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ORIGINAL ARTICLE

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Private or public adjudication? Procedure, substance and legitimacy

Yarik Kryvoi*

British Institute of International and Comparative Law, Charles Clore House, 17 Russell Square, London, WC1B 5JP, United Kingdom
Email: y.kryvoi@biicl.org

Abstract

This article identifies the essential differences between public and private adjudication and their implications for the legitimacy and efficiency of dispute resolution institutions, as well as the rule of law. Public adjudication comes at a significant cost for the taxpayers but helps secure a consistent body of case law, promotes public policy goals, and allows third parties to know the rules of conduct in advance to prevent undesirable activities. This article shows that procedural rules of these institutions (regardless of whether the procedure is called adjudication or arbitration) differ when it comes to the appointment of adjudicators, their professional background, and how long they serve. Public and private institutions consistently follow different approaches to transparency and confidentiality of proceedings, the application of primarily substantive rules or principles to resolve disagreements, and the extent to which decisions can be reviewed internally or externally. By examining the procedural rules and practices of selected institutions, the article asserts three main claims. First, the choice of public or private adjudication is likely to lead to different procedural outcomes, including the cost of the process and the duration. Second, the legitimacy of any dispute resolution system must rest on both procedural and substantive aspects, while in reality these two are often viewed in isolation. Finally, the article shows how institutions could learn from each other to become more efficient and strengthen their legitimacy.

Keywords: arbitration; choice of forum; courts and tribunals; institutional design; protection of property rights

1. Introduction

As states actively attempt to reform the system of investor-state dispute settlement,[1] this article provides a theoretical foundation for distinguishing between three ideal models of adjudication: private, public, and hybrid. It examines the implications of each model for the efficiency and legitimacy of dispute resolution institutions. The article demonstrates how inherent differences between models of adjudication affect the legitimacy of such institutions, the rule of law, and the facilitation of legal certainty. Regardless of whether the adjudication model is called

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[1]See, e.g., United Nations Commission on International Trade Law (UNCITRAL), Working Group III: Investor-State Dispute Settlement Reform, available at uncitral.un.org/en/working_groups/3/investor-state; ICSID, Rules and Regulations Amendment Process, available at icsid.worldbank.org/resources/rules-and-regulations/icsid-rules-and-regulations-amendment-working-papers.

adjudication or arbitration[2] private, public, and hybrid models differ when it comes to the appointment of adjudicators, their professional background, and how long they serve.

While the distinction between substantive public and private law is widely recognized,[3] the distinction between private and public adjudication is less familiar. Scholars agree that states cannot be subject to the same legal procedures and moral approaches as private individuals,[4] but the features distinguishing private and public adjudication remain largely unexplored.

Private adjudication existed long before the emergence of states and subsequently flourished in various forms, including as *lex mercatoria* (the law of merchants) in the Middle Ages.[5] It still remains the only method of dispute settlement in some tribal societies.[6] Public courts in many countries for a long time had characteristics of private institutions funded by court fees, with each court trying to secure as much business as possible, including attracting claims not originally intended to fall under its jurisdiction.[7]

At the end of the twentieth century, in the context of post-Cold War globalization, powerful private actors began to play a more important role in the world economy, controlling greater financial and political resources than many states and shaping dispute resolution methods.[8] Today multinational enterprises often avoid what they perceive as inefficient and oft-biased domestic courts[9] and prefer to rely on international dispute resolution institutions.[10]

[2]For example, the default dispute resolution mechanism under the 1982 United Nations Convention on the Law of the Sea is called arbitration, while its funding model and the nature of interest served by it largely reflects that of public adjudication such as the ICJ. See Annex VII, Art. 7, 1982 UN Convention on the Law of the Sea. Despite having 'court' in its title, the International Court of Arbitration is the world's leading arbitral institution; see iccwbo.org/dispute-resolution-services/icc-international-court-arbitration/.

[3]Different views exist on the distinction between public and private law. One view is that in public law the state imposes imperative rules of behaviour, which the private parties cannot change. Private law regulations normally set the limits of the allowed behaviour and the market participants to change the default rules within such limits. For a historical analysis of this distinction see J. H. Merryman, 'The Public Law – Private Law Distinction in European and American Law', (1968) 17 *Journal of Public Law* 3; for an in-depth analysis of the private-public law distinction see C. Harrow, '"Public" and "Private" Law: Definition without Distinction', (1980) 43(3) *Modern Law Review* 241; see also Section 4.1, *infra*.

[4]See, e.g., J. Goldsmith and D. Levinson, 'Law for states: International law, constitutional law, public law', (2008) 122 *Harvard Law Review* 1791, at 1867; see also Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other State, ICSID/15 April 2006, at 35 (The term 'international law' as used in this context should be understood in the sense given to it by Art. 38(1) of the Statute of the International Court of Justice, allowance being made for the fact that Art. 38 was designed to apply to inter-state disputes.); S. Brekoulakis and M. Devaney, 'Public-Private Arbitration and the Public Interest under English Law', (2017) 80 *Modern Law Review* 22 ('historical development of arbitration as an exclusively private mode of dispute resolution ... results in a conceptual and legal void in respect of how public interest is accounted for, and protected, in arbitrations involving public bodies ...').

[5]See, e.g., however, J. H. Dalhuisen, 'The Operation of the International Commercial and Financial Legal Order: The Lex Mercatoria and its Application – Moving from the Theories of Legal Positivism and Formalism to the Practicalities of Legal Pluralism and Dynamism', (2008) 19(5) *European Business Law Review* 985.

[6]W. M. Landes and R. A. Posner, 'Adjudication as a Private Good', (1979) 8(2) *Journal of Legal Studies* 235 ('The governmental institutions of primitive societies are often rudimentary to the point of nonexistence. There may be no legislature, no permanent executive ... no government bureaucracy, no public judges, no public prosecutors or police-indeed, no concept of public law. Yet even in such societies, there will often be adjudication. For example, the Yurok Indians of California had no government at all but they did have a well-developed system of private judging.').

[7]E.g., in France and England. See A. Smith, *Wealth of Nations* (2007), at 557.

[8]The growing power of private actors has led to the co-operation between public and private actors under different forms of public-private governance. See L. C. Backer, 'Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board and the Global Governance Order', (2011) 18(2) *Indiana Journal of Global Legal Studies* 751.

[9]See, e.g., E. Glaeser et al., 'Securing Property Rights', (2016) Working Paper 22701, *National Bureau of Economic Research* ('A central challenge in securing property rights is the subversion of justice through legal skill, bribery, or physical force by the strong—the state or its powerful citizens—against the weak').

[10]Investors also avoid domestic courts because of lack of judicial expertise or the weak rule of law. See L. E. Trakman, 'Choosing Domestic Courts Over Investor-State Arbitration: Australia's Repudiation of the Status Quo', (2012) 35(3) *UNSW Law Journal* 998.

The emergence of new fields, such as international human rights law and international investment law enables private claims against states and led to the emergence of new dispute resolution institutions. These institutions try to strike proper balancing of the protection of private interests (including property rights) against the public interest.[11] In this context, states are increasingly worried about powerful private actors, which limit what they consider as their sovereign powers[12] and undermine the legitimacy of dispute settlement mechanisms.[13]

To protect their property, private parties may resort to various institutions, on some occasions even simultaneously[14] and may rely upon sophisticated corporate structures to access more favourable dispute resolution mechanisms.[15] Public adjudication institutions such as the International Court of Justice (ICJ) and the European Court of Human Rights (ECtHR) coexist alongside private institutions such as the International Court of Arbitration of the International Chamber of Commerce (ICC)[16] and the Singapore International Arbitration Centre (SIAC).[17] The dramatic rise of foreign direct investments created a new economic and political context and a demand for hybrid institutions tasked with the protection of foreign investments such as the International Centre for Settlement of Investment Disputes (ICSID).[18]

This article demonstrates that although private adjudication is usually quicker and may work well to resolve a specific dispute, it fails to facilitate legal certainty by setting precedents or clarifying the rules of conduct for future disputes. On the other hand, public adjudication institutions normally have the power to shape the interpretation of law for other parties in the future, not involved in the current dispute. They typically rely on earlier decisions to substantiate their rulings and generally aim at protecting the public interest and preventing the undesirable conduct in the future. Private adjudication always remains constrained by higher legal orders (through domestic courts) and does not have a pronounced 'law-making' function.

By examining the procedural rules and practices of selected institutions, the article asserts three main claims. First, the choice of public or private adjudication is likely to lead to different procedural outcomes, including the cost of the process and the duration. Avoiding the uncritical use of private dispute resolution mechanisms for essentially public disputes, and conversely, of public

[11]On the development of 'international private rights' alongside the rights of states see A. Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of private Law* (2009), at 264.

[12]The distrust on the part of host states might result from the large size and high complexity of multinational enterprises, and the lack of transparency of their transactions (E. Pausenberger, 'How Powerful Are the Multinational Corporations?', (1983) 18(3) *Intereconomics* 130). For more recent research on how multinational companies erode state power in the international system and within national boundaries see S. Kapfer, 'Multinational Corporations and the Erosion of State Sovereignty', (2006) *Illinois State University Conference for Students of Political Science*.

[13]See, e.g., S. D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions', (2005) 73(4) *Fordham Law Review* 1521.

[14]For example, former shareholders of once the largest Russian oil company Yukos initiated proceedings related to the largely same set of facts in US domestic courts, arbitration under the rules of the International Chamber of Commerce, Arbitration Institute of the Stockholm Chamber of Commerce, investor-state arbitration acting under the auspices of the Permanent Court of Arbitration, and the ECtHR: *In re Yukos Oil Co*., 321 B.R. 396 (Bankr. S.D. Tex. 2005); *Yukos Capital Sarl and Rosnetf*, Award, Arbitration Court of the International Chamber of Commerce, 19 September 2006; *OAO Neftyanaya Kompaniya Yukos v. Russia*, Judgment of 20 September 2011, ECHR (No. 14902/04); *RosInvestCo UK Ltd. v. The Russian Federation*, Final Award of 12 September 2010, SCC Case No. V079/2005; *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 226, Final Award of 18 July 2014 and three related awards.

[15]See, e.g., Y. Kryvoi et al., 'Empirical Study: Corporate Restructuring and Investment Treaty Protections', 2020, *BIICL/Baker McKenzie*, available at ssrn.com/abstract=3560814.

[16]The world's business international commercial arbitration institution outside China, see J. Clanchy, 'Arbitration statistics 2018: London bucks downward trends', *LexisNexis Blog*, 20 June 2019, available at www.lexisnexis.co.uk/blog/dispute-resolution/arbitration-statistics-2018-london-bucks-downward-trends.

[17]The world's second busiest commercial arbitration institution outside China, see ibid.

