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THE RULE OF LAW WITHOUT THE RULE OF LAWYERS? WHY INVESTMENT ARBITRATORS ARE FROM MARS, TRADE PANELISTS ARE FROM VENUS

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TABLE OF CONTENTS

INTRODUCTION

At the 20th anniversary of the World Trade Organization (WTO), the WTO's dispute settlement system is celebrated as one of the organization's biggest achievements.[2] Although powerful members such as the United States (US), European Union (EU) and China are regularly on the losing side of WTO trade disputes, overall support for the system remains high. If anything, it has increased over time with early criticism by civil society waning.[3] Compare this to investor-state dispute settlement (ISDS) focalized around the World Bank's International Centre for Settlement of Investment Disputes (ICSID). ISDS, which started in earnest around the same time that the WTO was created, is under heavy fire not only in capital-importing countries ranging from Ecuador, South Africa and Indonesia but also in capital-exporting nations such as Australia, Germany and the United States.[4] Indeed, in the ongoing EU-US negotiations over a Transatlantic Trade and Investment Partnership (TTIP), ISDS emerged as one of the biggest bones of contention.[5]

How is it that today's perception of two parallel processes of legalization of world politics, on two closely related subject matters of global economic affairs – cross-border *trade* and cross-border *investment* -- differs so much? The aim of this article is not to provide a comprehensive answer to this question. Instead, it focuses on only part of a possible explanation: The pool of individuals deciding WTO versus ICSID disputes. Differences in perception between WTO dispute settlement and ISDS are due to a multitude of factors including the content of the substantive rules (the ISDS regime is often perceived as limiting the right to regulate) and the question of who has standing to sue (only in ISDS can private investors sue states, leading to criticisms that the regime is dominated by, and biased in favor of, multinational companies).[6] Yet, as this article will illustrate, part of the difference has to do also with who decides the disputes.[7]

We gathered data on adjudicator appointments since the creation of the two regimes. This data shows that, on average, WTO panelists tend to be relatively low-key technocrats from developing countries, with a governmental background, often without a law degree or legal expertise, whereas ICSID arbitrators are likely high-powered, elite private lawyers or legal academics from Western Europe or the United States. In addition, the pool of ICSID arbitrators is an ideologically polarized, closed network with a very small number of individuals attracting most nominations, whereas the universe of WTO panelists is ideologically more homogeneous, with a relatively low reappointment or experience rate and nominations more evenly distributed.

When the WTO was created, prominent observers predicted ever more, uni-directional "legalization" and an unavoidable end to the "diplomatic ethos" of WTO dispute settlement, in particular, an end to the appointment as WTO panelists of diplomats or ex-diplomats highly dependent for their work on the WTO Secretariat, in favor of more experienced jurists. As Joseph Weiler put it in 2001: "persistence of diplomatic practices and habits in the context of a juridical framework might end up undermining the very rule of law and some of the benefits that the new [WTO dispute settlement system] was meant to produce ... Juridification is a package deal. It

[2] See, generally, A HISTORY OF LAW AND LAWYERS IN THE GATT/WTO, THE DEVELOPMENT OF THE RULE OF LAW IN THE MULTILATERAL TRADING SYSTEM, GABRIELLE MARCEAU (ED.), CUP, 2015.

[3] See G. Shaffer, M. Elsig and S. Puig, *The Extensive (but Fragile) Authority of the WTO Appellate Body*, LAW AND CONTEMPORARY PROBLEMS, forthcoming 2015 (presenting various empirical indicators of the WTO Appellate Body's extensive authority not just litigant-specific but at the membership- and field-level including in academia and the broader public).

[4] For a recent critique of ISDS, see GUS VAN HARTEN, SOLD DOWN THE YANGTZE : CANADA'S LOPSIDED INVESTMENT DEAL WITH CHINA, IIAP, 2015. For an overview of reform proposals: Reform of Investor-State Dispute Settlement : In Search of a Roadmap, Transnational Dispute Management, Special Issue, 2014.

[5] See Christian Oliver, Public Backlash Threatens EU Trade Deal With The US, Financial Times, 13 January 2015.

[6] See EU Commission Staff Working Document, Report on the Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement, 13 January 2015, available at http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf.

[7] See Investor-State Dispute Settlement : The Arbitration Game, The Economist, 11 October 2014 (describing ISDS as giving « foreign firms a special right to apply to a secretative tribunal of highly paid corporate lawyers »).

includes the Rule of Law but also the Rule of Lawyers ... It would be nice if one could take the rule of law without the rule of lawyers. But that is not possible. To have one, you get the other".[8]

This prediction did not materialize. Twenty years after the creation of the WTO, WTO panelists continue to be predominantly diplomats or ex-diplomats, often without a law degree and mostly with relatively little experience. Still, WTO dispute settlement has spawned a sophisticated and well-respected jurisprudence and enjoys broad support.[9] The WTO manages to have (something of a) rule of law *without* the rule of lawyers. In contrast, ICSID arbitrators are likely high-powered, elite jurists with a much deeper level of expertise and experience as compared to the average WTO panelist. Yet, ISDS is in a state of crisis around the world and much of the criticism is focused precisely on who is deciding ISDS cases.[10] The investment regime is said to be governed by arbitrators, rather than states. Arbitrators are labeled as "private judges" operating in secrecy, biased in favor of large multinationals, without regard to conflicts of interest and issuing inconsistent decisions. EU Trade Commissioner Malmström, in charge of TTIP negotiations on behalf of the EU, put it succinctly, in a March 2015 tweet: "We want the rule of law, not the rule of lawyers".[11] From this perspective at least, the world investment regime seems, at present, to have too much rule of lawyers and not enough rule of law.

This article explains why a regime with adjudicators that ostensibly have less expertise and experience can outshine a regime with, on its face, higher quality decision-makers. In ICSID, the high level of expertise and experience of ICSID arbitrators comes at the expense of their representativeness and impartiality. In the WTO, it is quite the opposite: representativeness and impartiality of WTO adjudicators comes at the expense of expertise and experience. Yet, in the WTO, lack of expertise and experience of WTO panelists is compensated by (i) a strong WTO secretariat, (ii) the existence of a standing Appellate Body (albeit, itself, composed of mainly ex-diplomats rather than experienced jurists) and, most importantly, (iii) dispute settlement deeply embedded in a broader diplomatic trade community in Geneva. ISDS is, to date, devoid of all three of these features.

