

**THE SOCIAL AND PROFESSIONAL STRUCTURE OF INTERNATIONAL JUSTICE:  
FROM SCHOLARLY INSIDERS TO THE PULL OF MULTINATIONAL CORPORATE  
LAW FIRMS**

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**ABSTRACT**

Where does international justice draw its authority in an international scene largely driven by self-regulated professional markets for the settlement of transnational disputes? To revisit this classical debate, this article connects the professional and social structure of dispute settlement mechanisms to their social credibility among users of international justice. Drawing on extensive biographical databases, it suggests that the growth of investor-state disputes is favoring a shift from a professional market shaped by scholarly insiders to one dominated by corporate legal elites. It links this dynamic of the field to the contrasted development of a scholarly meritocracy of international litigators, and the model of the Wall Street law firm which is sustaining the continuous expansion of private arbitration. These changes are further reflected in dynamics of alignments, within the wider marketplace of users of international justice, to structural changes in the global economy that favor the expansion of flexible strategies of dispute settlement.

## INTRODUCTION

With the increased traction of international justice in global affairs in the last years, there has been a growing interest for international lawyers and the role they play to sustain the authority of international dispute settlement mechanisms.<sup>1</sup> Legal debates classically emphasized the legitimating role played by this ‘invisible college’ of international lawyers, who operate for the most part within self-regulated professional markets. When coined in the 1970s, the term referred to a then small cluster of predominantly law professors.<sup>2</sup> Since then, there has been a dramatic acceleration of the pace of institutionalization of the international scene, and with it a growth of the marketplace for international justice.<sup>3</sup> Arguably, the most spectacular transformation has been the expansion of international investment arbitration from the 1990s. With these changes, the role of international lawyers has been increasingly under fire. The ‘club’ of international arbitrators<sup>4</sup> is seen to be turning international arbitration into an echo chamber of corporate interests;<sup>5</sup> for its part, the ‘Western monopoly’ over the ‘international bar’ of the International Court of Justice (ICJ) is considered to be hampering the authority of the ICJ as a world court.<sup>6</sup>

A major difficulty with these accounts is that they tend to reproduce - albeit in the form of a criticism - discourses that are produced by professionals of international justice themselves.<sup>7</sup> Typically they channel the attention towards the rhetoric that sustains the distribution of professional positions in international law along distinct functional, institutional and normative divisions of labor, predominantly between the so-called ‘public’ side of international justice (inter-state adjudication) and the ‘private’ side of international justice, dealing with transnational business disputes. Thus, where private international lawyers emphasize the ethical self-regulation of international arbitrators,<sup>8</sup> debates in public international law pinpoint the detrimental effects of the fragmentation of international law.

To go beyond these oppositions, this article argues that it is necessary to move away from the professional and institutional categories that these discourses draw on. It emphasizes rather the correlation between the professional markets for international justice, and the social credibility of international dispute settlement mechanisms. Its cue is that mapping the social

spaces in which professionals of international justice are situated can help account for the authority, over time, of international justice institutions. Focusing on the structural characteristics of the marketplaces for international justice can provide a key, furthermore, to explain current dynamics of change that remain otherwise obscured in existing accounts. Reflecting the prominence taken by disputes between states and corporations over ‘mega politics,’<sup>9</sup> recent debates have noted the growing convergence between the two sides of international justice. Emblematically, core institutions of investment arbitration like the World Bank’s International Centre for Settlement of Investment Disputes (ICSID) are moving towards ‘treaty-based’ arbitration, and there is an increased circulation of rules across forums of international justice. In the face of mounting criticisms against investment arbitration, this is notably seen as favoring a ‘return of the state’ in high stakes disputes between states and corporations.<sup>10</sup> Focused, however, predominantly on procedural rules and existing institutional divides between public and private international justice, these accounts do not help explain the empirical drivers that lead either to the ‘fragmentation’ of international law, or its ‘harmonization;’<sup>11</sup> nor do they help assessing their wider impact on the authority of international justice.

By contrast, this article recalls the characteristic of international justice as a market for ‘symbolic goods’<sup>12</sup> – a characterization rendered all the more relevant given the absence, on the international scene, of a normative hierarchy and top-down regulation of professions of international justice. The authority, therefore, of international justice institutions is derived as much from the *belief* in international dispute-settlement mechanisms among audiences of users, foremost states and corporations, as it is driven by *professional competition*. Building on a structural sociology approach, this paper correlates the characteristics of professionals of international justice – their juridical, but also political, economic and social resources – to their capacity to respond to, and refract, the interests of these external constituencies. In doing so, it documents a dramatic shift, within the ‘invisible college’ of international law: the move from a professional marketplace of international justice privileging scholarly insiders to one dominated by multinational corporate law firms. More than anecdotal, this shift has a direct import for the authority of international justice. Indeed it is favoring the prominence of a model of production and reproduction of legal practice and professional hierarchies - that of the ‘Wall street law

firm’ - which is particularly well positioned to wage multi-front legal wars according to the interests of clients, and could thus be contributing to the continuous fragmentation of international law. But this model is also a powerful engine for the co-optation of emerging global-trade oriented legal elites from the Global South<sup>13</sup> into flexible, segmented, marketplaces for international justice. Beyond a disruption of the divide between public and private international justice therefore, it is the whole structure of international justice itself that may be gradually shifting.

To flesh out this thesis, this article proceeds in three steps. The first section briefly describes the research strategy. This involved a necessarily broad purview. To trace the transformation, over time, of the social and professional structure of international justice, this article takes on the challenge of considering together both sides of international justice – public and private – to underscore their parallel and competing development. The second section connects this social history of international justice to the professional monopolies that gradually emerged around the International Court of Justice (ICJ) for inter-state adjudication on the one hand, and the market for commercial arbitration on the other hand. The description of the differentiated development of these two sides of international justice leads to a tentative conclusion. Building on empirical data that had yet to be compiled, detailing the profiles of judges and counsels before the ICJ and its predecessor, the Permanent Court of International Justice (PCIJ), this empirical analysis indeed suggests that contrary to prevailing accounts<sup>14</sup> the professional and social structure of the market for inter-state adjudication corroborates the symbolic authority of the ICJ as a world court. However, the dynamic of development of this marketplace, that is, its internal differentiation, has also fostered its insulation from political and economic interests, and this is rendering it increasingly vulnerable to outside pressure - be it political backlash or the professional competition of multinational corporate law firms. By contrast, the capacity of adaptation (and alignment) of the latter with corporate and political interests helps explain the dynamic of growth and continuous expansion of international commercial arbitration, including towards investor-state disputes from the 1990s. It is this contrasted dynamic that accounts for what the final section sees as an ongoing transformation of the structure of the field of international justice. It suggests that the dynamic of this shift is

reinforcing the prominence of the model of the ‘Wall street law firm,’ which radically differs from the erstwhile ‘invisible college.’

## **INTERNATIONAL JUSTICE: A MARKET FOR SYMBOLIC GOODS**

Taking on the characteristic of international justice as a market for symbolic goods shifts the focus towards the dynamic relationship between the restricted professional markets of producers of international law and the enlarged markets of users of international justice. Focusing on this dynamic relationship between producers and users of international justice is a way to connect the development of international justice mechanisms to wider contextual political and economic variables.<sup>15</sup> Highlighting the fragility of the symbolic authority of international justice institutions, this also underscores that their sustainability depends on the capacity to invest continuously in the reproduction of the belief in their authority. In this relation with users of international justice, the channels of (re)production of legal knowledge and legal hierarchies play a central role. In this process, the insiders of the ‘international bar’ of the ICJ or the ‘club’ of private arbitration hold a commanding position. They control all the more the rules and practices of these mechanisms of international justice that they have contributed to their shaping. Yet, these insiders must also respond to the specific interests of the wider professional markets who act as their correspondents, referents or potential users at the national level.

To trace this dynamic relation, this article builds on the hypothesis of a ‘field’ of international justice. This analytical tool refers to a relatively autonomous social microcosm, made up of professional networks and hierarchical relationships, and types of resources that determine the rules of the game and status within the space, all of which can change over time.<sup>16</sup> This hypothesis echoes earlier studies that have underscored the common genesis of public and private international justice institutions at the turn of the twentieth century.<sup>17</sup> Going back to these initial encounters is a way to trace connections over time within the field,<sup>18</sup> including the drivers of professional competition and their effects on the structure of the field.

