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Towards Deeper Judicialisation: Explaining Thailand's Increasing Engagement with International Adjudication

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Abstract

This paper calls attention to a little-noticed phenomenon: the Thai government's increasing involvement in international adjudication over the last two decades. For the first time, it has participated in the advisory proceedings before the ITLOS and made oral statements in the advisory proceedings before the ICJ. It has faced the first treaty-based arbitration by a German investor. There has also been an attempt to initiate proceedings at the International Criminal Court against Thai officials. All of these events parallel the government's extensive participation in the dispute settlement mechanism of the WTO. What accounts for such developments? The paper argues that Thailand's constantly increasing engagement with international adjudication should be understood as part of the judicialisation of international relations. Specifically, it is shaped by four main conditions. First, the Thai government has cautiously yet constantly expanded its acceptance of the jurisdiction of courts and tribunals. Second, the number of potential claimants has exponentially increased. Third, the composition of the international litigator communities has changed, resulting in a significant increase in the number of lawyers willing to

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pursue new cases. Fourth, Thai government officials are learning to strategically make themselves more visible in the litigator communities.

Keywords: International adjudication — Proliferation of international courts and tribunals — Judicialisation — Institutional conditions — Socio-professional conditions

I. INTRODUCTION

The Thai government has been increasingly involved in international adjudication in many fora in the course of the last two decades. For the first time, it has fully participated in the advisory proceedings before the International Tribunal for the Law of the Sea (ITLOS) in 2015[1] and appeared in the oral phase in the advisory proceedings before the International Court of Justice (ICJ) in 2018.[2] Also for the first time, it was brought to arbitration under an investment treaty by a German company in 2006,[3] which was followed by other similar claims.[4] Additionally, there was an attempt to initiate proceedings at the International Criminal Court (ICC) as a result of the massacre in downtown Bangkok in 2010.[5] All of these events parallel the widely-discussed case concerning the interpretation of the judgment in the *Preah Vihear* case before the ICJ,[6] and the government's extensive engagement with the dispute settlement mechanism of the World Trade Organization (WTO) as a claimant, respondent, and third party, which now exceeds 100 cases.[7] What explains such developments?

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[1] *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (Advisory Opinion, 2 April 2015) ITLOS Reports 2015, 4.

[2] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965,* (Advisory Opinion) [2019] ICJ Reports 95. On the basis of the record of the ICJ, the first time the Thai (then Siamese) government participated in the advisory proceedings before the Court is the *Conditions of Admission of a State to Membership in the United Nations* case in 1948. In that case, it only submitted a written statement (which was received after the expiration of time-limit) without presenting the oral statements.

[3] This refers to the *Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau AG (In Liquidation) v Thailand* case. All of the relevant documents are usefully collected in the ITALAW website, <https://www.italaw.com/cases/123>.

[4] At the time of writing this paper, the *Kingsgate Consolidated v Thailand* case where an Australian company filed a claim against the government is still pending. See the developments in UNCTAD website, <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/825/kingsgate-v-thailand>. There is also a report on an arbitration brought by Chevron, the details of which have not been made public.

[5] Hired by former Prime Minister Thaksin Shinawatra, an American lawyer Robert Amsterdam prepared the application to the International Criminal Court. See the white paper "The Bangkok Massacres: A Call for Accountability" *Amsterdam & Peroff LLP* (2010) <https://amsterdamandpartners.com/wp-content/uploads/2010/07/Thailand-White-Paper-Final.pdf>.

[6] *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v Thailand)* (Judgment) [2013] ICJ Reports 281.

[7] For the full list, see the database of the WTO, <https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm#tha>.

While there has been episodic attention to some of the cases mentioned above, an overview of the pattern that seemingly emerges remains little noticed by academics and practitioners. In each case, a good analysis of the litigation strategy, the outcome, and the broader implications of each decision requires a highly contextualised, case-specific focus. Yet, it is also illuminating to zoom out and direct attention to the panoramic view of the contemporary landscape of international courts and tribunals to grasp the practice and pattern of the behaviour of the government and other actors. To pave the way for future investigation, this paper seeks to explain the increasing engagement with international adjudication by the Thai government against the backdrop of the contemporary state of international adjudication.

By bringing into conversation two strands of literature, namely "judicialisation of international relations" and sociological approaches to international courts and tribunals, I argue that the Thai government's increasing engagement with international adjudication over the last two decades has been shaped by four main conditions. First, the Thai government has cautiously but constantly expanded its acceptance of the jurisdiction of international courts and tribunals in recent decades. Second, the jurisdiction *ratione personae* of the courts and tribunals to which the government has given its consent covers non-state actors, which has resulted in an exponential increase in potential claimants bringing cases against the state in international adjudication. Third, over the last three decades, new litigators, including lawyers in international law firms, have become particularly active in the landscape and have sought new cases, new clients, and innovative procedures. Fourth, Thai government officials, for their part, are learning to strategically make themselves more visible in the international litigator communities. With all of these four conditions present, the further involvement of the Thai government in international adjudication can be expected. The first two conditions will be discussed together in Section 2 as "institutional conditions." The other two conditions will be treated as "socio-professional conditions" and will be discussed in Section 3.

A few words about the terminology and scope of the present work are in order. Following Cesare Romano, Karen Alter, and Yuval Shany, a group of international legal scholars and political scientists, "international adjudication" in this paper is understood to be concerned with the proceedings before bodies that are:

> 1. international governmental organizations, or bodies and procedures of international governmental organization, that . . .
> 2. hear cases when one of the parties is, or could be, a state or an international organization, and that . . .
> 3. are composed of independent adjudicators, who . . .
> 4. decide the question(s) brought before them on the basis of international law . . .
> 5. following pre-determined rules of procedure.[8]

[8] Cesare P. R. Romano, Karen J. Alter, and Yuval Shany, "Mapping International Adjudicative Bodies, the Issue, and Players" in Cesare P. R. Romano, Karen J. Alter, and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2014) 3, 4–9. I have excluded

As such, I exclude proceedings before *domestic courts* in foreign states which involve the Thai government, even though these have increasingly gained practical significance and scholarly interest in many types of cases, such as state immunity, universal criminal jurisdiction, and enforcement of arbitral awards.[9] Similarly excluded is the arbitration against the government based on contractual claims governed by *domestic law*. With the terms "engagement" and "involvement," which will be used interchangeably, I limit the scope of analysis to the government's participation as an applicant/claimant, as a respondent, as a third-party/non-disputing party/intervener in contentious cases, and to its participation in advisory proceedings. I therefore leave out other forms of engagement, such as the nomination of adjudicators, reform projects, etc., even though they are worthy of further exploration in their own right.[10]

II. INSTITUTIONAL CONDITIONS

The causes of the expansion of international adjudication, as well as governments' involvement in it, are undoubtedly multiple. Legal academics and political scientists tend to focus on what is called the "proliferation of international courts and tribunals." The term refers to the phenomenon of a sudden increase in the number of new international courts and tribunals after the end of the Cold War in different fields of international law, which has completely altered the landscape of international adjudication.[11] Among the well-known ones are the ITLOS under the United Nations Convention on the Law of the Sea (Law of the Sea Convention), two ad hoc criminal

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the last element of their definition, which is "issuing binding decisions," because I wish to include advisory proceedings in the analysis. By doing so, the analysis will be more illuminating and better captures the practice in the field from the standpoint of both governments and litigators.

[9] For a good contemporary overview, see Andre Nollkaemper and August Reinisch (eds), *International Law in Domestic Courts: A Casebook* (Oxford University Press 2018).

[10] My scope of the concept is thus narrower than the on-going research led by Hilary Charlesworth and Margaret Young. See, Margaret A. Young, Emma Nyhan, and Hilary Charlesworth, "Studying Country-Specific Engagements with the International Court of Justice" (2019) 10 Journal of International Dispute Settlement 582.