As I have argued elsewhere[12], legalization of world politics is a bi-directional interaction between law and politics, not a uni-directional from-politics-to-law story. More law, compulsory dispute settlement and reduced options for countries to defect from or "exit" a regime, are made possible, and can only be sustained, in the presence of sufficient levels of politics, participation and abundant opportunities for expressing preferences or "voice". The fact that WTO panelists (i) are appointed by agreement or neutrally by the WTO Director-General who, himself, is appointed by consensus of all WTO members and (ii) are predominantly diplomats or ex-diplomats embedded in the Geneva trade community, is one way of expressing this "voice". From this perspective, WTO dispute settlement is successful not *despite* it being run by relatively inexperienced trade diplomats but *because* it is so run.

Part I of this article introduces and compares the word trade and investment regimes. Part II identifies striking differences between WTO panelists and ICSID arbitrators in terms of nationality, professional background, legal expertise, diversity, status and ideology. Part III offers a number of factors that explain these differences centered on appointment rules and conditions and the broader institutional context of the WTO versus ICSID. Part IV points at some of the possible consequences of these differences, a full assessment of which is left for future research. Part V concludes.

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[8] J. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35 Journal of World Trade (2001), 191–207 at 194 and 197.

[9] See notes 2 and 3 above.

[10] See Corporate Europe Observatory, Profiting from Injustice, How Law Firms, Arbitrators and Finaciers are Fuelling an Investment Arbitration Boom, November 2013, available at http://corporateeurope.org/sites/default/files/publications/profiting-from-injustice.pdf.

[11] Tweet, 18 March 2015, available at https://twitter.com/malmstromeu/status/578201842678640641, with reference to a longer Speech of the same date, available at https://twitter.com/malmstromeu/status/578201842678640641.

[12] Joost Pauwelyn, *The Transformation of World Trade*, 104 MICHIGAN LAW REVIEW (2005) 1-70.

I. THE WORLD TRADE AND INVESTMENT REGIMES COMPARED

Who are the individuals deciding today's international disputes? Is the pool of people, their nationality, professional background, diversity, status or ideology different across international tribunals? If so, why? And does it matter in terms of outcomes, or the effectiveness or legitimacy of the tribunal or the broader legal system within which the tribunal operates?

This article focuses on adjudicators in WTO dispute settlement and investor-state arbitration before ICSID. At the WTO's 20th anniversary, we collected data on WTO panelists appointed between 1995, date of entry into force of the WTO, and the end of 2014.[13] We compared this data to information on ICSID appointments from 1972, when the first ICSID dispute was registered, to 2014.[14]

WTO and ICSID are not randomly compared. The two regimes developed largely independently, serve different objectives and have different design features.[15] The WTO treaty includes both substantive treaty rules aimed at liberalizing trade between nations and a compulsory dispute settlement system, with no veto rights that can block the proceedings. The ICSID convention, in contrast, merely sets out institutional rules for the settlement of investment disputes; the substantive rules on cross-border investment protection and liberalization are found mainly in close to 2'300 bilateral investment treaties (BITs), many of which include binding consent to ICSID arbitration for the settlement of BIT disputes. WTO dispute settlement is purely state-to-state and has a two-tiered system of ad hoc panels and a standing Appellate Body. Investor-state arbitration – for which ICSID is only one amongst several fora besides, in particular, arbitration under United Nations Commission on International Trade Law (UNCITRAL) rules -- offers private standing to companies and individual investors, but lacks appellate review. ICSID awards are, however, subject to review by ad hoc annulment committees but on limited procedural grounds.[16]

Differences between WTO and ICSID adjudicators can, therefore, be expected. Today, however, these regimes are converging. One and the same law or governmental conduct can increasingly be challenged either before the WTO or investor-state arbitration or both. At the time of writing, Australia's plain packaging of tobacco law, for example, is being challenged by a number of countries before the WTO and by Philip Morris Asia, a tobacco multinational, pursuant to a BIT between Hong Kong and Australia under UNCITRAL arbitration rules.[17]

At least three trends explain this convergence. First, from a business angle, trade and investment operations are increasingly bundled together[18], especially in so-called global supply chains where different components of a finished product are produced in different countries thereby requiring both trade and investment across these countries.[19] Second, in terms of substantive disciplines, trade and investment commitments increasingly overlap. Think of national treatment, the prohibition of certain performance requirements or protection of intellectual property rights, all

[13] 201 disputes, 251 individuals, 603 appointments. In the WTO's first 20 years of operation, 488 requests for consultation were filed. However, by the end of 2014, this led to (only) 201 distinct disputes for which a panel was established and composed. Moreover, in some cases there are multiple complainants leading to multiple, distinct requests for consultations but which are then collectively addressed by one and the same panel. 201 disputes counts compliance panels as separate disputes.

[14] 502 cases; 94% of which were registered in the last 20 years; 396 individuals; 1666 appointments.

[15] Compare: Joost Pauwelyn, *The Transformation of World Trade*, 104 MICHIGAN LAW REVIEW (2005) 1-70 to Joost Pauwelyn, *At the Edge of Chaos? Foreign Investment Law as A Complex Adaptive System, How It Emerged and How It Can Be Reformed*, 29 ICSID Review – Foreign Investment Law Journal (2014) 372-418.

[16] See ICSID Convention, Article 52.

[17] Australia's law has been challenged by five WTO members in WTO dispute settlement (see WT/DS434, 435, 441, 458 and 467) as well as by Philip Morris (Asia) under the Hong Kong – Australia bilateral investment agreement pursuant to UNCITRAL arbitration rules (see Notice of Arbitration, 21 November 2011, available at http://www.pca-cpa.org/showpage.asp?pag_id=1494). UNCITRAL arbitrators in this case are: Professor Karl-Heinz Böckstiegel (President); Professor Gabrielle Kaufmann-Kohler; Professor Donald M. McRae. WTO panelists: Mr Alexander Erwin (Chairman); Mr François Dessemontet; Ms Billie Miller.

[18] A mining investment may require imports of machinery and engineering services and survive only if minerals can be exported. Trading sugar or tobacco may require the establishment of a distribution center and investment in brand names and marketing.

[19] Richard Baldwin, *21st Century Regionalism: Filling the gap between 21st century trade and 20th century trade rules*, CEPR Policy Insight No. 56, 2011, London: CEPR.

covered in both regimes. Trade and investment are nowadays frequently set out in one and the same treaty, a trend that started with the 1994 North American Free Trade Agreement (NAFTA) and continues in today's so-called mega-regionals: the Canada-EU Comprehensive Economic and Trade Agreement (CETA), Trans-Pacific Partnership (TPP) or Transatlantic Trade and Investment Partnership (TTIP). Whereas trade provisions increasingly expand to include behind-the-border regulations and standards, investment provisions, conversely, are moving beyond post-establishment protection of investments to cover also investment liberalization.[20] Third, ICSID arbitration has become more "public" in nature, scrutinizing not only contractual/commercial relations between investors and states but also pure treaty breaches by general laws or regulations without a contract between the parties. WTO dispute settlement, in contrast, has somewhat "privatized": although state-to-state only, in many cases, private actors are pulling the strings and paying private law firms to do the litigation, before whatever forum is best for the client: in some cases, it may be the WTO; in others, investor-state arbitration, or both.