Empirically, the research strategy focused on professionals involved in inter-state adjudication (the PCIJ and the ICJ) on the one hand, and in international private arbitration, whether institutional (such as the ICSID and the Chamber of arbitration of the International

Chamber of Commerce in Paris - ICC) or *ad hoc*. It aimed at gaining some knowledge about the social and professional characteristics of the agents involved in these two sides of international justice. Two sets of qualitative data were gathered. The first purported to map out the hierarchical structures that determine access and status within these marketplaces by looking at the resources of the agents invested in them - legal, political, social, economic, but also familial - and by tracing the national and international components of their professional trajectories. This was done by building a unique biographical database of 135 individual profiles of international judges and counsels associated with the PCIJ and the ICJ on the one hand,<sup>19</sup> and by relying on the findings of earlier studies on the growth of international arbitration from the 1980s on the other hand.<sup>20</sup>

The second aim was to connect these evolutions to the enlarged markets of users of international justice. To do this, this article relied on the specific position of the Permanent Court of Arbitration (PCA) as both a forum for the settlement of international disputes, and the historical - albeit symbolical - function of endorsement of judges appointed to the ICJ (and before that, the PCIJ) given to the national groups of arbitrators to the PCA. It construed, for this purpose, the lists of arbitrators to the PCA as a showcase of (potential) users of international justice users. These lists were compared at two different periods: in 1999 on the anniversary of the first century of existence of the institution, and in 2013.<sup>21</sup> Based on this database of 533 profiles, the aim was to uncover patterns in the backgrounds of these individuals by looking at their positions at the national and international levels, and to gain some knowledge on their channels of internationalization. These lists certainly have a purely symbolic value. But they remain an indicator of international notoriety for national legal elites who (strive to) position themselves as intermediaries or referents towards transnational dispute settlement mechanisms and the inner core of the 'club' of international arbitrators or the 'international bar' of the ICJ who hold the quasi monopoly over them. Their profiles are also an indicator of the orientations of the states, which select them. State membership to the founding treaties of the PCA has continuously expanded since 1899 to 117 members as of November 2015, with a relative surge of adhesion from the early 2000s, particularly from Asian and East-European countries. While this is reflecting a wider state interest for international justice, the specific backgrounds and expertise of their national groups of arbitrators also give an indication on the modalities of

production of legal knowledge and practice that are being privileged by states for the international settlement of disputes.<sup>22</sup>

## **THE CONTRASTED CONSOLIDATION OF PUBLIC AND PRIVATE INTERNATIONAL JUSTICE AROUND PROFESSIONAL MONOPOLIES**

What were the drivers that triggered the dramatic reawakening – albeit widely contrasted<sup>23</sup> – of both sides of international justice from the 1980s? Turning back to the genesis of international justice is key to understand what social and professional resources were brought into these nascent institutions - but also to uncover the conflicts and contradictions that existed at the outset and that help explain their differentiated dynamic of expansion.

### **Inter-state adjudication: the gradual constitution of a two-tier marketplace between multi-positioned legal elites and a scholarly meritocracy of insiders**

Studies on the genesis of international justice institutions at the turn of the twentieth century have underscored that the social and professional properties of the agents associated with these nascent institutions played a key role to enable them to gain credibility in a context of weak institutionalization of the international legal scene. Their multi-positioning - across scholarly positions, legal practice, service to state diplomacy and at times political positions at the national level - was a key condition precisely because these lawyers could at once *reflect* national political and economic interests and *deflect* them by constructing the doctrine of international law as universal.<sup>24</sup> At the stage of the genesis, legal knowledge and scholarly affiliations were therefore both a driver of complementarity - connecting legal elites from different parts of the world within scholarly networks and societies - and a condition for the symbolic authority of international justice institutions. The biographical data gathered for the purpose of this article on judges and counsels at the PCIJ and ICJ underscores the remarkable continuity of these characteristics in the social structure of the marketplace for inter-state adjudication. Beyond this continuity, however, there has been a gradual, internal, differentiation within this small marketplace. The social, professional, geographical backgrounds of judges remain



complementary; on the other hand, the ‘international bar’ of counsels is now dominated by a cluster of European legal scholars. Contrary to recent studies on the ICJ which have pinpointed this as a ‘Western monopoly’ over the ‘international bar’ of the court,<sup>25</sup> this internal differentiation helps explain, albeit paradoxically, both the symbolic authority gained by the ICJ from the 1980s as the ‘world’ court, but also its protracted vulnerability to external shocks.

The profiles of judges have thus remained relatively constant over time. At the stage of the genesis, these were characterized by a stark contrast between judges from core European states and the US – who were mostly law professors and *jurisconsultes* acting on behalf of their state diplomacies – and non-European judges, who, for their part, were ‘gentlemen politicians of law’<sup>26</sup> holding the dual heading of political elites in their respective countries and law professors. This contrasted profile is reflected in the 36 successive judges nominated to the PCIJ (between 1921 and 1939). For their part, the eight counsels identified as repeat players before the PCIJ (as counsels in more than 4 cases)<sup>27</sup> were typically, already, from core European countries. They were usually law professors acting as counsels for their own countries, like Jules Basdevant for France, Erich Kaufman for Germany or Sir Henry Beckett for the UK.

The analysis of the profiles of 43 judges of the ICJ underscores the remarkable resilience of these characteristics. Judges continue to combine individually or collectively the three characteristics of the stage of the genesis - scholarly capital, legal practice and service to state diplomacies. A similar contrast can be identified in the profiles of judges from Europe and the US compared to judges from outside Europe/the US. However, contrary to the early stage of the genesis, typically judges from Europe and the US are no longer defined by a scholarly form of capital.<sup>28</sup> They primarily, if not essentially, start their careers within the legal services of foreign affairs ministries, with some variations in this common channel of access to international legal positions. For their part, judges from outside Europe/the US, particularly judges from former colonies, still display a trajectory of internationalization determined by a portfolio of extremely strong political, economic, and social national resources. In their case, access to international positions builds on this national platform but they also have all validated their legal expertise with international credentials, both scholarly - with degrees predominantly from core European universities such as fellowships at the Hague Academy of International Law<sup>29</sup> - and

institutionally, through positions within international institutions like the UN International Law Commission.

This dual profile provides for a form of complementarity - and thereby universal credential - within this side of international justice, which is therefore predominantly achieved through the specific channel of legal education and scholarly societies - with a definite and continuous pull towards a cluster of core universities in Europe and the US. Indeed, the co-optation of gentlemen politicians of law to universal legal principles through scholarly networks and affiliations at core European scholarly centers is precisely what nurtured the promotion of the ICJ, and before that, the PCIJ, as the world court. The Institute of International Law (*Institut de droit international* - IDI) emerged early on as the first transnational network of legal scholars in the 1870s, and the *sociétés savantes* created in its wake provided for a 'bank of symbolic capital'<sup>30</sup> vouching for the reputation and credibility of international lawyers as neutral umpires, while also ensuring the allegiance of legal elites from the Global South to the cause of international law. With the independence eras of the 1960s, the IDI pursued its strategies of co-optation of legal elites from former colonies. The Geneva Graduate Institute of International Studies, founded in 1926 with the purpose of training future international lawyers and diplomats<sup>31</sup> also played a central role in this regard, as did the Hague Academy of International Law.

The biographical data gathered points, however, to a gradual, internal, and stark differentiation within this small marketplace: between judges and counsels. By contrast, indeed, what developed into the 'international bar' of the ICJ is now exclusively made up of learned practitioners from Europe, that is: essentially legal scholars. The characteristics of the counsels that appeared repeatedly before the ICJ at inception were similar to the stage of the genesis, in that they were mostly law professors also serving as *jurisconsultes*. From the mid-1980s, however, the profile of members of the international bar is drastically transformed, with a gradual monopolization of cases among a very restricted core of predominantly European professors, who all rely quasi-exclusively on their scholarly credentials.<sup>32</sup>

The defining characteristic of these repeat-players is also that their scholarly credentials are essentially meritocratic. This suggests that, compared to their earlier counterparts, access to this small marketplace is no longer defined by resources drawn from outside the field, be they

political, economic or social. For example, the profile of Ian Brownlie, described as the ‘dean of (the) practitioners’ before the ICJ from the mid-1980s, contrasts markedly with that of Sir Beckett, of the earlier generation, who was both a barrister and a *jurisconsulte* at the UK Foreign Office. With an aura gained as main counsel for Nicaragua in 1984, Brownlie monopolized more than half of the ICJ docket from this case until his death in 2010.<sup>33</sup> His trajectory epitomizes the characteristics of this small meritocratic elite. With modest origins, he won a scholarship to read law at Hertford College, Oxford and completed his Oxford DPhil in 1961 under the supervision of Sir Claud Humphrey Meredith Waldock, a repeat-player of the early development of the ICJ, at the Chichele Chair of Public international law. Brownlie also typified a UK model, that of learned barrister<sup>34</sup> which contrasts with a continental model of professor-practitioner, in France or Germany.<sup>35</sup>

This gradual internal differentiation of the marketplace for inter-state adjudication reflects in great part external variables. After their relative success during the ‘Geneva episode’ of the inter-war period, the international justice mechanisms created during the first two decades of the twentieth century remained very much a sideshow in global politics. The ICJ survived in the shadow of Cold war and decolonization politics with a meek, at times empty, docket, especially following the shunning of the court by newly independent states after a number of controversial decisions.<sup>36</sup> These external drivers help explain the retreat into an Ivory tower of the international bar of the ICJ.<sup>37</sup> Their correlate distancing from political and economic interests certainly contributed to the gradual autonomization of this small marketplace from national diplomacies. But this also suggests that it fostered their insulation from wider transformations on the international scene and the global economy.