[18]Y. Kryvoi, 'The Path of Investor-State Disputes: From Compensation Commissions to Arbitral Institutions', (2019) 1 *ICSID Review* 19.

adjudication for private disputes will help improve the legitimacy of these institutions and better manage expectations of their users. Second, the legitimacy of any dispute resolution system must rest on both procedural and substantive aspects, but in reality, these two are often viewed in isolation. Finally, the article argues that private and public adjudication institutions have much to learn from each other and proposes how they could learn from each other to become more efficient and strengthen their legitimacy.

This article proceeds as follows. Section 2 illustrates how different institutions serve to secure property rights. Section 3 focuses on procedural aspects of dispute resolution across different institutions: appointment and tenure of adjudicators, transparency and confidentiality, the length and the cost of adjudication. Section 4 discusses the substantive aspects of adjudication including applicable law and review mechanisms. Section 5 takes a normative approach and considers procedural and substantive legitimacy of dispute resolution. In particular, it demonstrates how public, hybrid and private adjudication can learn from each other. Section 6 concludes.

2. Conceptual framework

Since the emergence of states, property rights have come under threat, primarily from other private actors and from the state. The risks from the private direction include monopolizing the markets, dumping practices, criminal conduct or even outright violence ('the risk of disorder').[19] States can infringe property rights by expropriation without appropriate compensation, denial of justice and other infringements ('the risk of dictatorship').[20]

The traditional response to securing property rights is to assert claims through neutral adjudication. In theory, independent domestic courts should resolve disputes involving non-public and public infringement of rights. In practice, the lack of institutional capacity to efficiently resolve such disputes on a domestic level (e.g., insufficient expertise, lack of resources or corruption) means that international courts and tribunals often fill the gap.[21] The idea of international adjudication is that highly qualified independent adjudicators with experience in handling similar disputes should resolve disputes related to property rights efficiently, thus restoring market discipline.[22]

This article analyses five dispute resolution mechanisms relevant to securing property rights to explore differences between procedural rules, practices and institutional capacity of these institutions: ICJ, ECtHR, ICSID, ICSID, and SIAC. All these institutions serve the goal of securing property rights, among other goals. However, they differ significantly when it comes to their institutional design and procedures, which affects their efficiency and legitimacy. The selection of these five institutions allows us to draw a manageable illustration of the public–private spectrum: two public, one hybrid, and two private adjudication institutions. The aim is not to express a view as to their quality and efficiency but to facilitate presentation of the key ideas. Before discussing the differences between public, hybrid and private adjudication models and their implications, it will be useful to illustrate the conceptual differences with a few examples related to securing property rights.

A dispute between the United States and Italy decided by the ICJ illustrates purely public adjudication.[23] In that case, the court considered alleged interference with the shareholders' right to 'control and manage' a US company, by Italy's requisition of the company's plant and equipment.

[19]S. Djankov et al., 'The New Comparative Economics', (2003) 31 *Journal of Comparative Economics* 595.

[20]Ibid.

[21]Political risk insurance is another alternative for the protection of investments of foreign investors, see L. Johnson, L. Sachs and J. Sachs, 'Investor-State Dispute Settlement, Public Interest and U.S. Domestic Law', *Columbia Center on Sustainable Investment (CCSI) Policy Paper* 4, May 2015, available at ccsi.columbia.edu/files/2015/05/Investor-State-Dispute-Settlement-Public-Interest-and-U.S.-Domestic-Law-FINAL-May-19-8.pdf.

[22]R. H. Coase, 'The Problem of Social Cost', (1960) 3 *Journal of Law & Economics* 1.

[23]*Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Merits, Judgment of 20 July 1989, [1989] ICJ Rep. 15, at 50, paras. 69–74.

The US brought a claim to protect the private investor's property rights[24] on the basis of an international treaty.[25] The judges, all experts in public international law with fixed-term appointments,[26] decided the case in accordance with the applicable municipal and international law and rendered a publicly available judgment,[27] which could not be challenged in domestic courts.[28]

Another example of a property dispute resolved by a public institution comes from the ECtHR. Yukos, once the largest Russian oil company, asserted a claim based on breaches of the right to property under the European Convention on Human Rights (ECHR).[29] The dispute arose out of tax assessments and enforcement of the debt resulting from these assessments. The panel of judges, consisting of experts on international human rights law[30] appointed for fixed periods of time,[31] delivered a judgment[32] which, similar to ICJ judgments, domestic courts cannot revisit.[33]

The *Exxon Mobil* v. *Venezuela* case serves as an illustration of how ICSID, a hybrid public-private adjudication mechanism, functions.[34] In that case, a foreign investor alleged that the host state breached a treaty by adopting regulatory measures resulting in the expropriation of its property.[35] The parties decided to conduct their proceedings in Paris and appointed their arbitrators for this particular case, who rendered a publicly available award.[36] This award can be revised and annulled by a special committee appointed by the ICSID Secretariat, but not by domestic courts.[37]

Finally, private commercial arbitration institutions such as ICC and SIAC decide a significant number of international disputes related to the protection of private property. The vast majority of awards remains confidential,[38] which makes it difficult to give an example of a typical case. Both institutions allow the parties to agree on the law applicable to the merits of the dispute,[39] the seat of arbitration,[40] and the identity of arbitrators – most of whom tend to have backgrounds in

[24]Commentators also refer to the *ELSI* case as an example of an investment dispute before the ICJ. See, e.g., S. D. Murphy, 'The ELSI Case: An Investment Dispute at the International Court of Justice', (1991) 16(2) *Yale Journal of International Law* 391.

[25]Treaty of Friendship, Commerce and Navigation between the United States of America and the Italian Republic, dated 2 February 1948 (FCN Treaty).

[26]Judges sitting in this case were José Maria Ruda (President), Shigeru Oda, Robert Ago, Stephen M. Schwebel, and Sir Robert Jennings, who were all well-respected jurists with expertise in the area of public international law. Section 3.1 of this article includes further discussion on how and for how long the ICJ judges are appointed.

[27]See *Case Concerning Elettronica Sicula S.p.A. (ELSI)*, *supra* note 23.

[28]1945 Statute of the International Court of Justice (ICJ Statute), Art. 60.

[29]1953 European Convention of Human Rights (ECHR), Art.1 of Protocol 1. According to one survey, this right is among the most frequently violated Convention rights, and as of 1 January 2010, 14.58% of all judgments where the ECtHR found a violation of the Convention concerned the right to property. See the information, available at www.echr.coe.int/Documents/Facts_Figures_1959_2009_ENG.pdf.

[30]Judges sitting in this case were Christos Rozakis (President), Nina Vajić, Khanlar Hajiyev, Dean Spielmann, Sverre Erik Jebens, Giorgio Malinverni, and Andrey Bushev (*ad hoc* judge).

[31]See Section 3, *infra*.

[32]See *OAO Neftyanaya Kompaniya Yukos v. Russia*, *supra* note 14.

[33]The Court eventually awarded its largest ever amount of compensation and ordered Russia to pay approximately €1.9 billion to the shareholders of Yukos. For a case comment with the relevant examination of the background facts of the case see E. Brabendere, 'Introductory Note to OAO Neftyanaya Kompaniya Yukos v. Russia (Eur. Ct. H. R.)', (2016) 55 *International Legal Materials* 474.

[34]*Mobil Corporation, Venezuela Holdings, B.V., et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award of The Tribunal of 9 October 2014.

[35]This dispute arose out of a series of measures that Venezuela adopted between 2004 and 2007 concerning its legal framework in the oil and gas sector, which had a direct impact on the investments of the claimants in a number of projects.

[36]See *Mobil v. Venezuela*, *supra* note 34.

[37]Arts. 50–52 of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) and 2006 ICSID Rules of Procedure for Arbitration Proceedings (ICSID Arbitration Rules) 50–55 set out the relevant procedures for such applications.

[38]See Art. 31.1 of the 2016 SIAC Rules; 2017 ICC Rules of Arbitration, Art. 22(3).

[39]2016 SIAC Rules, Art. 31; 2017 ICC Rules of Arbitration, Art. 21(1).

[40]If they fail to agree, the International Court of Arbitration (under Art. 18(1) of the 2017 ICC Rules of Arbitration) or the tribunal (under 2017 SIAC Investment Arbitration Rules, Art. 18(1)) would decide the seat of arbitration.

private legal practice.[41] The awards are not subject to appeal[42] but domestic courts can set them aside or refuse their enforcement in case of certain procedural irregularities.[43]

Table 1 demonstrates the essential differences between public, hybrid and private dispute resolution institutions explained in more detail in subsequent sections of this article.

Table 1. Public and private adjudication continuum

	PUBLIC ADJUDICATION	HYBRID ADJUDICATION	PRIVATE ADJUDICATION
	⟷	⟷	⟷
	ICJ ECtHR	ICSID	ICC SIAC
Ownership and funding	Institutions owned by and funded by states with no or nominal fees for the disputing parties	Institution owned by states, funded primarily by fees of parties but subsidized by an intergovernmental organization	Institutions owned by and funded by private actors with significant fees for the parties
Appointment and tenure of adjudicators	Adjudicators appointed by states, usually for fixed terms ('status adjudicators')	Adjudicators appointed by parties or the institution for each case ('contractor adjudicators')	Adjudicators appointed by parties or the institution for each case ('contractor adjudicators')
Requirements on diversity of adjudicators	Rigid requirements on diversity of adjudicators on geographic and development level of the country of origin	No requirements on diversity of adjudicators on geographic and development level of the country of origin	No requirements on diversity of adjudicators on geographic and development level of the country of origin
Adjudicators' background	Adjudicators primarily have public law and public service background	Adjudicators have private law and/or private practice background	Adjudicators primarily have private law and private practice background
Transparency and confidentiality	Decisions and other procedural documents are published	Decisions and other procedural documents are published in most cases	Decisions and other procedural documents are confidential in most cases
Applicable law	Disputes are resolved primarily on the basis of public law with open-ended principles playing the most important role	Disputes are resolved on the basis of public and private national and international law with open-ended principles playing the most important role	Disputes are resolved primarily on the basis of private national law with rules playing the most important role rather than open-ended principles
Setting precedents	Decisions in earlier cases often serve as guidance for future cases	Decisions in earlier cases often serve as guidance for future cases	Decisions in earlier cases do not serve as guidance for future cases
Internal review mechanisms	An internal review mechanism of rendered decisions in limited circumstances	An internal review mechanism of rendered decisions in limited circumstances	No internal review mechanism of rendered decisions
External review mechanisms	Decisions cannot be challenged or set aside by domestic courts	Decisions cannot be challenged or set aside by domestic courts	Decisions can be challenged and set aside by domestic courts

[41]2017 ICC Rules of Arbitration, Arts. 12–13; 2016 SIAC Rules, Arts. 9–17 set out the relevant procedures for the appointment of arbitrators. Section 3 of this article includes further discussion on the constitution of arbitral tribunals under the rules of ICC and SIAC, and on the identity of arbitrators.

