

Investor-State dispute settlement: private adjudication dressed in public clothes?



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Public and private adjudication

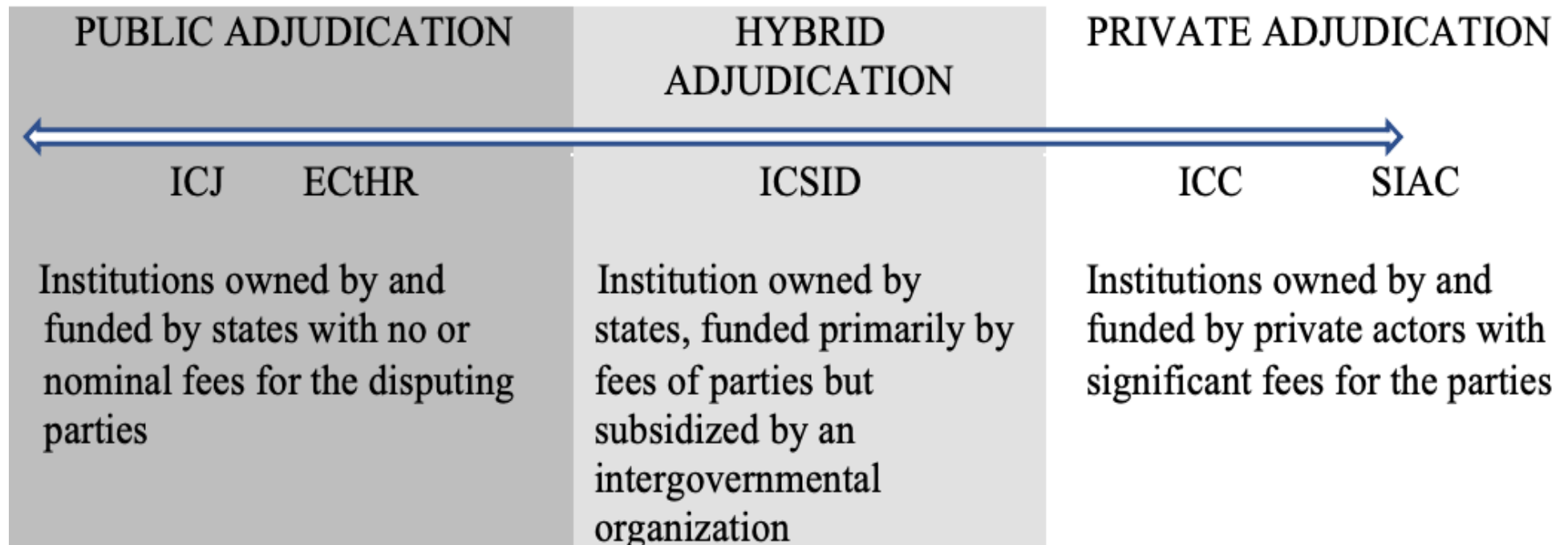
Foreign direct investments are beneficial for States and investors if adequately regulated and protected

Procedural and substantive aspects of adjudication:

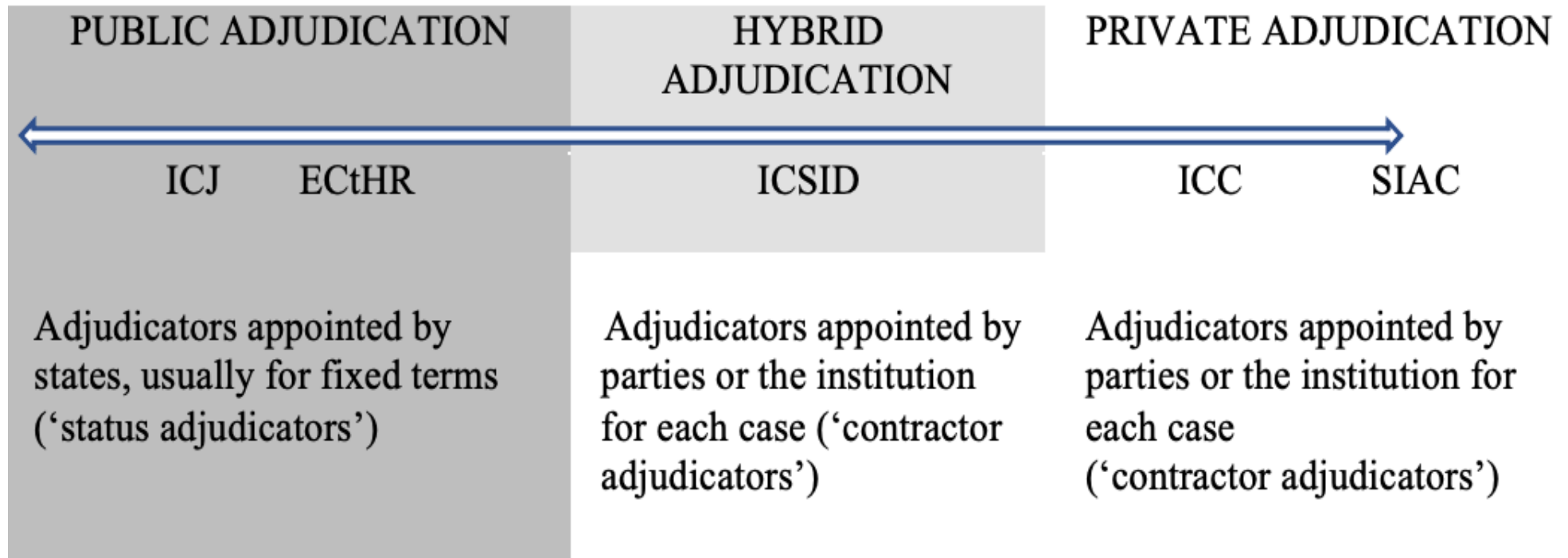
- Ownership and funding
- Appointment and tenure of adjudicators
- Requirement on diversity of adjudicators
- Adjudicators' background
- Transparency and confidentiality
- Applicable law
- Setting precedents
- Internal review mechanisms
- External review mechanisms