These two models of learned practitioners indeed point to the dynamics of reproduction of access and status within this small meritocratic elite. This dynamic helps account, somewhat contradictorily, for both the formidable – though symbolic – revival of the ICJ from the 1980s, and the limited capacity of this restricted marketplace to deflect external shocks. These dynamics of reproduction, indeed, are defined around mentor-pupil relations at a cluster of European academic centers, like the Chichele Chair of Public international law at Oxford, which along with the Whewell Chair at Cambridge are incubators of international litigators from the UK, or the Université de droit of Paris-Ouest Nanterre around Alain Pellet in France.<sup>38</sup> As noted by a

young recruit into this small milieu, ‘any caste must organize the conditions of its own survival.’<sup>39</sup> The corollary of the limited demand for public international justice and the peripheral position of this nutshell of learned practitioners has been the constitution of this professional space into a restricted, meritocratic space, with scholarly and relational barriers of entry. These mentor-pupil relations determine rules of access which can be traced in the hierarchical composition of the counseling teams in inter-state disputes. For example, Ian Brownlie mentored Alain Pellet in the *Nicaragua* case, propelling the latter as a tenor of the international bar. But this space is now also defined predominantly in charismatic terms sometimes doubled with family relations.<sup>40</sup> These high barriers of entry not only define a collective form of legitimacy based on reputation; they also fit with the definition by these professionals of the proper rules of the games of inter-state litigation. As indicated by a prominent member: ‘to enter this universe, it is preferable but not essential to be good; what matters is to belong to the small circle of renown (counsels) ... you have to know the rules of the game ... it is absolutely essential to have a mentor.’<sup>41</sup>

The ICJ gained renewed prominence as the world court following the *Nicaragua* decision of 1984-1986 and the *Frontier Dispute* between Burkina Faso and Mali in 1986, which, according to the doctrine, brokered the ‘reconciliation of the ICJ with the Third World.’<sup>42</sup> A closer look at the composition of the bench at the time, and the relations between judges and counsels, underscores the role played by the dynamic of this small marketplace to foster this outcome. The success of these decisions in promoting the ICJ as the world court, indeed, also hinged on another defining feature of this space: the relations of the European professors of this meritocratic elite, as professors and mentors, with gentlemen politicians of law, notably from former European colonies. Here again, external variables greatly shaped these relations. In particular, the Hague Academy of international law had attracted the support of the Ford Foundation and other US Foundations from the 1960s, with the intent of ‘mak(ing) contact with and influenc(ing) the elites of the newly-decolonizing Third world.’<sup>43</sup> This support waned from the 1970s due to the perceived failure of this institution as a ‘beach head’ for US interests, and the Academy returned to being an ‘old world consortium.’<sup>44</sup> This not only reinforced the prominent position of the core European members of the international bar of the ICJ as gate-

keepers for access into their restricted marketplace. It also confirmed the key role their relations with pupils from the Global South could play to sustain the symbolic authority of the ICJ.

The *Nicaragua* and *Frontier* decisions can be seen as a microcosm of these relations of co-optation. The specific conjuncture at the turn of the 1980s was the nomination to the bench of the Court of new judges from former colonies. In particular, the Chamber deciding over the *Frontier* decision was chaired by Mohammed Bedjaoui, elected to the ICJ in 1981. An Algerian diplomat and lawyer, with law degrees from French universities, his professional trajectory was typical of a gentleman politician of law: Dean of the Faculty of Law at the University of Algiers, Ambassador to France, President of Algeria's Constitutional Council, minister of Foreign Affairs in 2005-2007. At once a prominent advocate of the 'Third World' in a New International Economic Order in the 1970s, his international legal stature had also been validated through membership to the IDI and lectures at the Hague Academy.<sup>45</sup> The profile of Georges Abi Saab, *ad hoc* judge in this case also illustrates the links with the scholarly elite of the international bar of the ICJ. Born into a French-speaking family of Cairo, a professor at the Geneva Graduate Institute of International Studies from 1963, he became an occasional member of the international bar of the ICJ from the *Tunisia v. Libya* case in 1978 thanks to his relations 'with many of the well-known players in international justice'<sup>46</sup> as a former pupil of Sir Robert Jennings. The latter had been elected president of the IDI in 1983 and was the successor of Sir Hersch Lauterpacht at the Whewell Chair of international law at Cambridge from 1955.

These two decisions have contributed to the formidable symbolic capital of the Court, and to the growth of the docket of the ICJ with an expansion of both the substance areas of the disputes at stake<sup>47</sup> and their geographical spread toward Africa or the Middle East. Yet, recent controversial decisions<sup>48</sup> underline the protracted fragility of the public side of international justice. This could suggest that the consolidation of the monopoly of the international bar around extremely strict scholarly (mentor-pupil) and charismatic modalities of reproduction limits the capacity of this restricted marketplace to generate innovation from inside and renders it, rather, permeable to external constraints – including the increased professional competition since the 2000s from contenders like multinational corporate law firms. Further developed in the last section, this argument is first tested by recounting the contrasted dynamic that has fostered the continuous growth of the private side of international justice from the 1980s.

## **Corporate lawyers, ‘grand old men,’ and the Wall Street law firm as an engine for the sustained boom of commercial arbitration**

The dynamics that favored the growth of the market for international commercial arbitration from the 1980s have already been substantially traced in earlier studies.<sup>49</sup> Recounting this process, however, is necessary as these dynamics help explain the growth since the 1990s of investment arbitration, and with it wider transformations in the relations between the two sides of international justice. The early development of the private side of international justice - what became institutionalized as international commercial arbitration - followed a similar path than the public side of international justice. The PCA dwindled to an empty shell after the creation of the PCIJ, with both institutions competing for the same pool of disputes between sovereign states.<sup>50</sup> For its part, international commercial arbitration was sidelined in the oil disputes triggered by decolonization between newly independent states and Western corporations.<sup>51</sup>

The later surge of commercial arbitration stemmed in great part from external shocks and wider transformations in the global economy. The oil crises of the 1970s and the move toward North-South economic relations fostered the demand by multinational corporations for flexible forms of conflict resolution, away from national courts in the Global South. This growth was also spurred by the entry into play within the market for commercial arbitration of a new generation of contenders: multinational corporate law firms from the US, which combined considerable resources, including their proximity with businesses and elites in the South. The alliance between US corporate lawyers with European professors, the ‘grand old men’ and architects of the principles of the *lex mercatoria*, contributed to legitimating this form of justice by granting ‘a legally principled manner to treat multinational agreements with sovereign states in the Middle East and Africa as if they were private contracts.’<sup>52</sup>

The alliance and complementarity of positions between these professors and practitioners (QCs, high judges, senior partners of multinational law firms) converged toward a small cosmopolitan network of professors and practitioners who collectively embody the symbolic authority of this form of justice: what some commentators refer to as the ‘super arbitrators,’ who are ‘not just the mafia, but a smaller, inner mafia.’<sup>53</sup> This complementarity also allowed US

practitioners to gain some scholarly credibility, and learned practitioners from Europe to get closer to business interests. In turn, high barriers of entry - LLMs from North American law schools and positions within multinational corporate law firms - enabled the co-optation of national legal elites into this marketplace, while also legitimating this form of ‘offshore’ justice away from national judicial proceedings. In this, multinational corporate law firms have played an essential role to shape the structures of production and reproduction of access and status within this marketplace. The institutional capacity of firms to provide the whole panoply of services required by state and corporate clients, by allowing for flexible legal strategies, has fostered the continuous expansion of this form of justice. It is also enabling the conversion into this space of a variety of resources - not just the symbolic capital of a scholarly form of universality as in the case of the international bar of the ICJ - so as to respond to (and pre-empt) changing political and economic interests. This helps explain the growth of the market for arbitration to new terrains, including investors-states disputes from the 1990s, which the next section turns to.

