

IN CONVERSATION WITH DR. KABIR DUGGAL



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Editor's Note: Dr. Kabir Duggal is a Partner at Akin Gump Strauss Hauer & Feld LLP, in their international arbitration practice, based in New York. He is also a Lecturer-in-law at Columbia Law School, and a Senior Fellow and Advisor at the Center for International Commercial and Investment Arbitration at Columbia. He was also an adjunct professor at Fordham Law School, and has been a visiting professor to the Durham Law School, University of São Paulo, Universidad de Los Andes, Universidad Externado de Colombia and National Law University, Jodhpur.

He is internationally recognised for his extensive experience as counsel in complex, high-stakes investor-state and commercial arbitrations, across the energy, infrastructure, mining, telecommunications, financial services, construction and telecom, media and technology (TMT) sectors. He has also served as an arbitrator and mediator in several disputes, spanning a broad range of industries.

Dr. Duggal is also a prolific scholar and widely cited authority in international arbitration and investment law, with a presence on the editorial boards of recognised journals. He also engages in arbitration policy, serving as a Consultant to the United Nations Office of the High Representative for Least Developed Countries, on the creation of the Investment Support Program. He also works closely with the United States Department of Commerce's Commercial Law Development Program. He has prior public international law experience, including work with the World Bank Group, UNICEF. He had also served as a clerk to a judge of the Supreme Court of India.

Editorial Board [“EB”]: With a career as illustrious as yours, you get to sit as both counsel and arbitrator in different matters. How do you manage that dual role? Does being a counsel make you a better arbitrator, or the reverse?

Dr. Kabir Duggal [“KD”]: That is a question I am asked quite often, and I have come to think that the two roles are complementary, provided one is disciplined about keeping them entirely separate. When I sit as arbitrator, my only responsibility is the integrity of the process and to deciding the dispute on the facts and the law. When I act as counsel, my responsibility is to advance my client’s case as effectively and ethically as possible. Those are different responsibilities, and they require different mindsets. What I have found however, is that each role makes me better at the other. Acting as counsel gives me a healthy appreciation of the commercial realities that parties face, the strategic decisions lawyers make under pressure, and the practical consequences of procedural decisions. Conversely, serving as arbitrator has made me a more thoughtful advocate. It has reinforced the importance of clarity over volume, precision over rhetoric, and credibility over advocacy for its own sake. One quickly learns that tribunals remember the lawyer who assists them in reaching the right answer, not simply the one who speaks the longest.

Perhaps the greatest lesson from moving between the two roles is humility. Every dispute has at least two plausible narratives, and sometimes more. Sitting on both sides of the table is a constant reminder that what appears obvious from one perspective can look rather different from another. That experience encourages careful listening, intellectual curiosity, and a willingness to question one’s own initial assumptions before reaching a conclusion.

EB: Your work is quite diversified, including areas such as energy, infrastructure, mining, and TMT disputes, each of which have different technical demands. Is there a sector where you find fact-finding or expert evidence particularly difficult to referee as arbitrator?

KD: One of the pleasures of international arbitration is that no two cases are ever quite the same. I have worked on disputes involving energy, mining, infrastructure, telecommunications, and technology, and I would hesitate to say that one sector is inherently more challenging than another. The technical subject matter certainly changes, but the arbitrator’s role does not. We are not appointed to become engineers, geologists, or economists. We are appointed to ask the right questions, understand the evidence well enough to evaluate it, and ultimately decide the legal issues before us. In my experience, the more difficult cases are not necessarily those with the most technical evidence, but those where expert evidence risks overshadowing the real dispute. The challenge is to distinguish between what is genuinely necessary to resolve the issues and what is simply interesting background. A good expert should educate the tribunal rather than advocate for

a party. The most persuasive experts I have encountered are often those who are candid about the limits of their opinions and willing to acknowledge uncertainty where it exists.

Perhaps that is why I enjoy technically demanding arbitrations. They are intellectually stimulating and require the tribunal to learn continuously. Every case is an opportunity to explore a new industry, a new technology, or a new way of thinking. That constant learning is one of the aspects of international arbitration that I have found most rewarding, and it is one of the reasons the practice continues to be as engaging today as it was when I first entered the field.

EB: The literature on the subject, including your work of *“Evidence in Investment Arbitration”* points out that investor-state tribunals often import evidentiary practices without examining their basis in public international law. What, according to you, would be the clearest example that you have seen of a tribunal getting this wrong?

KD: I would hesitate to say that tribunals routinely “get it wrong.” Investment arbitration has evolved through an extraordinary body of jurisprudence, and tribunals are often dealing with novel procedural questions for which there is no single correct answer. If I were to identify one area where there is room for further development, however, it would be the tendency to rely on evidentiary practices because they have become familiar, rather than because their legal foundation has been fully articulated.

