Analytical Note on ISDS Reform from a Knowledge Perspective

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Abstract: The effectiveness, fairness and legitimacy of the Investor-State Dispute Settlement (ISDS) mechanism is the hallmark of a trust-based and justice-oriented legal framework for international investments. The jurisprudential and institutional implications of inconsistent decision-making processes in the ISDS mechanism have led to disagreements and geo-political cleavages among various States in the contemporary context. This is also because of the main concerns in the ISDS framework about sovereignty and regulatory chill, inconsistency of the awards, knowledge asymmetries between the developed and the developing world. The article examines the most relevant scholars' contributions and the jurisprudence relating to investment disputes in order to point out the weaknesses of the actual ISDS system and to propose possible solutions, with a special attention to substantive reforms. These solutions are proposed on the basis of a knowledge perspective approach aiming to guarantee developing countries fair treatment and real possibilities of further development.

Keywords: investor-state dispute settlement; knowledge perspective; institutional reforms; right to development; developing countries.

1. *Introduction*

Investor-State Dispute Settlement (ISDS) as a method of international arbitration is one of the key issues attracting criticism in contemporary legal as well as economic scholarship. The lack of public trust and support in ISDS has led to the formulation of a political consensus among many states as well regional organisations that edges towards reform in the process of the settlement of disputes relating to international investment[1]. This paper takes the critique of the ISDS format and looks at it from the perspective of international development, aided by the concept of knowledge – flows and exchange.

The article opens with a descriptive picture of the main criticisms addressed to the ISDS system. It argues that these problematic aspects are more pressing with reference to developing countries because in their regard they may give rise to an infringement of the principle of fair and equitable treatment. The so-called *regulatory chill* indeed impairs the capacity of a state to issue regulation in the public interest. Further, the claim that the ISDS framework may have positive spill over effects on the growth of the developing countries' legal systems proves to be false. It is then suggested (section 4.) that many of these drawbacks for the developing countries originate from a situation of knowledge asymmetric, compared with the one owned by developed states, or are aggravated by the latter. This section elaborates on the importance of curating and utilising legal knowledge generated

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1. See Cecilia Malmstromm, *Investment Court System: New System for Resolving Investor-State Disputes in TTIP* (September 2015), available at https://www.youtube.com/watch?v=w_uR9cFzhjs (last visited November 21, 2020).

during the settlement of investment disputes and hint towards the formation of an international consensus over the adjudication of international investment disputes. Knowledge indeed has the power to consolidate existing power structures as the analysis of several piece of ISDS jurisprudence demonstrates. Finally, section 5, explores some of the reform prospects for the ISDS framework giving a renovated and central role to the Right to Development as enshrined in United Nations General Assembly Resolution of 4 December 1986.

2. *Preliminary Remarks on ISDS*

In order to contextualise ISDS in contemporary international law some preliminar considerations could be important. The International Centre for Settlement of Investment Disputes (ICSID) is the leading institution for ISDS and provides guidelines for the arbitration of International Investment Agreements (IIAs). ICSID was established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), a treaty between 153 signed and ratified contracting states that first entered into force on October 14, 1966. ISDS was originally created to provide safeguards to investments from developed countries coming into developing countries, which were characterised by a relatively weaker legal system while recent trends in the data indicate that investors are increasingly arbitrating against developed countries[2]. Newly registered cases in 2015 included 37 percent from Western European, 23 percent Eastern European and Central Asian, 15 percent Sub-Saharan African, and 11 percent Middle Eastern and North African countries[3]. This suggests a clear evolution in the function of ISDS as more than a simple method of investment protection in the absence of sound domestic legal frameworks.

2. See Christoph H. Schreuer, et al., *The ICSID Convention: A Commentary* at 416 (Cambridge University Press 2nd ed. 2009 [2001]).

3. International Centre for Settlement of Investment Disputes, The ICSID Caseload-Statistics at 24-25 (2016), available at https://icsid.worldbank.org/sites/default/files/publications/Caseload%20Statistics/en/ICSID%20Web%20Stats%202016-1%20%28English%29%20final.pdf (last visited November 21, 2020).

Moreover, it seems to be more – and other – of a simple investment incentive mechanism, too[4]. In fact, Professor Martti Koshkenniemi opined that the existence of ISDS is of no relevance to the attraction of foreign direct investments and executives may not be factoring in ISDS at all, while making decisions of investing or not[5]. In addition, whether Bilateral Investment Treaties (BITs) really increase foreign direct investments inflows has been the central question in several studies by researchers, too; and more than one concluded that the existence of BITs is of little consequence to the investment decisions of companies[6].

The consideration that ISDS systems do not just ensure more safeguards for investors but promote better democracy and good governance standards as common externalities has been recently reconsidered. Part of scholars still recognised these positive effects, as sustained by Christoph H. Schreuer who says that "relevant standards have shown spill-over effects into the domestic systems of the concerned countries"[7]. The provision of free and equitable treatment under ISDS is a bulwark against discrimination, delay and uncertainty

4. See Anna Joubin-Bret and Jean E. Kalicki, Introduction TDM Special Issue on "Reform of Investor-State Dispute Settlement: In Search of a Roadmap", 11(4) Transnatl Disp Mgmt 1 (2014), available at https://www.transnational-dispute-management.com/article.asp?key=2023 (last visited November 21, 2020). See also Rebecca L. Katz, Modeling an International Investment Court After the World Trade Organisation Dispute Settlement Body, 22 Harv Negot L Rev 163, 188 (2016).

5. See Martti Koshkenniemi and Greens Efa, *Investor-State Dispute Settlement (ISDS) in EU Law and International Law* (2016), available at https://www.youtube.com/watch?v=OkqUYFoRG8U (last visited November 21, 2020) (he is talking in a conference on ISDS in EU Law and International Law organised by Greens Efa. It must be noted here that he is arguing in the context of European and American legal systems which he says are the most developed in the world. However, it is evidence to the fact that FDI attraction is not an absolute function of ISDS or even has a direct correlation to it).

6. See Nicolette Butler and Surya Subedi, *The Future of International Investment Regulation: Towards a World Investment Organisation*, 64 Nl Intl L Rev 43, 46 (2017).

7. Christoph H. Schreuer, *Do We Need Investment Arbitration?,* 11(1) Transnatl Disp Mgmt 1, 4 (2014), available at https://www.transnational-dispute-management.com/article.asp?key=2026 (last visited November 21, 2020).

of the domestic courts for the foreign investors, Schreuer argues[8]. Such a provision would help investors, especially Small and Medium Enterprises, to "get away from the vagaries of proceeding through domestic courts"[9]. However, others as Rebecca L. Katz goes on to oppose that ISDS itself functions in vagaries as different tribunals reach different sets of conclusions based on the same facts giving not more guaranties in term of consistency and predictability[10]. Moreover, there are no evidence supporting ISDS systems have positive effect in terms of democracy and governance development.

3. *Jurisprudential Critique of the ISDS System*

In this context of general reconsideration among scholars of some key elements of ISDS mechanisms have been arose various criticisms. The most relevant seem to be impugned sovereignty, greater rights for foreign investors, homogeneity of arbitrators origin, opacity of the arbitration system and inconsistency of awards.

First and foremost, the concept of state-sovereignty is concerned by the application of ISDS arbitration because of a variety of reasons including but not limited to a broad interpretation of clauses that can cause *regulatory chill* effects. In fact, these clauses potentially prevent states issuing regulations or passing legislations in public interest because they might lead to legal exposure in the ISDS format. The root of this issue lies in the fact that ISDS was intended to safeguard private

8. See *id*. at 10 ("In many countries there is no independent judiciary. Even where courts are independent, in principle, their decisions are often influenced by national loyalties. When measures adverse to foreign investors are taken by way of domestic legislation, the courts are usually unable to be of assistance to foreign investors even if they were disposed to do so").

