Journal of International Dispute Settlement, 2023, **14**, 428–450
https://doi.org/10.1093/jnlids/idad021
Advance access publication 15 September 2023
Article

OXFORD

Equitable representation on international benches and the appointment of tribunal members in investor–State dispute settlement: a historical perspective

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ABSTRACT

The lack of diversity in the appointment of tribunal members in investment arbitration has long been subject to criticism. This article analyses the design of adjudicator appointment mechanisms and challenges the mainstream view that investment arbitration is modelled after the structures and procedures of commercial arbitration. Instead, drafters of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention) largely drew inspiration from the Permanent Court of Arbitration and the International Court of Justice. Following this institutional pedigree, the development of the equitable representation requirement is linked to the growing appreciation of the public aspects of the international judicial function. Nevertheless, drafters adopted Article 14(2) of the ICSID Convention mainly to facilitate the performance of the private function of dispute resolution. Through the historical lens, controversies surrounding different approaches for addressing diversity concerns in the ongoing investor–State dispute settlement reform are essentially surface products of deeper disagreements on the private and public aspects of the judicial function.

INTRODUCTION

The lack of diversity in the appointment of tribunal members in investor–State dispute settlement (ISDS) has long been subject to criticism. As seen in the International Centre for Settlement of Investment Disputes (ICSID) statistics (1966–2022), adjudicators in investment arbitration are mostly males from Western Europe and North America.[1] Concerns

I am grateful to Martins Paparinskis, Gracia Marín Durán, Anna Saunders, Filip Batselé, the participants of the 2022 European Society of International Law Interest Group on the History of International Law Workshop and anonymous peer reviewers for their constructive comments.

[1] *The ICSID Caseload – Statistics (Issue 2023-1)*, 17–20.

about the lack of diversity in investment arbitration also permeate the ongoing ISDS reform at the United Nations Commission on International Trade Law (UNCITRAL) Working Group III.[2] The reform proposals presented by delegations range from recalibrating the current investment arbitration system to establishing a multilateral standing court.[3] Specifically, in designing the adjudicator appointment mechanism, ensuring diversity, including 'geographical, gender and linguistic diversity as well as equitable representation of different legal systems and cultures', is one of the key policy goals in the reform process.[4]

The diversity concerns in the current investment arbitration system are not surprising and are rather the expected outcome of institutional design. The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention) reflects limited efforts to ensure diversity in the appointment of adjudicators.[5] Article 14(2) provides that the Chairman of the Administrative Council, when designating persons to serve on the Panel of the Arbitrators (and the Panel of Conciliators), shall 'pay due regard to the importance of assuring representation on the Panels of the principal legal systems of the world and of the main forms of economic activity'. Other than this institutional feature, however, no other provision in the ICSID Convention explicitly addresses diversity concerns either relating to the designation of persons to the Panel of Arbitrators by the Contracting States or the appointment of arbitrators in actual disputes by disputing parties and appointing authorities.

The institutional design features of investment arbitration are often perceived as resembling commercial arbitration, which generally prioritizes party autonomy as well as the private function of judicial institutions in terms of effective dispute resolution. This article, however, challenges the mainstream view that investment arbitration is based on structures and procedures developed in the field of commercial arbitration.[6] A close reading of the ICSID drafting history (1961–1965) suggests that the design of the appointment mechanism of adjudicators largely drew inspiration from public international law institutions, especially the organizational structure of the Permanent Court of Arbitration (PCA),[7] on the one hand, and the representation requirement in Article 9 of the International Court of Justice (ICJ) Statute,[8] on the other. Regarding international courts and tribunals, scholarship has explored not only the private function of dispute resolution but also the public aspects of the judicial function, including the development of international law on generalist issues and in specialist fields.[9]

This article analyses the extent to which this institutional pedigree rooted in public international law has shaped the original institutional choices concerning the adjudicator

[2] A/CN.9/964, paras 91–98.
[3] A/CN.9/WG.III/WP.166, paras 12–63.
[4] A/CN.9/WG.III/WP.203, para 10.
[5] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (done 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 ('ICSID Convention').
[6] Gus van Harten and Martin Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17 EJIL 121, 139; Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107 AJIL 45, 45; Sundaresh Menon, 'A Tale of Two Systems: The Public and Private Faces of Investor-State Dispute Settlement' (2022) 37 ICSID Rev – FILJ 619, 619, 627.
[7] ICSID, *History of the ICSID Convention (Volume II-1)* 29–30.
[8] ICSID, *History of the ICSID Convention (Volume II-2)* 728. Statute of the International Court of Justice ('ICJ Statute'), as annexed to the Charter of the United Nations (UN) (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS xvi.
[9] Hersch Lauterpacht, *The Development of International Law by the International Court* (reprinted edn, CUP 2010) 3–25; Vaughan Lowe, 'The Function of Litigation in International Society' (2012) 61 ICLQ 209, 212; Jose Alvarez, 'What Are International Judges For? The Main Functions of International Adjudication' in Cesare Romano and others (eds), *The Oxford Handbook of International Adjudication* (OUP 2013) 168–77; Yuval Shany, *Assessing the Effectiveness of International Courts* (OUP 2014) 38–40; Thomas Schultz, 'Against Consistency in Investment Arbitration' in Zachary Douglas, Joost Pauwelyn and Jorge Vinuales (eds), *The Foundations of International Investment Law* (OUP 2014) 303–8; David Caron, 'The Multiple Functions of International Courts and the Singular Task of the Adjudicator' (2017) 111 Proceed ASIL Ann Meet 231, 232.

appointment mechanism, especially the drafting of the equitable representation requirement, in the negotiating history of the ICSID Convention, as well as its potential to continue to shape the contemporary debate in the ongoing ISDS reform. The term 'equitable representation' is adopted to refer to the geographical dimension of diversity concerns and issues commonly associated with the geographical background of adjudicators on international benches, such as the representation of different regions, nationalities, legal systems and cultures.[10] This represents the traditional focus of diversity requirements in the history of international adjudication. In the contemporary context, the meaning of diversity is multi-faceted and evolving, incorporating not only geographical origins but also other elements, such as gender, ethnicity, age and language.[11] The broader notion of diversity will be further investigated in the analysis of the ISDS reform.

The main claim of this article is that the development of equitable representation in the history of international adjudication is linked to the evolving conceptions of the public aspects of the international judicial function beyond the private function of dispute resolution. Through the historical lens, this article shows how, when borrowing the institutional features from the PCA and the ICJ, the ICSID drafters diluted the conceptions of public functions and reconstructed the rationale underpinning the equitable representation requirement from the perspective of facilitating the performance of the private function of dispute resolution. In contrast, the ISDS reform negotiators demonstrate a certain degree of ambiguity when it comes to the judicial function of the ISDS system in the current reform debate about diversity, where divergent conceptions of the judicial function can and should be spelled out.

The reconstruction of the debate through the lens of judicial function further bridges the gap between the scholarship's finding concerning the question of why diversity matters and the reform negotiation's focus on the question of how to achieve greater diversity. In existing literature, there are mainly two justifications for increased diversity. The first relates to the impact of diversity on the judicial decision-making processes. The general assumption is that diverse perspectives brought by adjudicators improve the quality of decision-making,[12] including through mitigating 'group-thinking behaviour' or 'risk of judicial bias'.[13] Nevertheless, the empirical evidence in this respect is overall equivocal.[14] There are divergent findings regarding whether geographical representation[15] or gender diversity[16] has a significant impact on legal reasoning or judicial outcomes. The second justification is to view diversity as a value in and of itself. The presence of a diverse group of adjudicators is connected with the 'legitimacy' of judicial institutions, the need for 'democratic representation' or the

[10] The term 'equitable (geographical) representation' is commonly used in the UN context, see eg, 'Question of Equitable Representation on the Security Council and the Economic and Social Council' A/RES/1991(XVIII) (17 December 1963); 'Improvement of Equitable Geographical Representation in the United Nations Secretariat: Report of the Secretary-General' A/59/264 (13 August 2004).

[11] Freya Baetens, 'Identity and Diversity on the International Bench: Implications for the Legitimacy of International Adjudication' in Freya Baetens (ed), *Identity and Diversity on the International Bench: Who is the Judge?* (OUP 2020) 5; Andrea K Bjorklund and others, 'The Diversity Deficit in International Investment Arbitration' (2020) 21 JWIT 410, 414.

[12] Baetens (n 11) 8–10.

[13] Philipp Günther, 'Groupthink Bias in International Adjudication' (2020) 11 JIDS 91, 98; Shany (n 9) 100–1.

[14] Gabrielle Kaufmann-Kohler and Michele Potestà, 'The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards: CIDS Supplemental Report' (15 November 2017) 30.

[15] Susan D Franck, 'Development and Outcomes of Investment Treaty Arbitration' (2009) 50 Harv Intl LJ 435, 459; Michael Waibel and Yanhui Wu, 'Are Arbitrators Political? Evidence from International Investment Arbitration' ASIL Research Forum Working Draft (2017) 17; Malcolm Langford and others, 'The West and the Rest: Geographic Diversity and the Role of Arbitrator Nationality in Investment Arbitration' in Daniel Behn and others (eds), *The Legitimacy of Investment Arbitration: Empirical Perspectives* (CUP 2022) 283.

[16] Nienke Grossman, 'Sex Representation on the Bench and the Legitimacy of International Criminal Courts' (2011) 11 Intl Crim L Rev 643, 645; James Crawford, 'Appearing before and Sitting with Female Adjudicators: Reflections from Practice' in Baetens (n 11) 417–20.

pursuit of 'non-discrimination'.[17] From this angle, the significance of diversity is independent of uncertainties surrounding its impact on the process of adjudication. Overall, these two justifications to varying degrees relate to the performance of the private and public aspects of the judicial function.

In the reform context, the controversies that attract the most attention are those associated with the question of the extent to which different institutional design proposals can possibly achieve greater diversity in ISDS. The rationales underpinning the need for greater diversity are lightly touched upon in reaching the consensus decision about the desirability of addressing diversity concerns[18] but are largely disconnected from the debate about the design of and the choices between various proposed appointment mechanisms. However, an inquiry into the conceptions of the judicial function that underpin different institutional design proposals uncovers the underlying policy divergences as to the extent to which diversity is significant or ranks high on the priority scale of States as reform negotiators. In other words, the different answers to the question of how to best achieve greater diversity in the reform process are intrinsically linked to the varying assumptions about why diversity matters in the first place.

