

Kluwer Arbitration Blog

Global Perspectives on Teaching International Investment Arbitration: The Challenges of Teaching International Investment Arbitration in India

Prabhash Ranjan (South Asian University) · Monday, July 31st, 2023

I have been teaching international investment arbitration (IIA) in India for the last 15 years with a focus on its substantive principles contained in numerous bilateral investment treaties (BITs) and the investment chapters of free trade agreements (FTAs). I have taught at the following Indian law schools/universities: the National University of Juridical Sciences (NUJS), National Law University Jodhpur, Jindal Global Law School, and South Asian University. The journey has been riveting and demanding. In this post, I discuss some of the challenges I have faced teaching IIA in India. I classify these challenges into three parts: institutional, academic, and diversity. While there are several challenges, I pick these three because they are fairly representative of challenges other academics may face in the Global South including India and South Asia.

Institutional Challenges

One of the foremost institutional challenges I faced when I started teaching IIA in 2007-08 at NUJS was the lack of adequate reading materials such as the absence of core textbooks on the subject and journals in the university's library. The lack of textbooks and reading materials can seriously impede the ability of first-time learners to grasp a subject. The reason for the lack of reading materials was two-fold. First, IIA was a new kid on the block. Such a course had not been taught before and there was no teaching history or academic legacy to build on. Thus, the library had never procured IIA-related reading materials. Second, most textbooks on IIA are published by Europe or North America-based publishers including university presses, which, in turn, makes these books too expensive for the libraries and students of the Global South. You rarely get a South Asian or an Indian edition. Ditto with scores of academic journals. Given the shoestring budget of most public universities in India, it is not easy to procure such books. For example, I had to put in effort to convince the NUJS library to even procure one copy of the 2008, first edition of Rudolf Dolzer and Christopher Schreuer's 'Principles of International Investment Law' for almost 50 students. Although over the years things have improved, the lack of quality reading materials continues to haunt the teaching of IIA in India.

Another key institutional challenge has been the missing academic legacy or vibrant teaching and research culture in the field of international law in Indian law schools. Unlike domestic law, which is seen as a passport to a flourishing litigating or practising career in a law firm, international law is

not perceived as something that will fetch a job easily within India. Consequently, international law and its various aspects are often given less emphasis. This, of course, does not mean that Indian students are not interested in studying international law. Indeed, they are interested and have also done well in this field, including by winning prestigious moot court competitions on international law. But the interest and achievements of a few students cannot mask the larger institutional failure to mainstream international law teaching. This, in turn, spoils the field to teach specialized courses on international law such as IIA. Thus, in my IIA classes, I often must spend a lot of time explaining the basics of treaty interpretation, custom, sources of international law, and other such elementary concepts of international law to students. A professor in a Global North classroom might take many of these things for granted.

Academic Challenges

A major academic challenge I have faced in teaching IIA is how to pitch it to students and to academic administrators. Given the huge popularity of courses on international commercial arbitration (ICA) largely because of the belief that studying ICA will help students to obtain lucrative jobs, the dominant mindset is to approach IIA as just another variant of commercial arbitration. Often students ask me whether studying IIA will help them get a job in a leading Indian law firm that has an arbitration practice. Unlike the law firms in London or Paris, Indian law firms do not do much work on IIA except if India is involved in a treaty arbitration. Indian law firms haven't reached the level where they can attract foreign investors or States as their clients for regular investment treaty arbitration proceedings or work. When I tell them that the course on IIA will focus more on the substantive principles rooted in international law, and not so much on procedural issues pertaining to arbitration, it reduces the draw of the course for them. Nonetheless, I have been fortunate to get good students for my IIA course across universities. Partly, this has been possible because their interest had been sparked by the numerous IIA claims brought by foreign corporations against India in the last decade or so.

A daunting challenge is to convince academic administrators of law schools that IIA is not a mere extension of ICA. The dominant belief amongst academic administrators is that IIA is part of commercial arbitration and thus falls under the rubric of 'commercial' or 'private law' courses. The failure to mainstream international law teaching is responsible for this thinking. Moreover, the entire approach to teaching international law in India is to limit the syllabus to core topics like the United Nations Charter, international humanitarian law, the law of the sea, etc. Studying the legalization of international economic relations that spring from flows of international trade and foreign investment has generally not been on the radar of international lawyers in India, though things are changing now.

It is for this reason that in my teaching, I lay a great deal of focus on how IIA while sharing some commonalities with ICA, is a very different animal. Gus Van Harten's [work](#) on investment treaty arbitration and public law is extremely handy in this regard. My experience has confirmed that students can appreciate this critical distinction well and, at the end of the course, are fully equipped to see where IIA lies in the broader global arbitration landscape.