9. See *ibid.*

10. See Katz, *Modeling an International Investment Court* at 163 (cited in note 4). Compare also ICSID ARB/03/9, *Continental Casualty Company v. The Argentine Republic* (September 5, 2008), with ICSID ARB/01/3, *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic* (May 22, 2007). See also ICSID ARB/01/8, *CMS Gas Transmission Company v. The Republic of Argentina* (May 12, 2005); ICSID ARB/02/16, *Sempra Energy International v. The Argentine Republic,* (September 28, 2007); ICSID ARB/01/3*, Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, Decision on Application for Annulment of Argentine Republic* (July 30, 2010).

investment in regions with weak rule of law from extreme cases of mob violence or nationalisation of industries. However, it is now at risk being abused in various ways wherein almost any regulation – environmental, health related, fiscal or otherwise made in public interest – can be considered grounds for a suit under ISDS as it may potentially hurt the profits of private investors in the region[11].

Katz substantiates this argument by citing the infamous case of *Tecnicas Medioambientales Tecmed, S.A. v. United Mexican States* where Mexico had to pay in damages when it refused to renew the foreign claimant's license to operate an hazardous waste landfill which was found to be a breach of fair and equitable treatment[12]. Many such cases like *The Renco Group, Inc. v. The Republic of Peru*[13], *S.D. Myers, Inc. v. Gov't of Canada*[14], *Saluka Investments v. Czech Republic*[15], *CMS Gas Transmission Co. v. The Republic of Argentina*[16] and *Eureko B.V. v. The Slovak Republic*[17] have been awarded in favour of the investor, finding the breach of fair and equitable treatment whenever the state engaged in policy activity in public interest. This effectively risks making the state and its functions a footnote to the profit interests of private investors[18]deepening knowledge and development asymmetries between countries.

A further criticism of the ISDS system was the likelihood of foreign investors demanding greater rights as against domestic investors by the host state. For example, in *Quasar de Valores SICAV S.A., et al. v.*

11. See Charles N. Brower and Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law*, 9 Chi J Intl L 471, 474 (2009).

12. See ICSID ARB (AF)/00/2, *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States* (May 29, 2003). See also ICSID ARB (AF)/ 97/1, *Metalclad Corp. v. The United Mexican States* (August 30, 2000) (awarding Metalclad Corp. damages for Mexico's refusal to permit the expansion of a hazardous facility).

13. ICSID UNCT/13/1, *The Renco Group, Inc. v. The Republic of Peru* (November 9, 2016).

14. NAFTA-UNICITRAL, *S.D. Myers, Inc. v. Government of Canada,* (November 13, 2000).

15. PCA 2001/04, *Saluka Investments v. Czech Republic*, *Partial Award*, (March 17, 2006).

16. ICSID ARB/01/8, *CMS Gas Transmission Co. v. The Republic of Argentina* (May 12, 2005).

17. PCA 2008/13, *Achmea B.V. (formerly Eureko B.V.) v. The Slovak Republic* (December 9, 2012).

18. See Katz, *Modeling an International Investment Court* at 173 (cited in note 4).

The Russian Federation, the arbitration panel found that the clause that foreigners may invoke a higher standard of protection than nationals does not seem extraordinary for reasons as follows:

> For one thing, human rights conventions establish minimum standards to which all individuals are entitled irrespective of any act of volition on their part, whereas investment-protection treaties contain undertakings which are explicitly designed to induce foreigners to make investments in reliance upon them. It therefore makes sense that the reliability of an instrument of the latter kind should not be diluted by precisely the same notions of 'margins of appreciation' that apply to the former[19].

This claim suggesting an idea of greater rights is based on the fact that BITs are designed to induce foreign investment which already has been argued in prior sections to not be the only aim of the deals. However, even in the realm of theoretical international relations, this claim emerges with several problems. Suggesting that the foreign investors' rights against the state may not be diluted like the freedoms of the general population, may be a violation of the customary principle of fair and equitable treatment.

Therefore, in effect clauses similar to the above mentioned accord almost diplomatic level privilege to foreign investors simply on the account of being induced to come due to BITs special protection. There is an inherent problem with that idea, diplomatic privileges or similar are only handed out by the state to sovereign actors of other states and not to non-state actors such as private corporations. Therefore, ISDS in multiple ways becomes a regime that may be not only in violation of customary international law but also the basic political theories of a state[20].

Furthermore, another criticism of ISDS lies in the fact that the community of international investment dispute arbitrators suffers from a genuine lack of diversity. Investment arbitrators above all else

19. SCC 24/2007, *Quasar de Valores SICAV S.A., et al. (formerly Renta 4 S.V.S.A, et al.) v. The Russian Federation* (July 20, 2007).

20. The principle of free and equitable treatment and no expropriation without compensation from the perspective of international tribunals observing these principles.

are generally an elite pool of law professionals[21]. It appears that over 50 percent of ISDS arbitrators have acted as counsel for investors in other ISDS cases, while it has been estimated about 10 percent of ISDS arbitrators have acted as counsel for states in other cases[22]. Moreover, in less than 10 percent of the cases, a female arbitrator is appointed as an arbitrator. More than 90 percent of presiding arbitrators has received their higher education in OECD countries[23]. Michael Waibel and Yanhui Wu in their inquiry of political and other biases among arbitrators use sound econometric modelling and empirical data to conclude that the homogeneity of arbitrators leads to biases in their decision making[24].

This has also to do with another compounded criticism that the ISDS process itself has major issues of transparency. While judges may also suffer from a lack of diversity, they are functioning in open courts as opposed to closed door arbitrations[25]. Any biases reflected in their judgements can and should be scrutinised by civil society. On the contrary, with respect to private arbitrators, their decisions are not met with the same scrutiny and thus get away without having to explain their decision-making process, should it hinge on any such biases. Moreover, public interests and consequently public policy seldom finds its way into ISDS negotiations. Furthermore, certain ISDS policies may even prevent future public scrutiny of the decisions of the arbitration because the publication of case documents or the hearing of the case itself being public is contingent upon the consent of

21. See Jose Augusto Fontoura Costa, *Comparing WTO Panelists and ICSID Arbitrators: the Creation of International Legal Fields*, 1(4) Oñati Soc Legal Ser 1, 24 (2011), available at http://opo.iisj.net/index.php/osls/article/viewFile/63/207 (last visited November 21, 2020). See also Catherine A. Rogers, *The Vocation of the International Arbitrator*, 20 Am U Intl L Rev 957, 958 (2005).

22. See Michael Waibel and Yanhui Wu, *Are Arbitrators Political? Evidence from International Investment Arbitration*, SSRN Electronic Journal, 28 (2017), available at http://www.yanhuiwu.com/documents/arbitrator.pdf (last visited November 21, 2020).

23. See *id*. at 13 (Organisation for Economic Co-operation and Development (OECD) is an intergovernmental economic organisation with 36-member countries. The reference here primarily refers to the highly developed countries that support free market economies).

24. See *id*. at 20.

25. See Katz, *Modeling an International Investment Court* at 176 (cited in note 4).

the parties. Should the parties choose the arbitration to be completely anonymous, they shall be granted that request. This is laid down in the rules of procedure of the ICSID[26].

The lack of transparency in ISDS also prevents civil society organisations (CSOs) to act as *amicus curiae* and submit briefs to the tribunal in order to further democratise the process of the decision. Therefore, the lack of transparency and third-party submissions make the entire process of ISDS less democratic as opposed to previous arguments made by scholars[27] about ISDS processes promoting global governance and democracy.