## **FROM THE GROWTH CRISIS OF INVESTMENT ARBITRATION TO THE RESTRUCTURING OF THE MARKET FOR INTERNATIONAL JUSTICE**

Somewhat surprisingly, the two institutions that have emerged since the turn of the 2000s as the ‘two major players’<sup>54</sup> of the thriving market for investment arbitration - the ICSID and the PCA - had both remained dormant for decades.<sup>55</sup> The explosion of international investment agreements<sup>56</sup> certainly contributed to the growth of investment treaty arbitration, as did the Argentina debt crisis of the end of the 1990s.<sup>57</sup> Tracing the strategies pursued within these two institutions and the professional composition of the market for investment arbitration underlines that this growth built out of two apparently contradictory drivers: the dynamic of the market for commercial arbitration, and the symbolic authority gained by the ICJ as the world court from the 1980s. While this suggests a growing convergence between the two sides of international justice, the empirical dynamics of this rapprochement seem to further consolidate a key driver in the growth of the market for commercial arbitration: multinational corporate legal firms. In this sense, the debated ‘backlash’ against investment arbitration<sup>58</sup> can be construed, rather, like a

growth crisis that could indicate a wider restructuring of the marketplace for international justice.

### **The boom of investment arbitration: building on the dynamic of the market for commercial arbitration and the symbolic authority of the world court**

Set up in 1967 as an independent entity of the World Bank Group with the specific aim of providing a forum for the settlement of disputes between foreign investors and host states, the ICSID aimed at privatizing the relationship between foreign corporations and host states, away from the uncomfortable ‘ménage à trois’ involved by the diplomatic protection of foreign corporations by home states against host states.<sup>59</sup> Its first Secretary General, Aron Broches, then general counsel for the World Bank, modeled the rules of ICSID arbitrations to fit what had spurred the efficiency of commercial arbitration: the ‘twin influence’ of commercial arbitration procedures, and vaguely formulated public international legal principles for the protection of foreign investments.<sup>60</sup> However, the ICSID was shunned under the Third Worldism debates that dominated the UN General Assembly in the 1960s-1970s, and which were epitomized in the fierce opposition of Latin American countries against international arbitration.<sup>61</sup> The profile of the ICSID’s second Secretary General, Ibrahim Shihata, appointed in 1983, director-general of the Vienna-based OPEC Fund for International Development in 1973-83 and a proponent of the New International Economic Order, contributed to easing this ideological divide by expanding membership to the ICSID to Latin American countries. Shihata also played an instrumental role in fostering a shift in the profiles of the ICSID panel of arbitrators: ‘it was around this time (the mid-1980s) that politicians, professors of economics, chairmen of oil and multinational corporations and directors of financial and development institutions started to be replaced by law professors, international judges, private legal practitioners, and diplomats in the roster of conciliators and arbitrators of the institution.’<sup>62</sup> Though symbolic, as less than a third of arbitrators in ICSID tribunals are appointed by the ICSID Secretariat,<sup>63</sup> this transformation gave a signal that fit the institution to the dynamic of the market for commercial arbitration.

According to doctrinal accounts the revival of the ICSID followed a jurisprudential



‘revolution,’ that of the *APPL v. Sri Lanka* dispute in 1991.<sup>64</sup> This decision recognized the capacity for foreign investors to introduce claims on the basis of treaties, notwithstanding the specificities of their contracts with host states. It was ‘the serment du Jeu de Paume, better still, the storming of the Bastille by investors.’<sup>65</sup> This transition from contract-based to investment treaty-based arbitration opened the potential for ‘a new market for public international lawyers’- by making public international law applicable to these disputes. But this shift ‘took place without any significant break in the professional profiles of the lawyers dealing with such arbitration.’<sup>66</sup> Indeed, as with the *Frontier* decision in the case of the ICJ, the *APPL* dispute constitutes a microcosm that reflects how the boom of investment arbitration befitted the dynamic of the market for commercial arbitration. The two prominent arbitrators in this decision were Berthold Goldman, appointed by APPL, and Ahmed El-Kosheri, appointed as Chair of the tribunal by the Chairman of the ICSID Administrative council. A French international private law professor,<sup>67</sup> converted to US litigation practice, Goldman was a core architect of the *lex mercatoria*. El Kosheiri for his part was a typical ‘grand old man’ from the Global South. With law degrees from Cairo University and France, a professor of international economic law at the International University for International development, he also embodied the symbolic authority of the public side of international justice, as member of the IDI since 1987, and *ad hoc* judge to the ICJ between 1992 and 2003.

While relying on the alliance between ‘grand old men’ and corporate lawyers - a core driver in the growth of commercial arbitration - the expansion of investment arbitration also built on the prominence taken by multinational corporate law firms within that market from the late 1990s. ‘The professionals who later became active in the then emerging field came from the same type of law firms that had dealt with the earlier contract-based ICSID arbitrations and other international commercial arbitration between private parties. They were commercial arbitration specialists.’<sup>68</sup> The boom of investment arbitration fostered by this decision fit indeed precisely with this dynamic in the market for commercial arbitration. Characteristically, Jan Paulsson, now heralded as one of the ‘movers and shakers of investment-treaty arbitration’<sup>69</sup> was then a spearhead of the generation of contenders that emerged in the market for commercial arbitration in the 1980s. As a partner of the Paris outlet of the UK corporate law firm Freshfields, he had gained his credentials as an arbitrator entirely from positions within the field of international

commercial arbitration. His profile epitomizes the generational shift of this market from an informal justice dominated by law professors - the 'grand old men' of international law - to a form of 'offshore' justice dominated by US litigators predominantly operating within multinational corporate law firms.<sup>70</sup> Paulsson's advocacy in favor of 'arbitration without privity'<sup>71</sup> - which had a long-lasting effect on the field of investment arbitration<sup>72</sup> - marketed arbitration as a neutral modality for the resolution of disputes related to foreign investments, notwithstanding specific contractual terms. This stance was directed at states in the Global South<sup>73</sup> and heralded corporate lawyers and their law firms as strategically positioned to respond to the interests of their clients beyond any North-South ideological divide. The emphasis on strategic efficiency also downgraded legal doctrine - and by the same token, law professors - as too ambiguous to fit these purposes.

Yet, the Argentina cases and the legitimacy crisis of investment arbitration they have triggered, have been followed with a subtle and ongoing shift in the profile of arbitrators. International lawyers associated with the symbolic authority of the ICJ as the world court are thus increasingly appointed as arbitrators in disputes between states and investors. For example, the appointment, in the Argentina cases, of Georges Abi Saab at once 'an advocate for the periphery'<sup>74</sup> and a guardian of the legitimacy of public international justice played a symbolic role to signal that the ICSID had 'become more responsive to sovereign concerns.'<sup>75</sup> Characteristically, the current Secretary General of the PCA, Hugo Siblecz, has described this convergence as a 'cross-pollination' between the two sides of international justice, which he deemed a key condition to enable each to gain in symbolic authority.<sup>76</sup> Shifting the focus to the empirical drivers of this convergence highlights the acute professional competition it is fostering: the 'clash of ethos' between 'two epistemic communities along different lines,' namely corporate lawyers and public international legal scholars.<sup>77</sup> The drivers of this professional competition, however, seem to be moving 'the center of gravity increasingly (...) toward the commercial arbitration bar.'<sup>78</sup> Indeed, the learned practitioners of the ICJ are pulled into treaty investment arbitration under the impetus of multinational corporate law firms, which play the role of gatekeepers for access into the market for investment arbitration.<sup>79</sup> As noted somewhat scathingly by Charles Brower, one of the 'elite 15'<sup>80</sup> of investment treaty arbitrators as a partner with White & Case and now 20 Essex Street Chambers: '(w)hile lack of familiarity with public international

law may be a barrier to commercial arbitration practitioners entering the field of investment treaty arbitration, it is a barrier that can be overcome with relative ease (...) The (...) lack of familiarity with litigation techniques and commercial transactions, (...) is less easily remedied (...). It must be “soaked up” through extended exposure:<sup>81</sup> that is, through practice and proximity with corporate interests. The differentiation of international justice into two sides - public international law and commercial arbitration – seemed therefore to be used as a blueprint to feed into a division of labor that reinforces this prominent role played by multinational corporate law firms. A core player of the international bar of the ICJ explained how the selection of arbitrators from the public side of international justice was effected through a screen-search by corporate law firms on behalf of their clients. ‘They have to research five names in 24 hours, and there you come out with a label’: as more or less state or business-oriented. By contrast, ‘multinational corporate law firms have the capacity to play it both ways,’<sup>82</sup> that is, to alternate between serving the interests of states, or corporations, by waging multi-front legal wars in multiple forums - be it arbitration, or inter-state adjudication.