Against this background of increasing convergence and forum competition – today, both the WTO and ICSID address politically sensitive, public disputes driven by private economic interests -- major differences between the pool of WTO panelists and ICSID arbitrators stand out and can, legitimately, be questioned. They transcend the purely academic debate: *Who* decides – as much as what law applies – may then guide forum choice, litigation outcomes and even the longer term legitimacy and future of international trade and investment law. With ISDS under intense scrutiny, especially in Europe in the context of TTIP negotiations with the United States, the differences between dispute settlement in trade and investment are also increasingly questioned, especially as they relate to the establishment and functioning of arbitral tribunals and the absence of an appellate mechanism to review ISDS decisions.[21] Lessons can be learned also for this debate by comparing WTO to ICSID adjudicators.[22]

II. ARE INVESTMENT ARBITRATORS FROM MARS, TRADE PANELISTS FROM VENUS?

Both WTO panels and ICSID tribunals are typically composed of three, ad hoc appointed individuals. As recently as 2013, Mavroidis writes that "[p]aradoxically, there is little known about the identity of the WTO judges".[23] Based on an increasing number of empirical studies in the field, six major differences between WTO panelists and ICSID arbitrators have, however, emerged. Our data (WTO appointments from 1995 to 2014; ICSID appointments from 1972 to 2014) confirm that we may, indeed, talk of different planets. Of the 396 individuals who were ICSID arbitrators[24] and 251 appointed as WTO panelists, only 8 overlap.[25] This amounts to only 2% of ICSID individuals or 3.2% of WTO individuals. Strikingly, although the two regimes have more recently been converging, there is no evidence of a marked increase of overlap over time: 3 overlaps occurred in

[20] Pursuant to some investment agreements, investor-state arbitrators are explicitly called upon to consider WTO treaty provisions (e.g. when stating that compulsory licensing in line with TRIPS does not amount to compensable expropriation). Similarly, under the WTO treaty (e.g. GATS MFN), WTO panelists may have to take cognizance of a BIT. One and the same treaty provision may thus be interpreted by either ICSID or WTO adjudicators, possibly leading to different approaches. See Jürgen Kurtz, *The use and abuse of WTO law in investor - state arbitration: Competition and its discontents* 20 *European Journal of International Law* (2009) 749-771.

[21] See EU Commission Staff Working Document, Report, Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement, 13 January 2015, at 4, available at http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf.

[22] Some go as far as proposing to «move the ICSID into the WTO », see G. Hufbauer and T. Moran, Investment and Trade Regimes Conjoined: Economic Facts & Regulatory Frameworks, Working Paper, March 2015, at 7, on file with the author.

[23] P. Mavroidis, *Selecting the WTO Judges*, in J. Huerta-Goldman, A. Romanetti & F. Stirnimann (eds.), WTO Litigation, Investment and Commercial Arbitration – Cross-fertilization and Reciprocal Opportunities, Kluwer, 2013, 103-114 at 103.

[24] ICSID arbitrators are those nominated in pending and concluded cases in the following link on the ICSID webpage (note that this includes both arbitrators and conciliators but the number of conciliation procedures is extremely low: 9 out of 502): https://icsid.worldbank.org/apps/ICSIDWEB/arbitrators/Pages/CVSearch.aspx?gE=cases&cases=all (last visited 13.01.2015); WTO panelists are those who serve(d) on completed panels (available at http://www.worldtradelaw.net/databases/panelists.php) and on ongoing disputes (available at http://www.worldtradelaw.net/static.php?type=dsc&page=currentcases) (last visited 07.01.2015).

[25] Only 1 of these 8, Gonzalo Biggs, was appointed on a WTO panel more than once

the first 10 years of the WTO; 5 in the second 10 years, of which only 1 in the last five years. What is notable is that especially WTO Appellate Body (AB) members figure prominently in this overlap: 3 of the 8 overlaps between WTO panelists and ICSID arbitrators have also served on the WTO AB; another 5 AB members subsequently served as ICSID arbitrators, increasing the total of WTO-ICSID overlaps to 13 (see Table 1 below). Indeed, of the 25 WTO Appellate Body members appointed in the first 20 years of the WTO, 10 (40%)[26] have also served on investor-state tribunals (be it ICSID or UNICTRAL).[27] In all but one of these 10 cases[28], the overlap occurred *after* 2000. If there is a recent trend of overlap, therefore, it is the appointment of (former or serving) AB members as ICSID arbitrators.

TABLE 1: Two Different Planets: Overlapping WTO-ICSID Appointments

1. Nationality: Euro-American (ICSID) versus Developing Countries (WTO)

	Name of adjudicator	Time of first overlap	First served in	ICSID appointments	WTO Panel appointments[1]	WTO Appellate Body Member
1.	Florentino Feliciano	1995	ICSID	10	1	Yes
2.	Guillermo Aguilar Alvarez	1998	ICSID	1	1	-
3.	Armand de Mestral	2001	WTO Panel	1	1	-
4.	Giorgio Sacerdoti	2003	WTO AB	5	-	Yes
5.	Gonzalo Biggs	2004	WTO Panel	1	3	-
6.	Georges Abi-Saab	2005	WTO AB	7	-	Yes
7.	Claus-Dieter Ehlermann[1]	2006	WTO AB	1	-	Yes
8.	Francisco Orrego Vicuña	2006	ICSID	34	1	-
9.	Luiz Baptista	2009	ICSID	3	1	Yes
10.	Merit Janow	2009	WTO Panel	1	1	Yes
11.	Ricardo Ramírez-Hernández	2012	WTO AB	2	-	Yes
12.	Hugo Perezcano Diaz	2012	ICSID	1	1	-
13.	Yasuhei Taniguchi	2013	WTO AB	1	-	Yes

Based on 1468 arbitrator appointments in ICSID (including annulment proceedings[29]), Sergio Puig finds that the US, France and the UK – by quite a stretch -- top the ICSID nationality list. These three countries combined represent close to 1/3 of all appointments.[30] Statistics by ICSID

[26] Abi-Saab, Luiz Baptista, Feliciano, Janow, Sacerdoti, Taniguchi, Ramirez, Bacchus, Lacarte and Ehlermann (Bacchus and Lacarte served as arbitrators under UNCITRAL, not ICSID). Costa (J.A. Fontoura Costa, *Comparing WTO Panelists and ICSID Arbitrators: the Creation of International Legal Fields*, Oñati Socio-Legal Series, 2011, Volume 1, n. 4, 1-25 at 14) also lists David Unterhalter as having been appointed as an ICSID arbitrator. The ICSID website does not offer support for this (Underhalter is, however, a well-known ICC arbitrator and also Seung Wha Chang has served as an arbitrator in commercial, not investor-state, arbitration). So if one includes commercial arbitration, the overlap is 12 out of 25 (or 48%).