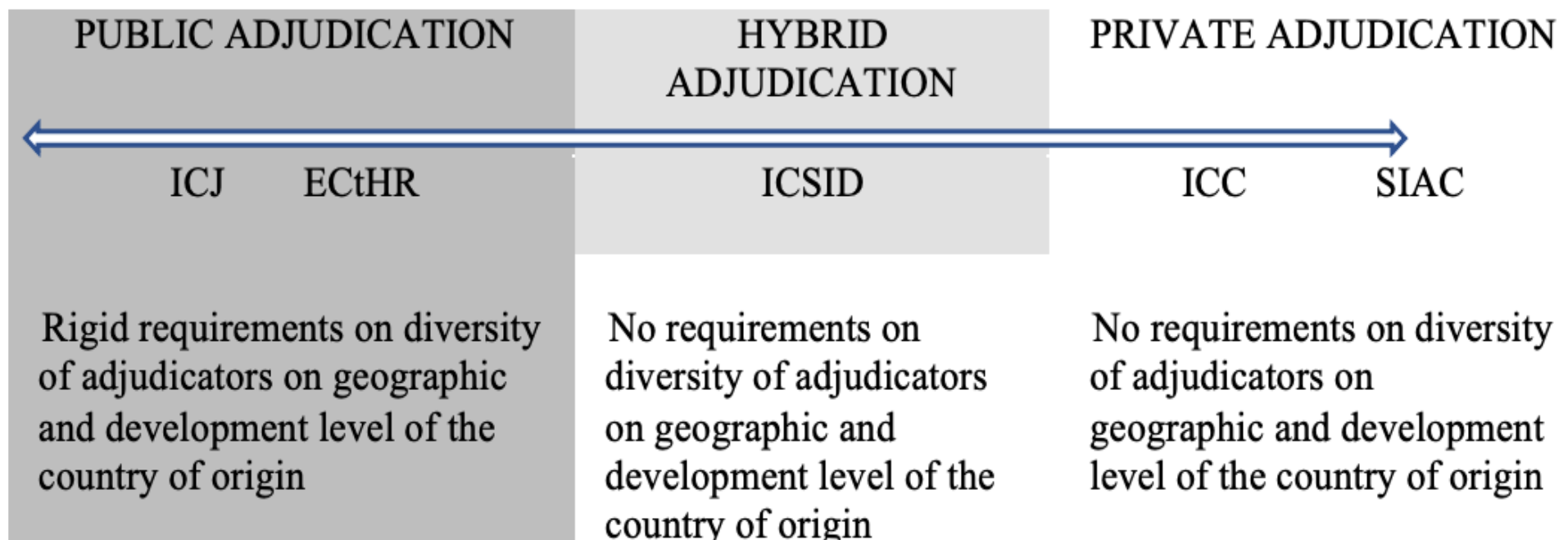
Ownership and funding



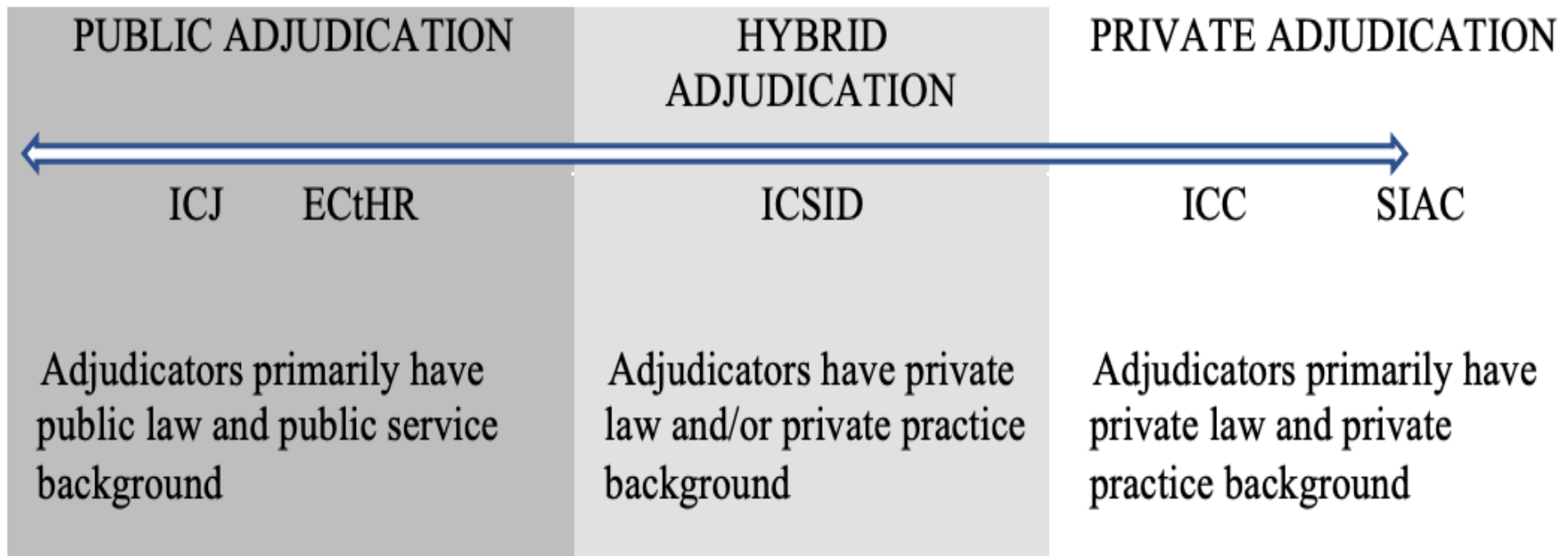