[11] For literature providing a good overview of the phenomenon, see Cesare P. R. Romano, "The Proliferation of International Judicial Bodies: The Pieces of the Puzzle" (1999) 31 New York University Journal of International Law and Politics 709 (discussing the creation of new courts and tribunals, its causes, and the increasing roles of non-state actors); Benedict Kingsbury, "International Courts" in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion of International Law* (Cambridge University Press 2012) 203 (discussing the typology and the unevenness in the issues and the range of actors that are under the jurisdiction of international courts and tribunals); Gary Born, "A New Generation of International Adjudication" (2012) 61 Duke Law Journal 775 (emphasising the significance of the new style of adjudication such as investor-state arbitration, which is structurally different from traditional inter-state proceedings before a court); Romano, Alter, and Shany, *International Adjudication* (n 8) 3–26 (discussing definitional issues, taxonomy, common criticisms, and a wide variety of actors involved).

tribunals for former Yugoslavia and Rwanda created by the Security Council of the United Nations, the ICC, the dispute settlement mechanisms of the WTO, and hundreds of ad hoc tribunals established in the explosion of cases before investor-state arbitration being brought under investment treaties. In the same period, older institutions such as the ICJ and the Permanent Court of Arbitration, which administer international arbitration, have seen a remarkable rise in their caseload. In the case of the ICJ, for example, while there were 13 contentious cases brought before the Court in the 1980s, the number leaped to 36 cases in the 1990s (including 10 cases initiated simultaneously by Yugoslavia against separate NATO members). This was followed by 24 cases in the 2000s, and 30 cases in the 2010s, which has made the World Court busier than ever. Third-party dispute settlement in international relations has traditionally been an exception to the rule, but today, in some issue-areas, it has morphed into a default option.

How then should one account for the increase in a government's involvement in international adjudication? Intrigued by the proliferation of international courts and tribunals, political scientists have pursued an effort in theorising under the rubric "the judicialisation of international relations."[12] This strand of works has focused on the questions as to why, and under which circumstances, states delegate their authority to adjudicatory bodies, and the questions about the many roles of international courts and tribunals.[13] To my mind, the most illuminating theoretical framework is that which has recently been developed jointly by Karen Alter, Emilie Hafner-Burton, and Laurence Helfer in a multidisciplinary project by international legal academic and International Relations scholars.[14]

The theory developed by Alter, Hafner-Burton, and Helfer is concerned with the extent to which international adjudication has shaped politics and policy-making processes at the domestic and international levels. It first clarifies that an adjudicatory body that can contribute to the judicialisation of international relations must possess certain qualifications. There are four: first, it must have the formal authority to decide

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[12] The seminal work and the research programme are initially conducted under the label "legalization of world politics." Judith Goldstein et al., "Introduction: Legalization and World Politics" (2000) 54 International Organization 385. See also, Robert O. Keohane, Andrew Moravcsik, and Anne Marie Slaughter, "Legalized Dispute Resolution: Interstate and Transnational" (2000) 54 International Organization 457.

[13] For the overview largely from a rational-choice perspective, see Karen J. Alter, "The Multiple Roles of International Courts and Tribunals: Enforcement, Dispute Settlement, Constitutional and Administrative Review" in Jeffrey L. Dunoff and Mark A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2013) 345, Barbara Koremenos and Timme Betz, "The Design of Dispute Settlement Procedures in International Agreements" in Jeffrey L. Dunoff and Mark A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2013) 371. For the more theoretically broader coverage, see Mark A. Pollack, "Political Science and International Adjudication" in Romano, Alter, and Shany, *International Adjudication* (n 8) 357.

[14] Karen J. Alter, Emilie M. Hafner-Burton, and Laurence R. Helfer, "Theorizing the Judicialization of International Relations" (2019) 63 International Studies Quarterly 449.

concrete legal disputes between contesting parties; second, it must be an independent decision-maker that applies pre-existing rules and procedures to review facts, evidence, and legal claims; third, it must provide authoritative determinations of violations of law, which are either binding or non-binding; and fourth, it must provide an order or recommendation of actions to remedy legal violations and prevent their repetition. The theory then discusses two cumulative preconditions for the process of judicialisation to occur: first, delegation of power to an adjudicatory body charged with applying legal rules, and second, legal rights-claiming by actors who bring or threaten to bring a complaint to an adjudicatory body. In this theoretical framework, the process involves multiple groups of actors including non-state actors, and therefore, governments or state officials do not, or indeed cannot, have full control over the time, nature, or extent to which political and policy decisions are adjudicated. The main component of the theory provides the model and the steps in which the process of judicialisation occurs, but, for the purpose of this paper, only the two preconditions for judicialsation, delegation of power and rights-claiming actors, will be of relevance for the discussion. Their insight will be brought to bear upon the analysis of Thailand's increasing engagement with international adjudication as part of the broader phenomenon on a global scale.

A. Increasing Acceptance of Jurisdiction

The first condition about the acceptance of the power of courts is an obvious point of departure from the perspective of the international legal system. As a matter of international law, contentious jurisdiction of courts or arbitral tribunals is consensual; that is, the existence and the extent of the jurisdiction of international courts and tribunals depend upon the consent of the relevant states, international organisations, or other actors.[15] In a contentious case, the consent of the parties to that case confers upon the court the jurisdiction to hear and decide the case. In advisory proceedings, the jurisdiction is derived from the statute and other relevant treaties. There thus exists no compulsory jurisdiction as generally understood in domestic legal systems. The proliferation of international courts and tribunals in the 1990s has not changed this foundational principle. Therefore, for international adjudicatory bodies to have and exercise jurisdiction, states must, in the terms familiar to IR scholars, delegate the power to them by virtue of consent.

Yet, experience has shown that courts and tribunals have at times expanded the scope of their jurisdiction with the opposition of some states. The legal argument that courts and tribunals have employed to support such a move is the *kompetenz-kompetenz* principle, according to which it is the court itself that has the competence

[15] For doctrinal discussion of the principle of consent, see e.g., Elihu Lauterpacht, "Principles of Procedure in International Litigation" (2011) 345 Collected Courses of The Hague Academy of International Law 387, 437–84.

to definitively determine the existence and scope of its jurisdiction.[16] In other words, the final say lies with the court, and not with the states or any other actors. A recent example of a court's tendency to expand its jurisdiction is the ongoing debate about the relationship between the International Criminal Court and the non-state parties to the Rome Statute.[17] For instance, in the Bangladesh/Myanmar situation, the Pre-Trial Chamber has laid down a relatively low threshold for the existence of the ICC's jurisdiction *ratione loci,* as follows: "provided that part of the *actus reus* takes place within the territory of a State Party, the Court may thus exercise territorial jurisdiction within the limits prescribed by customary international law."[18] This pronouncement has been invoked as a ground to request the Prosecutor to investigate the alleged crimes of deportation committed by Chinese officials against the Uighur people in the territories of the parties to the Rome Statute such as Tajikistan and Cambodia, notwithstanding the fact that China has not even signed the Statute.[19]

The Thai government, on the whole, has been cautiously yet constantly expanding its consent to the jurisdiction of international courts and tribunals in different fields. There has been a noticeable trend towards more acceptance over the last three decades, albeit with some unevenness, before one witnesses the increasing involvement in adjudication. This cautious attitude can be clearly observed in relation to the ICJ and ICC. In the case of the International Court of Justice, the Thai government has not declared its unilateral acceptance of compulsory jurisdiction in accordance with Article 36(2) of the Statute. There is also a common practice, which has arisen in recent decades, that, when it becomes a party, Thailand will invariably make a reservation to any compromissory clause in a treaty which provides a ground for recourse to compulsory dispute settlement. [20] In multilateral environmental agreements which allow the parties to opt in to compulsory adjudication, the government has not made such a declaration thus far.[21] One of the main causes for the

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[16] On this principle, see e.g., Christian Tomuschat, "Article 36" in Andreas Zimmermann et al. (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, Oxford University Press 2019) 712, at para 111–43.

[17] For a recent treatment of this issue, see Monique Cormier, *The Jurisdiction of the International Criminal Court over Nationals of Non-States Parties* (Cambridge University Press 2020).

[18] Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar (ICC-01/19), Pre-Trial Chamber III, 14 November 2019, para 61.

[19] Tia Sewell, "Unpacking the Recent Uighur ICC Complaint against Chinese Leader" (*Lawfare*, 21 July 2020) <https://www.lawfareblog.com/unpacking-recent-uighur-icc-complaint-against-chinese-leaders>.