The following sections begin by introducing the drafting history of Article 14(2) of the ICSID Convention, especially how the ICSID drafters imported institutional features from public international law institutions and, at the same time, endorsed the private aspect of the judicial function (see 'Equitable representation in the drafting history of the ICSID Convention' section). The 'Equitable representation in the history of international adjudication' section then selects the defining moments of institutional changes from the establishment of the PCA until the earlier practices of the ICJ and analyses how the equitable representation requirement emerged and was consolidated in light of the growing appreciation of the public facets of the role of international judicial institutions. The two visions of the equitable representation requirement, as connected with the private and public aspects of the judicial function, ultimately provide an analytical lens to reconstruct the divergent views about how to resolve the diversity concerns in the ongoing ISDS reform at UNCITRAL Working Group III (see 'ISDS reform and the appointment of tribunal members' section) with Concluding section.

EQUITABLE REPRESENTATION IN THE DRAFTING HISTORY OF THE ICSID CONVENTION

During the drafting process of the ICSID Convention, the World Bank convened a series of conferences including four regional consultative meetings chaired by Aron Broches, the then-General Counsel of the World Bank, at the headquarter cities of the UN Economic Commissions for Africa, Latin America and the Caribbean, Europe, and Asia and the Pacific.[19] These regional consultative meetings were organized mainly to enable legal experts[20] from various States to exchange views regarding the Convention and were part of the World Bank's effort to present an 'impression of representativeness'.[21] This section

[17] CIDS Supplemental Report (n 14) 31; Baetens (n 11) 8–10; Bjorklund and others (n 11) 418; Stéphanie Hennette Vauchez, 'Gender Balance in International Adjudicatory Bodies' in Max Planck Encyclopedia of International Procedural Law (2019) paras 18–35; Hélène Ruiz Fabri and Edoardo Stoppioni, 'International Arbitration: A Feminist Perspective' in Thomas Schultz and Federico Ortino (eds), *The Oxford Handbook of International Arbitration* (OUP 2020) 545–49.

[18] A/CN.9/935, paras 69–75; A/CN.9/964, paras 91–98; A/CN.9/1004/Add.1, para 101.

[19] *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (18 March 1965) para 7; Antonio Parra, *The History of ICSID* (2nd edn, OUP 2017) 43, 53.

[20] In the regional consultative meetings, the views expressed by legal experts, who were referred to as 'delegations' in Broches's Report of the meetings, did not formally bind the governments but were seen as strong indications of the views of governments in practice, see *Volume II-1* (n 7) 175, 455, 555, 558, 596, 601.

[21] Taylor St John, *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences* (OUP 2018) 138.

addresses the debate about the design of the organizational structure of the ICSID generally (see 'Organizational structure of the ICSID' section) and the equitable representation requirement specifically (see 'Article 14(2) of the ICSID Convention' section), highlighting the impact of the drafters' public international law perspective on institutional design.

Organizational structure of the ICSID

The key issue that the negotiation of the Convention intended to tackle was the absence of adequate machinery for the settlement of investment disputes, in that public international law institutions, including the PCA, were said to be 'not open to private claimants' at the time, and 'private organisations' such as the International Chamber of Commerce were frequently unacceptable to States as fora for dispute settlement.[22] In fact, the PCA administered for the first time an arbitration opposing a private entity and a State in the 1930s[23] and formally developed a set of procedural rules tailored for mixed arbitration in the 1960s.[24] Nevertheless, as Broches explained, the main aim was to create 'an international jurisdiction to private claimants with substantially the same access as States-claimants have to the [ICJ] or other international tribunals'.[25]

Beyond the official record of the negotiating history, a Draft Convention produced by a drafting committee under the auspices of the American Bar Association in 1961, which was seen as a precursor to the ICSID Convention, did refer to the International Chamber of Commerce as one of the sources of inspiration.[26] However, the two explicit references were related to Article II Section 3 on the nomination of candidates in an adjudicator election system, which was not adopted in the first official Working Paper prepared by Broches, and Article IV on conciliation.[27] The Draft Convention mostly made references to the ICJ, the PCA and the 1958 ILC Draft Model Rules on Arbitral Procedure as the major sources for the design of the arbitration rules,[28] similar to the official record of the ICSID negotiation process.

The debate about the design of the adjudicator appointment mechanism thus largely centred around public international law institutions. At one end of the scale of possible dispute settlement mechanisms was the creation of a 'permanent tribunal' similar to the ICJ, staffed by adjudicators elected or appointed for a fixed period. At the other end was a 'panel of names' modelled after the PCA, either submitted by States or designated by some other authority, from which the arbitrators could be selected by disputing parties and appointing authorities.[29] As the former was seen as 'impractical' in the then-political context, the latter was adopted, with the awareness of possible contradictory decisions undermining the role, if any, of investment tribunals in developing the law.[30]

[22] *Volume II-1* (n 7) 1–2 (Broches); see also United Nations Economic and Social Council, 'The Promotion of the International Flow of Private Capital: Progress Report by the Secretary-General' E/3325 (26 February 1960) 80–81.

[23] *Radio Corporation of America v The National Government of the Republic of China*, PCA Case No 1934-01, Award of the Tribunal (13 April 1935). On precursors to modern investment arbitration in the history of the PCA, see A/CN.9/WG.III/WP.143, paras 8–11 (PCA).

[24] 1962 Rules of Arbitration and Conciliation for Settlement of International Disputes between Two Parties of Which Only One is a State. See further, Pieter Sanders, 'Private Parties and the Permanent Court of Arbitration' (1993) 6 LJIL 289, 289; Tjaco van den Hout, 'The Permanent Court of Arbitration: Responding to a Century of Globalization' (2000) 2 Int Law FORUM du droit international 235, 235.

[25] *Volume II-1* (n 7) 2.

[26] St John (n 21) 132–33, 250; see also, Juan Carlos Boue, 'Much More than a Footnote (or Three): Frank C Hendryx and an Untold Story of Petroleum Concessions and the Genesis of ICSID' (2022) 13 JIDS 1.

[27] American Bar Association Section of International & Comparative Law, 'Convention on the Conciliation and Arbitration of International Investment Disputes' (20 October 1961) <https://data.qdr.syr.edu/file.xhtml?persistentId=doi:10.5064/F6UMRNAC/IS2HMQ&version=1.>, 17–21.

[28] ibid.

[29] *Volume II-1* (n 7) 3 (Broches).

[30] ibid 117 (Broches).

Therefore, the organizational structure of the ICSID largely follows the PCA, consisting of an Administrative Council that is composed of one representative of each Contracting State [Article 4(1) of the ICSID Convention], a Secretariat including a Secretary-General elected by the Administrative Council [Article 10(1)] and Panels of Arbitrators and Conciliators (Articles 12–16). Regarding the Panel of Arbitrators, each Contracting State may designate four persons, and the Chairman of the Administrative Council may designate 10 persons (Article 13). Upon a request of arbitration, disputing parties are to appoint arbitrators from persons within or outside of the Panel to constitute a tribunal [Articles 37(2) and 40(1)],[31] while the Chairman, if called upon to make appointments in case of a deadlock (Article 38), is to appoint persons only from the Panel [Article 40(1)]. In addition, the Chairman shall appoint annulment committee members from the Panel of Arbitrators [Article 52(3)].

Article 14(2) of the ICSID Convention

Although the PCA's approach did not contain any explicit representation requirement, ICSID drafters drew inspiration from Article 9 of the ICJ Statute, which provides that the electors shall bear in mind that in the judicial body as a whole, 'the representation of the main forms of civilization and of the principal legal systems of the world should be assured'. Similarly, pursuant to Article 14(2) of the ICSID Convention, the Chairman of the Administrative Council, when designating persons to serve on the Panel of Arbitrators, is to pay due regard to the importance of assuring representation on the Panel of the 'principal legal systems of the world' and of the 'main forms of economic activity'. According to Broches, the former referred to 'various groups of prevailing legal systems' and was borrowed from the ICJ Statute, and the latter referred to 'such sectors of the economy as banking, industry, agriculture and the like'.[32]

The already limited representation requirement, which applied only to appointments made by the Chairman to the Panel of Arbitrators, still gave rise to controversies during the drafting process. In particular, there were two major concerns that prompted the drafters to clarify the meaning of and the justification for the proposed provision. The first objection emphasized the right of disputing parties and the Chairman to appoint arbitrators in individual cases. Some delegations doubted whether the representation on the Panel of the 'principal legal systems of the world', which was originally designed for a standing court, was relevant at all for an ad hoc system since 'a wide representation' could not be assured 'in every individual case'.[33]

In response to such concerns, Broches suggested that the representation requirement would enable disputing parties to appoint arbitrators with desired qualities in individual disputes, including those who could apply 'principles of law common to a certain group of countries' which were sometimes referred to in arbitration clauses at the time.[34] More generally, the criteria in Article 14(2) corresponded to the required qualifications of persons designated to serve on the Panel, including 'recognized competence in the field of law, commerce, industry or finance' (Article 14(1)).[35] In other words, the representation requirement was designed not to achieve diversity in every single dispute, but to facilitate the appointment of arbitrators by disputing parties for the purpose of effective dispute resolution in individual cases.

[31] In the drafting process, there were different views about whether disputing parties should be allowed to appoint arbitrators from outside of the Panel, see *Volume II-1* (n 7) 29–30 (Working Paper in the form of a Draft Convention prepared by General Counsel) 329–30 (US), 415–17 (Britain); *Volume II-2* (n 8) 983 (Broches).
[32] *Volume II-1* (n 7) 487; *Volume II-2* (n 8) 728.
[33] *Volume II-2* (n 8) 728 (Israel).
[34] ibid 728.
[35] ibid 728–29; *Volume II-1* (n 7) 29–30.