Indeed, this convergence goes both ways, with a growing involvement of multinational corporate law firms in inter-state adjudication. For example, the US multinational corporate law firm Foley Hoag has branched out into inter-state adjudication through an intensive political marketing with Latin American states, which remain prominent users of this side of international justice, by leaning on the symbolic aura of Paul Reichler who was part of the team representing Nicaragua in the 1984 decision. For its part, it is a prominent member of the ‘club’ of private arbitration, Jan Paulsson, who played an instrumental role in introducing Freshfields to ICJ adjudication, through his appointment as counsel for Bahrain in 2001.<sup>83</sup> This entry into play of corporate lawyers into inter-state adjudication is generating an intense professional competition with the established core of the international bar of the ICJ. It is criticized by prominent members of this exclusive marketplace for shifting the rules of the game of inter-state adjudication from an elegant battle between gentlemen of the law to a procedural exercise generating incremental costs.<sup>84</sup> However, the growing competition of this new generation of contenders who approach international adjudication from the side of the ‘profession’<sup>85</sup> seems to have pushed some members of the international bar of the ICJ to convert to the model of the corporate law firm in their practice as inter-state litigators. Characteristically, Rodnan Bundy has

been a repeat-player of inter-state adjudication, as a practitioner within the Paris based law firm Cabinet Frère Cholmeley, one of the first ‘cabinets conseils’ to appear repeatedly as counsel before the ICJ from the early 1990s. Specialized in inter-state litigation, this small law firm merged with the UK multinational corporate law firm Eversheds in 2001. While this is enabling the latter to branch out into inter-state adjudication, it is also allowing Bundy to convert to the market for commercial arbitration: he has thus set up a branch of the firm strategically positioned in Singapore as a new hub for private arbitration in Asia. By contrast, the Cabinet Lysias created around Alain Pellet in Paris in the mid-2000s to structure the litigation strategies of his expanding team of counsels seems to be operating, still, on the basis of the classical mode of reproduction – mentor-pupil relations - of the small scholarly market of counsels to the ICJ.

Beyond this professional competition, it is indeed the survival of the international bar that is at stake, and its capacity to foster a new generation of inter-state litigators. The transformation of the profiles of the *référéndaires* of the ICJ – one of the institutional pathways into this side of international justice – seems to indicate that the increased competition of multinational corporate law firms within this small marketplace is also reflected in the new generation. *Référéndaires* are now appointed from a pool of major North-American law schools, including NYU, McGill, Columbia or Yale, rather than the traditional European scholarly centers. A key player of the international bar of the ICJ tellingly noted that the most efficient access route to inter-state adjudication is now: ‘practice within one of the big corporate law firms: Foley Hoag, Eversheds, Freshfields, Lalive or White & Case.’<sup>86</sup> This could be pointing to a wider structural transformation of the marketplace for international justice which is strikingly illustrated by the revival of the PCA since the early 2000s. The changing profile of the list of arbitrators to the PCA is indicating, further, that this could be correlated with a parallel transformation of the markets of users of international justice.

### **The PCA: a showcase in the ongoing restructuring of the market for international justice**

As with the ICSID, the formidable re-emergence of the PCA from the early 2000s was closely connected to how key players within the institution, themselves drawn from the field of commercial arbitration, endeavored to fit the PCA to the dynamic of this market. The Secretary

General of the PCA in the 1990s, Hans Jonkman strategically leaned on a prominent member of the field of international commercial arbitration, Howard M. Hotzmann.<sup>87</sup> The latter played a key role in the drafting of the PCA's 1993 'Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State,' which adopted the United Nations Commission on International Trade Law (UNCITRAL) rules for investment disputes arbitrated under the auspices of the PCA. This reliance on the dynamic of the market for commercial arbitration is further illustrated in the profile of the current Deputy Secretary-General and Principal Legal Counsel of the PCA, Brooks W. Daly, as a former counsel at the ICC in Paris, which he joined after practicing with the US and UK corporate law firms Latham & Watkins and Hale & Door. Beyond, by setting up a strong Secretariat, the institution has endeavored to directly compete with other arbitration forums, through a strategy of seduction toward arbitrators: 'they closely tend to arbitrators to compete directly with the ICSID but with a better service and more advantages, in terms of remuneration.'<sup>88</sup>

A closer examination of the cases arbitrated under the auspices of the PCA - for the most part confidential - would be necessary to assess whether this proximity with the dynamic of the field of commercial and investment arbitration is reflected in the profiles of the arbitrators and counsels, and their selection. But this institutional strategy could be echoing a wider shift in the structure of the field of international justice. Indeed, the strategy of the PCA can also be correlated to transformations in the wider markets of users of international justice. In particular, the success of the PCA seems to have also hinged on its capacity to respond to changing state and corporate interests, in the face of growing criticisms against investment arbitration. From the early 2000s, the threat of challenges by corporations against governmental policies to regulate and steer their economy<sup>89</sup> or core public policies in the health or environment sector<sup>90</sup> have led to policy shifts within treaty investments themselves aimed also at avoiding the potential backfires against corporations from the North spurred by bi-directional investment flows.<sup>91</sup> The diffusion from 2004 of a 'U.S. BIT model' bundling together trade and investment matters and incorporating mechanisms of inter-state control over investor-state arbitration has been correlated with a move of states from the North away from investor-state dispute settlement.<sup>92</sup> There have also been growing numbers of inter-state proceedings launched pursuant to bilateral investment treaties, including some motivated directly by parallel or prior investor-state

arbitrations.<sup>93</sup> This demand for more flexible international dispute settlement mechanisms, allowing for opt-in (or out) strategies for states, according to the interests at stake, is reflected in the institutional stance of the PCA. Characteristically, Hugo Siblecz, the current Secretary-General of the PCA has striven to emphasize the strategic position of his institution as both endowed with the symbolic authority of the public side of international justice, and adapted to the flexibility required by these changing interests. He thus underscored that ‘the UNICTRAL Rules, developed with a commercial context in mind, have had a great impact on inter-state arbitrations at the PCA and on the evolution of the PCA’s own rules.’ But he also recalled the role played by the PCA as a bank of symbolic capital at the turn of the twentieth century for the creation and success of international commercial arbitration institutions: ‘the practices and principles developed in the Hague Conventions proved directly relevant to the evolution of international commercial arbitration.’<sup>94</sup>

This strategic positioning has been correlated with the adoption of new rules in the 2000s. The latter have aimed specifically at heralding the institution as a potential forum for disputes ‘with any combination of parties (...) involving at least a State, State controlled entity, or international organization,’ notably through the adoption of the 2001 ‘Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment.’ This positions the PCA precisely as a potential forum for the settlement of the types of disputes that have garnered mounting criticism against the ICSID and investment arbitration. In this, the PCA competes not only with the ICSID and other investment arbitration forums, but also with the ICJ, for more classic inter-state disputes over internal conflicts and frontier delimitation contests.<sup>95</sup> Sheer volumes indicate the success of this strategy. In 2014, the PCA administered 128 cases (39 of which were initiated that year), that is, nearly four times as many as the total number of cases submitted to it in the first century of its existence. 69 of these cases related to investor-state disputes arising under bilateral/multilateral investment treaties and national investment laws.<sup>96</sup>

This institutional story could thus be refracting an ongoing transformation within the wider markets of users of international justice. This seems to be confirmed by the radical shift in the profiles of arbitrators selected by states within their national groups to the PCA between 1999 and 2013. Among the latter, the now substantial number of arbitrators with a corporate legal background could be indicating the growing prominence of multinational corporate law

firms within the marketplaces for international justice: not only as the best positioned to offer flexible, multiple, legal services – be it commercial arbitration or inter-state adjudication – but also as driving engines of co-optation of national legal elites.