[20] Examples of the treaties where Thailand opted out from the ICJ's jurisdiction include: International Convention for the Suppression of the Financing of Terrorism 1999 (Thailand's ratification in 2004); United Nations Convention against Corruption 2006 (Thailand's ratification in 2011); United Nations Convention against Transnational Organized Crime 2000 (Thailand's ratification in 2013); International Convention for the Suppression of Acts of Nuclear Terrorism 2005 (Thailand's ratification in 2019).

[21] See e.g., Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade 1998 (Thailand's accession in 2002); Convention on

cautious attitude originates from the ICJ's judgment in the *Preah Vihear* case in 1962, which re-opened the dark episodes of colonialism in the region at the height of the Cold War. In that case, the Court held, *inter alia*, that "the Temple of Preah Vihear is situated in territory under the sovereignty of Cambodia," primarily on the basis that Thailand had long accepted the map produced by the French-Siamese Mixed Delimitation Commission.[22] As rightly observed by the prominent international lawyer Vitit Muntarbhorn, this experience "has been more dramatic and traumatic for the country than any other international legal issue, affecting national pride and sentiments."[23] Because of that trauma, the judgment "also explains the country's hesitation towards the ICJ and may have resulted in several reservations entered by Thailand to international treaties, whereby the country does not consent to dispute settlement by the ICJ."[24] The basis of the ICJ's jurisdiction in this case was Thailand's acceptance of the predecessor of the ICJ, the Permanent Court of International Justice, which was renewed under the Statute of the ICJ for a period of ten years from 3 May 1950.[25] As a result of Cambodia's initiation of proceedings, the Thai government did not renew its acceptance of the ICJ's jurisdiction.[26] It should be added that such a

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Biological Diversity 1992 (Thailand's ratification in 2003); Stockholm Convention on Persistent Organic Pollutants 2001 (Thailand's ratification in 2005).

[22] *Case concerning the Temple of Preah Vihear (Cambodia v Thailand)* (Merits) [1962] ICJ Reports 6, 36. For an excellent historical study on the case in the broader context of Cambodia–Thai relations, see Shane Strate, "A Pile of Stones? Preah Vihear as a Thai Symbol of National Humiliation" (2013) 21 South East Asia Research 41.

[23] Vitit Muntarbhorn, "Thailand" in Simon Chesterman, Hisashi Owada, and Ben Saul (eds), *The Oxford Handbook of International Law in Asia and the Pacific* (Oxford University Press 2019) 363, 369. A noted political scientist Thitinan Pongsudhirak recounts the vehement reactions from the Thai side as follows:

> Then-Foreign Minister Thanat Khoman called it a "miscarriage of justice," insinuated that the Polish president of the ICJ was a communist, labelled some of the judges as nationals of colonial powers and criticised and questioned the US' objectives in South East Asia for allowing Dean Acheson to plead the Cambodian case. As a sign of protest, Thailand withdrew its delegation from SEATO Council and the Geneva Conference on Laos, recalled its ambassador to France and turned back a Polish trade delegation. Echoing scenes to come years later, thousands of university students protested in the streets of Bangkok to "protect Phra Viharn."

Thitinan Pongsudhirak, "All Quiet on the Thai–Cambodian Front: Drivers, Dynamics, Directions" (2018) 26 South East Asia Research 330, 336.

[24] Vitit, *Thailand* (n 23) 369.

[25] Declaration of Thailand Recognizing as Compulsory the Jurisdiction of the Court, in Conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, Bangkok, 20 May 1950 (registered 13 June 1950) 65 UNTS 157.

[26] Declarations Recognizing as Compulsory the Jurisdiction of the International Court of Justice under Article 36, Paragraph 2, of the Statute of the Court (*United Nations Treaty Collections*) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-4&chapter=1&clang=_en#8>.

passive approach to the ICJ's contentious jurisdiction is not unique to Thailand: it seems common among many Asian countries.[27]

If the Thai government is cautious in accepting the ICJ's jurisdiction, it has been even more so in the case of the ICC. While the government participated in the Rome Conference to negotiate the ICC Statute, it has neither ratified the Statute nor accepted the ICC's jurisdiction. After the adoption of the Rome Statute, there have been discussions and deliberations as to whether Thailand should ratify the Statute in numerous fora, including the ad hoc committee in the Parliament.[28] Various concerns have been repeatedly voiced, which include the possible abuse of the proceedings for political purposes, and the immunity of the King as the Commander-in-Chief of the Royal Thai Army.[29] As a result, even though Thailand has signed the Rome Statute, it has not ratified it yet. The debates have recurred from time to time, particularly in relation to the tenacious culture of impunity in the country.[30] And yet there are no noticeable changes in the official position and policy.

The non-acceptance of the jurisdiction of the ICC, nevertheless, may not always exclude the involvement of the states and governments. The ongoing investigation in Afghanistan, for instance, may implicate Thailand. In 2017, the Prosecutor at the ICC requested authorisation from the Pre-Trial Chamber to initiate an investigation into alleged war crimes and crimes against humanity in relation to the armed conflict in Afghanistan, and similar crimes related to that conflict committed in the territory of other parties to the Rome Statute, including acts allegedly committed by US armed forces and members of the Central Intelligence Agency (CIA) such as torture and cruel treatment. The alleged torture and cruel treatment, according to the Prosecutor, were committed in the so-called "CIA black sites" located in various countries which, according to some media reports, include Thailand. In the list of the sites submitted to the ICC, however, the Prosecutor did not include the "Detention Site Green," reportedly located in Thailand and in operation until the end of 2002, even though it

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[27] For a thorough survey up until 2018, see Hisashi Owada and Samuel Chang, "International Dispute Settlement" in Chesterman, Owada, and Saul, *International Law in Asia and the Pacific* (n 23) 267, 270–74.

[28] For a summary of the concerns raised in the Committee, see ศูนย์ข่าว TCIJ, "สว. ชี้หากไทยให้สัตยาบันศาลระหว่างปท. เท่ากับลดความคุ้มกัน 'พระมหากษัตริย์'" [Thai Civil Rights and Investigative Journalism, "The Senate Said Ratification of the ICC Would Undermine the Immunity of the King"] (Thai) *TCIJ* (11 October 2013) <https://www.tcijthai.com/news/2013/11/scoop/3207>.

[29] For a concise summary of legal issues concerning constitutional law, as well as public opinions, see Jaturon Thirawat, "To Join or Not to Join the International Criminal Court: The Thai Dilemma" (2005) 1 Asia Pacific Yearbook of International Humanitarian Law 168; ปกป้อง ศรีสนิท, กฎหมายอาญาระหว่างประเทศ (วิญญูชน 2556) [Pokpong Srisanit, *International Criminal Law* (Winyuchon 2013)] (Thai) 256–58.

[30] For an excellent historical study of the issue of impunity in Thailand, see Tyrell Haberkorn, *In Plain Sight: Impunity and Human Rights in Thailand* (The University of Wisconsin Press 2019).

was mentioned in the declassified summary report of the Intelligence Committee of the US Senate in 2014.[31] How the Prosecutor will proceed remains to be seen.

Apart from the ICJ and the ICC, the government has been more willingly accepting of the jurisdiction of international tribunals. In 2011, Thailand finally ratified the Law of the Sea Convention which it signed three decades ago. The Convention provides for the compulsory dispute settlement mechanisms and the advisory jurisdiction of the ITLOS. However, the Thai government retained a measure of caution once again. The government has indicated that, in accordance with Article 298 of UNCLOS, it exempts certain categories of disputes from the dispute settlement mechanism, including disputes relating to sea boundary delimitations or involving historic bays or titles.[32] It has also chosen an arbitral tribunal, not the ITLOS or the ICJ, as the default method of dispute settlement, which will allow it to maintain some control over the selection of arbitrators who will decide cases.[33]

The acceptance of the investor-state arbitration under treaties shows an even more open attitude. Thailand has been concluding investment treaties for several decades, with the understanding that the protection under those treaties, as well as the accompanying investor-state arbitration, would attract more inward foreign direct investment to the country.[34] Nevertheless, according to interviews given by a few officials, the decisions to conclude these treaties in the early decades were not based on any thorough cost-benefit analysis or robust empirical study.[35] After the first

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[31] See e.g., "คุกลับ จับทรมาน: มรดกและหมุดหมายของมิตรภาพไทย-สหรัฐฯ (ซีไอเอ)" ประชาไท (1 เมษายน 2561) ["Black Site and Torture: Heritage and Milestone of Thai–US (CIA Relations)" *Prachatai* (1 April 2018)] (Thai) <https://prachatai.com/journal/2018/04/76177>; "New CIA Chief Ran Thailand's Secret Waterboarding Site" *Bangkok Post* (14 March 2018) <https://www.bangkokpost.com/world/1427606/new-cia-chief-ran-thailands-secret-waterboarding-site>; "What Happened at the Thailand 'Black Site' Run by Trump's CIA Pick" *The Atlantic* (14 March 2018) <https://www.theatlantic.com/international/archive/2018/03/gina-haspel-black-site-torture-cia/555539/>; "CIA Director Gina Haspel's Thailand Torture Ties" *BBC* (3 May 2018) <https://www.bbc.com/news/world-asia-43496212>. However, the Thai government has initially denied the allegation. See, "Thailand Denies Existence of CIA Black Site" *Bangkok Post* (12 December 2014) <https://www.bangkokpost.com/world/449082/thailand-denies-existence-of-cia-black-site>.

