



MAX PLANCK INSTITUTE

FOR COMPARATIVE PUBLIC LAW
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**The Historical Roots and Institutional Reforms of Investor-State Dispute Settlement:
A Public International Law Perspective**

MPIL Agora

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In the ongoing reform project of the United Nations Commission on International Trade Law Working Group III on investor-State dispute settlement (ISDS), delegations have proposed various institutional design options ranging from recalibrating the current investment arbitration system to establishing a standing court with an appellate mechanism. The key controversial features of investment arbitration, including the adjudicator appointment mechanism and the arbitral review mechanism, are often seen as being modelled after, or resembling, international commercial arbitration. Many of the problems and issues that emerged in arbitral practice were also said to stem from this private law root of dispute settlement.

However, a close reading of the negotiating history of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States will suggest that the key structural features mainly drew inspirations from the design of public international law dispute settlement mechanisms, including the Permanent Court of Arbitration, the International Court of Justice, and the International Law Commission's Draft Model Rules on Arbitral Procedure. More importantly, the original assumptions about the judicial function of investment tribunals were also shaped by this institutional pedigree and can be situated within the long-standing debate about the international judicial function beyond dispute settlement.

In this Agora, Yanwen Zhang will center around and build on arguments made in her recent paper published in the *Journal of International Economic Law* titled 'The Judicial Function of Investment Tribunals: Taking Foundational Assumptions Seriously'. She will explore the public international law root of investment arbitration, focusing particularly on the (dis)continuity in the design of certain institutional features, such as the adjudicator appointment mechanism and the arbitral review mechanism, and its correlation with the conception of the international judicial function. The correlation between institutional design and judicial function will also provide an analytical perspective to observe the ongoing ISDS reform.



Yanwen Zhang is a PhD candidate at the Faculty of Laws, University College London. Her doctoral research focuses on the judicial function and institutional design of investor-State dispute settlement mechanisms. She is currently a visiting scholar at the Max Planck Institute for Comparative Public Law and International Law.

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