Appointment and tenure of adjudicators



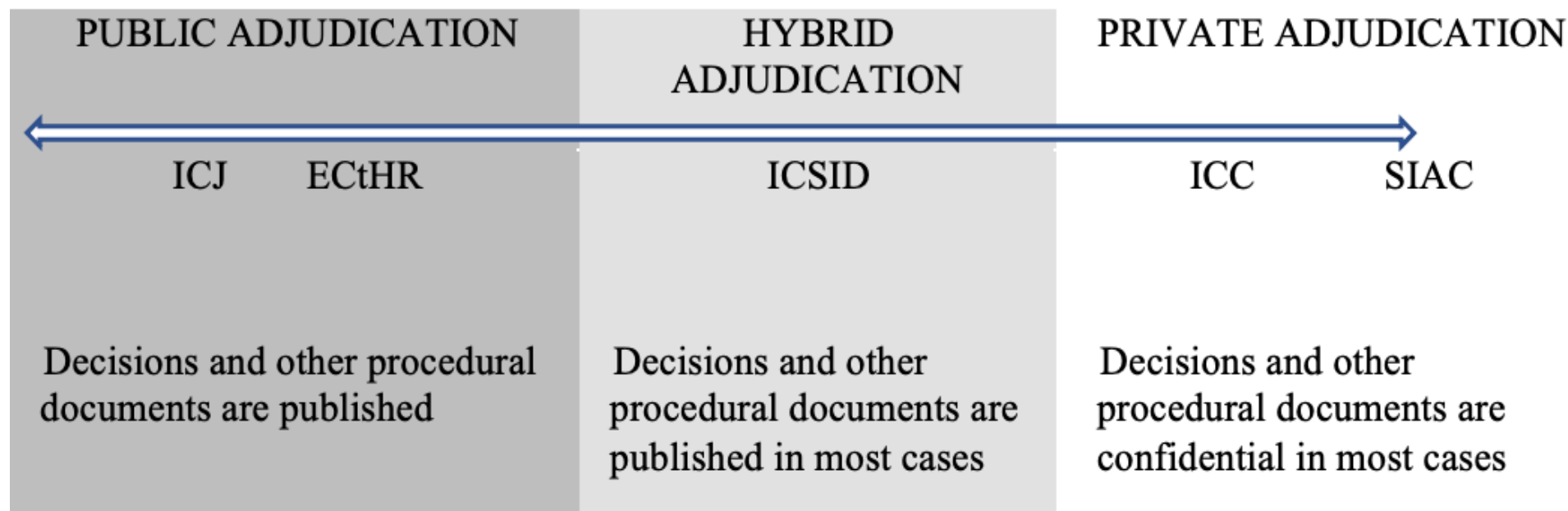
Requirement on diversity of adjudicators