Finally, ISDS has famously been criticised for coming to different decisions with different parties in cases which seem to share the same facts. In particular, the absence of a *de jure* rule of precedent or at least a set of clear common principles in ISDS decisions makes this jurisprudence even more chaotic and dangerously inconsistent. This can lead mistrust and abuses in ISDS and the lack of clear sets of rules facilitates political influences, too.

Taken as an aggregate, all these issues act as a hindrance for the development of sufficient awareness and tools within the developing world to safeguard its interests. A solution could be to centralize in ISDS evaluation the concept of *knowledge* as a shared, widespread, and worth good. The balance that must be found between stakeholders and investors interests could take into account the flows and exchanges of knowledge (in legal, technological, economic, and social field) in order to ensure the equality between the parts.

4. *Knowledge and Contemporary Investment Arbitration*

The concept of knowledge addresses principally two critiques of actual ISDS systems: knowledge asymmetries and inconsistency[28].

26. See International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1966), art. 48(5); ICSID, *Administrative and Financial Regulations,* reg. 22; ICSID, *Arbitration Rules,* rules 32, 48.

27. See generally Schreuer, et al*., The ICSID Convention: A Commentary* (cited in note 2).

28. See Amika Bawa, *Moving beyond aid agencies, towards knowledge platforms* (unpublished LLM thesis, O.P. Jindal Global University, 2018).

Knowledge asymmetries among countries relates to the production or access of knowledge and inconsistency is a matter of knowledge management. Generally, both further link to the existing power structures and political balance that have interest in maintaining knowledge monopoly. Scholars as Jean E. Kalicki and Anna Joubin-Bret have noted that ISDS arbitral awards have not only reinforced existing power structures but inconsistency and contradictions in arbitral have contributed towards systemic failure, too[29].

The section begins by unpacking the theoretical foundations of knowledge and concept of legal knowledge taking a multidisciplinary approach. The subsequent part studies the theory and role of knowledge in international arbitration. The aim of the first two parts is to understand the relationship between access to knowledge and consolidation of power structures and to address the issue of inconsistency and opacity that creates a trust deficit. The final part of this section takes an empirical look at selected ISDS cases through a conceptual lens of knowledge to argue for a system that ensures equitable justice through a mechanism that is accountable, consistent, transparent and thus reliable.

4.1 *Theory of Knowledge and the Concept of Legal Knowledge*

The philosophical foundations of the concept of knowledge can be traced to the works of the ancient Greeks – Socrates, Plato and Aristotle. Socrates and Plato viewed knowledge as a source of virtue making it an essential trait for a statesman[30]. Plato, in his famous work the *Republic*, uses the allegory of a cave wherein he argues that most men live in a fictional world, limited by their human senses, and thus are deep within the cave away from the light of the sun. He seeks for his

29. See generally Jean E. Kalicki and Anna Joubin-Bret (ed.), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill 1st ed. 2015).

30. See Terence Irwin, *Virtue and Law,* in John Marenbon (ed.), *The Oxford Handbook of Medieval Philosophy* at605, 610 (Oxford University Press 2012) (virtue can be said to be the driver of the ethics of law. In the philosophical work of *Summa Theologiae,* Thomas Aquinas introduces his discussion of the virtues, sins and vices before he introduces law. We might infer that he takes the understanding of virtue to be independent of, and even prior to, the understanding of laws and general principles in morality).

protagonist to move beyond the shadows and limitations of the cave in search of true virtuous knowledge, which is intangible, intrinsic, and intuitive[31]. Thus, one who possesses true knowledge – the Philosopher King – can morally guide human behaviour[32]. Thus, platonic Philosopher King is one who represents perfect knowledge and stands above the law of land and is freed from the impediment of positive law – meaning that one who acquires true knowledge lives in the state of a natural law[33]. Contrary to Plato, Aristotle's concept of knowledge is more steeped in factual reality and draws attention to the ability of human senses to gain and acquire knowledge, through experience, logic, reasoning and perception. Herein, the works of Aristotle attempt to widen the conception of knowledge bringing in together the experiential and intuitive capacities[34].

Similar conceptions of knowledge are evident in Indian philosophy. A basic principle in Jain Philosophy is *Anekantavada* – meaning that multiple truths can exist and at one point no one single point of view is completely true. However, it is only the *Kevalins,* in Jainism, that possess infinite knowledge and can know the true answer, while all others would only know a part of the answer. Again, arguing for a knowledge that is above the knowledge possessed by a common man. On the contrary, *Nyaya* Philosophy by Gautama Muni, states that valid knowledge needs to be in accordance with reason and experience, taking on a more scientific approach accompanied by logical thinking. This philosophy of knowledge, akin to Aristotelian

31. See generally Lorraine Smith Pangle, *Virtue Is Knowledge: The Moral Foundations of Socratic Political Philosophy* (University of Chicago Press 2014).

32. See Bertrand Russel, *History of Western Philosophy* at 125 (Simon and Schuster Ist 1945).

33. In a perfect society, according to Plato, everyone understands and conforms to the Natural Law. In his work, *Republic*, Plato describes an ideal state, driven by knowledge, and thus governed by principles that are universal to all making and driven by the morality of man. In such a society, or for such a person, Plato argues, there is no necessity of a positive law – the laws made by man to regulate man's behaviour.

34. STEMpedia, *Aristotle to Feynman-Learning through Experience* (September 5, 2018), available at https://medium.com/@thestempedia/https-medium-com-thestempedia-aristotle-to-feynman-learning-through-experience-304a2d7876bb (last visited November 21, 2020). See also Russel, *History of Western Philosophy* (cited in note 35).

conception, makes knowledge within the reach of the common man driven by experiential learning and search for established truths.

These broad philosophical frameworks point to two key aspects for trying to better understand the concept of knowledge. On one hand, the possessor of true or infinite knowledge acquires a unique position, often one of power, in comparison to one's peers and on the other hand, the validity of knowledge comes through a scientific, repeatable and experiential learning, an element of consistency and assurance, that builds trust in the system of knowledge.

The knowledge-power dichotomy – between who has knowledge and who has not – has evolved since its philosophical roots to actualize in multiple disciplines wherein multiple conceptions of knowledge exist. In the field of economics, knowledge as a source of innovation has incremental value unlike other factors of production – was extensively studied by scholars[35]. As concludes a relevant study on growth trends in Hong Kong and Singapore[36], the acquisition of knowledge, rather than the accumulation of raw factors of production was the force behind long-term growth[37]. Knowledge presents a fundamental comparative advantage and, particularly nowadays, it is a central part of production processes and economic growth[38]. Further, knowledge as a source of innovation accrues to the conceptualisation of knowledge as a source of competitive advantage for the functioning of an institution. Here, knowledge acquisition, its movement within an organisation, and application in projects and activities of the institution make the institution a living and growing entity. The efficiency

35. See generally John Emeka Akude, *Knowledge for Development: A Literature Review and an Evolving Research Agenda*, 18 German Devel Inst's Discuss Paper 1 (2014). See also Fritz Machlup, *The Production and Distribution of Knowledge in the United States* (Princeton University Press 1962).

36. Alwyn Young, *A Tale of two Cities: Factor Accumulation and technical Change in Hong Kong and Singapore*, 7 NBER Macroeconomics Annual 13, 64 (1992).