The second objection focused on the right of States and the Chairman to designate members to the Panel of Arbitrators. Some delegations contested this power of the Chairman,[36] since the representation of 'principal legal systems of the world' should be 'effected by Contracting States', and 'any failure in this regard would presumably be due to the fact that the legal systems concerned were those of States that had not adhered to the Convention'.[37] These concerns highlighted the distinction between the representation of the Contracting States to the particular legal instrument and the representation of the universal community. Delegations were aware of the regional and national differences in attitudes to international arbitration, as European, African and Asian States traditionally looked upon arbitration 'with more favour and less distrust' than American States.[38] The universal adoption of the Convention was thus 'neither to be expected nor to be regarded as a test of its usefulness'.[39]

More broadly, the backdrop in the 1960s was that attempts of capital-exporting States to seek regulatory means of securing foreign investment was increasingly challenged by capital-importing States, including newly independent States.[40] There was strong opposition to the negotiation of the ICSID Convention especially from Latin American States.[41] The division between capital-exporting and -importing States was also reflected in the reactions from States to the later 1970 ICJ decision in the *Case Concerning the Barcelona Traction, Light and Power Company, Ltd (Belgium v Spain)*.[42] Capital-exporting States thereafter sought alternative legal instruments and institutions to protect their investors, while capital-importing States, including States promoting the New International Economic Order, saw the decision as being favourable to their cause.[43]

Responding to the second objection, one major justification for the power of the Chairman was the importance attached to the equitable representation of capital-exporting and -importing States on the Panel of Arbitrators. This was not explicitly mentioned in Article 14(2), but the formulation of this provision was overall accepted as able to ensure a 'fair representation on the [Panel] of qualified persons from both investing and receiving countries'.[44] Additionally, the main reason that the drafters rejected a proposal to allow the Contracting States to elect candidates to the Panel also concerned the possible difficulties in designing a complicated voting procedure to assure a 'balanced composition of the [Panel] as between candidates nominated by the capital exporting and capital importing countries'.[45]

The concerns about the representation of capital-exporting and -importing States also permeated discussions about other institutional features. Notably, in the debate about the conditions required for the Convention to enter into force, it was highlighted that there should be 'a fair representation of both capital-exporting and capital-importing countries' among adherents to the Convention for the institution to function effectively.[46] Although the drafters eventually did not impose an explicit condition in this respect due to definitional difficulties, these discussions indicated an assumption about potential investment disputes being disputes between relatively stable groups of States as capital-exporting and -importing States.[47] Such

[36] ibid 387 (Austria); *Volume II-2* (n 8) 662 (Turkey).
[37] *Volume II-1* (n 7) 387 (Austria).
[38] *Volume II-1* (n 7) 80–81.
[39] ibid.
[40] Doreen Lustig, *Veiled Power: International Law and the Private Corporation 1886-1981* (OUP 2020) 179.
[41] *Volume II-1* (n 7) 92–93; Parra (n 19) 54–56, 66–68.
[42] *Case Concerning the Barcelona Traction, Light and Power Company, Ltd (Belgium v Spain)* (Judgment) [1970] ICJ Rep 3, paras 32, 103.
[43] Lustig (n 40) 183, 201–5.
[44] *Volume II-1* (n 7) 382 (Netherlands).
[45] ibid 29–30 (Working Paper in the form of a Draft Convention prepared by General Counsel).
[46] *Volume II-2* (n 8) 908 (Nigeria).
[47] The subsequent ratifications of the Convention in earlier years further affirmed the division between (mostly developed) capital-exporting States and (developed and developing) capital-importing States, see St John (n 21) 170–74.

an assumption reaffirmed the focus of the institutional design on encouraging and facilitating recourse to the arbitration institution for dispute resolution,[48] rather than concerns about the public aspects of the judicial function.

In short, the equitable representation requirement was adopted by ICSID drafters mainly to promote the effective performance of the private function of dispute resolution. The reference to 'principal legal systems of the world' and of the 'main forms of economic activity' in Article 14(2) was deliberately vaguely defined and adopted with a view to including individual arbitrators with desired qualifications and from both capital-exporting and -importing States. However, as will be discussed in the next section, the equitable representation requirement in the history of international adjudication was closely connected with the growing appreciation of the public aspects of the judicial function. These public functions were diluted in the drafting history of the ICSID Convention, despite a certain degree of continuity in institutional design.

EQUITABLE REPRESENTATION IN THE HISTORY OF INTERNATIONAL ADJUDICATION

This section traces the development of one key aspect of adjudicator appointment mechanisms, the representation requirement, in the history of international adjudication. It discusses the ways in which evolving conceptions of the public aspects of the judicial function, from peace preservation to law development, were linked to the emergence and the consolidation of the representation requirement. These conceptions were (un)successfully employed either as a commonly shared normative benchmark to justify a particular institutional design feature, as seen in the histories and practices of the PCA (see 'Permanent Court of Arbitration' section) and the ICJ (see 'International Court of Justice' section), or as an argumentative skill to reconcile divergent views, reflected in the negotiating processes concerning the Court of Arbitral Justice (CAJ) (see 'Court of Arbitral Justice' section) and the Permanent Court of International Justice (PCIJ) (see 'Permanent Court of International Justice' section).

Permanent Court of Arbitration

The first Hague Peace Conference (1899) achieved broad representation within the European region and was seen as including 'nearly all civilised nations' but excluded most Latin American, Asian and African States.[49] The proposals from Great Britain, the USA and Russia frequently provided the basis for discussions concerning the establishment of the PCA and relevant arbitral procedures.[50] In the negotiating process, one often-mentioned conception of the international judicial function was that arbitration, among other peaceful means of dispute resolution, would contribute to the prevention of war and bring about peace, which was the essential objective of the 1899 Conference.[51]

The backdrop of such a conception was the peace movements in the 19th century, mainly among the European States and the USA.[52] Notably, the use of arbitration by Britain and the

[48] *Volume II-1* (n 7) 21 (Working Paper in the form of a Draft Convention prepared by General Counsel).

[49] James Brown Scott, *The Proceedings of the Hague Peace Conferences: Translation of the Official Texts, The Conference of 1899* (OUP 1920) 9–13 (List of Delegates), 624 (US), 663–64 (France's delegate as the President of the meeting).

[50] ibid 127 (Third Commission Report), 813 (British Proposals), 833 (American Proposals), 797, 801 and 815 (Russian Proposals).

[51] ibid 14 (Netherlands at the Opening Meeting) 17–18 (Russia's delegate as the President of the Second Meeting) 712 (Belgium). See also, David Caron, 'War and International Adjudication: Reflections on the 1899 Peace Conference' (2000) 94 AJIL 4, 5.

[52] Caron (n 51) 6–9; Martti Koskenniemi, 'The Ideology of International Adjudication and the 1907 Hague Conference' in Yves Daudet (ed), *Topicality of the 1907 Hague Conference, the Second Peace Conference* (Brill Nijhoff 2008) 130–35.

USA in the earlier Jay Treaty[53] and the Alabama Arbitration[54] contributed to the widespread faith in the 'peacekeeping ability' of international adjudication.[55] In contrast, the idea of peace was much more restrictive in the development of mixed claims commissions in the 19th and early 20th centuries between the European States and the USA, on the one hand, and Latin American States, on the other.[56] The agreements establishing such commissions were oftentimes backed by the (threat of) use of force by the former rather than the free will of disputing parties.[57]

It was thus not surprising to see that the idea of peace in the Conference was mostly limited to the States that were present at the Conference.[58] Moreover, the conception of peace preservation was ambiguous and might leave a broad scope for disagreements, for example, between peace through 'disputes being formally terminated' and peace through 'justice being done'.[59] Still, the preservation of peace was overall the central theme of the Conference to the extent that it was seen as reflecting community interest in light of the far-reaching impact of international conflicts, which justified the duty of non-disputing States to remind disputing States the possibility of having recourse to the PCA pursuant to Article 27 of the 1899 Hague Convention.[60]

Guided by the aim of peace preservation, the institutional design of the PCA centred around facilitating the recourse to peaceful means of dispute resolution as an alternative to the use of force (Article 20),[61] notably through preserving party autonomy in the design of the adjudicator appointment mechanism. When choosing between an arbitration mechanism and a standing court, the party-appointment mechanism prevailed over the political appointment of tenured judges, as the latter might run the risk of creating a permanent court without the trust from disputing parties and was less likely to be accepted by States.[62]

The representation requirement was not explicitly discussed in the negotiation process. Instead, delegations placed emphasis on the equal rights of States to appoint arbitrators both to a pre-established list of arbitrators and in actual disputes. In the British plan, each signatory State would designate an equal number of arbitrators to a list of Members of the Court (Article 23) from which arbitrators would have to be chosen by disputing States (Article 24).[63] The number of designates was changed from two to four to allow for greater latitude to have various kinds of abilities and professions represented by the arbitrators, including jurists, diplomats and military officers.[64] Further, when having recourse to the PCA in actual

[53] Treaty of Amity, Commerce and Navigation, between His Britannic Majesty and the United States of America, by their President, with the Advice and Consent of their Senate (signed 19 November 1794, entered into force 29 February 1796) <https://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=008/llsl008.db&recNum=129>.

[54] *Alabama Claims of the United States of America against Great Britain*, Award (14 September 1872) <https://legal.un.org/riaa/cases/vol_XXIX/125-134.pdf>.

[55] Caron (n 51) 9, Koskenniemi (n 52) 132.

[56] On the emergence of mixed claims commissions, see Yarik Kryvoi, 'The Path of Investor-State Disputes: From Compensation Commissions to Arbitral Institutions' (2018) 33 ICSID Rev – FILJ 743, 749.

[57] Frédéric Mégret, 'Mixed Claim Commissions and the Once Centrality of the Protection of Aliens' in Ignacio de la Rasilla and Jorge E Viñuales (eds), *Experiments in International Adjudication: Historical Accounts* (CUP 2019) 128–30; Kathryn Greenman, *State Responsibility and Rebels: The History and Legacy of Protecting Investment Against Revolution* (CUP 2021) 37, 42, 55–57, 60, 66.

[58] *The Conference of 1899* (n 49) 14.

[59] ibid 620–23 (US), 623 (Belgium). The two different conceptions of peace emerged in the debate about a proposal on the revision of arbitral awards on discovery of a new fact, see Art 55 of the 1899 Convention for the Pacific Settlement of International Disputes (adopted 29 July 1899, entered into force 4 September 1900) 1901 UKTS 9 ('1899 Hague Convention').

