be to read as much as you can before you start to write. I often see people think that I am discouraging students from writing. But, I am not. I always want my students to read first. How will you write if you have not read? Read deeply. Only when you do this is when you will be able to identify the niche, unresearched and unexplored areas. The identification of niche areas could be jurisdiction specific, i.e., specific to India.

The identification of a niche and writing would truly depend on what you want to achieve through your piece. It could be a policy intervention, a theoretical intervention, etc. For a policy intervention, a country specific niche would be more useful. For a larger theoretical intervention, identifying a global niche would be more useful. The objective should never be just to publish a piece for the CV. It must be beyond that; how my intervention would help, and contribute to the discourse.

EB: What would you recommend to students aspiring to pursue a career in academia, particularly with a specialization in arbitration, especially investment arbitration?

PR: My advice to students who want to enter academia is first, pursue a LLM and a PHD. Do not enter academia without one. Second, you cannot think of entering academia with just one subject in mind. Keep your options open and be ready to teach other subjects. In fact, this will also help you draw connections between different subjects. In such situations, you teach the

subjects assigned to you and the offer electives based on your research. Third, understand that academia may be challenging, especially in India. You may be inundated with teaching and may not find time to research. Academicians are not merely teachers; they must also be researchers. University professors are not merely to disseminate knowledge. They must also be able to produce knowledge. You will have to find time to research and publish, if you want to make a name for yourself and contribute to the discourse.

EB: About a PHD, not everyone may not have the financial situation to be able to do one. Can they not be successful based on their research alone?

PR: There are certain mandatory requirements. While you can become an assistant professor with a LLM, you cannot move up the ranks without a PHD. It is possible to be successful, but your career could be stagnant without one.

I did my LLM, taught at NUJS for a year and then went to get my PHD. But now when I look back, I think it would have been better if I had done my PHD right after my LLM. But I agree that financial resources may get in the way of students' attempting to get a PHD. But one may do a PHD from India, which would impose a significantly lesser financial burden, when compared to getting a PHD from abroad.