37. See *ibid.*

38. See Nobel Foundation, *Nobel Prize in Economics 2018: Integrating innovation and climate with economic growth*, (October 8, 2018), available at www.sciencedaily.com/releases/2018/10/181008174322.htm (last visited November 21, 2020) (William D. Nordhaus and Paul M. Romer won the Nobel prize in Economic Sciences 2018 for studying the interaction of the market economy with nature and knowledge by integrating climate change and technological innovations into long-run microeconomic analysis).

in the flow of knowledge allows the institution to capitalise on the knowledge – making it a leveraging resource, to have and maintain an advantage over its contemporaries or for its own existence. Such knowledge can be held at the individual level, organisational level or among organisations and institutions at global level.

For examples, in International Relations, knowledge as a source of power is evident in the works of Michael Foucault and Susan Strange. Strange's theory of Structural Power explores the two-way relationship between knowledge and power[39]. Where knowledge not only does shape power but also the power of actors – which can be states, agencies, lobbies, or private entities– to define and influence institutions in the international system[40].

The possession or ownership of knowledge can further be understood in two ways: first, where knowledge can be viewed as a *public* good[41] – taking the analogy of light – accruing to its limitless and imperishable qualities and "having the capacity to transform lives"[42]; and second, knowledge as a *private* good, owned by entities due to its competitive advantage and as a source of innovation. It is clear that ownership of knowledge creates dichotomies and asymmetries between those who possess knowledge and those that do not – thus the possession of knowledge gives power to one side over the other.

Specifically looking at the concept of knowledge in the legal sphere, James White articulates legal knowledge as a way of claiming meaning for experience, which is the use of human ability to reduce, to define, to make more manageable, the uncertainties that are present in every human situation. White further highlights that the law is not reduced to a capacity to read and apply a set of rules rather it is the "ability to

39. See generally Patrick Holden, *In Search of Structural: EU Aid Policy as a Global Political Instrument* (Ashgate Publishing Limited 1st ed. 2009).

40. See *id*.

41. Joseph E. Stiglitz, *Knowledge as a Global Public Good*, in Inge Kaul, Isabelle Grunberg and Marc A. Stern (ed.), *Global Public Goods: International Cooperation in the 21st Century* at 308, 325 (Oxford University Press 1st ed. 1999).

42. See Kenneth King and Simon McGrath, *Knowledge for Development? Comparative British, Japanese, Swedish and World Bank Aid* (Zed Books 2004). See also World Bank, *World Development Report 1998/1999: Knowledge for Development* (Oxford University Press 1998), available at https://openknowledge.worldbank.org/bitstream/handle/10986/5981/WDR%201998_99%20-%20English.pdf?sequence=1&isAllowed=y (last visited November 21, 2020).

think about [the rules], to interpret them separately and in relation to each other, to bring them to bear [] upon real and imagined events, and to do so both analytically and argumentatively"[43]. One can then understand legal knowledge as not just the word of law, but also the intention behind and application of the word. Legal knowledge can be said to be "an activity of mind, a way of doing something with the rules and cases and other materials of law, an activity that is itself not reducible to a set of directions or any fixed description"[44]. Furthermore, legal knowledge is built on systems and processes of consistency. These create precedents and/or legal principles, upon which future judgements are often laid[45].

Ernst Haas defined knowledge as the sum of technical information and of theories about that information which commands sufficient consensus at a given time among interested actors to serve and guide policy and social realities[46]. Precedents indicate the legal principle driven by logical and reason-based decisions made by a court (having sufficient consensus). It is imperative to note that a decision is useful when decided upon certain principles and thus will not be binding if contrary to a set of accepted principles. In this way, precedents can be said to be a form of knowledge that is curated and applied (in an advisory or binding manner) in the process of ensuring justice. Thus knowledge, its management and reliance on existing legal principles is essential to build trust in the system and faith in the judgements of the system.

The linkages between knowledge, access, justice and trust have most recently been explored in the work of Judith Resnik wherein the author links access to justice with access to knowledge, highlighting the interdependencies between the two[47]. In her work, Resnik argues for public access to judgements in arbitration cases to ensure

43. James Boyd White, *Legal Knowledge*, 115 Harv L Rev 1396, 1397 (2002).

44. See *id*. at 1399.

45. Precedent is the legal principle created by a court's decision, founded on logic and reason, may be advisory or binding on future legal decisions.

46. See Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in Beth A. Simmons and Richard H. Steinberg (ed.), *International Law and International Relations: An International Organisation reader* at 16 (Cambridge University Press 2007).

47. See Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, 96 N C L Rev 605 (2018).

oversight, fair treatment, and trust in the system. Further, the works of Jean d'Aspremont[48], Judith A. Snider and C. Kemm Yates[49] also shed light on the use, control and management of knowledge by legal institutions. Jean d'Aspremont puts forward a narrative attempting to "re-imagine international courts and arbitral tribunals as bureaucratic bodies controlling the social reality created by the definitional categories of international law"[50]. D'Aspremont argues that such institutions control *over* (and not just through) knowledge given their bureaucratic nature, that gives them the power to intervene and redefine reality[51]. Here the control over knowledge is through the functioning of the institutions – a result of the control an institution wields over the construction of a specific reality through the application of law. The argument made here by d'Aspremont is similar to Strange's articulation of knowledge-power relations based on the way institutions themselves are created[52].

Judith A. Snider and C. Kemm Yates have attempted to understand the role of knowledge in dispute resolution in order to find the relationship between specialised or comparative knowledge and natural justice[53]. In respect to the nature of knowledge to be relied upon in arbitration, Snider and Yates articulate the importance of complying with the principles of natural justice additional to the expertise possessed at the individual level among arbitrators that bring in specialised knowledge[54]. Taking the example of *Wetherall v. Harrison*[55], Snider and Yates argue that the Court held that "it was not improper

48. See generally Jean d'Aspremont, *The Control Over Knowledge by International Courts and Arbitral Tribunals*, in Thomas Schultz and Federico Ortino, *Oxford Handbook of International Arbitration* (Oxford University Press 2018), available at https://ssrn.com/abstract=3034682 (last visited November 21, 2020) .

49. See Judith A. Snider and C. Kemm Yates, *Alternative Dispute Resolution: Use and Abuse of Information and Specialised Knowledge*, 33 Alta. L Rev 301 (1995).

50. D'Aspremont, *The Control Over Knowledge by International Courts and Arbitral Tribunals* at 328 (cited in note 48).

51. See *id*. at 336 (the author also notes, in passing, that bureaucracy often evokes pathological and systemic dysfunctions).

52. See generally Holden, *In Search of Structural: EU Aid Policy as a Global Political Instrument* (cited in note 39).

53. See Snider and Yates, *Alternative Dispute Resolution: Use and Abuse of Information and Specialised Knowledge* (cited in note 49).

54. See *id*. at 327.

55. See *Wetherall v. Harrison*, 1 Q.B. 773 (1976).

for [the arbitrator to use specialised knowledge] to interpret the case, provided that he did not use his knowledge as evidence or attempt to persuade the other members of the tribunal to reach a verdict based upon his specialised knowledge"[56]. The authors suggest guidelines on the use of knowledge for adjudication aimed to overcome the abuse of specialised knowledge that can favour one side over the other – creating asymmetries.

The use of knowledge by an arbitrator to create a bias or benefit for one side over the other should not obscure the neutrality of the procedure aimed to ensure justice. Martti Koskenniemi notes that investment arbitration, through the process of negotiations, maintains within the system a power dynamic that often favours the ones already powerful[57]. The lack of equitable access to specific, specialised and influential knowledge allows the system and its processes to create a social reality that favours those that possess knowledge over those that do not. The negotiation and decision-making process as a result create a *new* social reality, dictated by the use of specific legal knowledge over an impartial delivery of justice.