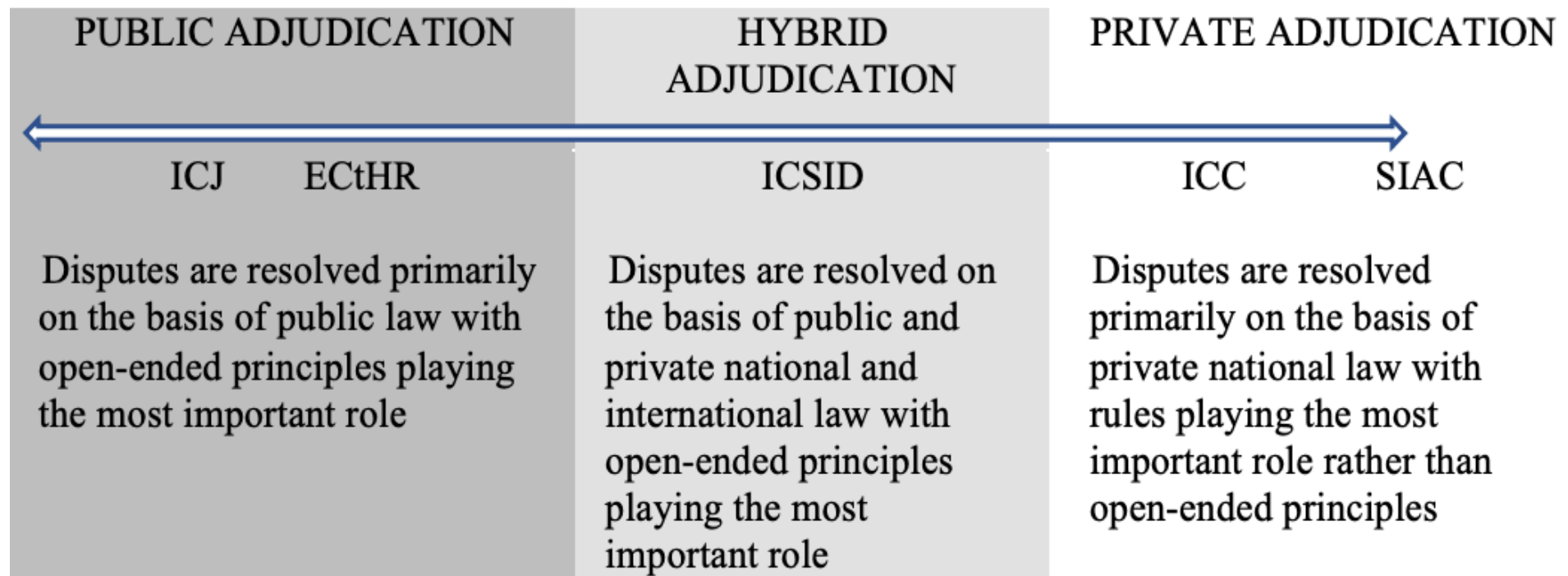
Adjudicators' background



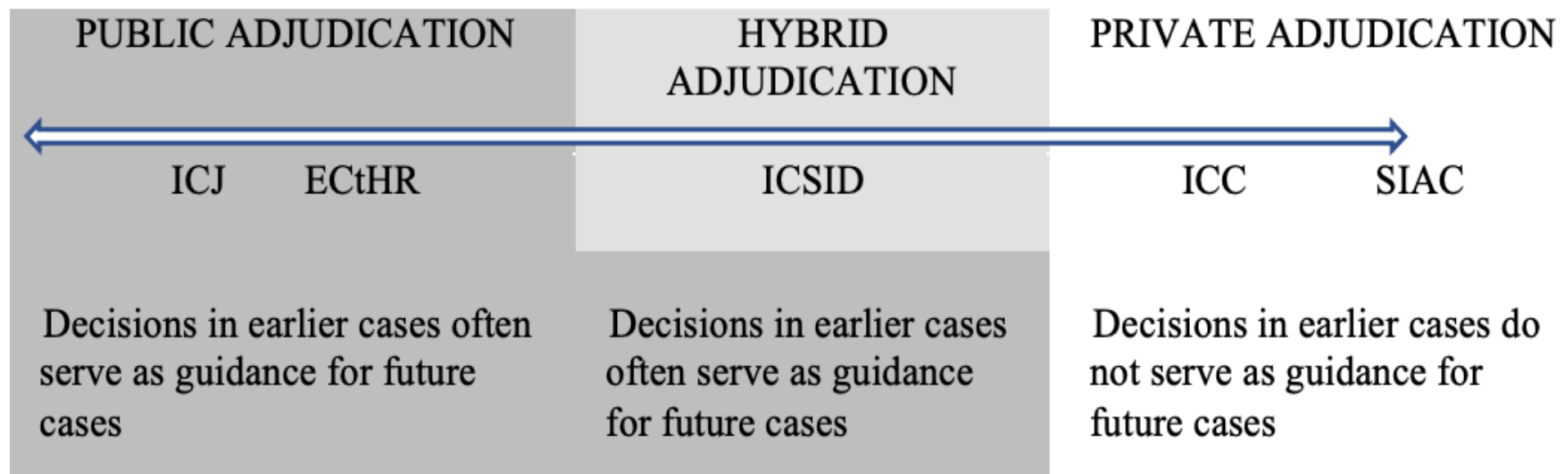
Transparency and confidentiality



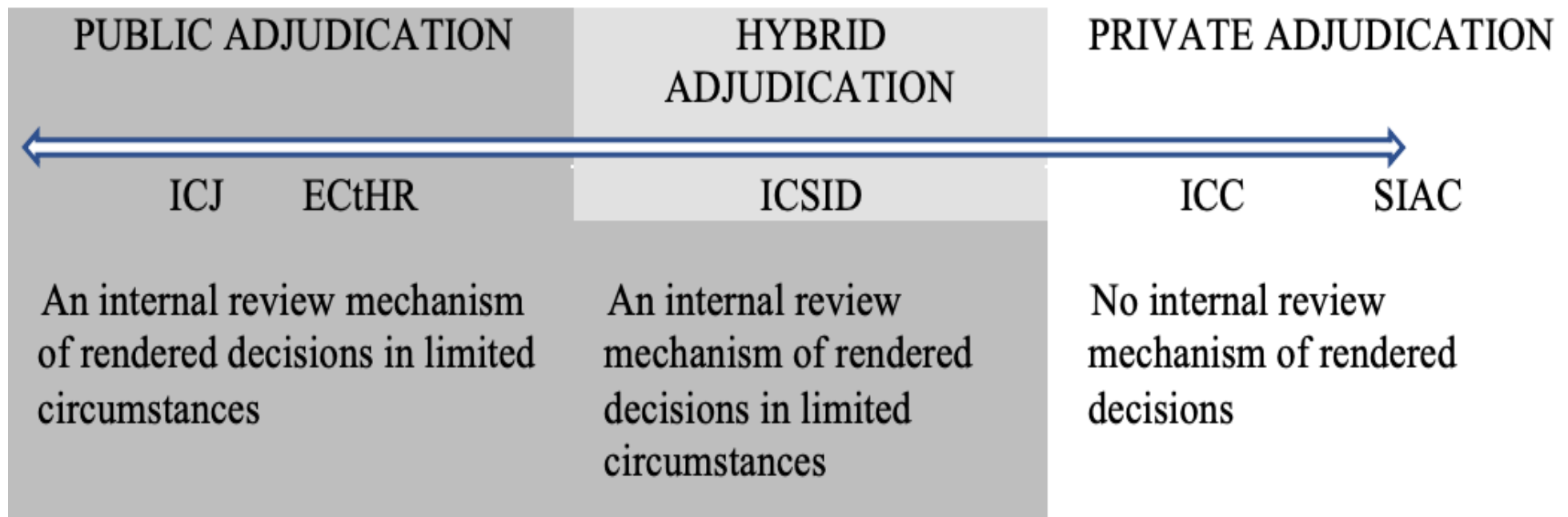
Applicable law



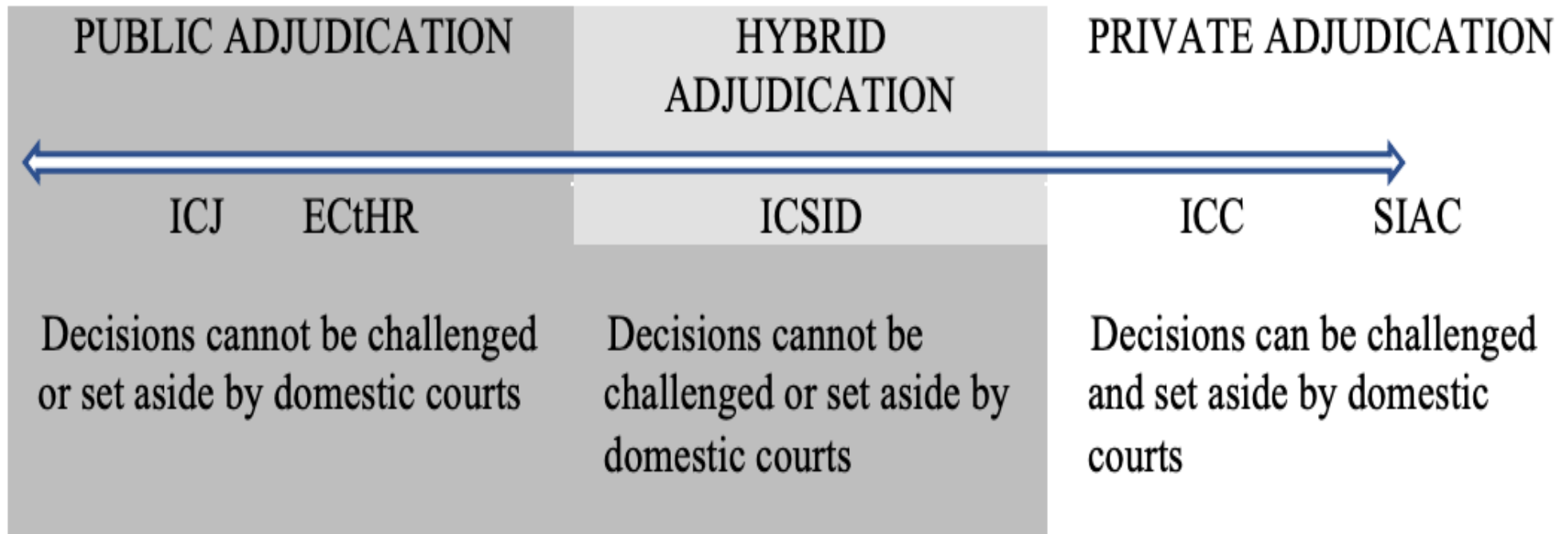
Setting precedents



Internal review mechanisms



External review mechanisms





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

The concept of legitimacy

- Legitimacy of a dispute resolution = acceptance of an institution as designed and operated in accordance with generally recognized principles of due process
- Depends on who has established an institution – public or private actors
- Both procedural and substantive aspects matter, cannot be viewed in isolation
- Substantive legitimacy: consistent and predictable body of substantive law (e.g., not amorphous principles).
- Procedural legitimacy: a satisfactory procedure (e.g., not excessively expensive)

Procedural legitimacy