Investment arbitration is neither purely commercial arbitration nor classical interstate adjudication. It occupies a unique place within public international law. Yet awards sometimes adopt concepts relating to burdens of proof, adverse inferences, document production, or witness evidence without explaining whether those principles derive from public international law, the parties’ agreement, comparative procedural practice, or simply arbitral discretion. My view has always been that tribunals should be more explicit in that reasoning. Doing so would not only enhance the coherence of the jurisprudence but would also make awards more persuasive, particularly for States and investors seeking to understand the legal principles that govern the arbitral process.

EB: Do you think the International Bar Association [“IBA”] Rules on the Taking of Evidence still serve the field well, or are they due for revision given how much investor-state practice has diverged from commercial arbitration?

KD: The IBA Rules on the Taking of Evidence have undoubtedly made an important contribution to international arbitration by providing a common procedural framework that parties and tribunals from different legal traditions can work with. In full disclosure, I had the privilege of participating in the most recent revision process, which underscored how carefully the Working

Group considered the evolving needs of both commercial and investor–state arbitration. At the same time, no soft law instrument should be viewed as static, particularly in a field that continues to develop as rapidly as investment arbitration.

That said, it is equally important not to lose sight of what the IBA Rules are designed to be. They are voluntary guidelines, not mandatory procedural rules. Their effectiveness lies in the considerable discretion they preserve for tribunals and, above all, in their respect for party autonomy. In my view, any future revisions should continue to refine the Rules where appropriate without compromising those fundamental characteristics, which have been central to their widespread acceptance.

EB: Your recently published paper titled “*Jurisprudential Drift in International Investment Law: From the Minimum Standard to Fair and Equitable Treatment*” reassesses the meaning ascribed to FET against its original conception, partly due to the jurisprudential drifts. Where do you think tribunals have drifted furthest from what states actually intended when they included the standard in early treaties, and in your opinion, how important is this shift?

KD: The question is one I have spent a number of years thinking about, both in practice and through my doctoral research at Harvard Law School, which examined the historical origins of the Fair and Equitable Treatment standard through archival records. One of the observations that emerged from that work is that we often read today’s jurisprudence through the lens of modern investment law, whereas the earliest treaty practice was shaped by a rather different legal and historical context. As the jurisprudence has developed, FET has gradually acquired a breadth that was not always reflected in the way States originally understood or articulated the standard.

That should not necessarily be viewed as a criticism. International law evolves, and tribunals inevitably interpret treaties against changing factual and legal landscapes. The more interesting question, in my view, is whether we are sufficiently attentive to the standard’s origins when considering its future development. Understanding where FET came from does not dictate where it must go, but it provides an important anchor for interpreting existing treaties and for helping States draft the next generation of investment agreements with greater precision and predictability.

EB: Having trained governments like Colombia, Saudi Arabia, Myanmar, and the Philippines on treaty negotiation, what is the most common gap you find in how ‘capital-importing’ states approach treaty drafting compared to how ‘capital-exporting’ states do?

KD: One of the things I have learned from working with governments across different regions is that the distinction between ‘capital-importing’ and ‘capital-exporting’ states is becoming less meaningful than it once was. Many capital-importing States today have highly sophisticated legal teams and are deeply engaged with developments in international investment law. The challenge is therefore rarely one of legal capability. More often, it is one of institutional capacity, of having sufficient time, resources, and coordination across ministries to translate policy objectives into precise treaty language.

Perhaps the most common lesson is that treaty drafting should begin with policy rather than precedent. It is tempting to start with the text of an existing treaty and negotiate from there. In my experience, the more effective approach is to ask a series of fundamental questions first: What types of investment is the State seeking to attract? What degree of regulatory flexibility does it wish to preserve? How should investment protection be balanced against environmental, public health, or development objectives? Once those policy choices are clearly defined, the drafting exercise becomes considerably more coherent. Good treaties are rarely the product of better drafting alone, rather they are the product of clearer policy choices.

EB: You have also written on reforming investment law to align with climate objectives. Do you see the current Investor State Dispute Settlement [“ISDS”] mechanisms acting as an obstacle to this energy transition, or as necessary protections to attract the capital it requires?

KD: There is no doubt that ISDS has come under increased scrutiny in the context of the energy transition, and that scrutiny has been both inevitable and, in many respects, constructive. It has encouraged States, practitioners, academics, and arbitral institutions to reflect on whether investment law remains appropriately calibrated for today’s challenges. In my view, however, the debate should not be framed as one between investment protection and climate action. Both are indispensable. The energy transition will require unprecedented levels of private capital, while States must retain sufficient regulatory space to pursue legitimate climate and environmental objectives.