4.2 *Role of Knowledge in International Arbitration*

Knowledge-power and knowledge-trust relations in the context of ISDS are manifested in the power asymmetries between countries and the inconsistency of awards.

The institutional structure of ISDS – made up of a homogenised group of arbitrators having access to advanced legal systems; the monopoly of investors over filing suit; the possession or unequal acquisition of legal knowledge; and the control over the sharing of knowledge (arbitration proceedings and awards) by the claimants (investors) – contributes to the power asymmetries that exist between countries in the international arena. Furthermore, having such comparative capacities in arbitration then enables one party over another to influence the system. This emerges as an eclipse over the principle of fair and

56. See Snider and Yates, *Alternative Dispute Resolution: Use and Abuse of Information and Specialised Knowledge* at 330 (cited in note 49).

57. See Koskenniemi and Efa, *Investor-State Dispute Settlement (ISDS) in EU Law and International Law* (cited in note 5).

equitable treatment. For example, these problems and – in particular – the exercise of knowledge-power within an institution are evident in the case of the role in the United States Office of the Assistant Legal Adviser for International Claims and Investment Disputes that works closely with investors to ensure that the ISDS mechanism protects US interests abroad[58].

The ISDS system has further been critiqued for a lack of legitimacy and opaqueness for two crucial reasons. First, the IIAs are claimed to be "broad and vague" giving arbitrators the power to interpret while establishing power asymmetries[59]. The second aspect then details into the inability of the system to ensure consistency and predictability given the lack of a formal system of arbitration precedent and of appellate mechanisms and limited judicial review of awards which fosters a trust deficit that further weakens the system[60].

Several authors have made cases in respect to an appellate mechanism to promote consistency and correctness in the outcome of the arbitration process, to ensure justice and establish trust. Karin L. Kizer, Jeremy K. Sharpe, and Antonio Parra have advanced the need for an appellate mechanism to overcome the issues of inconsistency in the application of law and arbitration awards, taking the empirical support of the US commitment to enforce an appeal mechanism in its (mega) Free Trade Agreements such as the TTIP[61]. Eun Young Park[62], Gabriel Bottini[63], and Jaemin Lee[64] suggest that an appeal mechanism

58. See Katz, *Modeling an International Investment Court* at 169 (cited in note 4).

59. Nathalie Bernasconi-Osterwalder and Lise Johnson (ed.), *International Investment Law and Sustainable Development: Key Cases from 2000–2010* at 13, (International Institute for Sustainable Development 2010), available at https://www.iisd.org/sites/default/files/publications/int_investment_law_and_sd_key_cases_2010.pdf (last visited November 14, 2020).

60. See Kalicki and Joubin-Bret, *Reshaping the Investor-State Dispute Settlement System* at 1 (cited in note 29).

61. See *id*. at 10.

62. See Eun Y. Park, *Appellate Review in Investor-State Arbitration,* in Jean E. Kalicki and Anna Houbin-Brett (ed.), *Reshaping the Investor-State Dispute Settlement System* (Brill 1st ed. 2015).

63. See Gabriel Bottini, *Reform of the Investor-State Arbitration Regime: The Appeal Proposal,* in Jean E. Kalicki and Anna Houbin-Brett (ed.), *Reshaping the Investor-State Dispute Settlement System* (Brill 1st ed. 2015).

64. See Jaemin Lee, *Introduction of an Appellate Review Mechanism for International Investment Dispute: Expected Benefits and Remaining Tasks,* in Jean E. Kalicki and Anna

would strengthen the trust and legitimacy of international investment arbitration and overcome the systemic failures of the ISDS system. Lee further substantiates the need to account for the high cost of review of awards in the ISDS system for developing countries and thus an appeal mechanism can provide an alternative given the limited access to legal capacity and resources.

While the aim of the ISDS system was to ensure autonomy, an appellate mechanism is critical to ensure that erroneous decisions can be reviewed and overturned if needed. The aim is to bring symmetry to the power dynamics between investors and states as well as will allow access to knowledge between institutions, by way of appeal. This is based on the understanding that an appellate body opens the scope of application of both common and specialised knowledge, creating an even playing field.

Access to arbitral decisions and awards in the public domain can provide a knowledge base for "attorneys [to] cite relevant decisions in support of their clients claims or defences and tribunal can delay on those decisions to support their findings in separate cases raising similar legal issues"[65]. Moreover, an appeal system could facilitate judicial and legal dialogue useful to create more clear and defined common legal principles. This leads to the issue of *arbitral precedent* that is needed to establish a base of knowledge or principles, which can be universally accepted through a commonly held set of beliefs, norms and values, that can then influence the social realities that the ISDS process attempts to adjudicate upon. In institutions, such as lots of courts, legal knowledge is used to obtain a result and create precedent, wherein the Courts are obliged to be advised by the precedent. Precedent ensures a relative consistency in decision making, that has the power to incentivise actors to establish trust among themselves and towards the system.

Currently, the ISDS system lacks a formal binding system of precedent under the doctrine of *stare decisis*. Gabrielle Kaufmann-Kohler in *Arbitral Precedent: Dream, Necessity or Excuse?* notes that despite a

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Houbin-Brett (ed.), *Reshaping the Investor-State Dispute Settlement System* (Brill 1st ed. 2015).

65. Bernasconi-Osterwalder and Johnson (ed.), *International Investment Law and Sustainable Development* at 13 (cited in note 59).

formal doctrine (*de jure*), arbitrators increasingly appear to refer to, discuss and rely on earlier cases – depicting a *de facto* form of this[66]. Such a *de facto* system, argues Nathalie Bernasconi-Osterwalder, has created a growing body of *de facto* international investment jurisprudence that not only impacts the obligations of states under respective IIAs upon which decisions are being made but also affects the future obligations, which is not open to judicial oversight and review.

The need for a formal doctrine of precedent is essential to ensure consistency in the application of legal knowledge and principles, addressing a core systemic critique, but also to build trust and create legitimate expectations among stakeholders[67]. Rebecca L. Katz argues that consistency ensures predictability, which can guide investment decisions for investors and the host state; it can also help overcome a trust deficit in the system; and increase cost-effectiveness of the process that can ensure equitable and fair settlement of disputes[68]. Additionally, access to legal knowledge and arbitral decisions can be used to support the arguments while providing the tribunal bases that can guide future decisions, overcoming the lop-sidedness created by lack of access to among actors[69].

4.3 *Application of Theoretical Models to ISDS Specific Cases*

The institutional experience with the existing investment arbitral mechanisms has highlighted the problem of asymmetry and inequity in the decision-making processes, that states are at least partially trying to face. In this regard, the proposition regarding establishment of investment courts under the Transatlantic Trade and the Investment

66. Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?,* 23 Arb Intl 357, 361 (2007) (Kaufmann-Kohler points out that the International Court of Justice (ICJ) and the World Trade Organisation (WTO) Appellate Body "adopt a type of de facto stare decisis doctrine" where in a "strong reliance on earlier judicial decisions are listed as "subsidiary means for the determination of rules of law" in Article 38 of the ICJ" and stated by the WTO Appellate body in the *Shrimp Turtle II* case).

67. See *ibid.*

68. See Katz, *Modeling an International Investment Court After the World Trade Organisation Dispute Settlement Body* at 174 (cited in note 4).

69. See Bernasconi-Osterwalder and Johnson, *International Investment Law and Sustainable Development* at 13-14 (cited in note 59).

Partnership are a step in the right direction[70]. However, as a good confirm of the remarkable difficulties in this regard, the negotiations and talks on this proposition had temporary stopped due to divergences between European Union and the United States[71].