[32] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

[33] For concise explanation and discussion on the various fora for dispute settlement under the Law of the Sea Convention, see Robin R. Churchill and A. Vaughan Lowe, *The Law of the Sea* (3rd edn, Manchester University Press 1999) 453–59; Yoshifumi Tanaka, *The International Law of the Sea* (3rd edn, Cambridge University Press 2019) 493–509.

[34] For a very good overview of the Thai government's changing attitude towards investment arbitration (including both contract-based and treaty-based claims), see Luke Nottage and Sakda Thanitcul, "International Investment Arbitration in Thailand: Limiting Contract-Based Claims While Maintaining Treaty-Based ISDS" (2017) 18 Journal of World Investment and Trade 793.

[35] Lauge N. S. Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (Oxford University Press 2015) 126–27 (recording the following statements from the interview with the author: "the idea in the 1990s was that we would have more investment if we negotiated those bilateral instruments"; and "the perception . . . was simply that this was a precondition for foreign investors making the decision to invest, so we thought there is nothing wrong with that.").

arbitral claim brought by a German company under the German-Thai bilateral investment treaty in 2005, which resulted in the victory of the investor, the Thai government has continued to conclude new investment treaties, including free trade agreements. But the policy justification has been modified: now that Thai investors increasingly make investments abroad, the treaties as well as the accompanying arbitration are intended to protect them. "Like many countries," noted Vilawan Mangklatanakul, the then Director of International Law Development Division of the Department of Treaties and Legal Affairs in 2010, "Thailand has signed a number of [international investment agreements] designed to protect its investors abroad *and simultaneously* attract investment from abroad into the country by offering an additional layer of protection for foreign investors."[36] There have been improvements in the drafting of the treaties, too. The 2002 Model BIT was revised in 2013 to give more precision to the wording in the provisions, including those concerning the jurisdiction of the arbitral tribunal. At present, Thailand has concluded 42 bilateral investment treaties and 26 treaties with investment protection provisions, a large number of which are now in force.[37] The so-called "second generation" of investment treaties are more precise and elaborate in their provisions, which demonstrates greater caution and care on the part of the government.

A largely similar attitude can be found in the context of the dispute settlement mechanism in the framework of the WTO. The Thai government joined in the early stages and has participated actively in the proceedings as a claimant, a respondent, and a third party.[38] However, with the currently defunct Appellate Body, the European Union and other members have proposed the multi-party interim appeal arrangement, according to which the members of the WTO may choose to resort to arbitration instead of the Appellate Body.[39] The Thai government has not joined the arrangement yet. The Director-General of the Trade Negotiations Department, Ministry of

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[36] Vilawan Mangklatanakul, "Thailand's First Treaty Arbitration: Gain from Pain" in Susan D. Franck and Anna Joubin-Bret (eds) *Investor-State Disputes: Prevention and Alternatives to Arbitration II. Proceedings of the Washington and Lee University and UNCTAD Joint Symposium on International Investment and Alternative Dispute Resolution* (UNCTAD 2011) 81, 81 (emphasis added). Similar statements have been repeated by the government officials on numerous occasions. See e.g., the similar statement by Vilawan Mangklatanakul at the Academic Seminar on Investor-State Arbitration: Past, Present, and Future, held on 20 February 2020, at Faculty of Law, Thammasat University, "สรุปสาระสำคัญจากสัมมนาวิชาการเรื่อง 'อนุญาโตตุลาการระหว่างรัฐและนักลงทุนตามสนธิสัญญา: อดีต ปัจจุบัน และอนาคต'" ["Summary of the Academic Seminar on Investor-State Arbitration: Past, Present, and Future"] (Thai) <https://www.law.tu.ac.th/summary-seminar-arbitration-state-investor/>.

[37] "International Investment Agreements Navigator" *UNCTAD* <https://investmentpolicy.unctad.org/international-investment-greements/countries/207/thailand>.

[38] ประสิทธิ์ เอกบุตร, กลไกการระงับข้อพิพาท WTO: วิธีพิจารณาคดีใน WTO และข้อสังเกตเกี่ยวกับการต่อสู้คดีของไทย (พิมพ์ลักษณ์ 2550) [Prasit Aekaputra, *Dispute Settlement Mechanisms of the WTO: Procedure and Observations About Thailand's Litigation Strategy* (Pimluk 2007)] (Thai); Pornchai Danvivathana, "Thailand's Experience in the WTO Dispute Settlement System: Challenging the EC Sugar Regime" in Gregory C. Shaffer and Ricardo Meléndez-Ortiz (eds), *Dispute Settlement at the WTO: The Developing Country Experience* (Cambridge University Press 2010) 210.

[39] "Interim Appeal Arrangement for WTO Disputes Becomes Effective" *European Commission* (30 April 2020) <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2143>.

Commerce, has only expressed support for the reform of the WTO dispute settlement mechanism.[40]

A brief survey of Thailand's position with regard to the jurisdiction of the ICJ, the ICC, the ITLOS, investor-state arbitration, and the dispute settlement mechanisms in the WTO, as presented above, paints a nuanced picture. The government has been cautious in accepting or expanding the jurisdiction of courts and tribunals, yet on the whole, it is clear that over the last 30 years the move has been to accept more, and not less, jurisdiction. In this period, Thailand has not withdrawn its consent to the jurisdiction of these courts and tribunals.

B. Proliferation of Potential Claimants

As Alter, Hafner-Burton, and Helfer rightly emphasise, the broader consent to jurisdiction alone is not sufficient for judicialisation; there must be right-holders bringing a claim before courts and tribunals. One of the revolutionary aspects in the landscape of international adjudication over the last 30 years has been the exponential proliferation of potential claimants, including non-state actors. While inter-state proceedings are the paradigmatic form of international adjudication in traditional international law textbooks, this has changed significantly in the second half of the twentieth century. Benedict Kingsbury usefully summarises ten types of international adjudicatory bodies as follows:[41]

- Inter-government claims commission (covering certain claims between states, but also allowing claims against the other state from a pre-defined list of grounds);
- Ad hoc inter-state arbitration (providing a traditional method of inter-state dispute settlement by the third party which precedes the establishment of a permanent international court);
- Inter-state arbitration embedded in pre-existing legal institutional structures (typically established under the administration of the Permanent Court of Arbitration);
- Standing international courts (providing the twentieth-century, quintessential example of an international adjudicatory body);
- International criminal courts (trying individuals for commission of international crimes);
- International administrative tribunals (deciding claims brought by officials of international organisations against the organisations);
- Regional human rights courts (allowing an individual whose rights under human rights treaties have allegedly been violated to bring a claim against governments);
- Regional economic integration courts (establishing under the treaty concerning

[40] "Bangkok Pushes WTO Multilateral System" *Bangkok Post* (19 March 2019) <https://www.bangkokpost.com/business/1646996/bangkok-pushes-wto-multilateral-system>.

[41] Kingsbury, *International Courts* (n 11) 205–10.

integration of a specific region such as the European Union);
- The WTO dispute settlement system (comprising three-member ad hoc panels and the permanent Appellate Body with the competence to decide the appeal);
- Investment arbitration tribunals (deciding claims brought by foreign investors against the host state in whose territory the investment is made).