[42]2016 SIAC Rules, Art. 32(11); 2017 ICC Rules of Arbitration, Art. 35(6). As per 2017 ICC Rules of Arbitration Art. 34, ICC tribunals shall submit the award before signing to the International Court of Arbitration, which may make some modifications as to the form of the award and draw the tribunal's attention to points of substance without interfering with the tribunal's liberty of decision.

[43]1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), 330 UNTS 3, Art. V.

3. Procedural aspects of adjudication

3.1. Appointment of adjudicators

Empirical studies demonstrate that in the domestic context, the identity of adjudicators may correlate with decision-making patterns. For example, the race,[44] gender,[45] and even whether adjudicators have daughters[46] have a proven effect on decision-making. Not surprisingly, determining the procedure for adjudicators' appointments often lead to political battles at national[47] and international levels.[48]

Procedural rules of the vast majority of dispute resolution institutions, regardless of their public or private nature, explicitly require that adjudicators act impartially.[49] However, approaches on how to achieve this diverge. Dispute resolution systems on the public end of the spectrum, such as the ICJ and ECtHR, favour appointing judges for fixed periods of time. Although both the ICJ and ECtHR allow the appointment of *ad hoc* judges, the vast majority of judges are appointed according to the procedure explained below.[50]

The United Nations General Assembly and the United Nations Security Council elect the majority of ICJ judges[51] from candidates nominated by state parties to the ICJ Statute.[52] Each judge serves for a renewable fixed term.[53] ECtHR judges are also elected by states for fixed terms.[54] Public adjudication institutions have strict conflict of interest rules. In order to ensure the independence and impartiality of the judges, the ICJ Statute prohibits them from exercising any political or administrative function, engaging in any other occupation of a professional nature, or acting as agent, counsel, or advocate in any case.[55] Similar to the ICJ, ECtHR judges cannot engage in any political, administrative activity or professional activity incompatible with their independence or impartiality or with the demands of a full-time office.[56]

Private dispute resolution offered by SIAC[57] and ICC[58] allows parties significant freedom to appoint their own arbitrators. Usually, each party appoints its own arbitrator for a specific case and if there is a disagreement on who should be the third presiding arbitrator, the relevant

[44]J. P. Kastellac, 'Racial diversity and judicial influence on appellate courts', (2013) 57(1) *American Journal of Political Science* 167.

[45]S. Farhang and G. Wawro, 'Institutional dynamics on the US court of appeals. Minority representation under panel decision making', (2004) 20(2) *Journal of Law, Economics and Organization* 299, at 330.

[46]A. N. Glynn and M. Sen, 'Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?', (2015) 59(1) *American Journal of Political Science* 37, at 54.

[47]See, e.g., J. Biskupic, '6 Supreme Court nominees who faced controversy', *CNN*, 4 October 2018, available at edition.cnn.com/2018/10/03/politics/supreme-court-controversial-nominations-justice/index.html.

[48]See, e.g., J. Landale, 'How UK lost International Court of Justice place to India', *BBC*, 21 November 2017, available at www.bbc.co.uk/news/uk-politics-42063664.

[49]See, e.g., Art. 4.1. of the Rules of Court of the ICJ (1978), Rule 4.1 of the Rules of Court of the European Court of Human Rights (2018), Art. 11.2 of the Arbitration Rules of the International Chamber of Commerce (2017). In the past, however, many compensation commissions did not expect commissioners to be independent or impartial but rather to act as representatives of those who appointed them. Only if they fail to agree on a solution would an independent umpire be appointed. Y. Kryvoi, 'The Path of Investor-State Disputes: From Compensation Commissions to Arbitral Institutions', (2019) 33(3) *ICSID Review - Foreign Investment Law Journal* 743.

[50]Under Art. 31.2 and 31.3 of the ICJ Statute, a state party to a case before the court which does not have a judge of its nationality on the bench may choose a person to sit as judge *ad hoc* in that specific case. Under Rule 29.1(a) of the Rules of the ECtHR, an *ad hoc* judge may be appointed when the elected judge is unable to sit in the Chamber, withdraws, or is exempted, or if there is none.

[51]See ICJ Statute, *supra* note 28, Art. 10.

[52]Ibid., Arts. 5(2), 6.

[53]Ibid., Art. 13.

[54]See ECHR, *supra* note 29, Art. 23.

[55]Ibid., Arts. 16(1), 17(1).

[56]Rule 4 of the Rules of Court, available at www.echr.coe.int/Documents/Rules_Court_ENG.pdf.

[57]2016 SIAC Rules, Arts. 9–12.

[58]2017 ICC Rules of Arbitration, Art. 12.

institution appoints the presiding arbitrator. The parties may agree upon the method of appointment that they would like to apply to a certain dispute, and the institutional procedures only apply in the absence of an agreement between the parties. Private arbitration institutions normally impose no restrictions on engaging in political, administrative activity or other professional activities.

The hybrid ICSID adjudication largely follows the private adjudication model appointing adjudicators for each specific case.[59] However, the system also provides for annulment, where the members of annulment committees are appointed not by the parties but by the Chairman of the ISCID Administrative Council Secretariat in each case.[60]

3.2. Public or private law background of adjudicators

The adjudicators at dispute resolution institutions on the public side of the spectrum such as the ICJ tend to have held senior administrative, judicial or legal academic positions in the past.[61] The vast majority of ECtHR judges have public sector or academic backgrounds[62] and similar patterns can be observed in other public dispute resolution institutions.[63] In private adjudication, private practitioners dominate comprising nearly 80 per cent of all ICC arbitrators.[64] The majority of arbitrators sitting in ICSID tribunals have backgrounds working in private law firms,[65] which arguably can make them less familiar with public law approaches to interpretation and less sensitive to the public interest.[66]

Adjudicators in public adjudication are appointed for specific periods with fixed salaries as well as diplomatic immunity ('status adjudicators')[67] whereas arbitrators in private and hybrid

[59]It must be noted that the ICSID, unlike the ICC and SIAC, is an international organization rather than an NGO as ICC and SIAC. For this reason, the Chairman of the ICSID Administrative Council, where each contracting state has one representative, acts as the designating authority in case of disagreement between the parties. See ICSID Convention, *supra* note 37, Arts. 4, 38; see also ICSID Arbitration Rules, *supra* note 37, Rule 4.

[60]See ICSID Convention, ibid., Art. 53; ICSID Arbitration Rules, ibid., Rules 50, 52–55.

[61]2013 Handbook of the International Court of Justice 23, available at www.icj-cij.org/public/files/publications/handbook-of-the-court-en.pdf. ('Of the 103 Members of the Court elected between February 1946 and December 2013, 31 had held judicial office, eight of them having served as chief justice of the supreme court of their respective countries; 41 had been barristers and 75 professors of law; 69 had occupied senior administrative positions, such as legal adviser to the ministry of foreign affairs or ambassador; and 25 had held cabinet rank, two even having been Head of State').

[62]A survey including the data set of judges who sat in the Court from 1998 to 2007 shows that 27.4% of the elected judges have an academic background; 15.3% worked in domestic judiciary; 13.7% worked for the government (administration); 6.4% served on the constitutional courts of their states; and 21.7% have a mixed background in more than of the above-mentioned occupations. See F. J. Bruinsma, 'Judicial Identities in the European Court of Human Rights', in A. van Hoek et al. (eds.), *Multilevel Governance in Enforcement and Adjudication* (2006), at 213.

[63]J. Pauwelyn, 'The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators Are from Venus', (2015) 109(4) *American Journal of International Law* 761, at 783 (concluding that because of different appointment mechanisms, WTO panelists 'tend to be relatively low-key diplomats … with a government background', whereas ICSID arbitrators 'are likely high-powered, elite private lawyers or legal academics').

[64]According to one survey, 78% of the ICC arbitrators are in private practice, 9% of the remaining arbitrators hold academic positions, 9% of the rest of them are (retired) members of the judiciary. See P. Bert and T. Wessing, 'ICC Arbitrator Appointments: A First Look At the Data', *Kluwer Arbitration Blog*, 13 September 2016, available at arbitrationblog.kluwerarbitration.com/2016/09/13/icc-arbitrator-appointments-a-first-look-at-the-data/.

[65]See M. Waibel and Y. Wu, 'Are Arbitrators Political?', (2017) draft, at 15, available at www.yanhuiwu.com/documents/arbitrator.pdf (showing that 60% work as private practitioners and 38% are full-time academics); Pauwelyn, *supra* note 63, at 15, 23.

[66]See, e.g., A. Roberts, '*Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*', (2010) 104 *American Journal of International Law* 179, at 207; D. Schneiderman, 'Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes', (2010) 30(2) *Northwestern Journal of International Law & Business* 383; M. Sornarajah, 'A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration in Arbitration', in K. P. Sauvant (ed.), *Appeals Mechanism in Investment Disputes* (2008), at 39, 41–2.

[67]For example, the ICJ judges benefit from diplomatic privileges and immunities and cannot be removed without the unanimous opinion of the other judges. See ICJ Statute, *supra* note 28, Arts. 18, 19.

adjudication are normally paid on an hourly basis and their income depends on the number of appointments they secure ('contractor adjudicators'). Arguably fixed-term appointments make adjudicators less sensitive about the needs of the parties. However, they may pay more attention to the public interests of the governments, which elect them, and their decisions are likely to affect their re-election prospects.[68] On the other hand, party-appointed adjudicators may have more 'feel of the issues' because of their expertise and them being under more pressure to satisfy the parties to secure future appointments.

Empirical studies show that the professional background of adjudicators influences their approaches to questions of law.[69] For example, a study of ECtHR practice demonstrated that adjudicators with a career in the public sector (either as diplomats, state officials, or at other government offices) are more likely to defer to the national interests of the states.[70] Another empirical study shows that in ICSID cases where the presiding arbitrator is a national of an advanced economy with a private practice background rather than a governmental background, investors have a 25 per cent greater chance of receiving an award of damages.[71] Presiding arbitrators with a background in private practice are more likely to assert jurisdiction and in a three-member tribunal; the policy preferences and incentives of party-appointed arbitrators are likely to offset each other, leaving the ultimate decision to presiding arbitrators,[72] normally appointed by ICSID in the absence of agreement between the parties.

3.3. Geographic diversity of adjudicators

In international adjudication, the country of nationality of adjudicators has a proven effect on the substance of decisions. One study found evidence that arbitrators originating from developing countries are more likely to render smaller awards against developing countries.[73] Public and private adjudication differ significantly when it comes to principles related to the nationality of arbitrators. Some argue that a small number of powerful states tend to dominate the institutional design of international dispute resolution institutions, which led to decisions of questionable legitimacy in themes of developing states, which did not have much say in the design of those institutions and were ultimately left powerless.[74]

In public adjudication, such as ICJ and ECtHR the rules mandate equitable geographical distribution of adjudicators.[75] ICJ judges are supposed to represent 'the main forms of civilization and of the principal legal systems of the world'.[76] Indeed, current members of the ICJ have

[68]For example, according to one ICJ insider interviewed by the author, ruling against Nicaragua may help to secure more votes in the re-election process, because Costa Rica, Colombia and Honduras all had disputes with Nicaragua recently. See ICJ, Judgments, Advisory Opinions and Orders, available at www.icj-cij.org/en/decisions.