[60] *The Conference of 1899* (n 49) 18 (Russia).

[61] ibid 130 (Third Commission Report), 584 (Britain).

[62] ibid 710–11 (France).

[63] ibid 814. In the subsequent practice of the PCA, disputing parties were able to select arbitrators from outside of the Members of the Court. See further, Art 47 of the 1907 Convention for the Pacific Settlement of International Disputes (adopted 18 October 1907, entered into force 26 January 1910) 1907 UKTS 6 ('1907 Hague Convention'); Manuel Indlekofer, *International Arbitration and the Permanent Court of Arbitration* (Kluwer 2013) 83–84, 97–98, 103.

[64] *The Conference of 1899* (n 49) 131–32, 653–54.

disputes, disputing States would enjoy equal rights to appoint arbitrators.[65] In contrast, the Russian plan proposed the Conference to designate five States, each one of which would name an arbitrator in case of a request for arbitration.[66] This proposal was not adopted, since the right of disputing parties to appoint adjudicators was seen as the fundamental feature of arbitration (Article 15).[67] Similarly, the American proposal to prohibit the appointment of arbitrators having the same nationality as one of the disputing parties in case of a tribunal composed of only three members also met with disapproval.[68]

Overall, the conception of the international judicial function as an instrument to preserve peace prompted the institutional design to focus on encouraging recourse to arbitration and strengthening utmost party autonomy in the adjudicator appointment mechanism. Moreover, the equal rights of (both signatory and disputing) States to appoint arbitrators further obscured the necessity of having any explicit representation requirement in place.

Court of Arbitral Justice

One noticeable change in the regional representation of the second Hague Peace Conference (1907) was the inclusion of Latin American States.[69] During the negotiation, as part of the effort to improve the 1899 Hague Convention, the USA, Britain and Germany proposed to create a permanent court with tenured judges.[70] Article 1 of the Draft Convention Relative to the Creation of a Court of Arbitral Justice contained a two-fold conception of the role of the CAJ: 'promoting the cause of arbitration' and 'ensuring continuity in arbitral jurisprudence.'[71] The former reinforced the peace preservation goal through stronger institutionalization of dispute resolution in light of the relative inactivity of the PCA.[72] The latter suggested a new conception of the role of the CAJ to 'ascertain and develop a system of international law'.[73]

However, the Conference eventually only adopted a *vœu* recommending States to adopt the project due to a deadlock relating to the appointment of the judges.[74] At the heart of the deadlock were disagreements about the representation on the bench. At one end of the spectrum, the USA highlighted the law-development aspect of the judicial function as a guiding principle to justify two institutional features: the permanency of the institution and the representation of various legal systems of the world on the bench.[75] It was expected that a court sitting in permanence would have the sense of responsibility to follow previous decisions of the same court.[76] Moreover, judges could not be 'denationalised', since they were 'product[s] of [their] training' and were influenced by the 'environment, processes, and characteristics' of their States.[77] It was thus necessary to have judges 'trained in various legal systems' to develop a system of jurisprudence that was 'truly international'.[78]

[65] ibid 814.
[66] ibid 816.
[67] ibid 119 (Third Commission Report).
[68] ibid 127, 131–32, 607, 722–23.
[69] James Brown Scott, *The Proceedings of the Hague Peace Conferences: Translation of the Official Texts, The Conference of 1907 Volume I* (OUP 1920) 1–15 (List of Delegates).
[70] James Brown Scott, *The Proceedings of the Hague Peace Conferences: Translation of the Official Texts, The Conference of 1907 Volume II* (OUP 1920) 595–96 (President of the Committee of Examination).
[71] *The Conference of 1907 Volume I* (n 69) 350–53 (Committee of Examination Report).
[72] ibid 47 (Russia's delegate as the President of the Opening Meeting) 342–43 (Committee of Examination Report); *The Conference of 1907 Volume II* (n 70) 596–97 (Germany, Netherlands).
[73] *The Conference of 1907 Volume I* (n 69) 350–53 (Committee of Examination Report).
[74] ibid 327–29, 574, 701–4.
[75] ibid 350–53 (Committee of Examination Report).
[76] ibid; see also *The Conference of 1907 Volume II* (n 70) 595–98 (France).
[77] *The Conference of 1907 Volume I* (n 69) 350–53 (Committee of Examination Report).
[78] ibid.

Nevertheless, in designing the composition of the CAJ, the original American proposal suggested that each State would have a right to appoint judges, but their appointees would serve for different periods of time: certain States were assigned a permanent representation, while others were put into a rotation system.[79] The primary considerations, apart from different systems of law, included population, industry and commerce, and geography, which were said to be relevant to the frequency and significance of international conflicts.[80] Although these considerations seemed to reflect the ultimate goal of peace preservation, the fact that all the States with a permanent representation were those who were strong in the scale of 'wealth and power' suggested that such institutional design was essentially not guided by the two-fold conceptions of the role of the CAJ as explicitly stated.[81]

At the other end of the spectrum, Brazil and other Latin American States opposed the rotation system where appointees from different States would have unequal rights to sit on the bench.[82] Instead, the Brazilian proposal's understanding of equitable representation featured the right of each State to appoint judges who would have equal rights to sit on the bench in a rotation system as well as the right of disputing parties to choose judges within the CAJ to hear their disputes.[83] Such a design was rooted in Brazil's conception of the difference between a 'court of justice' and an 'arbitral court': the former imposed itself upon obedience with its authority emanated from the sovereignty of States, while the latter thrived on confidence with its authority derived from voluntary consent and free choices of judges by disputing parties.[84] Brazil's vision of the CAJ tended towards the latter since States 'do not obey: they choose, they trust'.[85] This was how the often-mentioned principle of sovereign equality came into play to justify the equal right for States to appoint judges both in the composition of the CAJ and in actual disputes,[86] which was also supported by smaller European States.[87]

Nevertheless, even States that supported the principle of (absolute) sovereign equality mostly did not engage with the two-fold conception of the role of the CAJ. Regarding the goal of peace preservation, Brazil briefly warned that the idea of peace 'carried to the extreme' to promote a court of justice may 'put might in place of right'.[88] The role of the CAJ in developing international law was also largely left unaddressed except for occasional general comments from Brazil,[89] Uruguay[90] and Norway.[91]

Thus, neither side of the debate fully engaged with the explicitly stated conceptions of the roles of the CAJ but rather demonstrated intentional ambiguities when it came to the desirable international judicial function. One approach linked the equitable representation requirement to the law-development aspect of the judicial function but did not adhere to such a conception in the specific design of the composition of the CAJ. The other built on the rationale underpinning the PCA and insisted on the significance of consent and party autonomy but did not respond to the envisaged public aspects of the judicial function. Without shared conceptions of the judicial function, it is not surprising that the two ends of the spectrum did not find a middle ground regarding representation on the bench.

[79] ibid 609–13 (US).
[80] ibid.
[81] *The Conference of 1907 Volume II* (n 70) 645–53 (Brazil).
[82] ibid 626–28 (Brazil).
[83] ibid 150–51, 619–23.
[84] ibid 645–53, 660–62.
[85] ibid 660–62.
[86] ibid 147–48, 619–23, 690–93 (Brazil). See further, Gerry Simpson, *Great Powers and Outlaw States* (CUP 2004) 136–47.
[87] *The Conference of 1907 Volume II* (n 70) 144 (Switzerland), 147 (Denmark), 161 (Belgium and Romania).
[88] ibid 660–62.
[89] ibid 645–53 (on the danger of the CAJ and the PCA unfolding two systems of jurisprudence).
[90] ibid 156–58 (on the possibility of States opposing the jurisprudence established by the CAJ).
[91] ibid 161–62 (on the positive impact of the CAJ on the development of international law).

Permanent Court of International Justice

After the First World War, pursuant to Article 14 of the Treaty of Versailles signed in the Paris Peace Conference (1919–1920),[92] the Council of the League of Nations established the Advisory Committee of Jurists to formulate a plan for the establishment of the PCIJ, including addressing the once unresolved issue regarding the appointment of judges.[93] The war strengthened the overarching aim of preserving peace[94] and triggered reflections upon the relative inactivity of the PCA, which challenged the rationale that safeguarding party autonomy in institutional design would encourage recourse to arbitration and prevent further wars.[95] Instead, the unfinished CAJ project represented a desirable way forward. Drafters in the Advisory Committee further clarified the relationship between the two-fold conception of the role of the CAJ through developing the idea of 'peace through justice'. In other words, the renewed aim of the PCIJ was to ensure justice in the sense that it would apply and develop a system of international law, thereby contributing to the maintenance of peace.[96]

Unlike negotiators of the CAJ project, drafters of the PCIJ Statute engaged with the two-fold conception of the judicial function in institutional design. Through this lens, the right of States to appoint judges to the court and in actual disputes was no longer desirable, since these arrangements did not seem to influence States' choices between resorting to PCA for judicial settlement and initiating a war.[97] One major obstacle that once prevented the creation of an election mechanism in the CAJ negotiation was thus removed.[98] Article 4 of the PCIJ Statute situated an election mechanism within the institutional framework of the League of Nations by allowing the Assembly and the Council to elect judges from a list of persons nominated by the national groups in the PCA.[99] This was based on the Root–Phillimore scheme proposed by the US and British members in the drafting process, which conceptualized the source of the authority of the judicial institutions as deriving from political institutions,[100] and justified the Council's power as one of the electoral bodies by emphasizing its significance in the execution of the awards or decisions of the PCIJ (Article 13).[101]

Furthermore, drafters articulated the law-development aspect of the judicial function to address controversies arising from the proposed requirement concerning the representation of 'principal legal systems of the world' and of the 'main forms of civilization' on the bench. When this requirement was formulated as a means to guarantee that certain States (known as 'Great Powers' at the time) would be represented by judges on the bench,[102] it received little support. The underlying assumption that 'Great Powers' would represent major legal

[92] Treaty of Peace between the Allied and Associated Powers and Germany (adopted 28 June 1919, entered into force 10 January 1920) 1919 UKTS 4 ('Treaty of Versailles').

[93] Permanent Court of International Justice, Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee (June 16th -July 24th 1920) with Annexes* (Van Langenhuysen Brothers 1929), 7 (Bourgeois), 12 (Descamps).