In any case these issues – that the states are trying to solve – arose particularly in relation to developing countries which are often victim of unfair knowledge-power exercise. s, three arbitral awards under illustrate the challenge of sustaining institutional credibility amidst regulatory concerns. As example, under the North American Free Trade Agreement (NAFTA) it is useful to look at the arbitral decisions made in the cases of *Metalclad Corp. v. United Mexican States*[72] and *Tecnicas Medioambientales Tecmed, S.A. v. United Mexican States*[73]. In these cases, the use of the arbitral process benefits the investor in the face of a weaker developing state, where the latter was held for a breach of contract or treaty violations due to regulations taken by the Mexican government to protect the public health and environment – a matter of public interest – for the welfare of its people[74]. Here, the application of legal knowledge benefiting the claimant resulted in Mexico compensating, 16,75 million US dollars cumulatively in the two cases. The cases stemming from the right of the state to ensure environmental and public reform, and thus undertake the right to regulate,

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70. See generally Stephen S. Kho, et al., *The EU TTIP Investment Court Proposal and the WTO Dispute Settlement System: Comparing Apples and Oranges?*, 32 ICSID Review – Foreign Investment L J 326 (2017), available at https://academic.oup.com/icsidreview/article/32/2/326/3828524 (last visited November 14, 2020).

71. European Parliament, *Transatlantic Trade and Investment Partnership Negotiations on International Court System* (October 2020), available at https://www.europarl.europa.eu/legislative-train/theme-international-trade-inta/file-ttip-investment-court-system-for-ttip (last visited November 14, 2020).

72. Katz, *Modeling an International Investment Court* at 172 (cited in note 4) (the case was filed by Metalclad Corp focusing on three violations of the North Atlantic Free Trade Agreement. The tribunal awarded in favour of Metalclad, for damages to the amount of the "sunken costs in the investment" due to "Mexico's refusal to grant a construction permit for the expansion of a toxic waste facility amid concerns of water contamination and other environmental and health hazard").

73. *Id.* at 173 (Tecmed's alleged violation of obligations under Spain-Mexico Bilateral Investment Treaty (para 93), accusing the Mexican Government of violations. The tribunal held Mexico for expropriation and fair and equitable standard awarding damages to be paid to Tecmed).

74. See *Id.* at 163.

demonstrate the limiting of the policy space of developing countries. This is on account of the deterrence created by these unfavoured awards against the state's enforcement of its prerogative to protect domestic public interests in international investment contexts. Additionally, in *Metalclad v. Mexico*, the arbitration tribunal articulated that it "need not decide or consider the motivation of intent or the adoption of the Ecological Decree"[75]. The narrow interpretation of the law to the denial of a construction permit claimed by Metalclad to the breach of NAFTA Article 1105 and Article 1110 overlooks the application of the law beyond the rules of the IIA, overlooking the issue of public health and ecological damage affecting the local environment due to dumping of hazardous wastes by the investing company[76]. This construction of a reality created a limited and asymmetrical knowledge that invariably benefits one entity – given the focus primarily on the breach of contract and the profit outcome of the investor – while disincentives the other – a nation-state acting towards the welfare of its citizens. In fact, the balance between the investors' interests and the state's aim of protecting its citizens rights was not adequately considered, in a knowledge-equity perspective. If the measures have a substantial non-discriminatory application and if they really tend to ensure better health or environmental protection according new and higher standards, it can be found no breach of duties.

Beyond constraints of arbitration mechanisms, the issue reflects the lack of flow of knowledge between international institutions that mandate a right to development[77] – more sustainable development in

75. Howard Mann, *Metalclad Corp. v. United Mexican States* at 72, 79*,* in Bernasconi-Osterwalder and Johnson, *International Investment Law and Sustainable Development* (International Institute for Sustainable Development 2010), available at https://www.iisd.org/sites/default/files/publications/int_investment_law_and_sd_key_cases_2010.pdf (last visited November 14, 2020).

76. See Esther Kentin, *Sustainable Development in International Institutions Dispute Settlement: The ICSID and NAFTA Experience*, in Nico Schrijver and Fred Weiss (ed.), *International Law and Sustainable Development: Principles and Practice* at 309, 330 (Martinus Nijhoff Publishers 2004).

77. The Declaration on the Right to Development was adopted by the General Assembly in its resolution 41/128 of 4 December 1986. See United Nation General Assembly, *Resolution 41/128*, U.N. Doc. A/41/53 (1986).

light of Agenda 2030[78] – and international mechanisms designed to bring justice through dispute resolution. Arguably, the lack of flow of knowledge (among and within institutions) and the lack of application of the law in awareness of the broader impact of the investment, continues to maintain the power asymmetry that favours the already powerful to shape the problems (and its resultant solution) through the construction a social reality, in which the ISDS system intervenes[79].

Furthermore, for the success of a dispute resolution it is essential for the parties to have trust on the procedures that will ensure justice. The trust deficit in the arbitration mechanism exists due to lack of a consistent and definitive structure giving a broad scope of powers of the tribunal and its arbitrators to interpret agreements that often reflect the existing political power-asymmetries. This creates a trust deficit between institutions of justice and seekers of justice[80]. The conflicting and inconsistent arbitral awards in the cases of *Metalclad v. Mexico vis-à-vis Methanex Corp. v. United States of America*[81] underscore the issue of arbitrary decision making on similar cases becomes evident. Both the cases were filed alleging violation of expropriation and obligation of fair and equitable treatment. Similar to *Metalclad v.*

78. Agenda 2030 is a call for countries to collectively work towards the achievement of the 17 Sustainable Development Goals. It explicitly calls for investment to be made focusing on the sectors and development needs for the success of the SDGs. See Transforming Our World: The 2030 Agenda for Sustainable Development, UN A/RES/70/1 (September 27, 2015), available at https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf (last visited November 14, 2020).

79. See generally Jean d'Aspremont*, The Control Over Knowledge by International Courts and Arbitral Tribunals* at 328*,* in Thomas Schultz and Federico Ortino*, Oxford Handbook of International Arbitration (Oxford University Press 2018),* available at https://ssrn.com/abstract=3034682 (last visited November 21, 2020).

80. For other cases highlighting the issue of consistency, see ICSID ARB/05/8, *Parkerings-Compagniet AS v. Republic of Lithuania* (September 11, 2007); ICSID ARB(AF)/00/2 *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* (May 29, 2003) (both cases pertain to fair and equitable treatment – with two different and irreconcilable approaches to each of these issues). Additionally, see Katz, *Modeling an International Investment Court* at 174 and n 48 (cited in note 4).

81. Methanex Corp alleged treaty violations of expropriation, fair and equitable treatment and national treatment under Chapter 11 of NAFTA (the tribunal awarded in favour of the United States of America).

Mexico, in the case *Methanex v. United States* the Government of the United States made new regulations to protect the environment and public health system. However, in *Methanex v. United States*, the tribunal awarded in favour of the state as opposed to the investor wherein the tribunal held that:

> A non-discriminatory regulation for a public purpose [...] which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation[82].

The "non-discriminatory regulation for a public purpose" as mentioned in the passage above states that regulations taken by the government operating in its policy space to regulate over issues concerning its citizens (public health, environment, etc.) are not expropriation regardless of the impact on the investor[83]. The passage also articulates the existence (or non-existence in this case) of specific commitments which invariable favours developed countries as such clauses are often inserted by investors when negotiating agreements with developing countries taking away the much-needed policy space for development[84].