[69]C. Creamer and Z. Godzimirska, 'The Job Market for Justice: Screening and Selecting Candidates for the International Court of Justice', (2017) 30(4) *Leiden Journal of International Law* 947; E. Voeten, '*The Politics of International Judicial Appointments*', (2009) 9(2) *Chicago Journal of International Law* 387; D. Terris et al., 'Toward a Community of International Judges', (2008) 30 *Loyola of Los Angeles International and Comparative Law Review* 419.

[70]E. Voeten, 'The Impartiality of International Judges: Evidence from the European Court of Human Rights', (2008) 102 *American Political Science Review* 231, at 417, 422.

[71]A. Strezhnev, 'Detecting Bias in International Investment Arbitration' (2016), *57th Annual Convention of the International Studies Association*, available at scholar.harvard.edu/files/astrezhnev/files/are_investment_arbitrators_biased.pdf.

[72]Ibid., at 18.

[73]Ibid.

[74]See E. Benvenisti and G. Downs, 'Prospects for the Increased Independence of International Tribunals', (2011) 12 *German Law Journal* 1057.

[75]S. Rosenne, *The Law and Practice of the International Court* (1965), at 168. (Rosenne likewise describes it as 'a version of other provisions of the Charter concerning the principle of what is called 'equitable geographical distribution' as a guide to the composition of various other organs of the United Nations').

[76]See ICJ Statute, *supra* note 28, Art. 9.

different nationalities, come from almost all continents of the world, and represent both civil and common law legal systems.[77] Similarly, each Council of Europe member state can appoint a judge of its choosing to the ECtHR.[78] Although states are not bound by the nationality criterion, most judges tend to be nationals of the appointing state.[79] In other words, public adjudication institutions aim at an equitable representation of all states involved in the work of these institutions and as a result, adjudicators reflect the diversity of the disputing parties.[80]

In contrast, private adjudication institutions have very few restrictions on where the arbitrators should come from. For example, the ICC merely requires that the sole arbitrator or the president of the arbitral tribunal is of a different nationality than those of the parties (unless they agree otherwise)[81] while the SIAC imposes no restrictions on the parties with respect to nationality.[82] A review of the caseload of private institutions such as the ICC[83] and SIAC[84] suggests that most arbitrators originate from regions from where the biggest share of their users come.[85]

Private disputes are resolved primarily on the basis of domestic law, which leads to appointments from relevant jurisdictions making it nearly as diverse as the number of legal systems involved.[86] As market-driven institutions, they aspire to facilitate the needs of their users. Private institutions are not under pressure to secure a certain geographic distribution of adjudicators, but the body of arbitrators is rather diverse because of the need to engage domestic law experts.[87]

Hybrid adjudication institutions, such as ICSID, do not show the same degree of representation of the disputing parties as private and public institutions. ICSID has no formal rules aimed at ensuring equitable representation of states among adjudicators similar to those found at the ICJ or ECtHR.[88] In practice, this results in a mismatch between the regions where the parties come from and the appointed adjudicators. The largest share of respondents in ICSID disputes comprises states from Eastern Europe and Central Asia (26%) and South America (23%), but the majority of adjudicators come from Western Europe (47%) and North America (20%).[89]

[77]The ICJ is composed of 15 judges, who originate from the following countries: Somalia, China, Slovakia, France, Morocco, Brazil, United States of America, Italy, Uganda, India, Jamaica, Australia, Russian Federation, Lebanon, Japan, and Belgium, available at www.icj-cij.org/en/current-members.

[78]See ECHR, *supra* note 29, Art. 22.

[79]Only Portugal, Lichtenstein, and United Kingdom have judges on the bench who are not their nationals, available at www.echr.coe.int/Pages/home.aspx?p=court/judges.

[80]Both the ICJ and ECtHR allow appointment of *ad hoc* judges, where the normal rules of nationality do not apply. See ICJ Statute, *supra* note 28, Art. 31; 2020 European Court of Human Rights Rules of the Court, Rule 29.

[81]See 2017 ICC Arbitration Rules, *supra* note 58 Art. 13(5). In a three-member tribunal the ICC rules allow the parties to choose an arbitrator of any nationality, but in confirming the appointment, the ICC Court shall consider arbitrator's nationality. See also 2017 ICC Arbitration Rules, ibid., Art. 13(1).

[82]See 2016 SIAC Rules, *supra* note 57, Art. 9.

[83]ICC Statistics 2017, available at cdn.iccwbo.org/content/uploads/sites/3/2018/07/2017-icc-dispute-resolution-statistics.pdf, at 52, 57.

[84]SIAC Annual Report 2018, available at www.siac.org.sg/images/stories/articles/annual_report/SIAC_AR2018-Complete-Web.pdf, at 16–18.

[85]Statistics indicate that most arbitrators appointed in these institutions originate from the USA, the UK, Switzerland, and France. Though not all of these nationalities dominate among the most frequent users, these countries comprise one of the biggest shares of the parties in those institutions. ICC Statistics 2017, available at cdn.iccwbo.org/content/uploads/sites/3/2018/07/2017-icc-dispute-resolution-statistics.pdf, at 52, 57. SIAC Annual Report 2018, ibid., at 16–18.

[86]See, e.g., ibid., (noting on arbitrator representation that '61.7% originated from Europe, 21.1% from South America, 10% from North America (United States and Canada), 12.6% from Asia and Australia and 3.6% from Africa. New nationalities represented in 2019 originated from Azerbaijan, Botswana, Haiti, Malawi, the Palestinian authority, St Kitts and Nevis').

[87]Ibid.

[88]The sole arbitrator cannot have the nationality of either claimant or respondent, unless both parties agree. See ICSID Arbitration Rules, *supra* note 37, Ch. I, Rule 1(3).

[89]ICSID Statistics 2019-1, available at icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1(English).pdf.

What explains this mismatch between the respondent states and adjudicators in the hybrid model? In the absence of mandatory rules, developing countries tend to appoint well-known arbitrators from the Global North to maximize their chances of winning, even if their appointees know very little about the laws, the culture of doing business, or the languages of the region. This has become a major concern for a number of states, which point out that the pool of arbitrators is homogenous in terms of its origin,[90] and for some scholars, who view the ICSID system as a way to undermine developing countries or as a form of colonialism.[91] Many developing states consider that this weakens the legitimacy of the system of investor-state disputes.[92]

Although individuals from developing countries comprise half of the recent designations by the Chairman of the ICSID Administrative Council to the ICSID Panel of Arbitrators and Conciliators,[93] in practice their appointments remain rare. The ICSID Secretariat also favours Western European adjudicators who recently comprised 44 per cent of all appointments made by it, while representatives of the largest group of respondent states (Eastern Europe and Central Asia) accounted for only around 2 per cent.[94]

To sum up, the identity and the method of appointment of adjudicators differ in public, private dispute and hybrid dispute resolution. Judges in public adjudication systems better reflect various regions where various parties come from compared to hybrid adjudication because of rules on fixed-term appointments. Somewhat unexpectedly, the diversity of arbitrators in private, market-driven adjudication is greater compared to hybrid adjudication. The main reason is that most disputes are decided under domestic law rather than on the basis of open-ended and often ambiguous international law principles or standards.

3.4. Transparency and confidentiality

Approaches to transparency significantly differ in private and public adjudication. In private adjudication, the normal approach is confidentiality; in public adjudication, the norm is maximum transparency.

A typical example of transparency under a public adjudication procedure is the ICJ, which publishes judgments, orders, advisory opinions, and any other document that the court may direct to be published.[95] The ICJ can decide to make copies of the pleadings and annexed documents accessible to the public.[96] Likewise, the ECtHR rules provide that final judgments and nearly all procedural documents are published in a free public database.[97] Private adjudication institutions such as the ICC and SIAC normally do not provide such information: to avoid disclosure of sensitive information, confidentiality remains the norm.[98]

In hybrid adjudication such as ICSID, the situation is different. If both parties consent, the institution can publish arbitral awards, minutes and other records of proceedings.[99] In the absence

[90]See statements of representatives of Colombia, Indonesia, and Poland. A. Roberts, 'UNCITRAL and ISDS Reforms: Concerns about Arbitral Appointments, Incentives and Legitimacy', (2018) *EJIL:Talk!*, 6 June 2018, available at www.ejiltalk.org/uncitral-and-isds-reforms-concerns-about-arbitral-appointments-incentives-and-legitimacy/.

[91]See K. Miles, *The Origins of International Investment Law: Empire, Environment, and the Safeguarding of Capital* (2013), at 23, 24.

[92]UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session, Doc. A/CN.9/935, 8-14 (2018), para. 70, available at undocs.org/en/A/CN.9/935.

[93]Members of the Panels of Conciliators and of Arbitrators, available at icsid.worldbank.org/about/arbitrators-conciliators/database-of-icsid-panels.

[94]See ICSID Statistics 2019-1, at 17, available at icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20Statistics%20%282021-1%20Edition%29%20ENG.pdf.

[95]See ICJ Statute, *supra* note 28, Art. 26.

[96]See ibid., Art. 53(2).

[97]See ECHR, *supra* note 29, Art. 44(3); see also ECHR Rules of the Court, *supra* note 80, Rule 78, available at hudoc.echr.coe.int/eng-press.

[98]C. Partasides and S. Maynard, 'Raising the Curtain on English Arbitration', (2017) 33(2) *Arbitration International* 197.

[99]See ICSID Convention, *supra* note 37, Art. 48; *Administrative and Financial Regulations*, Regulation 22.

Table 2. Publication of dispute-related materials (as a general rule)[100]

Institution	Adjudication model	Commencement of proceedings	Publication of key documents	Submission by a third party	Submission by a non-disputing party	Hearings	Disclosing the votes of the sitting panels	Publication of separate opinions
ICJ	public	yes	yes	yes	yes	yes	yes	yes
ECtHR	public	yes	yes	yes	yes	yes	yes	yes
ICSID	hybrid	varies	varies	varies	varies	varies	varies	varies
ICC	private	no	no	no	no	no	no	no
SIAC	private	no	no	no	no	no	no	no

of consent, the institution is under an obligation to promptly include excerpts of the legal reasoning of the tribunal in its publications.[101] Once a case is registered to ICSID, the relevant information on particular aspects of the dispute (including the parties, subject of dispute, economic sector, instrument invoked, and applicable rules) becomes available online for public access.[102]

The summary of procedural rules in Table 2 shows that transparency standards in public adjudication institutions are relatively high, since almost all the documents and the hearings are public. At the other end of the spectrum are hybrid and private adjudication models. ICSID, SIAC and ICC rules do not provide for greater transparency unless the parties decide to apply the UNCITRAL Rules of Transparency.[103] At ICSID, public access to documents and hearings depends entirely on the parties or the applicable law (e.g., a relevant treaty may provide for transparency rules). Private adjudication institutions have more restrictive rules on public access, reflecting the needs of private users for confidentiality.