[94] G John Ikenberry, *After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order after Major Wars* (new edn, Princeton University Press 2019) 117.

[95] *Procès-Verbaux* (n 93) 6–8 (Bourgeois), 12 (Descamps).

[96] ibid 125–28 (Phillimore, Descamps, Ricci-Busatti) 154–56 (Root). See further, Christian J Tams, 'Peace Through International Adjudication: The Permanent Court of International Justice and the Post-War Order' in Michel Erpelding and others (eds), *Peace Through Law: The Versailles Peace Treaty and Dispute Settlement After World War I* (Nomos 2019) 222–25, 237.

[97] *Procès-Verbaux* (n 93) 392 (Ricci-Busatti, de Lapradelle).

[98] *The Conference of 1907 Volume II* (n 70) 694–95, 701 (US), 690–93, 696–99 (Brazil).

[99] Statute of the Permanent Court of International Justice (adopted 16 December 1920, entered into force 8 October 1921) 6 LNTS 390 ('PCIJ Statute').

[100] *Procès-Verbaux* (n 93) 108–9 (Root), 125–27 and 358–60 (Phillimore), 702–5 (Report).

[101] ibid 10 (Bourgeois), 104–6 and 125–27 (Phillimore), 133–35 (Root), 137 (Hagerup), 365–68 (Fernandes), 700 (Report).

[102] *Procès-Verbaux* (n 93) 109–12, 132–33, 356, 362, 371, 373 (Descamps). On the definition of 'Great Powers', see *Procès-Verbaux* (n 93) 104–6 (Phillimore), 108–9 (Root), 119 (Altamira), 122–23 (de Lapradelle), 363 (Loder); Simpson (n 86) 5; Susan Pedersen, *The Guardians: The League of Nations and the Crisis of Empire* (OUP 2015) 16.

systems and civilizations[103] was viewed as an insufficient guarantee by 'Great Powers' themselves and rejected entirely by smaller States.[104]

Another approach to formulate this institutional feature was not to link it to the representation of any particular States but to the role of the PCIJ in applying and developing international law.[105] The main objection to this formulation was based on claims about the universality of international law and a civilization common to all States.[106] In this respect, the response was not to maintain distinctions between various conceptions of international law, but to acknowledge that distinct systems of legal education, which existed in different legal systems rooted in different civilizations, might result in judges acting in different ways when applying and developing international law.[107] This explanation facilitated the consensus reached on the representation requirement as a guiding principle in the election of judges (Article 9 of the PCIJ Statute), despite the lack of agreement on the exact meaning of the two criteria concerning equitable representation in that provision.[108]

On balance, the design of the appointment mechanism of the PCIJ was guided by more articulated conceptions of the judicial function within the broader institutional structure of the League of Nations. The clarification of the conceptions, especially the role of judges with different legal education backgrounds in the application and development of international law, contributed to the agreement on the once unresolved issue concerning the appointment of judges and the representation requirement. Nonetheless, this line of argument was adopted as an alternative to the unsuccessful claims advanced by 'Great Powers' to guarantee the presence of their nationals on the bench, thus representing a strategic choice by the drafters.

International Court of Justice

After the Second World War, the UN system was established in the San Francisco Conference (1945). The Statute of the ICJ was based upon that of the PCIJ (Article 92 of the UN Charter), resulting in continuity in terms of both the judicial function and the institutional design. The UN Charter further strengthened the idea of 'peace through justice', according to which the ICJ, as the principal judicial organ of the UN (Articles 7 and 92), provides a peaceful means of dispute resolution, thereby contributing to the maintenance of international peace and security (Articles 33(1) and 36(3)). In other words, the judicial institution was to provide 'justice and law' and thus the 'possibility of substituting orderly judicial processes for the vicissitudes of war', rather than preventing wars as such.[109]

As the conception of the judicial function of the ICJ was developing along the same lines as that of the PCIJ, the adjudicator appointment mechanism largely remained unchanged.[110] Nevertheless, institutional changes regarding regional representation in the ICJ came after the *South West Africa (Ethiopia v South Africa; Liberia v South Africa) Cases*.[111] The Judgment of 1966 triggered a backlash initiated by newly independent African and Asian States,

[103] ibid 119 (Altamira), 363 (Loder).
[104] ibid 370–71 (Phillimore), 120–21 (Hagerup).
[105] ibid 367 (Fernandes), 438 (Root), 709–10 (Report).
[106] ibid 164 (Loder), 364 (Hagerup).
[107] ibid 199–200 (de Lapradelle), 370 (Descamps), 438 (Root), 709–10 (Report).
[108] Ole Spiermann, '"Who Attempts too Much Does Nothing Well": the 1920 Advisory Committee of Jurists and the Statute of the Permanent Court of International Justice' (2002) 73 BYBIL 187, 240.
[109] *Documents of the United Nations Conference on International Organization, San Francisco, 1945, Volume XIII, Commission IV Judicial Organization* (United Nations Information Organizations 1945) 393 (Report of the Rapporteur of the Committee IV/1).
[110] The only major change was that the staggered triennial elections replaced the every nine-year full bench elections, see further, Gleider Hernandez, *The International Court of Justice and the Judicial Function* (OUP 2014) 38.
[111] *South West Africa (Ethiopia v South Africa; Liberia v South Africa)* (Second Phase) [1966] ICJ Rep 6, Judgment of 18 July 1966.

pushing the long-standing dissatisfaction with the composition of the ICJ to a peak.[112] In particular, African States endeavoured to 'make the Court reflect the real international situation' in the elections in 1966 and 1969, which brought the number of African seats to three.[113] An informal understanding of regional representation also emerged in the sense that the regional representation on the ICJ should roughly parallel the regional distribution of seats on the Security Council, which entailed a decrease in the number of European judges and an increase in the number of judges from African and Asian States.[114]

These changes were not only the result of the single incident in 1966[115] but were rooted in an evolution in the conception of public aspects of the judicial function. Notably, in the 'Review of the Role of the Court' (1970–1975) initiated by the General Assembly, States engaged in debates about the reasons and cures for the relative inactivity of the ICJ at the time.[116] The regional representation issue was explicitly linked to the conception of the role of the Court in relation to the development of international law within the UN institutional structure.

First, different from the PCIJ drafting process, the response to the claims about the universality of international law no longer focused on different systems of legal education, but rather on the process of the formation of international law, and, implicitly, the link between the regional background of judges and their approaches to international law. Against the backdrop of decolonization, a number of States attributed the lack of confidence in the ICJ to judges representing a more 'traditional approach to international law' developed mainly by the European and American States as opposed to 'progressive international law', the formulation of which involved more inputs from newly independent States.[117] More radically, there were also suggestions about 'legal regionalism' highlighting the significance of regional customs and movements in the development of legal systems and concepts.[118] Some States supported the creation of regional chambers,[119] which was eventually not adopted partly due to the risk associated with the fragmentation of international law.[120] The representation requirement embedded in Article 9 of the ICJ Statute, with its renewed regional dimension developed in practice, was seen as an overall desirable approach to enable the ICJ to contribute to the progressive development of a unified international legal order.[121]

Secondly, a community-oriented conception of the judicial function emerged within the institutional framework of the UN and underscored the significance of the regional representation. The law-development role of the ICJ was increasingly perceived as relating to not only disputing States but also an 'international community', so that judicial decisions should

[112] Ingo Venzke, 'The International Court of Justice During the Battle for International Law (1955-1975)' in Jochen von Bernstorff and Philipp Dann, *The Battle for International Law: South-North Perspectives on the Decolonization Era* (OUP 2019) 248; Terry D Gill, *Rosenne's The World Court: What It Is and How It Works* (6th edn, Brill 2021) 45.

[113] United Nations General Assembly (UNGA) '21st Session Official Records' (November 1966) UN Doc A/PV.1456, para 30 (Guinea). See further, Venzke (n 112) 252–53; Gill (n 112) 46–47.

[114] Malcolm N Shaw, *Rosenne's Law and Practice of the International Court: 1920-2015* (5th edn, Brill 2016) 392, 396; Bardo Fassbender, 'Article 9' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, OUP 2019) paras 23–25; Gill (n 112) 45–47.

[115] Edward McWhinney, '"Internationalizing" the International Court: The Quest for Ethnocultural and Legal-Systemic Representativeness' in Emmanuel G Bello and Prince Bola A Ajibola (eds), *Essays in Honour of Judge Taslim Olawale Elias: Volume I* (Martinus Nijhoff 1992) 277.

[116] UNGA Res 2723 (15 December 1970); UNGA Res 3232 (12 November 1974); UN Doc A/8568, paras 23, 50. The response rate from African States to the questionnaire was low, which was partly due to the impact of the 1966 Judgment, see UN Doc A/8382/Add.1, 11 (Senegal).

[117] UN Doc A/8382, paras 44–46 (US), para 65 (Iraq), paras 146–50 (Switzerland); UN Doc A/8568, para 26; UN Doc A/8747, 14 (Iran).

[118] UN Doc A/8382, paras 146–50 (Switzerland).

[119] ibid; UN Doc A/8382, para 151 (Canada), para 156 (Iraq); UN Doc A/8382/Add.3, 2 (Turkey); UN Doc A/8747, 12 (Colombia), 14 (Iran).

[120] UN Doc A/8382, paras 153–56 (France), para 157 (Austria), paras 156–59 (Belgium); UN Doc A/8568, para 36.

[121] UN Doc A/8382, paras 98–100 (US), paras 103–4 (Mexico), para 108 (Cuba), para 145 (Mexico).

correspond to the 'legal conscience of contemporary international community' and contribute to the 'maintenance of legal order' and the 'peaceful evolution' of the international community.[122] It was thus important to consider how the ICJ was perceived by States in different regions, especially in light of the 'confidence crisis'.[123] To concretize the scope of the relevant community, the membership of the UN was referred to as a parameter. Some States saw the increase in the number of States in the UN as a factor that should be reflected in the composition of the ICJ.[124] Others proposed an explicit geographical representation requirement based on the UN regional groups.[125] Although these proposals were not adopted, States generally reaffirmed the informal understanding that the composition of the ICJ should reflect changes in the character of the membership of the General Assembly and the regional composition of the Security Council.[126]

In short, the evolution of the appointment mechanism of the ICJ reflects both continuities and discontinuities in the conception of the international judicial function. The growth of the regional dimension of the representation requirement was associated with a renewed understanding of the judicial function in relation to the development of an international legal order in the interest of a growing international community within the UN institutional structure.