To this list, one may add "quasi-judicial bodies" established under human rights treaties, such as the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights. Such bodies comprise experts and may, depending upon the state party's acceptance, receive complaints made by individuals against governments, alleging violations of their protected rights. "All of this," Kingsbury aptly notes, "has led to a new paradigm of routinised litigation and judicial governance being layered alongside the traditional paradigm of episodic international (inter-state) dispute settlement by tribunals."[42]

The increasing engagement in international adjudication of governments around the world in different fields can thus be simply explained by the fact that they are brought to the cases to defend their positions by this massive group of new claimants. In other words, states are forced to defend their position; otherwise they will run the risk of losing the case. Compared with the old world of approximately 200 states bringing a case against each other, the new world of international adjudication appears as a dramatic one where a government faces potential claims for monetary damages by thousands of foreign investors, and potential allegations of human rights violations by millions of individuals in their territory or subject to their jurisdiction.

Many of the regimes in which the Thai government has accepted compulsory jurisdiction involve non-state actors. This is crystal clear in investor-state arbitration. Faced with the claims brought by a German investor and an Australian investor, the government did not have many options other than to defend its position in full in the proceedings. As with many countries, the risk of arbitration seems high, simply due to the fact that government officials are not fully aware of investment treaties, their meanings, and their implications for dispute settlement. Vilawan, again, provides a perceptive reflection upon the learning experience after the first investment arbitration:

> There are two key possible "pre-dispute pitfalls." First, government agencies can often lack experience with investment treaty arbitration. Thailand signed the first BIT with Germany in 1961 and many other countries thereafter; yet its first treaty arbitration only arose in 2005. The government officials were not fully well versed with the legal implications of the treaty, let alone the early dispute settlement or litigation under the arbitral rules of procedure. The realisation that an investor could invoke ISDS in a treaty was perhaps not fully appreciated. . . .
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> Secondly, there might be a lack of an institutionalised dispute-filtering mechanism or liaison unit that could prevent a "problem" related to investment from

[42] ibid 210.

> escalating into a formal investment "dispute."[43]

This statement was made in 2010, and it is unclear if these issues have since been alleviated to a satisfactory extent. Foreign investors continue to threaten lawsuits, which may arguably include investment-treaty arbitration. Facebook Inc, for instance, has very recently protested against the Thai government's attempt to prosecute its employees, raising concerns in alarming terms about its ability to "reliably invest in Thailand, including maintaining our office, safeguarding our employees and directly supporting businesses that rely on Facebook."[44]

The emergence of new potential claimants has also changed the traditional picture of the proceedings between states and the roles of governments. As it stands, many of the inter-state proceedings have been conducted by private persons with the help of the government, pursuing some kind of public-private partnership in adjudication. This is particularly true for the dispute settlement mechanism in the WTO. According to a path-breaking study by Gregory Shaffer in 2003, American and European companies have tried to use the WTO system to enhance their corporate interests. He concludes that the "growing interaction between private enterprises, their lawyers, and U.S. and European public officials in the bringing of most trade claims reflects a trend from predominantly intergovernmental decision-making toward multilevel private litigation strategies involving direct public-private exchange at the national and international levels."[45] A similar phenomenon can be observed in the Thai government's participation in the WTO dispute settlement mechanism. Pornchai Danvivathana, a Thai diplomat, insightfully summarises the practice of Thailand as follows:

> It should be noted that for Thailand, involvement of the private sector in any dispute is a good indicator of serious damage in real terms. However, it is the government that assesses whether the country and the industries concerned are being deprived respectively of rights and/or benefits accruing under the WTO Agreements. In making an assessment, the government considers whether there is a breach of another Member's commitments and, based on statistical data, examines whether its exports are impaired as a result of the other Member's measures. However, if the industries affected by the measures at issue petition the government to initiate a WTO dispute, the filing of a claim before the WTO is more easily justified.[46]

He also reports that in the *EC-Sugar* case, the Thai Sugar Association has closely cooperated with the Thai government. It sent its representatives to Geneva to discuss the legal, political, and public relations issues with the Thai Permanent Mission both

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[43] Vilawan, *First Treaty Arbitration* (n 36) 82.

[44] "PM in War of Words as Facebook Threatens Lawsuit" *Bangkok Post* (26 August 2020) <https://www.bangkokpost.com/thailand/politics/1974467/pm-in-war-of-words-as-fb-threatens-lawsuit>.

[45] Gregory C. Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (The Brookings Institution 2003) 4.

[46] Pornchai, *Thailand's Experience* (n 38) 216.

before and after the complaint was formally filed.[47] The eagerness of the Thai private sector to collaborate with the government is also evident in the consultation between Thailand, the Philippines, and the European Community regarding the tariffs on tuna imports. Challenging the EC's tariffs, the Thai government involved a representative of the Thai Food Processors' Association, which provided some significant financial support. In the words of the representative of the Association, "[w]hen we saw that there was not enough legal expertise in the ministry, we, the private sector, gathered the funding needed to hire a law firm in Brussels."[48] As such, even though private persons do not enjoy a formal legal standing in the mechanisms, they can engage with governments, which will bring them into the proceedings before adjudicatory bodies. Some have indeed argued for more engagement of Thai private actors, particularly in sharing the fees for external counsels and experts with the government[49]—the aspect of the phenomenon to which this paper will now turn.

III. SOCIO-PROFESSIONAL CONDITIONS

Institutional conditions alone do not sufficiently explain the rise of judicialisation and the increased involvement of governments in international adjudication. Since an institution tends to entail unintended consequences, for instance, creating a new audience that is not expected at the time of the creation, an analytical net should be cast widely so as to cover such consequences. This insight, inspired by the criticism of the institutional design literature, [50] is particularly illuminating for studying international courts and tribunals. To supplement an analysis of the expansion of consent to jurisdiction and the expansion of potential claimants, attention should be turned towards the communities of litigators who are not only involved in the proceedings before international courts and tribunals, but who also serve to sustain adjudicatory activities. The litigator communities also form part of the larger constituency of courts and tribunals which provides the springboard for the legitimacy and authority of those courts and tribunals. [51] In this sense, the analysis of the

[47] ibid 217.

[48] See the interview in, Nilaratna Xuto, "Thailand: Conciliating a Dispute on Tuna Exports to the EC" (2005) <https://www.wto.org/english/res_e/booksp_e/casestudies_e/case40_e.htm>.

[49] See e.g., บัณฑิต หลิมสกุล, "ความร่วมมือระหว่างภาครัฐและเอกชนของไทย (Public-Private Partnerships: PPP) ในการใช้กลไกยุติข้อพิพาทภายใต้กรอบ WTO เพื่อแก้ปัญหาการกีดกันทางการค้า" (2554) 29 วารสารเศรษฐศาสตร์ธรรมศาสตร์ [Bundit Limsakul, "The Proposed Model for Thai Public-Private Partnerships for Resolving Multilateral Trade Dispute under the World Trade Organization (WTO)" (2011) 29 Thammasat Economic Journal] (Thai) 1, 33–36.

[50] On the seminal critique of institutional design literature, see Paul Pierson, "The Limits of Design: Explaining Institutional Origins and Change" (2000) 13 Governance: An International Journal of Policy and Administration 475–99. For the more extensive discussion, see Paul Pierson, *Politics in Time: History, Institutions, and Social Analysis* (Princeton University Press 2004).