It appears that without the legitimacy of being selected by the parties, the least public adjudicators can do is to publicly explain the logic of their decisions, including by means of dissenting or concurring opinions. As Table 2 demonstrates, the public and private adjudication approaches to confidentiality clash in hybrid regimes, as tribunals have to engage in balancing private parties' entitlement to commercial confidentiality and the public's right to information about issues that affect the public at large.[104] The ongoing reforms have resulted in efforts to introduce greater transparency in hybrid investor-state dispute settlement.[105]

[100]UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration define each of these criteria in the scale of transparency. 2014 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014) (UNCITRAL Rules on Transparency), available at uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rules-on-transparency-e.pdf.

[101]See ICSID Arbitration Rules, *supra* note 37, Rule 48(4).

[102]The ICSID's case database is available at icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx.

[103]2017 United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention on Transparency), available at uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/transparency-convention-e.pdf.

[104]E. Moneke, 'The Quest for Transparency in Investor-State Arbitration: Are the Transparency Rules and the Mauritius Convention Effective Instruments of Reform?', (2020) 86(2) *International Journal of Arbitration, Mediation and Dispute Management* 157, at 180–1. L. Trakman and D. Musaleyan, 'The Repudiation of Investor-State Arbitration and Subsequent Treaty Practice: The Resurgence of Qualified Investor-State Arbitration', (2015) 31(1) *ICSID Law Review* 194, at 215–16; S. Allison and K. Dharmananda, 'Incorporating Arbitration Clauses: The Sacrifice of Consistency at the Alter of Experience', (2014) 30(2) *Arbitration International* 265, at 278.

[105]For example, a revision to Arbitration Rule 48(4) concerned the publication of information about awards and permitted the Secretariat to publish excerpts of the legal rules applied by tribunals. ICSID, A Brief History of Amendment to the ICSID Rules and Regulations, 10 March 2020, available at icsid.worldbank.org/news-and-events/speeches-articles/brief-history-amendment-icsid-rules-and-regulations; see also Mauritius Convention on Transparency, *supra* note 102; UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration, *supra* note 103.

Arguably, in public adjudication, adjudicators have a greater motivation to explain their reasoning for future disputes because their decisions are public. Private adjudicators who derive their appointments and legitimacy from private parties, the need to inform the public at large is less pressing. As the next subsection will show, this also has a knock-on effect on the cost and duration of proceedings.

3.5. Duration of proceedings

Resolving disputes in a time-efficient and cost-efficient manner is an important component of the rule of law and expectations of the parties.[106] Comparing the selected five institutions suggests that public and hybrid adjudication cases on average last longer than private adjudication.

The median duration of ICJ cases is around four years and the median length is around 28,000 words.[107] The median duration of ICSID proceedings was also around four years, but the median length of decisions was much longer – around 50,000 words.[108] The median duration of 20 ECtHR proceedings related to the protection of property was nearly nine years but with comparatively short judgements – around 5,500 words.[109]

As awards in private adjudications normally remain confidential, it is more difficult to access the duration of proceedings and length of decisions. However, arbitration institutions track the duration of their proceedings to retain their competitiveness. For example, according to one study by SIAC, the median duration of their proceedings in cases filed under SIAC Rules in 2013 was approximately one year.[110] Rules of arbitration institutions can also give a clue as to the 'normal' duration of the proceeding. For instance, under ICC rules the arbitral tribunal must render its final award within six months from the signing of the terms of reference.[111] That suggests that private adjudication proceedings are significantly shorter than public adjudication, where proceedings take years.

Surprisingly, ICSID decisions, being a hybrid of public and private procedures, turned out to be the second-longest after ECtHR. While the high volume of cases and a limited number of adjudicators explains the long duration of ECtHR proceedings,[112] the explanation for ICSID with access to an infinite number of adjudicators is different. Legal reasoning in ICSID awards often

[106]See, e.g., World Justice Project, World Justice Project Rule of Law Index, 2017–2018 (2018), available at worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf; UNCITRAL Working Group III (Investor-State Dispute Settlement Reform, Possible Reform of Investor-State Dispute Settlement (ISDS) - Cost and Duration, A/CN.9/WG.III/WP.153, available at undocs.org/en/A/CN.9/WG.III/WP.153.

[107]ICJ cases from the period of 2013 to 2018, available at www.icj-cij.org/en/decisions.

[108]ICSID cases from the period of 2013 to 2017, available at icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx. This is also consistent with larger datasets such as PluriCourt's Investment Treaty Arbitration Database, which contains over 600 investor-state cases, available at pitad.org/.

[109]ECHR cases from the period of 2018 to 2019, available at hudoc.echr.coe.int/; Kryvoi, *supra* note 18.

[110]SIAC's Costs and Duration Study released in October 2016 (on file with the author). Study is based on actual cases filed with SIAC under SIAC Arbitration Rules (2013). According to the same study, the median duration at other major arbitration institutions is similar: 14.3 months at the Hong Kong International Arbitration Centre (HKIAC), 16 months at the London Court of International Arbitration (LCIA), and 13.5 months at the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).

[111]1998 ICC Arbitration Rules, Art. 24. Furthermore, to induce compliance with this provision the ICC International Court of Arbitration introduced a policy of cost consequences for arbitrators for unjustified delays in submitting awards. Under the policy, tribunals should submit a draft award for internal review by the ICC within three months of the close of proceedings (two months for sole arbitrators). Should tribunals go outside of this time limit without proper justification, the ICC may lower the arbitrators' fees. See 'ICC Court announces new policies to foster transparency and ensure greater efficiency', 8 January 2016, available at iccwbo.org/media-wall/news-speeches/icc-court-announces-new-policies-to-foster-transparency-and-ensure-greater-efficiency/.

[112]K. Dzehtsiarou and A. Greene, '*Legitimacy and the Future of the European Court of Human Rights: Critical Perspectives from Academia and Practitioners*', (2011) 12(1) *German Law Journal* 1707 ('The delay caused due to its inability to handle the ever-increasing wave of applications also negatively affects the legitimacy of the ECtHR').

counts hundreds of pages resulting from the public international law character of investment disputes[113] as well as the reliance of tribunals on vague and ill-defined principles, as explained in subsection 4.1 below. Arguably, the involvement of states in investment disputes, the relevance of local industries, and implications of these disputes for economies result in more extensive reasoning in investment treaty arbitration than in international commercial arbitration.[114]

As a prominent arbitrator explained, in private disputes, national laws are 'sufficiently developed to be predictable, and the arbitrators' role does not involve developing rules belonging to this national law',[115] whereas in public disputes, international law is 'less developed and is still in the process of being formed' and therefore the arbitrators' role in the establishment of predictable rules becomes much more important.[116] This is one of the reasons why proceedings end up being shorter in private adjudication.

The hybrid private-public ICSID proceedings appear to be an outlier in terms of length also because of the ease of challenging adjudicators which slows down the proceedings.[117] Some explain it by the reluctance of tribunals to act decisively in certain situations to avoid challenges, or setting aside or annulment of the award, which may also lead to multiple extensions of time or rescheduling of hearings.[118]

3.6. Cost of proceedings

In public adjudication institutions, such as the ICJ and the ECtHR, disputing parties normally bear only the legal costs of their legal representation and experts.[119] Governments, which established such institutions, cover nearly all other costs, including the salaries of judges, which do not depend upon the number of cases.[120] Parties to ICJ and ECtHR disputes can also benefit from legal aid to access these dispute settlement mechanisms.[121] Such institutions serve to promote important public goals, such as protection of human rights or peaceful resolution of disputes between states,[122]

[113]E. Brabendere, *Investment treaty Arbitration as Public International Law: Procedural Aspects and Implications* (2014), at 89.

[114]G. A. Alvarez and W. M. Reisman, 'How Well Are Investment Awards Reasoned?', in G. A. Alvarez and W. M. Reisman, *The Reasons Requirement in International Investment Arbitration: Critical Case Studies* (2008), at 91–2.

[115]G. Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?', (2007) 23(3) *Arbitration International* 357, at 375.

[116]Ibid.

[117]B. Vasani and S. Palmer, 'Challenge and Disqualification of Arbitrators at ICSID: A New Dawn?', (2014) 30 *ICSID Review – Foreign Investment Law Journal* 194.

[118]UNCITRAL Working Group III, *supra* note 106, para. 91.

[119]2013 ICJ, Handbook of the Court, available at www.icj-cij.org/public/files/publications/handbook-of-the-court-en.pdf, at 31–2; www.echr.coe.int/Documents/Questions_Answers_ENG.pdf, at 9.

[120]See ICJ Statute, *supra* note 28, Art. 64; ICJ Annual Report 2017–2018, available at www.icj-cij.org/public/files/annual-reports/2017-2018-en.pdf; 2013 ICJ, Handbook of the Court *supra* note 119, at 31–2; ECtHR budget, available at www.echr.coe.int/Documents/Budget_ENG.pdf. For, example, the ICJ allocates approximately $479,487 per judge annually. See ICJ Annual Report 2017–2018, ibid.

[121]In the ICJ, states may, on a voluntary basis, designate additional sums to the UN Secretary-General's Trust Fund, which covers expenses incurred in connection with the submission disputes to the ICJ and the costs of implementing judgments. The fund operates on the basis of voluntary contributions. More information about the fund is available at www.un.org/law/trustfund/trustfund.htm; the ECtHR may also provide legal aid to applicants. See ECtHR Rules of the Court, Ch. XII, Rule 105.

[122]The ICJ serves as a principal judicial organ of the United Nations and is authorized to give binding judgments in any legal dispute concerning the questions of international law. The ECtHR ensures the observance of the engagements undertaken by states in the ECHR. See ICJ Statute, *supra* note 28, Art. 1; ECHR, *supra* note 29, Art. 19. See also *Case Concerning Legality of Use of Force (Yugoslavia v. Spain)*, Provisional Measures, Order of 2 June 1999, [1999] ICJ Rep. 761, available at www.icj-cij.org/en/case/112; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia And Herzegovina v. Serbia And Montenegro)*, Merits, Judgment of 26 February 2007 [2007] ICJ Rep. 43, available at www.icj-cij.org/en/case/91; *Case Concerning Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Merits, Judgment of 19 November 2012 [2012] ICJ Rep. 624, available at www.icj-cij.org/en/case/124.

which may explain the reason why they do not charge the disputing parties for their services and offer legal aid.