Thus, the list of 1999 still reflects a universe of national elites of international law very similar to the profiles of the lawyers involved in international justice institutions at the moment of the genesis – and the complementary characteristics of the judges of the ICJ. They typically have a background as law professors, *jurisconsultes* and/or high judges. Among the 58 members from European and North-American countries, the largely dominant profile remains that of the law professor-*jurisconsulte*. Very few have occupied high governmental or judicial positions. By contrast, the other 213 members from outside Europe/the US display a multi-positioned combination of strong national resources: beyond academic credentials at the national and international levels, about a quarter have been appointed to high governmental positions, most often as Foreign affairs ministers, but also prime ministers, presidents of the Parliament, sometimes even Heads of state. An important proportion has also been appointed to the highest judicial national positions (as Chief justice or Solicitor general) along appointments to high international jurisdictions. With few exceptions, access to international jurisdictions stems out of this strong cumulated capital of symbolic authority from national governmental and judicial platforms. The acquisition of a capital of international relations is also often built out of key diplomatic positions, as Ambassador in key postings (New York, Geneva or the Hague). Significantly, among the 1999 cohort of notables of international law, very few mention an experience in arbitration or any proximity with corporate legal practice.

By contrast, the 2013 list of arbitrators suggests a diversification towards profiles much closer to international commercial arbitration and, more generally corporate legal practice. Compared to the 1999 list, among the 262 arbitrators, the mention of private arbitration skills is increased from 3 percent to 22 percent. Conversely, less than one third are now identified as law professors-*jurisconsultes*. These shifts are more evident for states that could be qualified as the periphery or new entrants within the international markets for international justice, particularly new or more recent member-states to the PCA, typically from the former USSR block and Asia. For those, there is an extremely large proportion of arbitrators mentioning skills in commercial arbitration or corporate legal practice, for example: Serbia (3/4), Estonia (2/4), Lithuania (2/4),

Philippines (3/3), Singapore (3/4), Malaysia (1/2).<sup>97</sup> By contrast, arbitrators from European and North-American countries still display the more traditional profile of the scholar-*jurisconsulte*: for example, Germany (4/4), UK (4/4), Spain (4/4), Portugal (3/4), Austria (2/3), Denmark (2/3), France (2/4).

This shift is to some extent necessarily biased by the multi-positioning that still characterizes international lawyers from the Global South at the national and international levels, in that practice within a corporate law firm can often be combined with a multiplicity of other positions and resources. This could however also be indicating a wider, structural, shift in these markets of potential users of international justice. The radical transformation of the profiles of the Singapore group between 1999 and 2013 is remarkable in this regard. The 1999 group included one professor-*jurisconsulte* and two solicitors. By contrast, all four arbitrators appointed in 2013 have an expertise and a professional trajectory connected to corporate law. The biographical entry of one of them is a case in point. Now the managing partner of a major corporate law firm after serving as Attorney General and Chief Justice, his biographical entry also underscores that he is the best Asian specialist of international commercial arbitration. These patterns could be an indicator of strategies of repositioning that are at once political and professional. This is particularly well illustrated in the case of Singapore, as the profiles of its arbitrators could reflect this state's strategic positioning as a new hub for commercial arbitration in Asia. More generally, however, the profiles of the arbitrators of new state entrants to the PCA and beyond, of new arbitrators selected in 2013 from the Global South, all underscore some level of skills and positions in corporate legal practice. With a tendency to be less multi-positioned, they thus more often come from legal practice rather than academia, and fewer have held high judicial or governmental functions at the domestic level. Rather, they tend to mention their arbitration experience at the national level, notably within Chambers of commerce, and especially at the international level within diverse arbitration forums: the ICC in Paris for a third of them, and for another third the ICSID, MERCOSUR and WTO panels. One could surmise from these profiles that these newcomers vie to enter the marketplaces for international justice more from a professional platform in international (corporate) law than as gentlemen politicians of law. This seems to be corroborated by their academic credentials, with an important proportion holding an LLM in corporate law from North-American law schools.



## CONCLUSION

Where does international justice draw its authority in an international scene largely driven by self-regulated professional markets for the settlement of transnational disputes? To revisit this classical and ever more urgent debate, this article has underscored the characteristic of international justice as a market for symbolic goods in which there is a dynamic relation between the producers of international law - that is, professionals of international justice - and the users of international dispute settlement mechanisms. More than anecdotal, indeed, the social and professional characteristics of the professionals involved in these mechanisms could help account for the professional drivers - rules of the game and competition - that define the marketplaces for international justice. Beyond, the resources valued for access and status within these marketplaces - technical, scholarly, but also social, political or economic - could be an indicator of the interests, and with them, the credibility of international justice institutions among constituencies of users: not only states and corporations, but also professionals vying to enter these marketplaces. In doing so, this article has suggested a departure from existing accounts. Considering international justice as a field emphasized how the institutional and professional segmentation of international justice between a public and a private side, and their growing convergence, can be related at once to professional competition and to wider structural changes on the diplomatic scene and the global economy.

In this social and professional history of international justice, the most striking shift is arguably the relative devaluation of scholarly capital and the prominence taken by corporate legal practice, and with it multinational corporate law firms, for access and status within the marketplaces of international justice. This growing prominence could be related to the contrasted relational dynamic of the marketplace for inter-state adjudication on the one hand, and that of commercial arbitration on the other, with their wider constituencies of (potential) users. The international bar of the ICJ developed into a restricted scholarly professional marketplace, built on mentor-pupil relations, a characteristic that was a crucial driver to foster the symbolic authority of the ICJ as the world court, but that rendered also this small market more vulnerable to external shocks, notably the competition of multinational corporate law firms. By contrast,

the dynamic of the market for commercial arbitration builds on a very different engine of production and reproduction of the law: that of the Wall Street law firm, structured precisely to facilitate the circulation and accumulation of different forms of legal capital between scholarly knowledge, businesses and state power. This institutional structure seems all the better positioned, meanwhile, to adapt to the changing interests of states and corporations in the face of growing contests between corporations and states over core sovereign issues. Though symbolical, the transformation observed in the profiles of the national groups of arbitrators to the PCA seems to corroborate this shift, with national legal elites vying to enter the marketplaces for international justice more and more from corporate legal practice. Meanwhile, rather than a harmonization between rules and institutions of international justice, this growing prominence of multinational corporate law firms could be fostering the wider fragmentation of international law, by allowing for flexible, *à la carte*, and continuously adapting strategies of litigation.

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<sup>1</sup>A. Nollkaemper, J. d'Aspremont, W. Werner, T. Gazzini (eds.) *International Law as a Profession* (Cambridge: Cambridge University Press, *forthcoming*); D. Terris, C. P.R. Romano and L. Swigart, *The International Judge. An Introduction to the Men and Women Who Decide the World's Cases* (Oxford University Press, 2007).

<sup>2</sup>O. Schachter, 'The invisible college of international lawyers' 72(2) *Northwestern University Law Review* (1977-1978) 217-226.

<sup>3</sup>N. Klein, ed. *Litigating international law disputes: weighing the options* (Cambridge: Cambridge University Press, 2014).

<sup>4</sup>The word 'mafia' is used by detractors as much as by members of the inner circle of the small arbitration community. See Y. Dezalay and B.G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago: University of Chicago Press, 1996) 10.

<sup>5</sup>CEO and Friends of the Earth Europe, 'Lawyers subverting the public interest. Lobby group EFILA's stake in investment arbitration' *Briefing* (2015).

<sup>6</sup>K. Gaubatz and M. MacArthur, 'How International is 'International' Law?' 22(2) *Michigan Journal of International Law* (2001) 238-282.

<sup>7</sup>P. Bourdieu and L. J.D. Wacquant, *An invitation to Reflexive Sociology* (Chicago: University of Chicago Press, 1992) 212.

<sup>8</sup>See H. Muir Watt and D. P. Fernández Arroyo (eds), *Private International Law and Global Governance* (Oxford: Oxford University Press 2014).

<sup>9</sup>R. Hirschl, 'The Judicialization of Mega-Politics and the Rise of Political Courts,' 11 *Annual Review of Political Science* (2008) 93-118.

<sup>10</sup>W. Alshner, 'The return of the home state and the rise of 'embedded' investor-state arbitration' in S. Lalani and R. Polanco *The Role of the State in Investor-State Arbitration* (Brill/Nijhoff 2014) 192-218; A. Roberts, 'State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority' 55 *Harvard International Law Journal* (2014) 1-70.

<sup>11</sup>G. Mallard, 'Crafting the Nuclear Regime Complex (1950-1975): Dynamics of Harmonization of Opaque Treaty Rules' 25(2) *The European Journal of International Law* (2014) 445-472.

<sup>12</sup>P. Bourdieu, 'Le marché des biens symboliques' 22 *L'année sociologique* (1971) 49-126.