- When tribunals have so much discretion, very important who is deciding disputes
- Appointed arbitrators in hybrid adjudication rarely reflect the regions of the disputing parties
- Establishing additional requirements to adjudicators (e.g., as at WTO) or introducing fixed-term appointments of suitable adjudicators.
- In ICSID adjudication, not unusual to have arbitrators without any meaningful exposure to public international law
- The pressure to justify publicly available decisions in the absence of clearly defined rules impacts the duration as well as the length of awards
- ICSID may wish to learn from public adjudication institutions by facilitating access to legal aid to the parties as both ECtHR and the ICJ are doing

Substantive legitimacy

- ISDS has almost exclusively focused the settlement of the dispute at hand, without taking into account the normative implications of decisions
- ISDS has resulted a closely-knit system of investment law, significantly removed from the reach of states
- Consistency by introducing a selective review of the most important decisions would allow to improve substantive legitimacy
- An internal mechanism for setting aside 'fundamentally unfair' awards as a result of appeal or internal review could bolster more fair outcomes, predictability and legitimacy (as ICJ and ECtHR do)
- In ICSID arbitration, domestic courts have no role whatsoever in reviewing the award to challenges to its enforcement. A greater reliance on domestic law of host states in investor-state disputes could facilitate greater legal certainty



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Read more

Kryvoi, Yarik, Private or Public Adjudication? Procedure, Substance and Legitimacy. Leiden Journal of International Law (forthcoming 2021), draft available at SSRN: <https://ssrn.com/abstract=3823178>

Leiden journal
of international law