[27] In 8 out of 10 cases, the ICSID appointments are subsequent to their WTO appointments. Only Feliciano and Luiz Baptisa served ICSID before serving the WTO.

[28] Feliciano, overlap in 1995.

[29] Sergio Puig, *Social Capital in the Arbitration Market*, 25 European Journal of International Law (2014) 387-424, at 403 (ICSID-only appointments between 1972, year of the first ICSID dispute, and February 2014).

[30] Puig, Table, p. 406. 11.5%, 11% and 9.4% respectively. Canada is a relatively distant fourth with 7.57%.

itself find that 42% of all arbitrator appointments were EU-28 nationals.[31] Updated to the end of 2014, 47% were from "Western Europe" and 22% from "North America" (Canada, Mexico, the US) – a staggering 69% combined. "South America" is a distant third with 11% of appointments.[32] Waibel and Wu (using data up to 2011) find that even though 95% of ICSID cases are filed against developing countries[33], only 34% of all ICSID arbitrators in their dataset are from developing countries.[34] Our data, updated to 2014, indicates that 83% of all ICSID cases were filed against developing countries (as this group of countries is understood in the WTO[35]). In contrast, only 50% of ICSID arbitrators and less than 30% of ICSID appointments[36] are developing country nationals.[37]

The situation is quite different in the WTO. Looking at 603 WTO panelist slots (including panel appointments in compliance proceedings), we find only 14 US, 1 French and 6 UK panelist appointments. This is combined less than 3.5%[38], compared to close to 32% in ICSID. Only 2.3% of WTO panelist nominations were US nationals (14); 11.9% EU-28 nationals (72)[39] – combined a meager 14.2% compared to 53.5% in ICSID (and this even though the EU and US together represent 41.5% of all WTO complaints filed, and filed against[40]).

In contrast, 52%[41] of WTO panelist positions are nationals from countries considered in the WTO as "developing"[42] (compared to less than 30% when it comes to ICSID appointments). Intriguingly, this is the case even though in the WTO there are far fewer cases against developing countries (only 32%[43]) as compared to ICSID (83%). In other words, as indicated in Chart 1 below, even though there are far more cases decided against developing countries in ICSID as compared to

[31] ICSID Caseload – Statistics, Special Focus – European Union, updated to 1 March 2014.

[32] ICSID Caseload - Statistics, Issue 2015-1, updated to 31 December 2014. See also, CEO, Profiting from Injustice, p. 8: « Just 15 arbitrators, nearly all from Europe, the US or Canada, have decided 55% of all known investment-treaty disputes".

[33] UNCTAD statistics (*Recent Trends in IIAs and ISDS*, February 2015, collecting all known ISDS cases from 1987 to 2014, not just ICSID cases, 608 in total) show that 72% of all known investor-state arbitration cases were filed against developing countries or economies in transition. Only 28% of defendant countries were "developed", but this number is rising in recent years. In 2013, for example, almost half of all known cases were filed against developed countries (especially the EU): 27 out of 57; in 2014, 40% of cases were filed against developed countries.

[34] M. Waibel and Y. Wu, *Are Arbitrators Political?*, draft 2012, available at http://www.wipol.uni-bonn.de/lehrveranstaltungen-1/lawecon-workshop/archive/dateien/waibelwinter11-12, p. 27 (dataset includes 388 cases, between 1972 and 2011 and 341 arbitrations; observations on nationality amount to 336).

[35] See footnote 34 below.

[36] The number of developing country ICSID appointments is below 30% since, according to ICSID statistics, 69% of appointments are from Western Europe or North America and, on top of that, 5.6% are from Australia (49) or New Zealand (44). Note, however, that there is double counting for people with more than one nationality (Donald McRae, for example, is counted as both Canada and New Zealand), so that the total number of developed country appointments may be somewhat inflated.

[37] For the number of ICSID cases filed against developing countries, see ICSID case database https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx. For the number of developing country arbitrators, see ICSID arbitrator database: https://icsid.worldbank.org/apps/ICSIDWEB/arbitrators/Pages/CVSearch.aspx.

[38] 2.3%, 0.16% and 1% respectively.

[39] Knowing that of these 72 « EU » appointments, quite a number occurred before the country in question joined the EU (as was the case with Peter Palecka, of the Czech Republic). Only 58 of the 72 appointments went to EU-15 countries (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, United Kingdom).

[40] WTO legal affairs data, up to 31 December 2014; this number includes all WTO consultation requests also those that did not lead to a WTO panel.

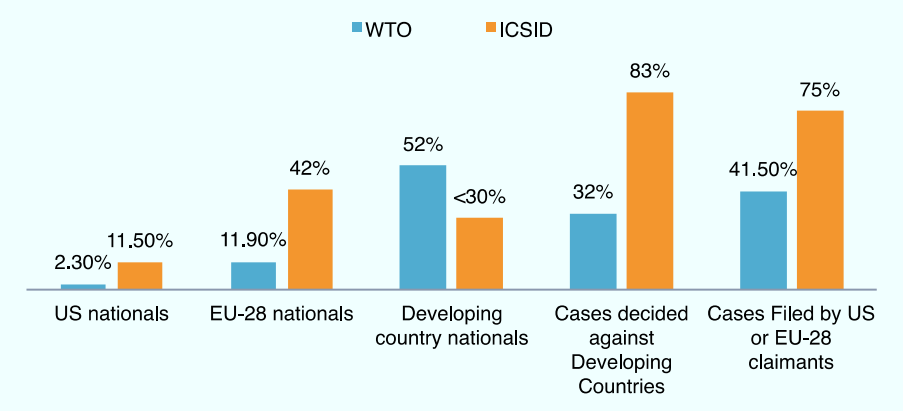
[41] 313 out of a total of 603.

[42] All nationalities of the panelists are considered developing except Australia, Austria, Belgium, Canada, Czech Republic, Finland, Ireland, Italy, France, Japan, Germany, Iceland, Netherlands, New Zealand, Norway, Poland, Portugal, Slovenia, Sweden, Switzerland, United Kingdom, United States, Bulgaria and Hungary. Although Bulgaria and Hungary are classified as "upper-middle-income economies" in the World Bank's regional system, we consider them "developed" as they are now part of the EU-28 and the EU is as a WTO member in its own right and classified for WTO purposes as developed.