<sup>13</sup>G. Shaffer, J. Nedumpara and A. Sinha, 'Indian Lawyers and the Building of State Trade-related capacity' 14-08 *Minnesota Legal Studies Research Paper* 2014. Available at SSRN: <http://ssrn.com/abstract=2390673>.

<sup>14</sup>K. Gaubatz and M. MacArthur, 'How International is 'International' Law?' 22(2) *Michigan Journal of International Law* (2001) 238-282.

- <sup>15</sup> K. Alter, L. R. Helfer and M. R. Madsen, 'How context shapes the authority of international courts' 79(1) *Law and Contemporary Problems* (2016) 1-36.
- <sup>16</sup> P. Bourdieu and L. Wacquant, *An invitation to Reflexive Sociology* (Chicago: University of Chicago Press 1992) 94-100; Dezalay and Garth *supra* note 4 at 16.
- <sup>17</sup> G. Sacriste and A. Vauchez, 'The Force of International Law: Lawyers' Diplomacy on the International Scene in the 1920s' 32(1) *Law & Social Inquiry* (2007) 83-107; Y. Dezalay and B.G. Garth, 'Constructing a Transatlantic Marketplace of Disputes on the Symbolic Foundations of International Justice', in G. Mallard and J. Sgard (eds) *Contractual Knowledge: One Hundred Years of Legal Experimentation in Global Markets* (Cambridge University Press 2016) 185-215.
- <sup>18</sup> P. Bourdieu, *Sur l'État: Cours au Collège de France (1989-1992)* (Paris: Seuil 2012).
- <sup>19</sup> This biographical database comprises 79 judges of the PCIJ and the ICJ and 39 international litigators (*counsels*), appearing as repeat-players before the PCIJ and the ICJ. The profiles of the 36 successive judges (exclusively men) of the PCIJ were reconstructed on the basis of the annual reports of the PCIJ (available at <http://www.icj-cij.org/pcij/series-e.php?p1=9&p2=6>); the other 43 profiles were built out of the biographies of the 15 judges of the current bench, and of the 28 former presidents and vice presidents of the ICJ. These official biographies provide the key biographical and professional elements emphasized by states to further the election of their nationals as judges; they are thus remarkable a source to identify the properties seen as key to access these high international judicial positions. The case law of the PCIJ and the ICJ (focusing on the 39 contentious cases decided by the PCIJ and 134 by the ICJ) was used as basis to identify the 39 counsels who appear as repeat players in inter-state adjudication at the different stages of development of the PCIJ (5) and the ICJ (34). Their biographies were reconstructed out of biographical interviews and secondary sources.
- <sup>20</sup> Dezalay and Garth *supra* note 4; see also P. Erberhardt and C. Olivet, *Profiting from injustice. How law firms, arbitrators and financiers are fuelling an investment arbitration boom* (Brussels/Amsterdam: Corporate Europe Observatory and the Transnational Institute 2012); S. Puig, 'Social capital in the arbitration market' 25(2) *European Journal of International Law* (2014) 387-424; S. Schill, 'W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law' 22(3) *The European Journal of International Law* (2011) 875-908; E. Gaillard 'Sociology of international arbitration' 31 *Arbitration International* (2015) 1-17.
- <sup>21</sup> These lists are available in the annual reports of the PCA at: <https://pca-cpa.org>.
- <sup>22</sup> For each nomination to the list of arbitrators, biographical notes are provided to the International Bureau of the PCA indicating specific fields of expertise, which the nominating states wish to underscore.
- <sup>23</sup> See the huge contrast between the 120 new contentious cases introduced before the ICJ from 1984 contrast with the 13 000 commercial claims administered by the ICC of Paris from 1976.
- <sup>24</sup> Sacriste and Vauchez *supra* note 17.
- <sup>25</sup> Kumar and C. Rose, 'A Study of Lawyers Appearing before the International Court of Justice, 1999-2012' 018-PIL *Grotius Centre Working Paper* (2014).
- <sup>26</sup> Sacriste and Vauchez *supra* note 17 at 87.
- <sup>27</sup> Out of a total of about 39 cases before the PCIJ between 1922 and 1939.
- <sup>28</sup> This confirms Terris et al *supra* note 1.
- <sup>29</sup> Typically Cambridge/Oxford, the Sorbonne in Paris, the Hague Academy of International law, the Geneva Graduate Institute of International Studies in Europe; Yale and Harvard in the US.
- <sup>30</sup> Sacriste and Vauchez *supra* note 17 at 98.
- <sup>31</sup> With for example fellowship doctoral programs designed specifically 'for promising scholars from the Third World, a need that was recognized in the immediate post-decolonization period,' with alumni such as Georges Abi Saab or Kofi Annan, the former Secretary General of the UN (Terris et al *supra* note 1 at 133).
- <sup>32</sup> Out of a total of over 80 cases since the turn of the 1980s. Among the 39 repeat players identified (with four cases or more), a more restricted group of 15 counsels have appeared in seven cases or more from this period, and within the latter, some tenors have appeared in more than 40 cases before the ICJ. Some tenors in this bar like Alain Pellet or James Crawford have appeared as counsel in over 40 cases before the ICJ.
- <sup>33</sup> His biography prepared by James Crawford, one of his students at Oxford can thus be read as an example of a *who's who* of mentor-pupil relations in this restricted market (J. Crawford, 'Brownlie, Sir Ian (1932–2010)', *Oxford Dictionary of National Biography* ed. Lawrence Goldman (online ed. Oxford: OUP 2014, <http://www.oxforddnb.com.proxy.ub.uni-frankfurt.de/view/article/102553>).

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- <sup>34</sup> Defining himself ‘as a practitioner (who) would sometimes gently chide those who might address a letter to him as Professor Brownlie’ (P. Sands, ‘Obituary’ *The Guardian*, 11 January 2010).
- <sup>35</sup> E.g. Pierre-Marie Dupuy at the Université Panthéon-Assas and the Geneva Graduate Institute of International Studies or Alain Pellet at the Université Paris-Nanterre.
- <sup>36</sup> In particular, the Court’s advisory opinions on the International status of South West Africa in the first half of the 1960s – with the Court’s refusal to pronounce itself on the right to self-determination.
- <sup>37</sup> Dezalay and Garth *supra* note 17.
- <sup>38</sup> Some prominent mentors like Hersch Lauterpacht: he combined the Whewell chair of international law at Cambridge (1938-1955), with key *jurisconsulte* positions for the UK, membership to the ILC, before his appointment to the ICJ (1955-1960). He was also a mentor of international litigators before the ICJ, notably Sir Derek Bowett a repeat-player in ICJ adjudication between 1973-1997.
- <sup>39</sup> Authors’ interview, Geneva, 4.4.2014.
- <sup>40</sup> As evidenced by the humorous comment of Elihu Lauterpacht to another member of a similar family lineage: ‘I suggest we establish a club... as the sons of famous professors of international law’ (Authors’ interview, Paris, 20.5.2014). Some other remarkable examples of such family lineages within the international bar include René-Jean Dupuy and Pierre-Marie Dupuy (his son), Jules Basdevant and Susan Bastid (his daughter), Antonio Malintoppi and Loretta Malintoppi (his daughter).
- <sup>41</sup> Authors’ interview, Paris, 20.5.2014.
- <sup>42</sup> A. Pellet, ‘Remarques cursives sur les contentieux “africains” devant la CIJ’ in M. Kamga and M. Mbengue (eds), *Liber amicorum en l’honneur de Raymond Ranjeva. L’Afrique et le droit international: variations sur l’organisation internationale* (Paris: Pedone 2013) 277.
- <sup>43</sup> G. Scott-Smith, ‘Attempting to secure an “orderly evolution”: American foundations, the Hague Academy of international law and the Third world’ 41 *Journal of American Studies* (2007) 509.
- <sup>44</sup> *Ibid* at 532.
- <sup>45</sup> Dezalay and Garth *supra* note 4 at 25.
- <sup>46</sup> Terris et al *supra* note 1 at 134.
- <sup>47</sup> With, in broad terms, an expansion from a traditional focus on territorial delimitation disputes, self-determination, maritime passage or past use of force, toward human rights, genocide and on-going armed conflicts. See P.-Y. Condé, Condé, ‘Causes de la justice internationale, causes judiciaires internationales. Note de recherche sur la remise en question de la Cour internationale de justice’ 174 *Actes de la recherche en sciences sociales* (2008) 24-33.
- <sup>48</sup> E.g. the advisory opinion of the ICJ on the status of Kosovo in 2010 was used explicitly by Russian President Putin to condone Crimea’s secession from Ukraine in 2014. That same year, Colombia’s Constitutional court ruled out giving effect to the Court’s judgment on its territorial dispute with Nicaragua.
- <sup>49</sup> Dezalay and Garth *supra* note 4.
- <sup>50</sup> C. Romano, ‘Trial and error in international judicialization’ in C. Romano, Karen Alter and Y. Shany (eds.) *The Oxford Handbook on international adjudication* (Oxford: Oxford University Press 2013) 111-134.
- <sup>51</sup> Y. Dezalay and B.G. Garth, ‘Corporate law firms, NGOs and issues of legitimacy for a global legal order’ 80(6) *Fordham Law Review* (2012) 2329.
- <sup>52</sup> Dezalay and Garth *supra* note 17.
- <sup>53</sup> A. Barker, ‘Taking on the ‘inner mafia’ 7(6) *Global Arbitration Review* (2012).
- <sup>54</sup> Gaillard *supra* note 20 at 7-8. The ICSID thus attracts about 30 new claims per year, while the PCA has officiated as an umbrella for 150 new arbitration cases in the past 15 years.
- <sup>55</sup> The ICSID barely survived with a mere 37 disputes registered between its creation in 1967 and the end of the 1990s; while the PCA had dwindled to a one-man Secretariat at the Hague Peace Palace.
- <sup>56</sup> Totalling over three thousand worldwide, up from just a few hundred in the late 1980s.
- <sup>57</sup> About 46 different claims have been filed by businesses against the economic reform programs implemented by Argentina in the wake of its crisis in 2001, precipitating a boom of the ICSID. In 2011 Argentina still accounted for more than one fifth of the ICSID’s docket. By 2008 close to a 1 US\$ billion dollars had been awarded for breach of investment treaty protections – though that figure now stands closer to US\$430 million (plus interests). See Peterson 2011.
- <sup>58</sup> See M. Waibel, A. Kaushal, L. Chung and C. Balchin (eds.), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2010).