[51] Mikael Rask Madsen, "Sociological Approaches to International Courts and Tribunal" in Romano, Alter, and Shany, *International Adjudication* (n 8) 388, 408–11 (providing an overview of the issue of

judicialisation process should include the community of actors involved in the entire process of adjudication. The sociologist Antoine Vauchez aptly speaks of the "symbiotic relationship" between communities and courts, and rightly observes as follows:

> Any analysis of the symbiotic relationship between "international courts" and their "legal communities" should start from the simple yet instrumental fact that international courts are particularly precarious institutions, especially when compared to their national counterparts. Not only do they lack the backing of the state, but they cannot count on the existence of a supranational judicial profession because there is no such thing as a supranational body competent for setting common educational requirements. . . . In other words, newly-built international courts do not mechanically succeed in claiming a "natural" domain of jurisdiction of their own by the mere force of the black letter of the treaties. More often than not, their existence as an "authentic" jurisdiction capable of producing an authoritative body of case law is initially questioned by a variety of groups and professions (such as national scholarships, national supreme courts, and diplomats).[52]

Communities of international litigators comprise diverse roles and multiple actors from different backgrounds. Much will therefore depend upon the specific setting in the court and tribunal in question, even if two courts may share some overlapping litigator communities. Legal scholars have increasingly adopted this insight and have fruitfully studied a wide variety of international courts and tribunals.[53] In what follows, I shall focus on the most salient features in the composition of the international litigator communities from a socio-professional

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legitimacy and legitimation of international courts from a sociological perspective); Karen J. Alter, Laurence R. Helfer, and Mikael Rask Madsen, "How Context Shapes the Authority of International Courts" in Karen J. Alter, Laurenc R. Helfer, and Mikael Rask Madsen (eds), *International Court Authority* (Oxford University Press 2018) 24, 28–36 (usefully providing a typology of de facto authority on the basis of difference audiences such as litigants, business actors, civil society organisations, etc); Fuad Zarbiyev, "Saying Credibly What the Law Is: On Marks of Authority in International Law" (2018) (9) Journal of International Dispute Settlement 291, 293–97 (conceptualizing authority as "deference entitlement" supported by the belief system collectively shared within a community).

[52] Antoine Vauchez, "Communities of International Litigators" in Romano, Alter, and Shany, *International Adjudication* (n 8) 655, 658–59.

[53] See e.g., Yyves Dezalay and Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press 1996) (a pioneering work, analyzing how legal professions based mainly in Europe and the US have created and competed in the field of international commercial arbitration); Mikael Madsen, "France, the United Kingdom and the 'Boomerang' of the Internationalisation of Human Rights (1945–2000)" in Simon Halliday and Patrick Schmidt (eds), *Human Rights Brought Home: Socio-Legal Perspectives on Human Rights in the National Context* (Hart Publishing 2004) 57–86 (providing the history of the European Court of Human Rights in the context of the reconstruction of the British and French empires which covers the creation of the lawyers' communities and constituency of the Court); Tommaso Soave, "Who Controls WTO Dispute Settlement? Socio-Professional Practices and the Crisis of the Appellate Body" (2020) 29 Italian Yearbook of International Law 13–31 (providing an account of how the "inner circle" of the community of legal professionals have developed the practices and norms in the dispute settlement mechanism of the WTO).

perspective, namely, the multiplication and diversification of counsels and the strategic learning of government officials. These aspects are significant, for if these groups of actors seek more cases, it is likely that international adjudication will increase, which in turn means that it is likely that the government will become more involved.

A. Emergence of Law Firms

Counsels in international adjudication are motivated, to use the distinction drawn by Max Weber, by both material and ideal interests.[54] For them, more jurisdiction and more cases mean more job opportunities, and more job opportunities, in turn, result in more income, more prestige, more sense of accomplishment, and more perception of justice. There is therefore a clear incentive for litigators to seek to expand jurisdiction of courts and tribunals and bring more cases to them.

Traditionally, counsels before the International Court of Justice and inter-state arbitration were almost monopolised by a close-knit group of British barristers and professors based largely in the UK, US, Belgium, France, and Italy.[55] In cases before the ICJ and the inter-state arbitration, the team is typically composed of the government official as an agent and several counsels from both Anglophone and Francophone backgrounds.[56] In 1994, Keith Highet, an experienced counsel before the ICJ, spoke of "the international bar that continues to serve the Court," which

> consists of those international lawyers who have practiced and who continue to practice as oral advocates before the Court, who represent a variety of foreign states other than their own governments, who are well-known to the Judges and Registrar of the Court, who know how things work out in practice, and who understand by experience the difficulties, pitfalls and tricks of the trade.[57]

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[54] For a succinct summary, see Hans H. Gerth and Charles Wright Mills, "Introduction" in Hans H. Gerth and Charles Wright Mills (eds), *From Max Weber: Essays in Sociology* (Oxford University Press 1946) 1, 61–65.

[55] Alain Pellet, "The Role of the International Lawyer in International Litigation" in Chanaka Wickremasinghe (ed), *International Lawyer as Practitioner* (BIICL 2000) 147, 147–53; Shashank P. Kumar and Cecily Rose, "A Study of Lawyers Appearing Before the International Court of Justice, 1999–2012" (2014) 25 The European Journal of International Law 893; Sarah Dezalay and Yyves Dezalay, "Professionals of International Justice: From the Shadow of State Diplomacy to the Pull of the Market for Commercial Arbitration" in Jean d'Aspremont et al. (eds), *International Law as a Profession* (Cambridge University Press 2017) 311.

[56] For the discussion of the composition team, see Alain Pellet and Tessa Barsac, "Litigation Strategy" in Hélène Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* (2019) <https://opil.ouplaw.com/view/10.1093/law-mpeipro/e3109.013.3109/law-mpeipro-e3109>.

[57] Keith Highet, "A Personal Memoir of Eduardo Jiménez de Aréchaga: Doyen of the Invisible Bar of the International Court of Justice" (1994) 88 Proceedings of the ASIL Annual Meeting 577, 578–79. Highet himself was certainly a member of this invisible bar, having appeared in such cases as *Southwest Africa*, *Tunisia/Libya*, *ELSI*, *Qatar v Bahrain*, *Cameroon v Nigeria, Fisheries Jurisdiction (Spain v Canada)*.

What is noteworthy from Highet's statement is not only the rich and unrivalled experience and expertise of this group of international lawyers, but also their reputation in the eyes of the ICJ judges. States appearing before the ICJ therefore have a prudential reason for choosing the counsel from this group of international lawyers to secure the trust of judges. Judge Jennings, the former President, was candid about this. "The judges," he wrote, "can therefore often make a good guess at the names of leading counsel even before the list of names is provided; and the only question remaining may well be just to learn on which side they will respectively appear."[58] Such practice and preference for the *status quo* were already revealed in the *Electricité de Beyrouth* case in the early years of the ICJ. When the Agent of Lebanon asked the Registrar for a list of potential counsels for the case, part of the Registrar's reply was the recommendation that Lebanon should seek counsels whose names appear in the judgments in previous cases.[59]

The departure from the small community of international litigators seems to have been initiated with the creation of the Iran-US Claims Tribunal in the wake of the Iran-US crisis in 1980.[60] But it certainly accelerated in the succeeding decade when investor-state arbitration, the dispute settlement proceedings before the WTO, and two ad hoc international criminal tribunals gained currency in the 1990s. With the increase in the number of international courts and tribunals, the social fabric of international lawyers appearing before them has become much more diverse. The most salient aspect in these changes is the increasing role of lawyers from law firms. James Crawford, an academic (and subsequently a judge) with very extensive experience in litigation as a counsel and arbitrator over the last three decades, once pointed out that there was an ongoing "major competition on the Anglophone side between the large law firms and the international lawyers who are professors." He also admitted he was not certain "that the professors will retain the dominant status that they have enjoyed in the past."[61] Alain Pellet, another experienced counsel, goes even further in affirming the inevitable role of law firms in international adjudication:

> I have some reservation with systematically resorting to law-firms in inter-State cases: it unavoidably and considerably raises the cost of the case and, quite usually, makes the procedure more cumbersome. This said, resorting to a law-firm will be virtually indispensable in two circumstances: first, for very poor States ill-equipped to face rather complex and heavy procedures; second, when the case implies difficult factual

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[58] Robert Jennings, "The Work of the International Law Bar" in Lal C. Vohrah et al. (eds), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Kluwer Law International 2003) 443, 444.

[59] James Crawford, "The International Law Bar: Essence before Existence?" in Jean d'Aspremont et al. (eds), *International Law as a Profession* (Cambridge University Press 2017) 338, 340. This episode also illustrates the role of ICJ officers in the litigator community.

[60] ibid 342.

[61] James Crawford, Alain Pellet, and Catherine Redgwell, "Anglo-American and Continental Traditions in Advocacy before International Courts and Tribunals" (2013) 2 Cambridge Journal of International and Comparative Law 715, 723.

> or archives researches for which law professors are poorly equipped.[62]

His observation was made in the context of inter-state cases, but it is equally applicable, or indeed even more applicable, to the cases involving private persons. In particular, where the governments of small, developing countries are sued, they will inevitably have to rely upon the legal service of external counsels including lawyers from law firms.