[43] 68% of WTO panels were cases against developed countries and 59% of those cases were also filed by developed countries. Note, however, that in a good number of those cases filed by developed countries also developing countries may be co-complainants. That said, it is often the case that these developing countries then simply « piggy-back » on the developed country complainant(s) in terms of shouldering the political fallout of filing a WTO case or gathering the factual evidence and legal expertise to substantiate the claim. Considering both claimants (of which there can be many in a single case) and defendants (one single in each case), 68% of WTO panel cases involved at least one developing country ; 91% involved at least one developed country.

the WTO (83% v. 32%), the percentage of developing country appointments in ICSID is considerably smaller than that in the WTO (less than 30% v. 52%).

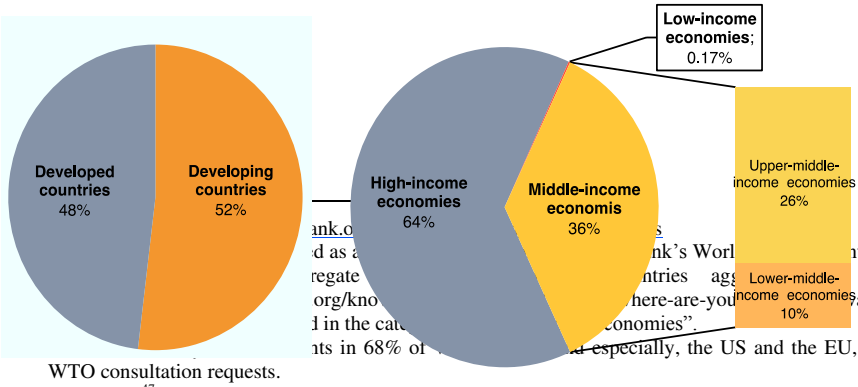
CHART 1: Nationality of ICSID versus WTO Appointments



When using not the broad WTO definition of "developing countries" but World Bank country classifications [44], the picture is more mitigated: 63.8% of WTO panelist appointments are nationals of high-income economies[45], 26% of upper-middle income economies, 10% of lower-middle income economies and only 1 appointment from a low-income economy (see Chart 2 below). The 63.8% high-income economy appointments is considerably higher than the 48% developed country appointments simply because the WTO continues to treat high-income economies such as Chile, Israel, Hong Kong, Singapore, South Korea and Uruguay as "developing countries". In other words, although 52% of appointments are from developing countries as the WTO defines them, only 36% are from middle or low-income countries as defined by the World Bank. Developed WTO members [46] may therefore "tolerate" a high percentage of developing country panelists (52%) deciding their disputes; at the same time, many of these (31.3%[47]) actually come from high-income developing countries.

In this new light, the 63.8% of high-income economy panelist slots offers an interesting match with the fact that roughly 60% of all WTO cases are filed by and against high-income economies.[48] Put differently, although there are surprisingly many developing country panelist appointments (52%) compared to the number of panels against developing countries (32%), there is a much closer match between the percentage of high-income panelist appointments and the percentage of WTO panels filed by and against high-income economies.

CHART 2: WTO Panelist Appointments by Country Classification



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nts in 68% of especially, the US and the EU, defendants in 41.5% of all WTO consultation requests.

[47] 16.3% of the grand total.

[48] 61% of complainants; 58% of defendants. See http://www.worldtradelaw.net/databases/classificationcount.php, consulted 23 January 2015.

individually) is topped by New Zealand (55) followed by Australia (46) and Switzerland (44).

2. Professional Background: Government (WTO) versus Private Sector/Academia (ICSID)

Being a WTO or ICSID adjudicator – appointed ad hoc to decide a particular dispute -- is not a full-time employment. Even members of the WTO Appellate Body, appointed for a once-renewable fixed term of four years, are part-time employed and paid by the number of days actually worked. So what is the professional background of WTO/ICSID adjudicators?

Using data from 1995 to 2009 for both the WTO and ICSID, José Fontoura Costa compared the profiles of 430 WTO panelist appointments (excluding Appellate Body members) to 863 ICSID arbitration nominations (including ad hoc annulment committee members). [49] Distinguishing between governmental service[50], academia[51] and private sector (especially law firms), and realizing that one person may have a background in all three, Costa finds that a staggering 80% of WTO panelists have a governmental background.[52] Our own data (1995-2014) goes even further: an amazing 88% of WTO panelist appointments have a substantial governmental background [53] and 57% of appointments were at some point in their careers Geneva-based diplomats. Only 15% of WTO panelist appointments have substantial experience in a private law firm[54], only 18% have an academic background[55] and a mere 3% have judicial experience in their home country (see Table 2 below). Even considering the 25 WTO Appellate Body members appointed to date (1995-2014), 72 % (18) were formerly in the service of one of the WTO member governments (only 7 never worked for a government and were academics or former international civil servants).

TABLE 2: Professional Background of WTO Panelist Appointments

	Substantial government background	**Geneva-based diplomat**	**Academic background**	**Private law background**	**Judge in home country**
1995-1999	87%	65%	22%	9%	2%
2000-2004	85%	53%	20%	14%	3%
2005-2009	91%	60%	12%	15%	4%
2010-2014	90%	52%	15%	25%	2%
1999-2014	88%	57%	18%	15%	3%

In ICSID, in contrast, Costa finds that the most common background is private sector (76%), followed by academia and only in third place governmental service.[56] Waibel and Wu's dataset shows that 63% of ICSID arbitrators are full time practitioners with law firms; 26% are full time academics.[57] Moreover, cumulating different backgrounds is considerably more common in ICSID than in the WTO. According to Costa, the average of professional affiliations by individual

[49] Costa, supra note 26.

[50] Costa (p. 10) defines « governmental service » as including employment for any branch of government (diplomats as well as executive, judicial and legislative branches) but excluding advisory or consultancy services to states.

[51] Costa (p. 10) defines « academic » as « work as professor, dean, president, coordinator, lecturer or tenured researcher in universities or research institutes".

[52] Costa, p. 17 and p. 21 (« their share of the population seems to have stabilized at around 80%"). He also found that only 19% are from the private sector.

[53] Minimum 3 years in government as diplomat, negotiator, bureaucrat, minister etc.

[54] Minimum 3 years of experience with a law firm either before or after the WTO appointment.

[55] Tenured or tenure-track academic appointment at a university, i.e. full-time academics.

[56] Costa, p. 23.