The more important question is therefore whether our legal framework is evolving in step with those realities. Many first-generation investment treaties were negotiated long before climate change became a central feature of international policymaking. As treaty practice continues to evolve, States are expressing with greater precision how they wish to balance investment protection with regulatory authority. Tribunals, in turn, should continue to interpret those treaties in accordance with established principles of international law, taking account of the treaty text, its

object and purpose, and, where appropriate, the broader framework of public international law. That, in my view, is how investment law can continue to provide legal certainty while remaining responsive to one of the defining policy challenges of our time.

EB: In your opinion, how should tribunals treat a state's climate regulation when an investor claims that it amounts to indirect expropriation of a fossil fuel asset?

KD: I would be reluctant to answer that question in absolute terms because these disputes are invariably fact and treaty-specific, and as an arbitrator one must avoid approaching them with predetermined conclusions. What I would say is that climate regulation raises issues of profound importance, not only for the parties before the tribunal but also for the broader international community. Those issues deserve to be treated with the seriousness and care they require.

From a legal perspective, tribunals should begin with the treaty text, but they should also be mindful that investment treaties do not exist in isolation from the broader framework of public international law. Particularly in the case of older-generation treaties, principles of treaty interpretation, including systemic integration under Article 31 (3)(c) of the Vienna Convention on the Law of Treaties, may assist tribunals in interpreting investment obligations consistently with other relevant rules of international law where appropriate. That does not mean rewriting treaties or diminishing investment protection. Rather, it means recognizing that international law is an integrated legal system. A careful, principled analysis of the treaty language, the purpose and effect of the regulatory measure, its proportionality, and the broader legal context is more likely to produce decisions that are both legally rigorous and institutionally credible.

EB: You have had a tremendous journey as a scholar who started in law at the oldest law school in Asia (Government Law College, Mumbai) and moved onto being a doctoral candidate at the prestigious Harvard Law School. Could you reflect on it for our young readers who are looking up to you not only as an arbitrator but also as a meticulous student of law?

KD: I have been extraordinarily fortunate to study and work in very different intellectual environments, beginning at Government Law College, Mumbai, and continuing through Oxford, New York University, Leiden, and Harvard. Looking back, what strikes me most is not the institutions themselves, but how each challenged me to think differently about the law. Every stage of that journey reinforced the idea that there is rarely a single “correct” way to approach a legal problem. Exposure to different legal traditions, academic cultures, and mentors has probably shaped my thinking as much as any particular degree or qualification.

One lesson I have come to appreciate is that expertise is not measured by how much one knows, but by how willing one remains to keep learning. International arbitration is a particularly humbling field because every case introduces a new industry, a different legal system, or a novel question of international law. That is one of the reasons I continue to teach, write, and engage with students and younger practitioners. Teaching is not simply about passing on knowledge; it is one of the best ways of testing and refining one's own thinking. I have often found that the most insightful questions come not from seasoned practitioners, but from students who are unencumbered by assumptions. Those conversations have undoubtedly made me a better lawyer, arbitrator, and scholar.

For younger lawyers, my advice would be to invest in substance rather than appearances. It is tempting to measure progress by titles, rankings, or the next professional milestone, but those things tend to follow rather than lead. Read widely, remain intellectually curious, seek out mentors who challenge you rather than simply encourage you, and remember that your professional reputation is built one interaction at a time. In the long run, people may forget a particular argument or publication, but they rarely forget integrity, generosity, sound judgment, or genuine kindness. Those qualities are every bit as important as technical excellence.

EB: How exciting do you find your work as one of the leading professionals in the Global Arbitration Practice? What advice would you give our young readers who wish to make a career in the Arbitration Practice?

KD: What continues to excite me about international arbitration is that it never becomes routine. Every dispute brings together a different legal system, a different industry, different cultures, and often questions that have not previously been answered. It is one of the few areas of practice where law, economics, politics, technology, and public policy regularly intersect. That means there is always something new to learn, and I think that intellectual curiosity is what has kept me engaged throughout my career. I have also been fortunate to work with remarkable clients, colleagues, arbitrators, and students, all of whom have challenged my thinking in different ways.

For those considering a career in arbitration, my advice is to focus less on arbitration itself and more on becoming an outstanding lawyer. Build a strong foundation in contract law, public international law, private international law, civil procedure, evidence, and advocacy. Read widely beyond the law - economics, history, political science, and even engineering or finance can prove invaluable depending on the dispute. Just as importantly, invest in your reputation. International arbitration is a relatively small community, and people remember professionalism, reliability, kindness, and intellectual honesty. Your technical ability may open doors, but your judgment,

integrity, and how you treat others will determine whether those doors remain open. I have found that the most respected practitioners are often the most generous with their time, and I hope the next generation will continue that tradition.