The emergence of law firms has irrevocably altered the dynamic of international adjudication. Most importantly, compared to the "international bar of the ICJ," lawyers in law firms tend to have more time and resources to seek new clients and new cases.[63] They seem to have more incentive in trying innovative procedures. Investor-state arbitration is the case in point. Major law firms have occupied a significant part of the cases in total. Indeed, it is uncommon for a company or a state to rely upon in-house lawyers alone in investor-state arbitration. In all of the investment cases that involve Thailand, the government has invariably hired external counsels, both foreign and Thai, from law firms, to work alongside government lawyers. With regard to international law firms, the government has hired White & Case in the *Walter Bau* case, and Arnold & Porter in the *Kingsgate* case. Both of them are major players in the field. According to one study which collects the number of state-related cases law firms dealt with in 2011, the long list includes Freshfields Bruckhaus Deringer (handling 71 cases), White & Case (handling 32 cases), King & Spalding (handling 27 cases), Curtis Mallet-Prevost (handling 20 cases), Colt & Mosle (handling 20 cases), Sidley Austin (handling 18 cases), Arnold & Porter (handling 17 cases), Crowell & Moring (handling 13 cases), K & L Gates (handling 13 cases), Shearman & Sterling (handling 12 cases), DLA Piper (handling 11 cases), Chadbourne & Parke (handling 11 cases), Cleary Gottlieb Steen & Hamilton (handling at least 10 cases), Appleton & Associates (handling 10 cases and probably more), Foley Hoag (handling 10 cases), Latham & Watkins (handling 10 cases), Hogan Lovells (handling 10 cases), Clyde & Co (handing 10 cases), Norton Rose (handling 10 cases), Salan (handing 9 cases), and Debevoise & Plimpton (handling 9 cases).[64] These law firms maintain the practice of keeping current clients constantly informed of the potential claims to be brought. Some of them also seek to expand their client pool by giving training on international investment law to government officials from developing countries.[65] As one political scientist

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[62] Alain Pellet, "Introduction from the Podium" in Edgardo Sobenes Obergon and Benjamin Samson (eds), *Nicaragua before the International Court of Justice: Impacts on International Law* (Springer 2017) 15, 34.

[63] That said, some law firms have developed the practice of collaborating with academics and barristers to form a large team of counsels. This tends to be the case at the ICJ and ITLOS. Moreover, some academics may seek to be involved in cases and provide counsel.

[64] Pia Eberhardt and Cecilla Olivet, "Profiting from Injustice: How Law Firms, Arbitrators, and Financiers are Fuelling an Investment Arbitration Boom" (2012) 20–21 <https://corporateeurope.org/en/international-trade/2012/11/profiting-injustice>.

[65] See the variety of practices that different law firms have employed to seek more cases and more clients, ibid 22–30.

observes, while law firms were largely absent in the treaty conclusions in the early phase of the field, such as the conclusion of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States in the 1960s, they are now playing an outsize role and occupy a prominent place in the constituency of investor-state arbitration. As such, law firms have brought about the new politics of this type of arbitration, stabilised the institution, and rendered it more difficult for governments to reform or exit.[66]

The attempt of counsels to bring more cases or expand the jurisdiction of courts and tribunals may, on some occasions, go hand in hand with the strategy of the judges or arbitrators. Judges and arbitrators, like counsels, may be motivated by both material and ideal stakes. As such, they may be motivated to enjoy expansive jurisdiction and hear more cases. The *Achmea* saga is a good illustration of an instance where the counsels' attempt to bring a case coincides with the arbitrators' preference in extending jurisdiction. In the *Slovak Republic v Achmea BV* case in 2018, the Grand Chamber of the Court of Justice of the European Union held that the arbitration clause in the investment treaties between members of the European Union, *in casu* the Netherlands-Slovakia bilateral investment treaty, violates EU law and is therefore invalid. [67] Yet, new cases continue to be brought under the intra-EU bilateral investment treaties. Several investment tribunals, on their part, have sought to contain the effect of this judgment using a variety of legal techniques, and continue to affirm the jurisdiction to hear and decide the cases. Indeed, there seem to be no (reported) cases where the tribunals followed the *Achmea* judgment and decline the jurisdiction to hear and decide the investor's claims.[68] In a very recent decision, for instance, the tribunal held that the Treaty on the Functioning of the European Union and the Greece-Cyprus bilateral investment treaty do not deal with the "same subject-matter" within the meaning of Article 30 of the Vienna Convention on the Law of Treaties, and that therefore the issue of termination of the Greece–Cyprus treaty on the basis of *lex posterior* does not arise. As a result, the bilateral investment treaty in question is still in force, and the tribunal has jurisdiction to hear the claims. The majority's view has prompted a strongly worded, but rare, dissent by one arbitrator:

> It is not in the interest of investment arbitration to extend jurisdiction where there is none and where there is not even any political or moral reason to do so. This policy only serves to discredit the system of international investment arbitration. The current practice at different levels, including treaties, looking for alternative ISDS systems should provoke a reflection in this regard.[69]

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[66] Taylor St. John, *The Rise of Investor–State Arbitration: Politics, Law, and Unintended Consequences* (Oxford University Press 2018) 240–41.

[67] Case C-284/16 *Slowakische Republik (Slovak Republic) v Achmea BV* EU:C:2018:158.

[68] For an up-to-date (and very long) list of cases, see Guled Yusuf and Godwin Tan, "United Utilities (Tallinn) v Estonia: ICSID Arbitration after Achmea: The Beginning of the End or the End of the Beginning?" (2021) 35 ICSID Review–Foreign Investment Law Journal 183, 185.

[69] *Theodoros Adamkopoulos and others v Republic of Cyprus*, Statement of Dissent of Professor Marcelo G. Kohen, ICSID Case No ARB/15/49, para 80.

In such cases, the emergence of law firms with their aim to expand jurisdiction and client pool, coupled with the receptive responses of judges or arbitrators, will result in more cases for governments to defend. Nevertheless, as emphasised by the legal theorist Duncan Kennedy, judges are bound both by legal materials such as precedents, legal provisions, etc., and their ideology.[70] Each decision, including the decision whether a court or tribunal has jurisdiction over a certain claim, therefore requires a context-specific analysis, as well as an analysis of any potential pattern of decisions made over time.

B. Strategic Positioning of Government Officials

Some government officials, for their part, may choose to strategically join the international litigator communities. By actively participating in proceedings before international courts and tribunals, they will gain more experience and credibility.[71] This is particularly the case when the government has adopted a clear policy on international adjudication. Nicaragua, for instance, has adopted the recourse to the International Court of Justice as part of its foreign policy after its historic victory in a case against the US in the 1980s.[72] It has appeared eight times as an applicant, five times as a respondent, and one time as an intervener. In these cases, the composition of the team remains largely unchanged. The agent has almost always been Ambassador Carlos Argüello Gómez, a government official of Nicaragua. Since the early years, the list of counsels has often included Paul Reichler (now a partner at a leading international law firm), Abram Chayes (a professor at Harvard Law School who has now passed away), Ian Brownlie (a professor at Oxford University who has now passed away), and Alain Pellet (now emeritus professor at Université Paris Nantere). Over time the team has expanded to include new members. In the words of Pellet, "it is in order to speak of 'the Team' in the singular—in spite of its partly changing composition depending on the case at stake: we are used to work [*sic*] together and have to live with

[70] Duncan Kennedy, "A Left Phenomenological Alternative to the Hart/Kelsen Theory of Legal Interpretation" in Duncan Kennedy, *Legal Reasoning: Collected Essays* (Davies Book Publishers 2008) 154, 168 arguing that:

> "biases" or ideology do not determine jurists' work strategies any more conclusively than the system of legal norms determines outcomes. Ideologies are indeterminate in just the way that the legal order is. There is a hermeneutic circle at work here, in which the indeterminacies of each level get resolved by appeal to a deeper level with its own indeterminacies, and so on, back to the starting point, in which legal ideas influence ideology as well as vice versa.

[71] Shirley V. Scott, "Litigation versus Dispute Resolution through Political Processes" in Natalie Klein (ed) *Litigating International Law Disputes: Weighing the Options* (Cambridge University Press 2014) 24, 30–31.