Private adjudication institutions focus on the resolution of specific disputes between parties[123] rather than on achieving certain public policy objectives. In private dispute resolution institutions, such as the ICC and SCC, in addition to costs of representation (counsel, experts), the parties also pay the fees and expenses of arbitrators and tribunal secretaries, as well as administrative costs charged by arbitral institutions.[124] Moreover, in some situations the losing party also needs to contribute or entirely cover the costs of the winning party.[125]

The ICSID model of funding and costs reflects its public-private hybrid nature: the institution itself is a creature of an international treaty and the International Bank for Reconstruction and Development makes a significant in-kind contribution to the expenses of ICSID.[126] On the other hand, adjudicators get their appointments on a case-by-case basis and much of the institution's funding comes from the income generated from its users.[127]

Despite being an intergovernmental organization, ICSID is rather expensive to access[128] and offers no legal aid for investors or states, which may struggle to afford the high costs of ICSID proceedings.[129] This is why the high cost of investor-state arbitration remains an important criticism of the ICSID system,[130] with developing states in particular feeling that the system imposes a disproportionately heavy burden on them.[131] The lack of precedent and reliance on vague standards also adds to the cost of proceedings as many issues dealing with jurisdiction and merits remain unsettled.

To sum up, the difference between public adjudication is evident when it comes to costs of proceedings. The system with salaried judges and no or nominal payments to access dispute resolution institutions and access to legal aid is expensive to maintain for states but cheap to access for the users. The private adjudication institutions are normally more expensive to access for the

[123]2017 ICC Arbitration and Mediation Rules, Art. 21; 2016 SIAC Rules, *supra* note 57, Art. 31.

[124]ICSID Schedule of Fees, available at icsid.worldbank.org/services/content/schedule-fees; 2017 ICC Arbitration and Mediation rules, Arts. 37, 38; SIAC Schedule of Fees, available at www.siac.org.sg/68-estimate-your-fees/360-siac-schedule-of-fees-1-august-2014. Unlike public institutions, ICSID, ICC, and SIAC charge additional fees for services that allow the parties to resolve their disputes with maximum efficiency. For example, the ICC and SIAC provide the possibility of expedited proceedings and emergency arbitrators, which are charged additionally to the rest of the costs. ICSID offers special services, such as the Secretary-General acting as appointing authority, or a request for a supplementary decision or its interpretation. See 2016 SIAC Rules, *supra* note 57, Art. 5, Sch. 1; SIAC Schedule of Fees; see ICC Arbitration and Mediation Rules, *supra* note 123, Arts. 29–30; ICSID Administrative and Financial Regulation 16, available at icsidfiles.worldbank.org/icsid/icsid/staticfiles/basicdoc/partc-chap03.htm#r16.

[125]When allocating costs, tribunals most frequently apply the presumption that the unsuccessful party will bear the costs of the arbitration. See J. Y. Gotanda, 'Awarding Costs and Attorneys' Fees in International Commercial Arbitrations', (1999) 21 *Michigan Journal of International Law* 1.

[126]2017 ICSID Annual Report, at 73, available at icsid.worldbank.org/sites/default/files/publications/annual-report/en/2017_ICSID_AnnualReport_English_LowRes.pdf.

[127]Ibid.

[128]According to the ICSID Schedule of Fees, a non-refundable fee of US$25,000 fee is paid to lodge an arbitration request, adjudicators are entitled to receive US$3,000 per day of meetings or other work performed in connection with the proceedings, as well as subsistence allowances and reimbursement of travel expenses. In addition, an administrative charge of US$42,000 is levied upon the registration of a request for arbitration, conciliation or post award proceeding, and annually thereafter. See 2020 ICSID Schedule of Fees, available at icsid.worldbank.org/services/content/schedule-fees.

[129]One study shows that in 2017 the costs awarded to claimants reached $110 million and this amount increases annually. See M. Hodgson and A. Campbell, 'Damages and costs in investment treaty arbitration revisited', (2017) *Global Arbitration Review*, available at globalarbitrationreview.com/damages-and-costs-in-investment-treaty-arbitration-revisited.

[130]South Africa and Italy argued that the high costs of ISDS makes it a system for powerful investors. See A. Roberts, 'UNCITRAL and ISDS Reforms: Concerns about Costs, Transparency, Third Party Funding and Counterclaims', *EJIL: Talk!*, 6 June 2018, available at www.ejiltalk.org/uncitral-and-isds-reforms-concerns-about-costs-transparency-third-party-funding-and-counterclaims/.

[131]UNCITRAL Working Group III, *supra* note 106, paras. 8–9.

parties but require no funding from states. Although ICSID as a hybrid institution is established and partially funded by states, most of its income comes from the disputing parties, it is rather expensive to use and offers no access to legal aid.

4. Substantive aspects of adjudication

4.1. Applicable substantive law: principles and rules

Procedural aspects of adjudication institutions cannot be isolated from their substantive aspects. The distinction between public and private substantive law can be traced at least to Roman law, under which all disputes to which the state was a party belonged to *jus publicum*. In disputes related to *jus publicum*, the norms of *jus privatum* as enforced by courts between private parties did not apply. State officials observed the relevant legislation but were not subject to other principles except for a vague notion of promoting the public interest.[132] On the other hand, the state abstained from interference into *jus privatum*, leaving it to the private parties – something which Roman lawyers considered a significant achievement.[133]

In other words, a more general principle of pursuing the public interest rather than formal rules primarily constrained public law. However, adjudicators often used precedent as a way to avoid blame, particularly where deliberations were made in public.[134] Judges could shelter themselves from blame by using examples of precedents of other judges, which also helped to form an orderly system. As this section will show, the same public-private distinction to a certain degree has survived in public adjudication, often guided by open-ended principles.

The ICJ Statute specifies that the function of the court is to decide the disputes in accordance with international law and lists the primary sources and subsidiary means for its determination.[135] The applicable law before the ECtHR is primarily the ECHR and its protocols, but in practice, the Court often makes reference to other human rights treaties, as well as other relevant rules and principles of international law, especially on treaty interpretation.[136] Both the ICJ and the ECtHR primarily rely on public international law, including decisions in previous cases.[137]

The ICSID Convention does not provide a set of applicable substantive rules but states that, unless otherwise agreed by the parties, the law of the host state and international law apply.[138] The term 'international law' corresponds to Article 38(1) of the ICJ Statute, bearing in mind that this Article was designed for inter-state disputes.[139] In other words, in the ICSID system, both international public law and domestic law serve as the main sources of applicable law.

Under the ICC and SIAC arbitration regimes the parties agree on the applicable law, and if not, the tribunal will apply the rules of law that it considers appropriate.[140] The ICC Arbitration Rules also expressly set out that the tribunal shall take account of the contractual provisions agreed by

[132]W. J. Jones, 'Expropriation in Roman Law', (1929) 45 *Law Quarterly Review* 512, at 517.

[133]Frontinus, *De Anuis Urbis Romae* (1923), at 128.

[134]Smith, *supra* note 7.

[135]See ICJ Statute, *supra* note 28, Art. 38(1).

[136]K. Dzehtsiarou, 'What Is Law for the European Court of Human Rights', (2017) 49 *Georgetown Journal of International Law* 89; D. Shelton, 'The Boundaries of Human Rights Jurisdiction in Europe', (2003) 13 *Duke Journal of Comparative & International Law* 95, at 129.

[137]G. Guillaume, 'The Use of Precedent by International Judges and Arbitrators', (2011) 2(1) *Journal of International Dispute Settlement* 5. ('the Court refers to itself frequently to ensure "consistency of jurisprudence". It sometimes does this by simply insisting on its "settled jurisprudence" (*jurisprudence constante*) and sometimes by mentioning judgments previously rendered').

[138]See ECtHR Rules of Court, *supra* note 80, Art. 42(1).

[139]Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other State, ICSID, 15 April 2006, at 35, available at https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf.

[140]See 2017 ICC Arbitration Rules, *supra* note 58, Art. 21(1); see also 2016 SIAC Rules, *supra* note 57, Art. 28(1).

the parties and any relevant trade usages.[141] In practice, choice-of-law clauses in ICC and SIAC disputes almost always provide for national laws of a particular jurisdiction.[142] Although national law includes private and public law, most disputes resolved in commercial arbitration relate to the interpretation of private law, particularly contract law.

Public law does not necessarily rely on principles more than on rules compared to private law.[143] However, the analysis of the selected five institutions suggests that public adjudication (ICJ, ECtHR) demonstrate a greater degree of reliance on open-ended principles compared to private adjudication (ICC, SCC) where domestic law applies and usually contains comprehensive rules on various issues.

Typically, rules offer more legal certainty than principles. When formulated as rules, the distinction between the impermissible and permissible conduct is more clear compared to principles, this clarity is crucial for the legitimacy of any adjudication procedure and the rule of law.[144] Formal rules as opposed to open-ended principles help to restrain official arbitrariness and to provide legal certainty.[145] Substantive rules drawn in advance also reduce the burden on the parties of having to research and argue the law, resulting in shorter duration and as a result lower costs of adjudication which also helps to address the problem of inequality of the parties.[146] However, the lack of detailed public international law rules often forces public adjudicators to resort to open-ended principles. The imprecise nature of principles gives tribunals extensive interpretative freedoms, and this can lead to lengthy and costly proceedings. It also gives more room for the adjudicators' discretion, which may even result in politically motivated bias or corruption.[147]

The reliance on broadly formulated principles becomes particularly problematic when it results in multiple conflicting interpretations of various standards, which is not helping future dispute resolution.[148] This supports the view that arbitration is normally suitable only for disputes where the rules are perfectly clear.[149] For example, in the ICSID system, although most decisions are public, they do not serve as precedents. In the absence of an appeal mechanism, there is no obvious way of harmonizing conflicting awards and adjudicators take a variety of different approaches to interpreting vague standards even in situations where the factual and legal issues are very similar. When private adjudicators have a nearly unrestricted freedom to interpret broad principles involving public policy concerns, that poses a significant problem for the legitimacy of the hybrid ICSID system and investor-state dispute settlement more generally.[150]

Vague principles also lead to an increase in the number of disputes because the vagueness creates an impression that each party has a chance to win. Not surprisingly, states complain about long duration, unpredictability, and a lack of consistency in arbitral decisions resulting from the

[141]See 2017 ICC Arbitration Rules, ibid., Art. 21(2).

[142]The most frequent choices for ICC arbitrations were the laws of England, the US, France, and Switzerland. See International Chamber of Commerce, ICC Dispute Resolution Bulletin 61(2), 2018.

[143]See, e.g., F. Ortino, 'Refining the Content and Role of Investment 'Rules' and 'Standards': a New Approach to International Investment Treaty Making', (2013) 28(1) *ICSID Review* 152.

[144]T. Franck, 'The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium', (2006) 100 *American Journal of International Law* 88, at 100.

[145]R. von Jhering, *Der Geist des Romischen Rechts* (1883), at 51–6.