The inconsistency driven out of the control over knowledge, negotiations and application of law is evident in the awards of the two cases. In the *Metalclad* decision the tribunal overlooked the Ecological Decree giving a broad definition of expropriation to include the regulations undertaken by the Mexican government while in *Methanex* decision the court provided for a narrower interpretation wherein expropriation "inherently [did not include] measures taken by the governments in the exercise of their customary police powers"[85]. This inconsistency in the application of the definition of expropriation reveals the challenge of party trust and predictability of the arbitral

82. Howard Mann, *Methanex Corp. v. United States of America* at 81, 87 (cited in note 75).

83. See *id*. at 88.

84. See *id*. at 89.

85. *Id*. at 87.

process. This inconsistency denies the government the clear delimitation of the legitimate regulatory space to make effective interventions to safeguard public interest, lest the arbitral process lead to adverse consequences. The development of coherent precedent regarding the right to regulate, especially in developing countries, would substantially rectify the institutional imbalance that entrenches existing geo-economic power structures. In light of these structural asymmetries and doctrinal inconsistencies, there is a need for development of equitable legal knowledge systems which should reflect the institutional experiences of the developing countries. This would increase access to and credibility of existing legal knowledge, and lead to the creation of precedent or clear common principles that ensure justice for all parties. Given equitable knowledge's potential to bring transparency in the system, it can be reasonably expected to further enhance the prospects for convergent behaviour among all stakeholders necessary for dispute resolutions. Hence, creation and dissemination of equitable knowledge (through clear delineation of doctrine and principle that adequately represents the core concerns of developing countries, too) could transcend divides, ensure equitable resolutions predicated on the principle of non-discrimination, and more so empower the powerless as opposed to retaining the dominant power asymmetries[86].

It is necessary for dispute resolution mechanisms to retain the trust of all stakeholders, through the creation of a transparent, knowledge-driven system that ensures predictability and consistency. At the same time, there is a critical need for developed and developing countries to robustly seek the convergence in their legal and institutional approach as well as practices, so that a golden mean or a fine balance between their interests can be achieved. As discussed above, the institutionalization of equitable knowledge can play a vital role in achieving this convergence. This would be critical to retain the equity of law and its credibility informed by a common socially conscious framework that finds a middle ground between furthering the economic interests of developing countries and incentivising private investment for profit maximisation.

Knowledge, in its continuous flow of sharing, transfer, exchange, and its (re)use and evolution in the arbitral system influences the

86. Krasner, *Structural Causes and Regime Consequences* at 16 (cited in note 52).

behaviour of investors and states guiding the profit-making decisions of the former and the welfare and investment regulations of the latter. The creation, curation and access to knowledge that is used by the system then has the power to influence the system itself. This influence is evidently linked to the issue of trust and credibility of the international arbitration system, demanding the need for a system that ensures transparency and reliability within its framework along with equitable dispute resolution acknowledging and facing the development priorities, lack of access to advanced legal systems and the need for policy space to regulate investments for public benefit of developing countries.

5. *The Way Forward for ISDS Reform*

Taking stock of the arguments made in the previous sections, it is evident that the free flow of knowledge is not achieved in the ISDS system. Even though, given the continuous criticisms, there has been marginal improvement in transparency and in certain cases *amicus curiae* briefs have informed arbitration proceedings, the situation is far from ideal[87]. Another problem is the absence a *de jure stare decisis* doctrine that could uniform the awards around precedents that are a verified and recognised form of common knowledge. The lack of clearly established and recognised principles causes unpredictability and inconsistency and generates confusion and mistrust in ISDS. This section follows on with the argumentative trail and argues that there is a need for a reform in the system. That has been argued extensively as to whether ISDS should incorporate an Appellate Body[88];

87. See generally Bernasconi-Osterwalder and Johnson, *International Investment Law and Sustainable Development (*cited in note 63).

88. [See], for example, The Dominican Republic-Central America FTA (CAFTA-DR) annex 10-F, available at http://www.ustr.gov/sites/default/files/uploads/agreements/ cafta/asset_upload_file328_4718.pdf (last visited November 19, 2020); United States-Panama Trade Promotion Agreement annex 10-D, available at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/panama/ asset_upload_file684_10351.pdf, (last visited November 19, 2020); United States-Peru Trade Promotion Agreement annex 10-D, available at https://ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file78_9547.pdf. (last visited November 19, 2020).

whether there should be a new permanent organisation[89]; a new international court and/or a new international investment treaty modelled on and building further on the principles of the World Trade Organisation's Dispute Settlement Understanding (DSU) in the context of investment disputes[90].

The idea of an international investment court as a permanent body for investment dispute settlement is effectively a potential proposal for ISDS reform as well as the deep reform of existing ISDS. The objective of this section is to highlight some substantive concerns that this new or reformed bodies would have to address.

Developed nations have elaborated legal and institutional mechanisms that ensure a balance between investor rights and public interest. However, developing countries lack such elaborate institutional structures and advanced legal systems to maintain that balance. They intend to augment their development opportunities trying to attract foreign investment. However, within the current system, this has become a paradoxical process. In an ideal scenario, BITs (and investments at large) must contribute to the economic, social, and institutional development of a developing country. If not, BITs should at least not hinder this growth. However, the pre-emptive approach that characterises most BITs, moves disputes directly to an international arbitration panel bypassing domestic legal remedies, thereby, not giving a chance to domestic institutions to practice good governance internally[91]. This limits the possibilities of flows of knowledge and expressions of higher legal standards in national courts, too.

89. See generally Butler and Subedi, *The Future of International Investment Regulation* (cited in note 6).

90. See generally Katz, *Modeling an International Investment Court* (cited in note 4).

91. Howard Mann and Konrad Von Moltke, *A Southern Agenda on Investment? Promoting Development with Balanced Rights and Obligations for Investors, Host States and Home States* 11–12 (International Institute for Sustainable Development 2005), available at https://media.law.wisc.edu/s/c_360/yzc4y/foreign_investment4.pdf (last visited November 19, 2020). ("Developing countries that were previously colonised emerged from the colonial era almost devoid of indigenous institutions and of the human resources required to run, let alone to develop them. Lack of human and financial capacity continues to limit necessary institutional development in many cases. It would seem almost self-evident that IIAs should contribute to the process of institutional development in developing countries. At the very least, they should not

Promote certain universal standards of good governance by strengthening domestic institutions could be done in many ways. For example, it could be given more space to domestic courts. In the situations that would not be adversely affected by strictly following the rule of exhaustion of domestic legal remedies (for instance cases that are not relatively time sensitive), the ISDS mechanisms or, in the future established, an hypothetical stable court can make it mandatory for parties to file cases domestically first and just then eventually appearing before the international body. This could create more involvement and exchanges of knowledge permitting domestic courts to face relevant cases and to dialogue more with ISDS bodies or other courts.

In the process of servicing the institutional gap between developed and developing countries, the new ISDS or investment court systems must recognise a Right to Development (RTD) of all people in the world. Adopted by the General Assembly on 4 December 1986, the United Nations Declaration on the Right to Development (UNDRTD) proclaims that:

> The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised[92].

The establishing of BITs and their implementation throughout ISDS cannot be a way to maintain less sophisticated legal, political, or social conditions in developing countries just to protect foreign economic interests. If applicated in this way, BITs could be significant barriers of the spread of knowledge.

Another important aspect of reform is the nature of representation in the institutional apparatus of ISDS or in a new hypothetical

undermine it. Yet there is little in most existing IIAs that contributes to this goal. The approach of pre-emption that characterises many IIAs, that is the tendency to move disputes directly to the international level without providing for settlement in the host country, and without an expression of deference to the laws or institutions of the host country, may undermine efforts to achieve good governance domestically").