[72] Pellet, *Podium* (n 62). For a thorough study of the litigation strategy in this case, see Terry D. Gill, *Litigation Strategy at the International Court: A Case Study of the Nicaragua vs the United States Dispute* (Brill 1989).

the qualities and defects of colleagues."[73] Using the repeat player tactic, Ambassador Carlos Argüello Gómez has now become a familiar face to the ICJ judges and earned a measure of their trust.

But Nicaragua's strategy is rather the exception, not the rule. Thailand has certainly not followed Nicaragua's path at the ICJ. And yet, the participation of the Thai government in the advisory proceedings of the ITLOS in the *Sub-Regional Fisheries Commission* (*SRFC)* case provides an interesting example of the visibility and credibility of the Thai government officials in the litigator community of the ITLOS, similar to Nicaragua's experience. At first glance, the *SRFC* advisory opinion seems only remotely related to Thailand. The SRFC is a small international organisation comprising 7 African states. It requested the ITLOS to give an advisory opinion regarding the obligations of states in relation to illegal, unreported, and unregulated (IUU) fishing and the potential responsibility arising therefrom under international law. The questions put to the Tribunal were worded rather broadly.[74] Notwithstanding the abstract questions, it is clear that the Thai government actively participated in the proceedings. It submitted written statements, in both the first and second rounds, and participated in the oral hearing. The oral pleading was given by Ambassador Kriangsak Kittichaisaree, who was then the Executive Director of the Thailand Trade and Economic Office in Taiwan. From the records before the Tribunal, it seems that the government did not secure any external counsels. It is noteworthy that there are not many parties to the Law of the Sea Convention who have participated as fully as Thailand did. While in the first round of written submissions, the Tribunal received statements from 22 parties, 6 organisations, and the SRFC; only 5 parties and the SRFC submitted additional statements in the second round. In the oral proceedings, only 10 parties, the SFRC and 2 other organisations participated. Interestingly, the second written statement of Thailand had as an attachment 60 pages

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[73] Pellet, *Podium* (n 62) 35.

[74] *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (Advisory Opinion, 2 April 2015) ITLOS Reports 2015, 4, 8. The questions read as follows:

> 1. What are the obligations of the flag State in cases where illegal, unreported and unregulated (IUU) fishing activities are conducted within the Exclusive Economic Zone of third party States?
>
> 2. To what extent shall the flag State be held liable for IUU fishing activities conducted by vessels sailing under its flag?
>
> 3. Where a fishing license is issued to a vessel within the framework of an international agreement with the flag State or with an international agency, shall the State or international agency be held liable for the violation of the fisheries legislation of the coastal State by the vessel in question?
>
> 4. What are the rights and obligations of the coastal State in ensuring the sustainable management of shared stocks and stocks of common interest, especially the small pelagic species and tuna?

of PowerPoint slides titled "Thailand Implementation in Combating IUU Fishing."[75] Indeed, the statement began with an overview of the measures that the Thai government has adopted in the "fight against IUU fishing." [76] The selection of Ambassador Kittichaisaree, as he then was, is noteworthy. He assuredly has expertise in the law of the sea, having written a doctoral dissertation on the topic of maritime delimitation at Cambridge University. [77] He also served as a member of the International Law Commission.[78] After this case, he was elected as a judge of the ITLOS from 2017. His selection as an agent served to increase his visibility and prominence in the litigator community, and added to his earlier experience as an advisor in the *"Chaisiri Reffer 2"* case.[79]

The *Chagos* advisory proceedings before the ICJ can be analysed along the same lines. The issue in that case concerned the decolonisation of the British colonies, which does not seem to directly concern Thailand. And yet, the Thai government made oral statements in the hearing. The representative of Thailand was the late Ambassador Virachai Plasai, who secured Professor Alina Miron as a counsel. Ambassador Virachai had already served as the agent of Thailand on the request for interpretation of the *Preah Vihear* judgment a few years earlier, where he worked together with prominent practitioners. The request came up while Cambodia–Thailand relations were tensely adversarial. In 2008, anti-government protests in Thailand fiercely protested against the government's acceptance of Cambodia's listing of the Preah Vihear temple as a UNESCO World Heritage Site, framing the issue as yet another loss of Thai territory. At the same time, the Hun Sen government had to mobilise political support for the 2013 general election. Cambodia's request to the ICJ has thus been construed as an attempt of the Cambodian government to rally domestic support for the 2013 election.[80] As a response, the Thai government garnered a stellar team of legal counsels: Alain Pellet, a French academic who has appeared before the ICJ more often than any other lawyer in the world; James Crawford, an Australian academic at Cambridge who would subsequently become a judge at the Court; and Donald McRae, a professor with vast experience in the law of the sea, international trade, and investment arbitration. These towering academics are truly from the circle of the "international bar," in which Ambassador Virachai has immersed himself. They brought with them two younger lawyers: Thomas Grant, a practitioner based at

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[75] "Request for an Advisory Opinion Submitted by the Sub-regional Fisheries Commission (SFRC) to the International Tribunal for the Law of the Sea: Written Statement of Thailand" *ITLOS* (2004) <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/written_statements_round2/21_II-5_Thailand.pdf>.

[76] ibid.

[77] The dissertation was subsequently published by Oxford University Press. Kriangsak Kittichaisaree, *The Law of the Sea and Maritime Boundary Delimitation in South-East Asia* (Oxford University Press 1987).

[78] For the full biography, see "Judge Kriangsak Kittichaisaree" (*ITLOS*) <https://www.itlos.org/the-tribunal/members/judge-kriangsak-kittichaisaree/>.

[79] "*Chaisiri Reefer 2" Case (Panama v Yemen)* (Order of 13 July 2001) ITLOS Reports 2001, 82.

[80] Thitinan, *All Quiet* (n 23); P. Michael Rattanasengchanh, "The Role of Preah Viehar in Hun Sen's Nationalism Politics, 2008–2013" (2017) 36 Journal of Current Southeast Asian Affairs 63.

University of Cambridge with extensive in international litigation, and Alina Miron, then a doctoral student under the supervision of Pellet. Through his reappearance at the ICJ, as well as securing Professor Miron, the visibility of Ambassador Virachai in the community of World Court litigators, and in the eyes of the judges, has been enhanced. It should also be added that he was already well known in the WTO litigator community, having regularly been appointed as a panelist in the WTO dispute settlement system.[81]

IV. CONCLUSION

In this paper, I have argued that the increasing engagement with international adjudication of the Thai government over the last two decades is not mere happenstance, but should be understood as part of a broader global phenomenon. Specifically, it is the outcome of four institutional and socio-professional conditions. Firstly, the Thai government has cautiously but constantly expanded its acceptance of jurisdiction of international courts and tribunals in recent decades in different fields. Secondly, there are now many more potential claimants who can bring cases against governments before international courts and tribunals, including those whose jurisdiction the Thai government has accepted; Thailand, like many other countries, is now more exposed to potential claims than before. Thirdly, over the last three decades, new litigants, including in particular international law firms, have become particularly active, seeking new cases and innovative procedures. Finally, government officials are seemingly in the process of learning to build a presence in litigator communities, in order to develop experience and gain reputation. With all of these four conditions present, further involvement of the Thai government in international adjudication can be expected. Therefore, this paper calls attention to the increasing risk of litigation that the government may face in the future.

Incidentally, by drawing upon theories and insights from the literature that has not been developed to capture Thailand's experience specifically, the paper also aims to show that the government's increasing involvement with international adjudication is not unique to Thailand. Rather, it is a common and general phenomenon across different continents. The broader aim of the paper is thus to situate the Thai government's experience in the broader phenomenon of the judicialisation of international relations. By doing so, it is hoped that the paper will prompt further investigation of both theoretical and practical significance. How much have international relations been "judicialised"? How effective are international courts and tribunals? How does international adjudication shape domestic policy-making processes, and what are the sources of its legitimacy? What are the distributive effects of increasing engagement with international adjudication? How does the experience

[81] Joost Pauwelyn, "The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators from Venus" (2015) 109 The American Journal of International Law 761, 779.

of one country compare to that of other similarly situated countries? Further research, drawing upon multidisciplinary collaboration, will enhance an understanding of this increasingly important topic.

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