[146]S. Djankov et. al., 'The New Comparative Economics', (2003) 31 *Journal of Comparative Economics* 15.

[147]D. Kennedy, *Form and Substance of Private Adjudication* (1976), at 1688.

[148]See J. Arato, 'The Private Law Critique of International Investment Law', (2019) 113 *American Journal of International Law* 1, at 16–29.

[149]W. Landes and R. Posner, 'Adjudication as a Private Good', *NBER Working Paper Series, Working Paper No. 263. 22*, 1978, available at doi.org/10.1086/467609 ('arbitration is generally limited to disputes where the rules are perfectly clear, and the only issue is their application to the facts').

[150]See, e.g, UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), Possible Reform of Investor-State Dispute Settlement (ISDS): Consistency and Related Matters, A/CN.9/WG.III/WP.150 (2018), available at undocs.org/Home/Mobile?FinalSymbol=A%2FCN.9%2F935.

significant interpretative discretion of adjudicators.[151] Tribunals may interpret the same treaty standard or principle of international law differently without a justifiable ground for the distinction.[152] This has a direct relevance to the development of the applicable substantive law, as it fails to help the parties to understand their rights and obligations.

This analysis of five selected institutions suggests that in public adjudication, disputes are resolved primarily on the basis of public law with open-ended principles playing the most important role. In hybrid adjudication, disputes are resolved on the basis of public and private national and international law with a significant reliance on open-ended principles. In private adjudication, disputes are resolved primarily on the basis of private national law with rules playing the most important role. While public adjudication institutions aim at facilitating consistency and coherence, private and hybrid adjudication focuses primarily on the dispute at hand.

4.2. Review of decisions: Internal and external

Review mechanisms such as internal appeals or challenges in domestic courts serve the function of making substantive rules more coherent and predictable thus facilitating legal certainty. Virtually all domestic legal systems provide for the right to appeal judicial decisions to correct errors. Review mechanisms also serve a 'law-making' function to inform other stakeholders about erroneous decisions and reduce the number of future mistakes.[153] States see the absence of review mechanisms and the inconsistency of arbitration awards in the hybrid investor-state arbitration such as ICSID, as a major setback to their legitimacy.[154]

Public adjudication systems tend to provide for limited internal review mechanisms but no right of appeal. For example, once rendered, ICJ judgments are final[155] and the parties may only resort to the revision of judgments of the court on limited grounds such as the discovery of a previously unknown potentially decisive fact.[156] Similarly, the rules of the ECtHR do not provide for appeal but for revision in case of discovery of a fact of a decisive influence.[157] Moreover, in exceptional circumstances, the ECtHR Grand Chamber can review decisions of the Chambers on the merits to deal with a serious issue of general importance that affects the interpretation or application of the ECHR and its protocols.[158] Essentially, the ECtHR reduces the cost of errors by selectively reviewing the cases where errors are most likely to occur rather than allowing a general right of appeal.

The ICSID model is similar to those adopted by other public dispute resolution institutions – it does not provide for an appeals procedure or an external review mechanism for awards,[159]

[151]See, e.g., UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session, Doc. A/CN.9/935 (2018), at 8–14, available at undocs.org/pdf?symbol=en/A/CN.9/935; for further reflections on these concerns see also UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), Secretariat Note on Possible Reform of Investor-State Dispute Settlement (ISDS): Arbitrators and decision makers: appointment mechanisms and related issues, UN Doc. A/CN.9/WG.III/WP.52 (2018), at 5–10, available at undocs.org/Home/Mobile?FinalSymbol=A%2FCN.9%2FWG.III%2FWP.152.

[152]UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), ibid. For a brief analysis of inconsistency in the adjudication of investor-state disputes with a number of illustrations from case law see I. M. Ten Cate, 'The Costs of Consistency: Precedent in Investment Treaty Arbitration', (2013) 51 *Columbia Journal of Transnational Law* 418, at 424–35.

[153]Compare *Ronald S. Lauder v. The Czech Republic*, UNCITRAL Case, Final Award of 3 September 2001, with *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL Case, Final Award of 14 March 2003.

[154]S. D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions', (2005) 73(4) *Fordham Law Review* 1521, at 1558.

[155]See ICJ Statute, *supra* note 28, Art. 60.

[156]Ibid., Art. 61.

[157]Ibid., (unlike the ICJ, no special procedure for interpretation exists as the ECtHR tends to defer to the interpretation of domestic courts).

[158]See ECHR, *supra* note 29, Arts. 43(2), 43(3).

[159]See ICSID Convention, *supra* note 28, Art. 53(1).

enforceable as if they were a final judgment rendered by states' domestic courts.[160] However, the ICSID Convention allows the parties to request revision in case of discovery of a potentially decisive fact[161] or to request annulment of an award. A specially constituted *ad hoc* committee appointed by the ICSID Secretariat from a panel of arbitrators may annul the award if the tribunal was not properly constituted, has manifestly exceeded its powers, because of corruption on the part of an arbitrator, a serious departure from a fundamental rule of procedure, or for failure to state the reasons on which the award is based.[162] In other words, it provides for additional grounds to challenge decisions internally compared to ICJ and ECtHR.

Domestic courts cannot review decisions resulting from public adjudication, but they can review private arbitration awards. Each party may file an application to set aside an arbitral award in courts of the seat of arbitration.[163] The parties may also resist recognition and enforcement of an award in domestic courts on the grounds provided in the New York Convention.[164] In most jurisdictions, this review is confined to procedural issues, such as the validity of arbitration agreements, respect for due process, or constitution and competence of the tribunal.[165] However, state courts can also set aside or annul awards on public policy grounds.[166]

The ICC Arbitration Rules provide for a peculiar internal review mechanism, which is not available in SIAC arbitration. According to this procedure, the International Court of Arbitration, acting as an independent body, may modify the form of the award or draw the arbitral tribunal's attention to substantive issues before the signing of the award.[167] This, however, cannot be regarded as an award review mechanism because the court essentially reviews the draft award before it becomes final.

This section shows that public procedures such as those at the ICJ or the ECtHR leave no room for the review of final decisions by domestic courts but normally provide for a self-contained form of review within the institution itself. In public adjudication, national courts cannot review public international law judgments and awards because international law normally prevails over domestic law.[168] On the other hand, awards resulting from private adjudication are not subject to internal appeal but can be challenged in domestic courts according to national arbitration laws.

Not surprisingly, public adjudication institutions such as ICJ or ECtHR established by states do not allow review of their decisions by domestic courts. This is partly compensated by their internal review mechanisms. It also makes sense that decisions of private institutions can be reviewed by domestic courts, which helps states to protect certain public policy objectives.

[160]Ibid., Art. 54(1).

[161]Ibid., Art. 51.

[162]Ibid., Art. 52.

[163]Art. 34 of the UNCITRAL Model Law on International Commercial Arbitration, has been widely adopted as a model by many states, provide for a number of specific grounds based on which the domestic courts in the seat of arbitration may set aside an arbitral award. See 1985 UNCITRAL Model Law on International Commercial Arbitration, available at uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-54671_ebook.pdf.

[164]See New York Convention, *supra* note 43, Art. V.

[165]Legislation based on the UNCITRAL Model Law has been adopted in 80 States in 111 jurisdictions. See UNCITRAL, *supra* note 163.

[166]See New York Convention, *supra* note 43.

[167]See 2017 ICC Arbitration Rules, *supra* note 58, Art. 34.

[168]See, e.g., 1969 Vienna Convention on the Law of International Treaties, Art. 27 ('A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'); International Law Commission Articles on State Responsibility, Art. 3 ('The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization').

5. Strengthening legitimacy and efficiency of dispute resolution

5.1. Procedural legitimacy

The legitimacy of a dispute resolution institution is understood here as acceptance of an institution as designed and operated in accordance with generally recognized principles of due process.[169] To a significant extent, legitimacy depends on who has established an institution – public or private actors. For example, hybrid adjudication is substantively public but procedurally private, which leads to legitimacy disconnect as some states are unwilling to accept private foreign arbitrators deciding on important public policy issues.[170] On the other hand, foreign investors may have good reasons to avoid domestic courts, as even in countries with a strong rule of law, courts are political institutions if the dispute concerns implementation of regulatory policy.[171] This may undermine the legitimacy of the procedure in the eyes of a foreign investor. In other words, legitimacy is not absolute but relative.

The legitimacy of any dispute resolution institution must rest on both procedural and substantive aspects, while in reality these two are often viewed in isolation. Even if one can imagine a fair and efficient procedure, it may not appear legitimate if it does not rest on a consistent and predictable body of substantive law but on principles. On the other hand, a body of substantive rules without a satisfactory procedure (e.g., excessively expensive) will not result in a system based on strong legitimacy.

This article demonstrates that it is not enough to distinguish between private and public adjudication only by looking at the nature of the parties (e.g., state or private), the subject matter of the dispute (e.g., a contractual dispute or a challenge to regulatory measures of states), the ownership of the institution (e.g., public or private), the name of the dispute resolution body (court or tribunal), or whether the procedure is described as arbitration, litigation, contentious proceedings or by another term. A range of procedural and substantive aspects of adjudication determine their public, private or hybrid nature and affect their legitimacy.

Appointment mechanisms constitute an important element of legitimacy and the rule of law. It is generally expected that disputes are resolved by those who reflect the makeup of the communities they serve.[172] In domestic legal systems, judicial function is traditionally regarded as resting on delegation from the people's representatives.[173] In international adjudication, the chain of delegation is further removed: people elect politicians, who in turn delegate their judicial power to international or foreign institutions, which in many cases delegate it further to foreign arbitrators rather than domestic courts.

As discussed in Section 3.3, in public adjudication such as that of the ICJ and the ECtHR, states appoint judges who represent different developmental and geographic constituencies and in private adjudication institutions appointees generally reflect the countries involved in the disputes. However, appointed arbitrators in hybrid adjudication rarely reflect the regions of the disputing parties they serve as discussed in Section 3.1.

[169]This definition is inspired by T. Franck, 'The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium', (2006) 100(1) *American Journal of International Law* 88, at 100.

[170]See, e.g., review of concerns raised by states at UNCITRAL. See A Roberts and Z Bouraoui, 'UNCITRAL and ISDS Reforms: Concerns about Consistency, Predictability and Correctness', *EJIL:Talk!*, 5 June 2018, available at www.ejiltalk.org/uncitral-and-isds-reforms-concerns-about-consistency-predictability-and-correctness/.

[171]C. Abram, 'The role of the judge in public law litigation', (1975) 89 *Harvard Law Review* 1281, at 632 ('. . . enforcement and application of law is necessarily implementation of regulatory policy. Litigation inevitably becomes an explicitly political forum and the court a visible arm of the political process').

[172]See, e.g., World Justice Project, World Justice Project Rule of Law Index, 2017–2018 (2018), available at worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf.