92. UN General Assembly, *Resolution 41/128*, at Art. 1(1).

international investment organisation. Considering the finality of the decisions and judgments of such institutions, it is important to address concerns about the lack of diversity[93]. Reforms must be thought to ensure equitable and fair representation to individuals from the Global South in these significant institutions. It must be highlighted the fact that a considerable number of the investor-state disputes take place in the developing world[94]. Ensuring equitable representation and separate benches composed of judges from diverse ranges of developing countries would not only make decision making processes more informed and fairer but would accord them greater acceptability and legitimacy.

6. *Proposals for a Knowledge-Perspective Reform*

The reform must ensure that the court or the reformed bodies be conscious of the developmental interests and relevant public international law issues from the developing countries perspective. This would mean that the bench of the new institution must be sensitive to a number of issues aiming to promote socio-economic development including but not limited to the obligations of implementation of the RTD; to mobilize existing provisions of international law to build momentum towards the Sustainable Development Goals (SDGs), to promote international cooperation rather than fuelling disputes and other such initiatives through its rulings, to sustain judicial dialogue with domestic courts and so on[95]. In practice, the court would essentially bring parity between the investor and the state in terms of both rights and obligations.

This parity in itself would have various manifestations and these could be considered in order to value if governmental initiatives – not at all compliant with the existing treaties – aim to rebalance unfair situations, to offer their citizens better safeguards, to set the internal market more efficiently and so on or not. Certain foreign investments

93. Katz, *Modeling an International Investment Court* at 175–176 (cited in note 4).

94. See generally Schreuer, *Do We Need Investment Arbitration?* (cited in note 7).

95. Karin Arts and Atabongawung Tamo, *The Right to Development in International Law: New Momentum Thirty Years Down the Line?,* 63 Neth Int L Rev 221, 249 (2016).

have an adverse crowding effect on domestic investments. For instance, investments in the service sector have a propensity to work with foreign suppliers creating a pressure on the balance of payments which increases imports without a corresponding increase in exports. Moreover, the profits generated from service sector investments put an additional burden on the balance of payments when they are repatriated because they do not create corresponding exports that generate foreign currencies[96]. Therefore, the linkage between foreign investment and development needs to be explicit and supported by policies that promote desired outcomes, even while they recognise the fundamental economic requirements associated with any investment[97]. Consequently, the idea of performance indicators in the context of socio-economic development of the host is important in evaluating the viability of any investment. These indicators are varied but can be categorised into six basic types: export performance; joint venture and equity ownership; research and development; technology transfer; employment and training; and other requirements such as local content requirements or the provision of surety in the form of bonds or otherwise[98]. Each of these indicator links to key aspects of economic development of the host country. For instance, these performance indicators are congruent to the modalities of development cooperation seen amongst developing countries[99]. But, given the lack of institutional arrangements to enforce these performance indicators, developing countries rarely find them enshrined in their agreements. Even if they manage being mentioned, the contemporary ISDS systems tend to hamper their adequate implementation leaving developing countries in a limbo. The argument for this puts forth by the investor's side is on the grounds that the application of performance indicators has an adverse effect on the financial efficiency of the investment itself. However, empirical analysis has shown that the trade-off

96. Mann and Von Moltke, *A Southern Agenda on Investment?* at 1–3 (cited in note 91).

97. *Id*. at 2.

98. See *Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries,* UNCTAD/ITE/IIA/2003/7, (United Nations Conference on Trade and Development 2003).

99. For more information, see generally Sachin Chaturvedi, *The Logic of Sharing: The Indian Approach to South-South Cooperation* (Cambridge University Press 2016).

between the loss of economic efficiency is more than enough because it is outweighed by the gains in development and public welfare that has often better and largely good externalities[100].

Therefore, the new ISDS bodies or dispute courts should take into account the positive and negative effects or externalities of such investments when considering the breach of the contract or treaty. Moreover, by recognising the importance of the free flow of knowledge within the system of investment dispute settlements and the spirit of reforming the ISDS system, the following argument can be made to further the case of developing countries. The free and reciprocal flow of knowledge could be an independent performance indicator denoting the "viability" (not just in narrow economic sense) of an investment for the host state. The various qualifications for this claim are as follows:

- the sharing of knowledge and information between the host state and the investor regarding the operational side of any investment would lead to the building of mutual trust that would automatically reduce the chance of dispute;
- an increase in the curation and exchange of knowledge would make future investments more safe, viable and competent thereby increasing the quality of returns, externalities, and development;
- a solid and institutionalised practice of knowledge exchange would improve in the understanding and codification of the rights and obligations of both the investor and the host state. This is particularly significant for the successful formulation of an international court functioning or common ISDS principles on uniform statutes or precedents for all states informed by the concerns of economic development and investor protection equally;
- an increased flow of knowledge would make it easier to establish facts in legal proceedings, improving the quality of the outcome and bringing about a balance in the settlement of disputes.

Therefore, an explicit induction of knowledge exchange as a performance indicator of an investment is in the interest of both parties.

100. See generally Mann and Von Moltke, *A Southern Agenda on Investment?* (cited in note 91).

However, it is important to underscore that with the unprecedented growth in trade and investment flows among developing countries across all possible sectors, their geopolitical importance in the world is also on the rise. The reform of ISDS on the accounts suggested in this paper would be a step further in bringing parity between the relations between the developed and developing countries.

7. *Conclusion*

The institutional architecture of the ISDS systems present several criticalities. Among them, the infringement of state sovereignty due to the *regulatory chill* and the inconsistency of the awards play a crucial role. Firstly, these issues make the settlement of investment disputes biased against the rights of the states *vis-à-vis* the ones of private investors. Indeed, they compromise the state capacity to issue regulation in the public interest. The *Metalclad Corp. v. United Mexican States*[101] and *Tecnicas Medioambientales Tecmed, S.A. v. United Mexican States* well exemplify this drawback of ISDS. In these cases, a narrow interpretation of the need of better health and environmental protection led the state to be held accountable for a breach of treaty provision.

Further, these criticalities give rise to an exacerbated bias if the state is a developing one. In this context, many of the negative consequences of ISDS can be traced back to a situation of knowledge asymmetric between developing and developed countries. The lack of diversity among the arbitrators and the lack of transparency of the process further aggravate the situation. As the above theoretical analysis as highlighted, the ownership of knowledge indeed creates dichotomies and asymmetries between those who possess knowledge and those that do not. The lack of equitable access to specific, specialised and influential knowledge, on the one hand, keeps alive a vicious circle of poverty and deprivation in the developing world and, on the

101. Katz, *Modeling an International Investment Court* at 172 (cited in note 4) (the case was filed by Metalclad Corp focusing on three violations of the North Atlantic Free Trade Agreement. The tribunal awarded in favour of Metalclad, for damages to the amount of the "sunken costs in the investment" due to "Mexico's refusal to grant a construction permit for the expansion of a toxic waste facility amid concerns of water contamination and other environmental and health hazard").

other hand, consolidates a power structure of the developed countries. The *Methanex Corp. v. United States of America* demonstrates that, although the right of the state are likely sacrificed for the protection of private investors, the ones of developed countries are not as likely to be ignored as the one of developing ones.

In this context, greater representation for developing countries in the judicial tribunals and institutions needs to be seriously deliberated upon. A justice system for investment adjudication based on the principle of the free flow of knowledge can be achieved through the creation of an appellate body and of a formal system of precedents. These reforms may improve the transparency of the ISDS system, and this way facilitates the knowledge flow. However, the system needs also to be fair and equitable and to achieve this result it is important to recognize a greater role of general international law within the investor-state adjudications, with a particular reference to the Right to Development.