[57] Waibel and Wu, p. 27.

is 2.0 in ICSID tribunals and 1.3[58] in WTO panels. 90%[59] of ICSID tribunals combine the three professional links amongst the three arbitrators.[60]

Costa does not detect significant changes over time in the background of ICSID arbitrators.[61] Equally striking is that over time the percentage of WTO panelist appointments with a governmental background has remained stable; if anything, it has slightly increased, from 87% in 1995-1999, to 90% in 2010-2014. In contrast, the percentage of panelist appointments with a private law background has increased considerably: from only 9% in the first five years to 25% in the last five years. Conversely, as time passed, fewer academics have been appointed on WTO panels (from 22% to 15%). The number of panelists that are or have been judges in their home country has remained consistently low, between 2 and 4%.[62]

Looking at WTO Appellate Body membership (see Figure 3 below), a drop in governmental background can be seen as of 2000 (dropping from 6 to 5), with a low point in 2007 (2 only). However, since 2007, the number of Appellate Body members with a former government affiliation has gone back up to 6 (out of 7).

3. Legal expertise: Required (ICSID) versus Optional (WTO)

Although both ICSID and WTO dispute settlement are, obviously, law-based proceedings, where increasingly complex procedural and substantive legal questions need to be answered, Costa finds that a striking 45% of WTO panelists (1995-2009) have no legal background.[63] Our data (1995-2014) shows that slightly more but still only 56% of panelist appointments have a law degree (see Table 3 below). Even on the WTO Appellate Body, 3 of the 25 members appointed to date (12%) have no law degree. Only 4 of the 25 had any prior court experience as a judge. In contrast, based on Costa's data, 99.6% of ICSID arbitrators have a law degree.

TABLE 3: Legal Background of WTO Panelist Appointments

Appointment Period	With a law degree
1995-1999	47%
2000-2004	52%
2005-2009	61%
2010-2014	69%
1999-2014	56%

Interestingly, however, there has been a clear upward trend in the number of WTO panelist appointments with a legal background: from 47% in the first five years (1995-1999), to 69% in the last five years (2009-2014). Moreover, even though panelists may not have a law degree, the number of panels without at least one lawyer serving on them is, in recent years, close to zero.[64] That said, given that the percentage of panelists in governmental service has remained stable (at around 88%), the increase in lawyers on WTO panels has mainly come from diplomats or government officials with a law degree.[65] Especially in this light, having a law degree is, of course, only a rough proxy for up to date and fine-tuned legal expertise. The legal credentials of a diplomat

[58] Our updated data shows 1.24.
[59] 95% from 2005 to 2009.
[60] Costa.
[61] Costa.
[62] If anything, the last five years provide the lowest number: 2.31%.
[63] Costa, p. 15 (« no links to any legal background or professional activity").
[64] Reto Malacrida, WTO Panel Composition: Searching Far and Wide for Administrators of World Trade Justice, in Gabrielle Marceau (ed.), A History of Law and Lawyers in the GATT/WTO, CUP, 2015, 311-333, at 322 (« panels invariably include at least one lawyer »).
[65] As well as, to a lesser extent, panelists with a private law background, whose numbers have also increased over time; the number of academic jurists, in contrast, went down.

or government official with a decades old law degree (a more common profile for WTO panelists) are likely to be lower than those of an active law professor, serving or former judge or practicing attorney (still a rare breed amongst WTO panelists).

4. Diversity: Closed Network (ICSID) versus More Evenly Distributed (WTO)

The pool or network of ICSID arbitrators is clearly more closed and dense, with a much higher repetition rate (that is, the average number of cases served on per individual) than that of WTO panelists. Costa's data (1995-2009) shows a repetition rate of 3.2 for ICSID arbitrators and only 2.0 for WTO panelists.[66] Our updated data for WTO panelists has a repetition rate of 2.4.[67] However, excluding appointments in compliance proceedings (which, by default, are the same three panelists as those who served on the original panel[68]) the repetition rate drops to 2.1. Our updated data for ICSID appointments[69] shows an even higher repetition rate than that found by Costa: 4.2.[70] In other words, the ICSID repetition rate (4.2) is exactly double the repetition rate for WTO panelists (2.1, excluding appointments in compliance proceedings).

That said, both in ICSID and the WTO, around half of adjudicators served only once: 56%[71] of ICSID arbitrators are "single shooters"[72]; for WTO panelists, this number is 54%.[73] Repeat players or elite adjudicators represent a small percentage of the total pool. In both systems – but much more outspokenly in ICSID than the WTO -- the distribution of appointments is L-shaped or heavy-tailed (commonly associated with a power law distribution): many individuals have one or few appointments; an elite group of individuals is collecting a very high number of appointments.

The "small world properties" of both the WTO and ICSID adjudicator network are illustrated in Figures 1 and 2 below. They plot the proportion of adjudicators (vertical axis; where, for example, 0.5 represents 50% of the total number of adjudicators) that have a specific number of ties with other adjudicators (horizontal axis). Each time an adjudicator gets appointed, two ties are made, one with each of the other 2 individuals on the tribunal/panel (unless the individuals already served together on a previous dispute). As Figure 1 below shows, in the WTO, for example, 54%[74] of adjudicators have ties with three or less other adjudicators; 18 panelists (7% of the network) attract 10 or more ties and only 2 individuals (0.8% of the network) have the maximum number of 17 ties. In the ICSID network (Figure 2 below, using Puig's data), the "tail" is even longer: 56% of the network has three or less ties, 8% -- or 33 arbitrators of the 419, Puig refers to them as "power brokers" -- attract 20 or more ties. Another study finds that an elite group of just 15 arbitrators was appointed on no less than 55%[75] of all investor-state treaty disputes.[76] At least one of these 15 individuals was appointed on 64% of the disputes with at least 100 million US$ at stake. Our data confirms that even though the repetition rate of ICSID arbitrators is double that of WTO panelists (4.2 compared to 2.1), more ICSID arbitrators are single shooters[77] (56%) than WTO panelists (54%): this is proof that fewer ICSID arbitrators attract more of ICSID appointments.

[66] ICSID arbitrators: 863 appointments; 273 individuals. WTO panelists: 430 appointments; 212 individuals.

[67] 603 appointments; 251 individuals.

[68] See Article 21.5 of the DSU.

[69] 1666 appointments; 396 individuals.

[70] ICSID Caseload - Statistics, Issue 2015-1, updated to 31 December 2014, p. 20 for the total number of appointments.

[71] 235 out of 419, using Puig's data.

[72] Puig, p. 419, defining "single shooters" as arbitrators who have 3 or less "ties" with other arbitrators, that is, who have served ICSID with 3 or fewer individuals (serving on one tribunal, as it is composed of 3 individuals, gives a person 2 ties; if one of these is subsequently replaced, 3 ties are created).