Another key academic challenge I face, and I am sure this one cuts across geographies, is how to structure the IIA course to make it as comprehensive as possible keeping in mind that it is a semester-long course to be taught in around 50 hours over 13 weeks. As stated above, the focus of

my course is on the substantive principles of IIA and thus enables a first-time learner to understand key concepts pertaining to jurisdiction, treaty protections for investors, and dispute settlement. However, over the years, IIA's interface with many non-investment concerns such as public health, climate change, national security, taxation and other fiscal policies, corruption, etc. has increased. While some of these encounters between IIA and non-investment concerns get captured in the discussion of issues like expropriation and fair and equitable treatment, it is not enough. Given the paucity of time and the need to prioritize the understanding of key concepts over such policy debates, I am not able to do full justice to the challenges that IIA's close encounter with non-investment concerns poses. As a remedial step, I am contemplating starting a new course on 'Investment Arbitration and Non-Investment Concerns', which will build on the knowledge imparted in the IIA course.

Diversity Challenge

I undertook my LLM and Ph.D. in London. Apart from rich intellectual resources and a well-endowed library and research infrastructure, I greatly benefitted from two kinds of diversities. First, the classroom diversity, that is, the presence of students from all over the world in the class. These students contributed their own national perspectives thereby enriching the course and enhancing the understanding of the material by the group as a whole. I am sure these varying perspectives also enriched the professor, not just the students. Second, ideological diversity in London or in British academia, that is, the presence of a critical number of teachers teaching courses on IIA or on related subjects brought different perspectives, mainstream and critical, to understand IIA. These viewpoints came about in seminars and conferences that students attended. This ideological diversity exposes students to varied viewpoints, thus enriching their discussion.

In India, both these diversities are missing. The classrooms are overwhelmingly Indian. At South Asian University, there are a few students from countries like Nepal, Bangladesh, Bhutan, Sri Lanka, etc. However, they are by far outnumbered by students from India. This makes the classroom space less diverse in terms of nationality. Furthermore, the fact that a small number of people teach courses on IIA, despite India having close to 1700 law schools, makes the IIA universe less stimulating and with scant prospects for well-informed ideological debates or deliberations on different doctrinal and empirical aspects of IIA. This lack of diversity affects the teaching of IIA.

Conclusions

In sum, IIA is a new and emerging field for students of Global South countries like India. While things have improved from what they were 15 years back when I started teaching this course, there is still a lot to accomplish. A vibrant teaching culture in IIA also depends on the quality of research in the subject in a particular jurisdiction and how academics can generate ideas that stimulate students. Countries like India need well-trained lawyers in subjects like IIA to shape the international economic order that takes on board their imperatives. Thus, Indian law schools need to invest massively in developing their capacity to teach and research in IIA.

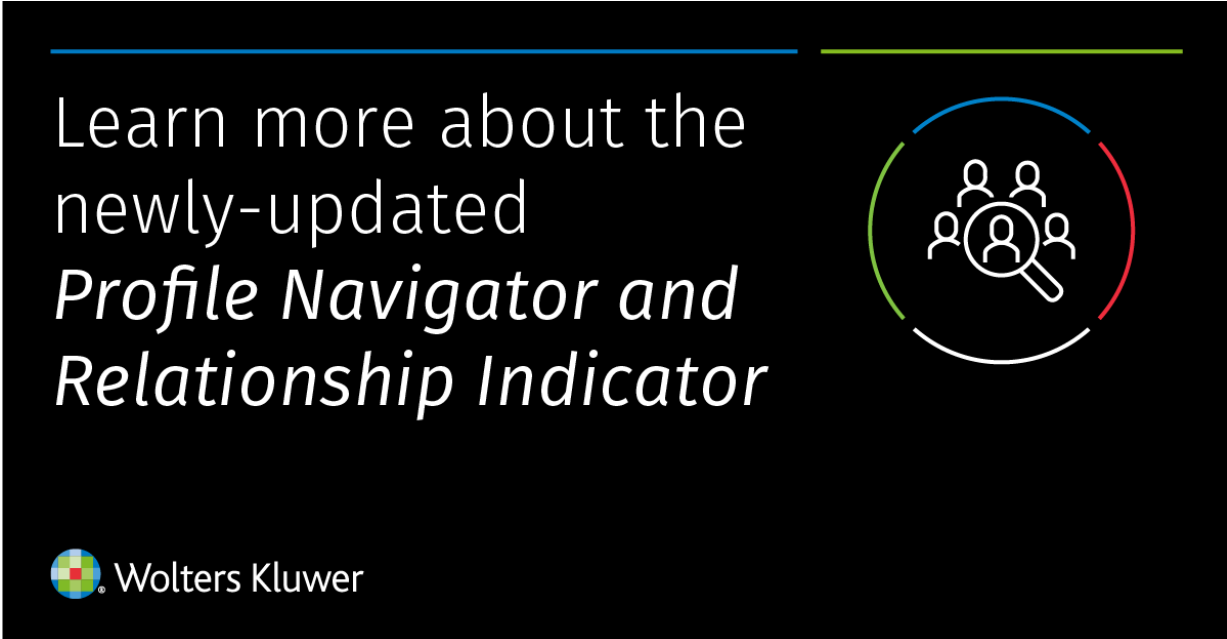
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