Revisiting the ICSID drafting history

Through the lens of the history of international adjudication, the two models from which the ICSID drafters drew inspiration, the PCA and the ICJ, endorsed different conceptions of the public aspects of judicial function. Without explicitly mentioning any representation requirement, the former preserved the equal rights of States to appoint arbitrators as signatory States and disputing parties to encourage recourse to the judicial institution for the purpose of peace preservation. The latter relied on a more articulated law-development aspect of the judicial function in connection with the progressive development of the international legal order and the international community, thereby consolidating the equitable representation requirement. The evolution of the adjudicator appointment mechanisms from the PCA to the ICJ overall suggests that the pursuit of equitable representation was increasingly connected with the fulfilment of the public functions of judicial institutions.

Despite the borrowing of institutional features from the PCA and the ICJ, the ICSID drafters neither endorsed the conception of arbitration as an instrument for peace preservation nor accepted the law-development aspect of the judicial function attached to the representation requirement. Instead, when prescribing the equitable representation requirement, the drafters diluted the public aspects of the judicial function and reconstructed the issue in the direction of facilitating the performance of the dispute resolution function. Such a conception focused on enabling disputing parties to appoint arbitrators with desired qualities and encouraging States at both ends of the investment flow to adhere to the Convention as a platform for settling investment disputes.

Moreover, the ICSID drafters' conception can be labelled as a private function not in the sense of being modelled after commercial arbitration, but in relative terms in comparison with the public functions developed in the context of public international law adjudication. Such a change in perspective further brings in a range of reference points that are not present

[122] ibid para 26 (Poland), paras 35, 49 and 78 (Japan), para 106 (Sweden); UN Doc A/8568, para 21.
[123] UN Doc A/8382, para 32 (Argentina), para 33 (Italy), paras 34 and 47 (Finland), paras 44–46 (US), para 48 (Switzerland); UN Doc A/8382/Add.3, 3 (Turkey); UN Doc A/8747, 3 (Australia), 11 (Colombia).
[124] UN Doc A/8382, paras 103–4 (Mexico), UN Doc A/8382/Add.3, 2 (Turkey), UN Doc A/8747, 7 (Brazil).
[125] UN Doc A/8382, para 97 (Laos).
[126] UN Doc A/8382, paras 98–100 (US), para 102 (Finland), para 105 (Switzerland), para 107 (Canada); UN Doc A/8382/Add.4, 2 (New Zealand); UN Doc A/8747, 4 (Australia).

in the field of commercial arbitration for the analysis of proposed institutional changes concerning investment arbitration in the contemporary context. As will be discussed in the next section, the two different visions of equitable representation as connected with the public and private aspects of the judicial function provide an analytical lens to observe the ongoing ISDS reform at UNCITRAL Working Group III.

ISDS REFORM AND THE APPOINTMENT OF TRIBUNAL MEMBERS

The notion of diversity in the reform context encompasses a wider range of issues beyond the geographical origins of adjudicators, with gender diversity rising to the forefront of the debate and other elements, such as the level of development of the home State of adjudicators and linguistic skills, attracting heightened attention from delegations.[127] At the current stage, the reform negotiation has proceeded to discuss the design of specific institutional reform options. Diversity considerations are factored into various proposed adjudicator appointment mechanisms. The 'Three approaches for addressing diversity concerns' section categorizes these proposals as three approaches for addressing diversity concerns and discusses controversies surrounding the question of how to achieve greater diversity with different institutional designs. The section 'An inquiry into the judicial function' shifts the focus to the question concerning why diversity matters and unpacks underlying policy divergences by analysing varying assumptions about the judicial function of the ISDS tribunals, which ultimately feeds into the debate about institutional design.

Three approaches for addressing diversity concerns

The discussion about how to achieve greater diversity in the ISDS reform context adds a renewed layer to the long-standing debate about solutions to diversity concerns by presenting an evolving picture of State practice. In particular, the divide is no longer simply between capital-exporting and -importing States as it was in the ICSID drafting history. Nor could the distinction between developed and developing States fully explain the various standpoints on the scale of proposed institutional changes. It is possible to observe regional approaches to a certain extent, but any observations need to appreciate internal divergences. A classification based on institutional design approaches thus avoids over generalization and facilitates the process of pinpointing specific stances taken by States as reform negotiators.

The first approach is to preserve the current ad hoc structure of ISDS and focus on the role of States in diversifying appointments and in capacity-building. In other words, the party-appointed system allows States as disputing parties to diversify their appointments; it mainly 'depends on their having the will to do so'.[128] Notably, the USA and Mexico explained their practice in appointing relatively new arbitrators when facing with investment disputes.[129] The UK suggested that its recent appointments to the ICSID's Panel of Arbitrators had a more diverse profile as a result of an open competition and a public campaign.[130] Chile and Israel also emphasized the responsibility of governments in increasing diversity in their appointments, implying the need of internal reform at a governmental level.[131]

[127] A/CN.9/935, paras 69–75; A/CN.9/964, paras 91–96; A/CN.9/1004/Add.1, para 101.
[128] A/CN.9/WG.III/WP.180, paras 59–61 (Bahrain).
[129] Audio from UNCITRAL Working Group (WG) III, 36th session, 31 October 2018, 14:00:00–17:00:00 <https://conferences.unite.un.org/carbonweb/public/uncitral/speakerslog/abe3b4f1-c10f-433e-b146-daf81ac94c60>, US at 16:18:40 (suggesting that the USA 'have appointed first time arbitrators' throughout its experience in arbitration and 'roughly 25%' of its appointments have been women), Mexico at 16:47:43 (indicating that Mexico 'has pursued diversity by appointing arbitrators who have not been appointed many times before' to give new arbitrators the possibility of participation).
[130] 'Comments by the UK on the Initial Draft of A/CN.9/WG.III/WP.203', paras 9–10.
[131] Audio from UNCITRAL WG III, 36th session, 31 October 2018, 09:30:00–12:30:00 <https://conferences.unite.un.org/carbonweb/public/uncitral/speakerslog/c7d63944-a899-45ba-8487-c31c9dafafbd>, Chile at 12:20:49 (stressing that

The willingness of States to diversify appointments in turn depends on the capacity of arbitrators from underrepresented regions as well as the capacity of States to make appointments. Armenia suggested that the root cause of unbalanced appointments was that 'international arbitration is not equally developed' in all States, and that diversity issues may be gradually 'self-regulated' once there were a growing number of qualified candidates from underrepresented geographical locations.[132] Technical assistance is thus essential, including training opportunities for candidates within the framework of the proposed Advisory Centre.[133] In both the Working Group III and the concluded ICSID rule amendment project, African States, which did not always actively participate in the composition of tribunals as respondent States,[134] indicated the necessity of assisting respondent States in making appointments.[135] This would include establishing a comprehensive database of arbitrators and a forum for the exchange of experiences regarding the evaluation of candidates,[136] which could also be integrated into the Advisory Centre.[137]

However, doubts about the extent to which the self-regulate and capacity-building approach can possibly achieve diversity target at the incentive that may flow from the current system for disputing parties to appoint well-known arbitrators with a proven track record. As the primary concern of disputing parties would be the circumstances of the case concerned and the successful outcome,[138] great importance is attached to previous experience as well as the clout that an arbitrator may carry on the bench.[139] From this angle, even when there are potentially qualified arbitrators in and known to developing States, such arbitrators may still face entry barriers as opposed to an elite group of well-established arbitrators.[140] In other words, the freedom of disputing parties to appoint arbitrators is not always as free as it appears; rather, the current system itself may compel disputing parties to choose experienced arbitrators rather than prioritizing diversity considerations.

The second approach supports arbitration institutions to play a stronger role in implementing diversity-driven policies in the appointment process. In the current system, institutional appointments, such as those made by ICSID, have indeed shown greater diversity than appointments made by disputing parties.[141] The elevation of the role of appointing authorities can be implemented in either a radical or a modest manner. In terms of the radical option, despite its overall support for a multilateral standing mechanism, Switzerland mentioned in its submission the advantages of a proposal to establish a roster from which

States 'could solve at least half of the problems' by taking the 'internal necessary measures' to address diversity concerns by diversifying arbitral appointments); Audio from UNCITRAL WG III, 36th session, 31 October 2018, 14:00:00–17:00:00 <https://conferences.unite.un.org/carbonweb/public/uncitral/speakerslog/abe3b4f1-c10f-433e-b146-daf81ac94c60>, Israel at 16:13:17 (agreeing with Chile that 'States have the power to have influence on diversity').

[132] 'Comments by Armenia on the Initial Draft of A/CN.9/WG.III/WP.203', 1-2; A/CN.9/964, paras 93, 95.

[133] A/CN.9/WG/III/WP.203, para 14; A/CN.9/964, para 93; A/CN.9/1004, para 34; A/CN.9/1004/Add.1, para 113.

[134] Emilia Onyema, 'African Participation in the ICSID System: Appointment and Disqualification of Arbitrators' (2019) 34 ICSID Rev – FILJ 365, 376.

[135] A/CN.9/WG.III/WP.204, 3 (Morocco); A/CN.9/WG.III/WP.183, para 31 (Guinea); 'ICSID Rule Amendment Project – Member States & Public Comments on Working Paper #1 of August 3, 2018', 145–46 (African Union).

[136] A/CN.9/WG.III/WP.204, 3 (Morocco); A/CN.9/WG.III/WP.183, para 31 (Guinea). See also, A/CN.9/WG.III/WP.174, 2 (Turkey).

[137] A/CN.9/WG.III/WP.212, paras 19, 34; A/CN.9/1124, paras 45–46, 51.

[138] A/CN.9/935, para 72; A/CN.9/964, para 95.

[139] 'Comments by the EU and its Member States on the Initial Draft of A/CN.9/WG.III/WP.203', 7; 'Comments by the Switzerland on the Initial Draft of A/CN.9/WG.III/WP.203', para 32; see also, Malcolm Langford and others, 'The Quadrilemma: Appointing Adjudicators in Future Investor-State Dispute Settlement', Academic Forum on ISDS Concept Paper 2019/12, 27–29.