[73] Using Puig's definition of «single shooters », 136 (of 251) or 54.2% of WTO panelists have 3 or less « ties » with other panelists. Defining « single shooters » as having only 2 ties gives 43% in ICSID; 50.2% in the WTO. If one does not count ties, but rather number of panels served on, 46.2% (116 out of 251) served on one WTO panel only, excluding compliance panels as a second panel served on, 53% of WTO panelists served on only one case.

[74] 136 of 251.

[75] 247 disputes out of a total of 450.

[76] Profiting from Injustice, 2012, at 38.

[77] Defined as having 3 or less ties.

FIGURE 1: Degree/Ties Distribution of the WTO Panelist Network

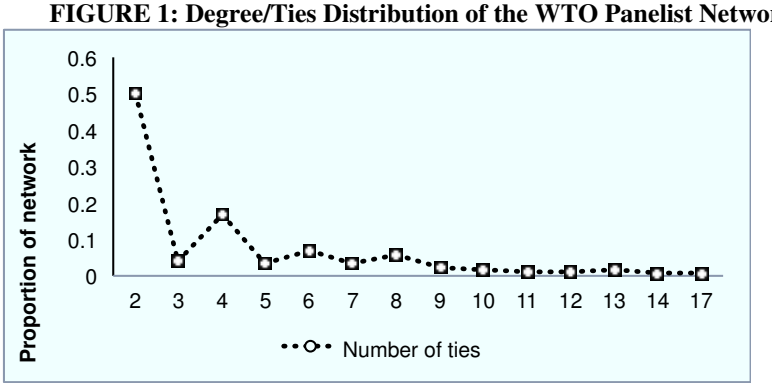
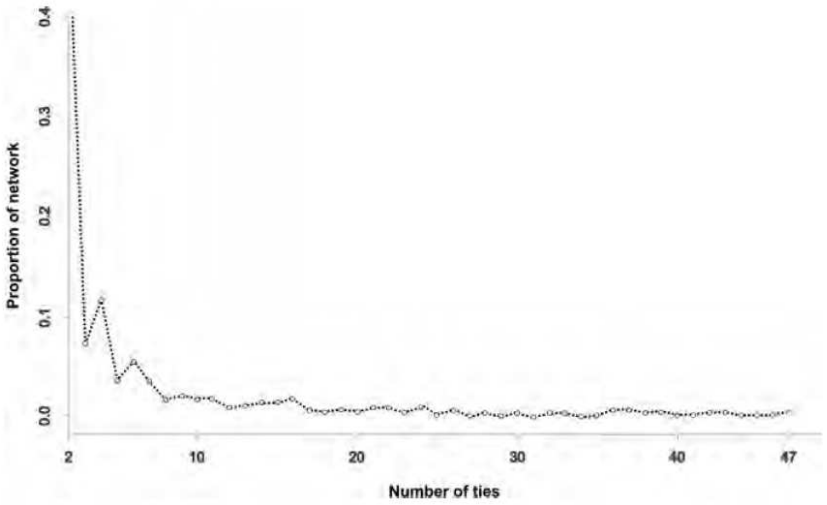


FIGURE 2: Degree/Ties Distribution of the ICSID Network[78]



In the WTO, the distribution of appointments is, indeed, spread out more evenly.[79] Of a total of 603 appointments, not one person attracted more than 10 appointments (see Table 4 below). Only three individuals were appointed 10 times (1.7% of appointments): Michael Cartland, Crawford Falconer and Claudia Orozco. Excluding appointments in compliance proceedings, Claudia Orozco and Enie Neri de Ross top the list with "only" 9 appointments. The top 10 WTO panelists attract a total of 14.4%[80] of appointments. Excluding compliance proceedings this number is even lower at 12.8%. Before ICSID, in contrast, a 2012 study finds that the top 10 arbitrators represent 20%[81] of all appointments with the number one arbitrator (Brigitte Stern of France) attracting 39 appointments (2.9%). Updated to the end of 2014, Brigitte Stern has been appointed 57 times (3.4%) compared to Michael Cartland's 10 WTO appointments (1.7%).[82] In other words, the top ICSID arbitrator has been appointed exactly twice as often as the top WTO panelist. Table 4 shows the top 15 WTO panelists by number of appointments: 9 of them are from developing countries; 4 are women; all 15 have a substantial governmental background.

TABLE 4: Ranking of WTO Panelists (Top 15) by Number of Appointments

[78] Figure 2 is copied from Puig, p. 421.
[79] Excluding compliance proceedings: panelists with 1 appointment: 53%; with 2 to 5: 43%; with 6 to 10: 4%.
[80] 87 out of 603.
[81] 270 out of 1350.
[82] Profiting from Injustice, 2012, at 38. See also Costa, p. 11, finding that a group of only 12 arbitrators (4.4%) of the ICSID population accounts for about a quarter of nominations, while 17 of WTO panelists (7,65%) respond for the analogous quartile.

	Panelist Name	Number of appointments	Share of Total	Cumulative Share of Total	Number excluding compliance cases
1	Michael Cartland (Hong Kong)	10	1.7%	1.7%	7
2	Crawford Falconer (New Zealand)	10	1.7%	3.3%	8
3	Claudia Orozco (Colombia)	10	1.7%	5%	9
4	Enie Neri de Ross (Venezuela)	9	1.5%	6.5%	9
5	Dariusz Rosati (Poland)	9	1.5%	8%	6
6	Paul O'Connor (Australia)	9	1.5%	9.4%	6
7	Christian Haberli (Switzerland)	8	1.3%	10.8%	5
8	Virachai Plasai (Thailand)	8	1.3%	12.1%	6
9	Peter Palecka (Czech Republic)	7	1.2%	13.3%	6
10	Jose Antonio S. Buencamino (Philippines)	7	1.2%	14.4%	5
11	Michael Mulgrew (Australia)	7	1.2%	15.6%	5
12	Alberto Juan Dumont (Argentina)	6	1%	16.6%	5
13	Deborah Milstein (Israel)	6	1%	17.6%	5
14	Hardeep Puri (India)	6	1%	18.6%	4
15	Luz Elena Reyes (Mexico)	6	1%	19.6%	5

In both systems, appointments are not random and there is a practice of reappointing the same people (a phenomenon also referred to as "preferential attachment" or "the rich get richer"). On the plus side, this increases the level of experience of adjudicators and may also enhance consistency. At the same time, it can lead to criticisms of a closed, elite network. That said, the phenomenon (density of the network, long-tailed degree distribution, short distance between adjudicators in the network) is much more outspoken in ICSID than in the WTO.