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- <sup>59</sup> Alshner *supra* note 10.
- <sup>60</sup> Schill *supra* note 20 at 882.
- <sup>61</sup> The Calvo doctrine impeded foreign nationals from invoking diplomatic protection to settle international disputes with Latin American states.
- <sup>62</sup> Puig *supra* note 20 at 552-3.
- <sup>63</sup> See J. Pauwelyn, 'WTO panelists are from Mars, ICSID arbitrators are from Venus. Why? And why does it matter?' (2015) SSRN Working paper, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2549050](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2549050).
- <sup>64</sup> P.-M. Dupuy, 'Diversité culturelle et arbitrage international entre États et investisseurs étrangers' Italian Society of International Law's XVIII Annual Meeting in Naples, Italy 13-14 June 2013.
- <sup>65</sup> Authors' interview, Paris, 20.5.2014.
- <sup>66</sup> *Ibid.*
- <sup>67</sup> At the Faculty of Dijon (1949-1960), then Paris (1960-1989), and president of the University Paris II (1974-1979).
- <sup>68</sup> Schill *supra* note 20 at 883
- <sup>69</sup> Eberhardt and Olivet *supra* note 20 at 38.
- <sup>70</sup> With careers within multinational corporate law firms, and a symbolic capital derived entirely from activities within the field, as opposed to the 'grand old men' who derived their symbolic authority as arbitrators from other platforms, notably academia (Dezalay and Garth *supra* note 9 at 23-24).
- <sup>71</sup> J. Paulsson, 'Arbitration Without Privity' 10 *ICSID Review. Foreign Investment Law Journal* (1995) 232-257.
- <sup>72</sup> Schill *supra* note 20 at 876.
- <sup>73</sup> J. Paulsson, 'Third World Participation in International Investment Arbitration' 2 *ICSID Review – Foreign Investment Law Journal* (1987) 19-65.
- <sup>74</sup> Terris et al. *supra* note 2 at 137.
- <sup>75</sup> J.E. Alvarez and G. Topalian, 'The Paradoxical Argentina Cases' 6(3) *World arbitration & mediation review* (2012) 532.
- <sup>76</sup> H. Siblesz, 'What role for the Permanent Court of Arbitration Today' (2013) [pca-cpa.org/showfile.asp?fil\\_id=2110](http://pca-cpa.org/showfile.asp?fil_id=2110) (accessed 6 February 2015).
- <sup>77</sup> Dupuy *supra* note 65.
- <sup>78</sup> Schill *supra* note 20 at 888.
- <sup>79</sup> The position and profile of Stephen Schwebel are an exception that confirms this pull. As the only agent associated with public international justice within the 'elite 15' of investment treaty arbitration (Eberhardt and Olivet *supra* note 20 at 41), this lawyer was a *jurisconsulte* at the US Department of State under the Kennedy and Carter administration before being appointed to the ILC: upon his election to the ICJ bench (also as vice-president and president in 1994-2000) he was already a prominent member of the core of the market for commercial arbitration, and entered the market of investment arbitrations after his mandate at the ICJ.
- <sup>80</sup> Eberhardt and Olivet *supra* note 20 at 39.
- <sup>81</sup> C.N. Brower, 'W(h)ither International Commercial Arbitration?' 24(2) *Arbitration international* (2008) 191-192.
- <sup>82</sup> Authors' interview, Paris, 20.5.2014. For example, the two main firms involved in treaty investment arbitration, Freshfields represents both investors and states (though the investor in the majority of cases); White & Case also has the capacity to represent both states and investors (Eberhardt and Olivet *supra* note 20 at 20).
- <sup>83</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits, Judgment, I.C.J. Reports 2001, p. 40.
- <sup>84</sup> A. Pellet, 'Remarques sur l'(in)efficacité de la Cour internationale de justice et d'autres juridictions internationales' in *Liber Amicorum Jean-Pierre COT - Le procès international* (Brussels: Bruylant 2009) 203.
- <sup>85</sup> J. Crawford, A. Pellet and C. Redgwell, 'Anglo-American and continental traditions in advocacy before international courts and tribunals' 2(4) *Cambridge Journal of International and Comparative Law* (2013) 9.
- <sup>86</sup> Authors' interview, Paris, 20.5.2014.
- <sup>87</sup> Appointed in 1981 to the Iran-US Claims Tribunal, Holtzmann was President of the American Arbitration Association and Vice Chairman of the International Council for Commercial Arbitration. He had also played a key role in the creation of the USA-USSR Optional Clause Agreement in 1977, which provided for the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) to be the forum of arbitration for Soviet, later Russian, and US commercial disputes.
- <sup>88</sup> Authors' interview, Paris, 20.5.2014.

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<sup>89</sup> Starting with Argentina's policies to respond to its debt crisis in 1998; more recently, Venezuela's nationalization policies triggered ten new claims by foreign businesses in 2011, positioning it as the 'top respondent' that year.

<sup>90</sup> In a recent emblematic case, tobacco giant Philip Morris responded to Uruguay and Australia's anti-smoking laws, by introducing claims before different international settlement dispute mechanisms, respectively the ICSID in 2010 and the PCA in 2012, under UNCITRAL Rules.

<sup>91</sup> Emblematically an early decision by an arbitral tribunal convened under Chapter 11 of the NAFTA, operating under UNCITRAL Rules, found Canada liable for breach of the fair and equitable treatment clause, *Pope & Talbot v. Canada*, Award in Respect of Damages, 31 May 2002, 41 I.L.M. 1347, 2002.

<sup>92</sup> For example, Australia has initiated a move away from treaty investment arbitration in the wake of the Philip Morris dispute. Characteristically the book edited by Klein (2014) was conducted for the Australian Research Council Discovery project 'Choosing litigation to resolve international law disputes in the protection of Australia's offshore assets, its citizens and foreign trade.' The volume spans different avenues for state adjudication - with the exception of investment-state arbitration. Mounting critiques against the TTIP in Europe are based on the similar defense argument of domestic rule of law processes against investment arbitration.

<sup>93</sup> For example *Ecuador v. United States*, PCA Case No. 2012-5, Request for Arbitration, ¶ 1 (Perm. Ct. Arb. 2011).

<sup>94</sup> Siblesz *supra* note 77.

<sup>95</sup> E.g. the Abyei Arbitration between the Government of Sudan and the Sudan People's Liberation Movement/Army in 2008-9.

<sup>96</sup> Permanent Court of Arbitration *supra* note 37.

<sup>97</sup> These states have ratified one of the two founding conventions to the PCA in the late 1990s and in the 2000s.