[140] Audio from UNCITRAL WG III, 44th session, 25 January 2023, 09:30:00–12:30:00 (on file), Zimbabwe (raising concerns from local body of arbitrators about their failure to secure appointments because investment arbitration is 'ring-fenced by an elite group of arbitrators who are in fact double-hatting' and supporting more stringent regulation on double-hatting which would 'allow the equitable geographical representation in the space of arbitration').

[141] *ICSID Caseload – Statistics* (n 1) 17, 20; Baetens (n 11) 20; Onyema (n 134) 374.

arbitration institutions, rather than disputing parties, could implement a mandate to make diverse appointments of tribunal members.[142]

Alternatively, there are more modest options to strengthen the role of arbitration institutions without removing the right of disputing parties to appoint arbitrators. Thailand and Bahrain proposed that in formulating a pre-established list or roster, arbitration institutions could be tasked with a greater responsibility of enlarging the pool of arbitrators and limiting repeat appointments.[143] In the ICSID rule amendment project, the African Union also saw the potential of institutional powers to promote diversity, including the power of the Chairman of the Administrative Council to appoint arbitrators in case of a deadlock and the power of the Secretary-General to assist with the appointment upon a request by disputing parties.[144]

Nevertheless, the potential of the radical option to foster diversity hangs on the transparency and accountability of appointment procedures adopted by arbitration institutions to mitigate the risk of concentrating the power of determining the composition of tribunals on very few actors.[145] For the more modest options, the major concern is that a list of diverse candidates may not necessarily result in greater diversity in the actual appointment of tribunal members.[146] The appointments made by disputing parties are likely to follow the same logic as the first approach. As in the current system, arbitration institutions either have much more limited opportunities than disputing parties to make appointments or need to incorporate the preferences of disputing parties in doing so.[147]

The third approach sees the party-appointment system as structurally incapable of achieving diversity and proposes to establish a multilateral standing mechanism. Such a mechanism, endorsed by the EU and its Member States, factors diversity considerations into the processes of the appointment of full-time judges and the assignment of cases.[148] It draws on recent reforms in standing courts, including the International Criminal Court (ICC) and the European Court of Human Rights (ECtHR).[149] One key feature designed to ensure equitable representation is the proposed formalization of regional groups in the nomination, selection and election processes.[150] Notably, at the election stage, it is proposed that electors 'shall ensure the representation of principal legal systems of the world, equitable geographical distribution, as well as equal gender representation in the Tribunal as a whole'.[151]

In terms of case assignment, the proposal also indicates the possibility for a range of diversity factors, such as 'gender and regional diversity as well as diversity of expertise of legal systems, language requirements, [nationality restrictions] and subject area', to be taken into account.[152] More recently, as a starting point, the EU has set up a panel assisting the European Commission in the selection of candidates to perform the duties of members of

[142] 'Comments by Switzerland on the Initial Draft of A/CN.9/WG.III/WP.203', paras 32, 39–40.
[143] A/CN.9/WG.III/WP.162, paras 20-21 (Thailand); Audio from UNCITRAL WG III, 36th session, 31 October 2018, 14:00:00–17:00:00 <https://conferences.unite.un.org/carbonweb/public/uncitral/speakerslog/abe3b4f1-c10f-433e-b146-daf81ac94c60>, Bahrain at 16:41:25 (proposing to strengthen the role of arbitration institutions in 'identify[ing] new generations of rising stars from underrepresented regions' and 'issuing recommendations such as placing a limit on the number of cases that an arbitrator can involve at any one time').
[144] *ICSID Rule Amendment Project* (n 135) 145–46.
[145] 'Comments by the Switzerland on the Initial Draft of A/CN.9/WG.III/WP.203', para 34.
[146] A/CN.9/1004/Add.1, para 113; Onyema (n 134) 374.
[147] A/CN.9/WG.III/WP.146, 3–8 (ICSID), 8–14 (PCA).
[148] A/CN.9/WG.III/WP.159/Add.1, para 21 (EU and its Member States); A/CN.9/WG.III/WP.213, paras 18, 31, 44–46, 60–61.
[149] A/CN.9/1050, para 52.
[150] A/CN.9/WG.III/WP.213, paras 31, 44–46; A/CN.9/1092, paras 45, 66, 72; A/CN.9/1124, paras 15, 22.
[151] A/CN.9/WG.III/WP.213, para 44; A/CN.9/1124, para 22.
[152] A/CN.9/WG.III/WP.213, paras 60–61, 78; A/CN.9/1124, paras 34–40.

international investment courts and tribunals and of rosters or other international courts and tribunals.[153]

Still, the main concern about the effectiveness of this approach in addressing diversity concerns is the limited number of seats on the bench in a standing mechanism as compared with a larger pool of potential adjudicators in an ad hoc system.[154] The premise is to define diversity as an 'indivisible concept' encompassing different facets rather than 'cherry picking' certain aspects of diversity concerns over others.[155] From this angle, a smaller size of the pool in a standing mechanism would necessarily entail a process of determining the relative importance of various characteristics of an adjudicator. Certain diversity criteria, such as geographical origin and gender, tend to outweigh other criteria, such as industry-specific knowledge or special language skills outside the working language of the standing mechanism. The weight attached to the specific nationality of adjudicators also tends to be diluted under the general requirement of geographical representation.[156]

An inquiry into the judicial function

On its face, the major disagreements among the institutional design proposals seem to lie in whether the proposed approaches can possibly achieve greater diversity. However, the divergent views on institutional design are essentially surface products of deeper disagreements on the conceptions of the judicial function of ISDS tribunals, reflecting both continuity and discontinuity in the history of international adjudication. Moreover, the varying weight attached to the private and public aspects of the judicial function to different degrees corresponds to the two types of oftenmentioned justifications for increased diversity, namely the impact of diversity on judicial decision-making processes and diversity as a value relating to the legitimacy of judicial institutions.

The first approach, by preserving the right of disputing parties to appoint arbitrators, strengthens the private function of dispute resolution. It reflects the rationale endorsed by PCA and ICSID that a broad scope of party autonomy in the appointment process can increase the confidence of disputing parties.[157] From this angle, diversity 'need not be a goal in itself', as the 'ultimate goal' of ISDS is the 'fair and efficient resolution of the dispute at hand',[158] which is fundamentally different from standing courts such as the ICC whose aim is to '[prosecute] serious crimes of concern to the international community' or the ECtHR which could be distinguished by the 'difference in the cases brought'.[159]

Rather, diversity matters to the extent that it has a bearing on the judicial decision-making processes, especially the competence and skills of arbitrators in resolving disputes.[160] It is the varying circumstances of individual disputes that necessitate diversifying the pool of potential

[153] Commission Decision (EU) 2021/1711 of 23 September 2021.

[154] A/CN.9/WG.III/WP.180, paras 36–38 (Bahrain); A/CN.9/WG.III/WP.188/Add.1, paras 18–19 (Russia); A/CN.9/1050, para 50.

[155] Audio from UNCITRAL WG III, 36th session, 31 October 2018, 14:00:00–17:00:00 <https://conferences.unite.un.org/carbonweb/public/uncitral/speakerslog/abe3b4f1-c10f-433e-b146-daf81ac94c60>, Bahrain at 16:41:25.

[156] Audio from UNCITRAL WG III, resumed 38th session, 23 January 2020, 09:30:00–12:30:00 <https://conferences.unite.un.org/carbonweb/public/uncitral/speakerslog/11f70063-e8fe-471f-a919-d8886cc4f42f>, Ukraine at 10:10:21 (expressing concerns about the 'danger in regional representation' in that neighbouring States classified as part of the same region whose interests are not reconcilable 'would not desire to have a single adjudicator appointed to the new court on behalf of both of them').

[157] A/CN.9/1004/Add.1, para 103.

[158] A/CN.9/1004/Add.1, para 101.

[159] A/CN.9/1050, para 52.

[160] Audio from UNCITRAL WG III, resumed 38th session, 23 January 2020, 09:30:00–12:30:00 <https://conferences.unite.un.org/carbonweb/public/uncitral/speakerslog/11f70063-e8fe-471f-a919-d8886cc4f42f>, Ukraine at 10:10:21 (suggesting that the 'ultimate goal' is the 'quality of adjudicators' and that diversity is comparatively 'less important'); Audio from UNCITRAL WG III, 42nd session, 15 February 2022, 10:00:00–12:00:00 <https://conferences.unite.un.org/carbonweb/public/uncitral/speakerslog/b7076c61-a837-46fb-a441-0488ebdc82cc>, Armenia (emphasizing that as opposed to geographical diversity, 'at the forefront' of the consideration of the constitution of a tribunal should be the 'competence', 'skills' and 'character' of adjudicators).

arbitrators so that disputing parties are given greater freedom to better assess the qualifications of candidates 'according to their interests and nature of dispute they face'.[161] Corresponding to the nature of investment disputes, disputing parties may take into account a wide variety of factors including knowledge in an economic sector, language and cultural backgrounds, as well as familiarity with the domestic legal system.[162] This contrasts with the prioritization of certain criteria in the diversity requirements of a standing mechanism,[163] where case-specific considerations are associated with the possibility of appointing experts.

The second approach is often positioned as a middle ground between the other two approaches and indicates greater sensitivity to the public aspect of the judicial function. It recognizes the importance of having qualified adjudicators that can appreciate the specificities of disputes and, at the same time, maintains that the broadening of the pool of adjudicators is a 'systemic concern', rather than an 'immediate concern', that disputing parties are 'neither tasked with nor interested' in addressing.[164] Therefore, diversity as a policy goal of systemic importance justifies stronger intervention by actors beyond disputing parties, including arbitration institutions. The proposed shift of appointment power from disputing parties to arbitration institutions would lead to a major change of the structural feature of arbitration, resulting in a 'semi-permanent' system[165] more akin to courts in terms of both its institutional design and its judicial function.

Alternatively, with greater involvement of arbitration institutions in the appointment processes, the proposal to retain the right of disputing parties to appoint arbitrators is a 'compromise solution' to bridge the gap between proponents and opponents of the current system.[166] However, such an option is not entirely consistent with its greater sensitivity to public functions and largely follows the same assumptions as the first approach. From this perspective, it is akin to the case study of the CAJ, where the design of the appointment mechanism did not entirely correspond to the envisaged role of the proposed institution.