[173]Abram, *supra* note 171, at 643 ('judicial action can be understood to rest on a delegation from the people's representatives'); *Marckx v. Belgium*, Judgment of 13 June 1979, ECHR (No. 6833/74), at paras. 58, 92 ('[t]he national authorities have direct democratic legitimation and are . . . in principle better placed than an international court to evaluate local needs and conditions').

The background of arbitrators is particularly important when disputes are resolved on the basis of open-ended principles as opposed to detailed rules, as adjudicators have a significant discretion to interpret such laws and practices imposing their vision on sovereign states. This mismatch can be tackled either by establishing additional requirements to adjudicators (e.g., to ensure regional representation) or introducing fixed-term appointments.

Although parties make most of the ICSID appointments, appointments by arbitration institutions can potentially play a significant role in enhancing the diversity of arbitrators.[174] In this context, it could be useful to look at the efforts of the World Trade Organization (WTO) to balance the position of developing and developed states in the WTO dispute settlement procedure.[175] The WTO created an explicit expectation that special attention should be given to the particular problems and interests of developing country members.[176] In a dispute between a developing country member and a developed country member, upon the request of the developing country member, the panel shall include at least one panellist from a developing country.[177]

Qualifications of adjudicators also matter. In ICSID adjudication, individuals with only commercial law experience without any meaningful exposure to public international law can get appointments to resolve public law disputes. That reduces the quality and consistency of awards. To illustrate this problem – in a commercial dispute governed by English law, it would be highly unusual to appoint as an adjudicator someone without any proven expertise in English law. However, this is not unusual to appoint in investor-state disputes individuals with no meaningful experience in the area of public international law. Although the parties decide whom to appoint as arbitrators in ICSID disputes, requirements for qualifications of arbitrators can be set out in the relevant arbitration rules.

Duration and costs of adjudication proceedings also affect their legitimacy. For example, as discussed in Section 3.6, the costs of resolving public disputes using private adjudication can be prohibitively expensive, particularly for smaller claimants, which results, among other things from the lack of a consistent body of laws. The pressure to justify publicly available decisions in the absence of clearly defined rules impacts the duration as well as the length of awards.

Funding of dispute resolution institutions and the availability of legal aid also shape their legitimacy. States financially support public adjudication institutions with most services provided for free or at a nominal charge. One reason why private adjudication institutions may survive and flourish is because they rely on the applicable law created by legislators and public adjudicators without the expense of contributing to it. To enhance legitimacy and legal certainty, private dispute resolution institutions may look to adopt approaches used in public adjudication – such as introducing greater transparency[178] and publishing anonymized decisions or summaries of such decisions. ICSID may wish to learn from public adjudication institutions by facilitating access to legal aid to the parties as both ECtHR and the ICJ are doing.[179]

[174]See C. Giorgetti, 'Who decides who decides in international investment arbitration?', (2014) 35 *University of Pennsylvania Journal of International Law* 431.

[175]D. Sarooshi, 'The Future of the WTO and its Dispute Settlement System', (2005) 2(1) *International Organizations Law Review* 132. (Practice under the current system has only seen approximately 35 per cent of the panelists having served since 1995 come from a DCM [Developing Country Member], and there is no reason to suppose that this type of figure would in practice increase unless there was an express stipulation in a new DSU provision).

[176]1994 WTO Dispute Settlement Understanding (WTO DSU), Art. 4(10).

[177]See ibid., Art. 8(10).

[178]Some private institutions already made steps in this direction. For ICC awards made as from 1 January 2019, publication of awards and other information about the proceedings will become a default rule, '[i]increasing the information available to parties, the business community at large and academia is key in ensuring that arbitration remains a trusted tool to facilitate trade' ICC, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration (2019), paras. 34–46, available at cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf; according to the 2017 SIAC Investment Arbitration Rules, Art. 38 the institution *may* publish limited information on proceedings conducted under the Rules, when the parties agree to apply them.

[179]Another approach is to establish a special advisory centre similar to the Advisory Centre on WTO Law (ACWL), which is an international organization established 'to provide developing countries and LDCs with the legal capacity necessary to

5.2. Substantive legitimacy

A core element of the rule of law is the resolution of disputes by application of the law, rather than the exercise of discretion.[180] Greater consistency and predictivity of substantive law strengthens the legitimacy of a dispute resolution institution. Traditionally, an important function of domestic litigation (at least in common law jurisdictions) has been to clarify the law to guide future private actions.[181] However, international private adjudication has almost exclusively focused on the settlement of the dispute at hand, without taking into account the normative implications of their decisions. To contribute to the development of law and legal certainty, private adjudication must become more visible and depart from the default rule of confidentiality of awards.

Hybrid adjudication has shaped to a certain extent the normative expectations of both investors and host states but the lack of legal certainty on many issues has undermined its legitimacy. It has resulted in a closely-knit system of investment law, significantly removed from the reach of states.[182] While the self-contained nature of the ICSID system removes it from domestic political pressures, it also undermines the legitimacy of the system when decisions are viewed as fundamentally unfair or inconsistent. The ICSID system may want to improve consistency by introducing a selective review of the most important decisions following the ECtHR approach or by establishing a standing annulment committee.[183]

When disputes affecting public policy are no longer resolved by judges with tenure but by private adjudicators insulated from court supervision,[184] that poses serious challenges to the legitimacy of the system.[185] In this context, a mechanism for setting aside fundamentally unfair awards as a result of a system of appeal or internal review could bolster the legitimacy of the procedure in a similar way as public law institutions such as ICJ and ECtHR do. A greater reliance on domestic law of host states in investor-state disputes could help the facilitation of greater legal certainty.[186]

6. Conclusion

As this article has demonstrated, differences between public and private adjudication affect the legitimacy of such institutions, the rule of law, and the facilitation of legal certainty. Private and public adjudication institutions have much to learn from each other and comparative law analysis and dialogue between different institutions may help to identify the most effective procedural approaches.

enable them to take full advantage of the opportunities offered by the WTO', 'The ACWL's Mission', available at www.acwl.ch/acwl-mission. See also J. Sharpe, 'An International Investment Advisory Center: Beyond the WTO Model', *EJIL:Talk!,* 26 July 2019, available at www.ejiltalk.org/an-international-investment-advisory-center-beyond-the-wto-model/.

[180]See, e.g., Lord Bingham, 'The Rule of Law', (2007) 66 *Cambridge Law Journal*, at 72.

[181]See, e.g., O. Holmes, 'The Path of the Law', (1897) 10 *Harvard Law Review* 457, at 457–8.

[182]S. Schill, 'System-Building in Investment Treaty Arbitration and Lawmaking', (2011) 5 *German Law Journal* 12, at 1083–110.

[183]See Y. Kryvoi, 'ICSID Arbitration Reform: Mapping Concerns of Users and How to Address Them', 30 November 2018, *SSRN*, available at ssrn.com/abstract=3280782.

[184]R. Wai, 'Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization', (2002) 40 *Columbia Journal of Transnational Law* 207, at 215–19.

[185]G. Van Harten, 'The Public—Private Distinction in the International Arbitration of Individual Claims against the State', (2007) 56 *International & Comparative Law Quarterly* 371, at 393 ('private contractors rather than tenured judges are left to manage the legal construction of the public sphere, without rigorous supervision by courts. The ultimate authority to determine what juridical sovereignty means is itself privatized', 'the rulings of arbitrators pursuant to investment treaties … involve governmental choices that are akin to the judicial determination of individual property and economic rights in domestic public law').

[186]Y. Kryvoi, 'Three Dimensions of Inequality in International Investment Law', 2 September 2020, *British Institute of International and Comparative Law*, available at www.biicl.org/documents/117_tackling-inequalities-international-investment_law.pdf.

It is hardly possible to make a clear distinction between permanent core and peripheral features of 'publicness' or 'privateness' of adjudication. Only by looking at the combination of key features can one make a judgement about the nature of the institution. For example, while commercial arbitration institutions (falling under 'private adjudication') are usually separate from states in most countries, in some jurisdictions they may be state-owned,[187] which does not automatically make the adjudicative procedure public given all other features. Similarly, a particular subject matter is not definitive to characterize a system as private or public. We have already discussed examples of how essentially the same property-related dispute may find itself in private, hybrid and public adjudication.[188]

Equally, private adjudication does not have to be confidential and there is an increasing trend towards making awards in commercial arbitration more public to facilitate the development of private law.[189] Adjudication mechanism may also change over time and move towards either a private or a public end of the spectrum. For example, the hybrid investor-state arbitration has evolved from public compensation commissions by gradually acquiring more features characteristic of private adjudication.[190]

However, despite these variations and changes, private and public adjudication possess a number of distinct features and their own legitimacy mechanisms. The analysis above suggests that when parties face the choice of a remedy to protect their property rights, they may resort to private adjudication to resolve disputes faster and confidentially. Private adjudication institutions are usually cheaper for the taxpayers, as the disputing parties cover the costs of proceedings.

Private adjudication institutions focus on a dispute at hand rather than on setting or clarifying the rules of conduct for future disputes. In other words, they are in an inferior position compared to public adjudication to facilitate legal certainty, secure a consistent body of case law, promote public policy goals or allow third parties to know the rules of conduct in advance to prevent undesirable activities. The transactional nature of private adjudication institutions, the lack of publicity and their much weaker law-making function prevents them from promoting reforms or socially desirable outcomes. On the other hand, public adjudication institutions have a greater capacity to serve as vehicles for reform or judicial activism to achieve socially desirable outcomes.

Legitimacy understood as acceptance of the institution by its users as operating in accordance with the rule of law is 'in the eye of the beholder' and depends on who is using an adjudication mechanism. The legitimacy concerns raised by states in relation to hybrid dispute resolution mechanisms, which they created, will sooner or later result in fundamental reforms on issues such as confidentiality, appointment of adjudicators, applicable law and review mechanisms.[191] If private parties no longer find a particular dispute settlement mechanism attractive or legitimate, they can switch to other dispute resolution institutions or rely on private contracts with private adjudication rather than hybrid or public adjudication.[192]

Private adjudication dressed in public clothes or imposing public adjudication for private disputes is likely to perpetuate a legitimacy crisis of such institutions. Any reform, moral or economic assessment of different models of adjudication should take into account their public or private nature.

[187]For instance, the world's business commercial arbitration institution is the China International Economic and Trade Arbitration Commission (CIETAC), which functions as a part of China Council for the Promotion of International Trade, a specialized state agency. See www.cietac.org/index.php?m=Page&a=index&id=34&l=en.

[188]See a discussion of Yukos cases in various institutions, *supra* note 14.

[189]See, e.g., ICC, *supra* note 178.

[190]See Kryvoi, *supra* note 18.

[191]See, e.g., Roberts and Bouraoui, *supra* note 170.

[192]See, e.g., C. R. Drahozal, 'Regulatory competition and the location of international arbitration proceedings', (2004) 24 *International Review of Law and Economics* 371.

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