The third approach more explicitly endorses the once-diluted public functions of international judicial institutions and, similar to the second approach, identifies diversity as a systemic concern.[167] Given the relatively high degree of homogeneity of investment treaties and the de facto precedential value of arbitral decisions, ISDS tribunals are seen as playing a crucial role in 'elaborating and further refining the precise meaning of substantive obligations' in investment treaties.[168] The fact that disputing parties tend to appoint adjudicators 'best serving their interests in [a] particular case', which is broadly consistent with the private aspect of the judicial function, may not necessarily be desirable for the performance of the law-development aspect of the judicial function in the 'long term interests' of States as treaty parties.[169]

[161] 'Comments by Armenia on the Initial Draft of A/CN.9/WG.III/WP.203', 1; A/CN.9/WG.III/WP.204, 3 (Morocco). See also, A/CN.9/WG.III/WP.177, 4 (China); A/CN.9/WG.III/WP.188/Add.1, paras 6–9 (Russia).

[162] Audio from UNCITRAL WG III, 35th session, 25 April 2018, 10:00:00–13:00:00 <https://conferences.unite.un.org/carbonweb/public/uncitral/speakerslog/a2ad492b-22e9-497c-93c8-4be3130e9978>, Mexico at 10:37:09 (providing Mexico's experiences in making appointments, including appointing arbitrators without experiences in investor–State arbitration but 'speak Spanish' or 'have legal training in roman law'); Audio from UNCITRAL WG III, Resumed 38th session, 23 January 2020, 09:30:00–12:30:00 <https://conferences.unite.un.org/carbonweb/public/uncitral/speakerslog/11f70063-e8fe-471f-a919-d8886cc4f42f>, USA at 11:03:44 (outlining disputing parties' considerations of 'case-specific equities' in appointing arbitrators, including instances where the USA replied on specific expertise of arbitrators such as those relating to judicial treatment of intellectual property in *Apotex v US* and environmental issues in *Glamis Gold v US*).

[163] A/CN.9/WG.III/WP.188/Add.1, para 19 (Russia).

[164] 'Comments by the Switzerland on the Initial Draft of A/CN.9/WG.III/WP.203', paras 30, 32.

[165] ibid para 32; A/CN.9/WG.III/WP.169, para 11.

[166] ibid para 38.

[167] A/CN.9/WG.III/WP.159/Add.1, para 10 (EU and its Member States).

[168] A/CN.9/WG.III/WP.145, paras 3–6 (EU).

[169] ibid paras 3–6, 31–32; A/CN.9/WG.III/WP.159/Add.1, paras 22–24 (EU and its Member States).

The analogy can thus be drawn from the PCIJ and the ICJ, where the recognition of the law-development aspect of the judicial function facilitated the crafting of equitable representation requirements. Further, a stronger focus on the public aspects of the judicial function necessitates situating the role of judicial institutions in their relationship with actors beyond disputing parties, including not only treaty parties but also the general public. The diversity requirements in a standing mechanism are closely connected with 'enhancing legitimacy of a dispute settlement system in the public perception'.[170] Accordingly, a 'systemic response' to the 'systemic concerns' regarding the current ad hoc system, including diversity concerns, is that 'party autonomy need not be a key component of ISDS'[171]; instead, the principle of diversity should be reflected in the composition of the standing mechanism.[172]

The analysis of the different institutional design proposals and their links with the private and public aspects of the judicial function suggests that underlying the seemingly uncontroversial consensus on the significance of diversity in general terms, there are genuine policy disagreements on various rationales for enhancing diversity. The question of how to achieve diversity is thus intrinsically connected with the question of why diversity matters in the first place. Is it for the purpose of effective resolution of disputes of a complex or peculiar nature, which justifies strengthening party autonomy? Alternatively, is it a systemic concern for a broader audience that necessitates stronger structural intervention within or beyond the current system? In other words, the debate about institutional design requires ISDS reform negotiators to reflect on the broader question concerning the desirable judicial function of the ISDS system.

In this respect, the relocation of investment arbitration within the context of public international law adjudication, as opposed to commercial arbitration, provides a possible starting point for responding to this query. The development of the public aspects of the judicial function in the history of the PCIJ and the ICJ reflects a long-standing assumption about the desirability of enhancing the role of judicial institutions in the development of a system of international law.[173] Such an assumption is reinforced by the growth of a range of standing courts in specialized fields of international law in recent years, contributing to the expansion of law-making and institutional-building at various levels.[174] At the same time, the re-examination of the initial ambition for the PCA to contribute directly to the preservation of peace suggests that judicial institutions may not always satisfactorily perform all types of public functions envisaged by States as mandate providers.[175] The contemporary debate about judicial overreach and the trend of backlash against international courts and tribunals are also manifestations of the unintended impact that might be accompanied with an enhanced role of judicial institutions beyond dispute resolution.[176]

Against the backdrop of emerging competing visions of the judicial function, the ICSID drafters' choice to strengthen the private function of dispute resolution rested not only on considerations about the political feasibility of institutional building but also assumptions about the nature of investment disputes as involving issues that are specific to economic sectors or that might divide capital-exporting and -importing States. The dilution of the public aspects of the judicial function corresponds to the design of light equitable representation

[170] CIDS Supplemental Report (n 14) paras 42, 49.
[171] A/CN.9/WG.III/WP.159/Add.1, paras 11; A/CN.9/1004/Add.1, para 104.
[172] A/CN.9/WG.III/WP.213, para 19.
[173] Lauterpacht (n 9) 3–25.
[174] Armin von Bogdandy and Ingo Venzke (eds), *International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance* (Springer 2012).
[175] Caron (n 51) 5.
[176] Mikael Rask Madsen and others, 'Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts' (2018) 14 Intl J Law Context 197, 208; Campbell McLachlan, 'The Assault on International Adjudication and the Limits of Withdrawal' (2019) 68 ICLQ 499, 503; Lowe (n 9) 214–20; Caron (n 9) 235–37.

requirements. As discussed above, the reform process provides an opportunity to re-examine the rationales underpinning the original choice of the ICSID drafters. Ultimately, recalling the CAJ negotiation process, what hindered the institutional design process was not only disagreements but also ambiguities, especially the lack of serious engagement with the conceptions of the judicial function. It is thus crucial to spell out and engage with the divergences in the assumptions underpinning various approaches for addressing diversity concerns in the contemporary debate.

CONCLUSION

The emergence and consolidation of the equitable representation requirement in the history of international adjudication is linked to the growing appreciation of the public aspects of the judicial function, especially the role of judicial institutions in developing international law. Starting with the PCA negotiation process, the conception of arbitration as an instrument to preserve peace prompted the institutional design to focus on encouraging recourse to arbitration and strengthening party autonomy without any explicit representation requirement. The equitable representation requirement emerged in the eventually unsuccessful CAJ negotiation process, where delegations connected it with the law-development aspect of the judicial function but did not seriously engage with this conception. The PCIJ drafters later adopted the equitable representation requirement and elaborated on the role of judges with different legal education backgrounds in the application and development of international law. The subsequent practice of the ICJ further consolidated the regional dimension of the equitable representation requirement, accompanied by a community-oriented conception of the judicial function pertaining to the progressive development of the international legal order.

In contrast, the ICSID drafters reconstructed the equitable representation requirement to facilitate the performance of the private function of dispute resolution. Article 14(2) of the ICSID Convention was designed mainly to enable disputing parties to appoint arbitrators with desired qualities or identities and to encourage States at both ends of the investment flow to adhere to the Convention as a platform for settling investment disputes. From a historical perspective, the focus on the dispute resolution function was a result of the dilution of the public facets attached to the institutional features borrowed from public international law institutions, including the PCA and the ICJ. This finding departs from the mainstream view that investment arbitration is based on the structures and procedures developed in the context of commercial arbitration. Therefore, the better starting point of an appraisal of investment arbitration is not a generalized critique of its alleged commercial arbitration roots, but an appreciation of its public international law pedigree with respect to specific institutional features.

In a forward-looking manner, the UNCITRAL Working Group III on ISDS reform is re-examining the original institutional choices made by the ICSID drafters. The broad consensus on the desirability of addressing diversity concerns in general terms has shifted the focus of the debate from the seemingly uncontested question of why diversity matters to controversies surrounding the question of how to achieve greater diversity with different institutional design proposals. Nevertheless, the reconstruction of the debate through the lens of judicial function uncovers genuine policy divergences among States as reform negotiators with respect to rationales justifying the need for increased diversity, which underpin divergences in the answers to the question concerning institutional design.

At one end of the spectrum, the self-regulate approach, coupled with capacity-building, attaches great weight to the private function of dispute resolution and party autonomy

following the founders of the ICSID and the PCA. Diversity thus matters to the extent that it has a case-specific impact on judicial decision-making processes, which may not always be measurable from an empirical perspective. At the other end, echoing the paths taken by the PCIJ and the ICJ, the standing mechanism proposal recognizes the law-development aspect of the judicial function, thereby connecting diversity requirements with not only its case-specific impact but also the legitimacy of judicial institutions especially in the public perception. In between the two ends, the proposal to enhance the role of arbitration institutions, especially in its modest form, to some extent mirrors the drafting process of the CAJ, as its adherence to an ad hoc mechanism does not entirely correspond to its greater sensitivity to the public aspects of the judicial function.

The debate about institutional reform proposals thus invites reformers to revisit the question of why diversity matters in light of the desirable judicial function of the ISDS system. The relocation of investment arbitration within the context of public international law adjudication provides a possible starting point for such reflections. The endorsement of the law-development aspects of the judicial function in the history of the PCIJ and the ICJ reflects an assumption about the desirability of entrusting international judicial institutions with roles beyond dispute resolution, while the unfulfilled vision of peace preservation initially attached to the PCA indicates the potential constraints of judicial institutions in performing certain types of public functions. Similar tension is manifested in contemporary debates about the contribution of international courts and tribunals to the development of international law in generalized and specialized fields, on the one side, and the visible trend of backlash against courts and tribunals, on the other. In short, the pursuit of diversity is not an isolated policy objective but forms part of the broader inquiry into the international judicial function.