Another number illustrating higher diversity in the pool of WTO panelists compared to ICSID arbitrators is that, in ICSID, only 7% of appointments went to women[83]; in the WTO, 15.6%. Making matters worse, in ICSID, two women attracted ¾ of all female appointments; in the WTO, the top 2 women attracted only 20% of all female appointments.

5. Status: "Star arbitrators" (ICSID) versus "Faceless Bureaucrats" (WTO)

Another prominent difference, but harder to pinpoint or prove empirically, is the status or individual star or prestige level of adjudicators. WTO panelists are generally described as relatively low-key bureaucrats. This is, of course, a generalization and there are many and notable exceptions. Writing in 2001, Weiler (a prominent legal academic who has himself been appointed twice as

[83] Puig, p. 404-5.

WTO panelist) refers to the "Gnomes-of-Geneva syndrome", the "tireless (and increasingly tiresome) accusation that important issues of world and domestic socio-political and economic policy are being decided by 'faceless' bureaucrats" in Geneva.[84] At the same time, he confirms – and then laments -- the general view, referring to (pre-WTO) GATT panelists as having an "ethos which favoured 5:4 outcomes rather than 9:0 … Custodianship over the Law of the GATT was far from both the minds, *and let us be frank, the ability* of many [GATT] Panellists".[85] When it comes to WTO panelists, Weiler may be somewhat more diplomatic but remains as critical.[86] This view has not subsided over time. Mavroidis, writing in 2013, confirms it, noting that "the judges issuing these [WTO] decisions which have an impact on the shaping of regulation at the domestic level are typically unfamiliar names, often unknown even to the Geneva experts … The typical WTO judge is a government official, not necessarily of high seniority, who is or has spent some time in Geneva representing his/her country before the WTO".[87]

Our data confirms that 88% of WTO panelist appointments have a substantial government background, a number that has gone up – not down -- over time (from 87% in 1995-1999 to 90% in 2010-2014, see Table 2 above). In addition, 57% of appointments were, indeed, Geneva-based diplomats at some stage in their careers. Notably, however, the number of Geneva-based diplomats has gone down over time: from 65% in the first five years to 52% in the last five years (see Table 5 below). Moreover, and somewhat contradicting the "Gnomes-of-Geneva" story line, more than a third of all WTO panelist appointments were individuals with a "high political function" (ambassadors or government ministers). This number has, however, slightly receded from 37% in 1995-1999 to 35% in 2010-2014.

TABLE 5: WTO Panelist Appointments: Geneva-based; High political function

Appointment Period	Geneva-based diplomat	High political function
1995-1999	65%	37%
2000-2004	53%	30%
2005-2009	60%	35%
2010-2014	52%	35%
1999-2014	57%	34%

Elsig and Pollack provide what is ultimately a similar account on (recent, 2006-2011) WTO Appellate Body nominations, backed-up by interviews and other evidence. They find that if the first wave of Appellate Body appointments "demonstrates a concern for the eminence and expertise of the candidates"[88], the third wave (2006 to 2011) "favored candidates with non-controversial positions and those who had been careful in the past not to make enemies in Geneva", with WTO member representatives limiting their support to "candidates whose views were not too distant from their own".[89] One successful candidate is reported as stating that "if you want to become ABM, I would advise against writing on the subject matter".[90]

[84] J. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35 Journal of World Trade (2001), 191–207 at 201-202.

[85] Weiler, p. 197, emphasis added.

[86] Weiler, p. 202 : « I would further argue that the profile of the ideal individual Panellist, or the ideal Panel, given the new reality of WTO dispute resolution, is not reflected in the current roster nor in the selection and composition of Panels. The life experience, professional backgrounds of Panellists have to be commensurate with the evident gravity and profundity of the issues decided in a globalized world. This I submit has conspicuously not been the case in some of the most important instances".

[87] Mavroidis, p. 104.

[88] M. Elsig and M. Pollack, *Agents, trustees, and international courts: The politics of judicial appointment at the World Trade Organization*, 20 European Journal of International Relations (2014) 391 at 404.

[89] Elsig and Pollack, p. 407.

[90] Ibid., p. 408.

The overall reputation or individual prestige level of ICSID arbitrators stands, once again, in stark contrast (although, of course, as noted above, there are many exceptions to this generalization and this on both sides). Puig refers to ICSID arbitrators as the "Grand Old Men" and "Formidable Women", "exceptional professionals", a "small group of socially prominent actors".[91] Waibel and Wu claim that 30% of individuals appointed as ICSID arbitrators (336 observations) are "graduates from elite law schools" (which they list, somewhat arbitrary, as: Harvard, Yale, Stanford, Oxford or Cambridge).[92] Costa as well concludes that "the social *status* associated with the [ICSID] arbitrators is higher than that of panelists"[93], adding that "the arbitrators' *star system* is very different from the bureaucratic profiles of most of the WTO's panelists".[94]

To the extent ICSID arbitrators get criticized, it is not for being "faceless bureaucrats". On the contrary, they get referred to as "elite lawyers"[95], "ambitious investment lawyers keen to make a lucrative living"[96], a "mafia"[97], "super arbitrators" who are "not just the mafia but a smaller, inner mafia"[98], adjudicators – not faceless – but with conflicts of interest and a "hidden agenda" ("one minute acting as counsel, the next framing the issue as an academic, or influencing policy as a government representative or expert witness").[99]

Empirically, this distinction can be backed-up by the fact that 88% of WTO panelist appointments have a governmental background, mostly working (or having worked) for diplomatic missions or trade bureaucracies (57% have been Geneva-based diplomats). They may be excelling in what they do[100] but by profession they are mostly technocrats or political appointees operating in large bureaucracies, where team play and policy rather than individualism and honed legal skills are valued. ICSID arbitrators, in contrast, generally come from more egocentric, star-driven professions –private law practice, legal academia – where individual performance, reputation and legal craftsmanship matter more.

In support of their claim of "increasing politicization of the AB selection process"[101], Elsig and Pollack point at data showing that "WTO Members increasingly select candidates with extensive trade policy experience and who have a familiarity with the WTO system and its particularities, gained through negotiation and panel activities, to the disadvantage of other key characteristics (e.g. public international law background, court experience)".[102] Updated statistics on AB membership show, indeed (see Figure 3 below), that even though there was a dip in the early 2000s in ABMs with governmental background and trade law/negotiator experience with more academics onboard, more recently (as of 2007) this trend has been reversed: more governmental background, trade law/negotiator experience, fewer academics or individuals with court experience. Average age -- and thus years of experience -- grew from 1995 to 2000 (starting at 65.4 and peaking at 69.5). Thereafter, a downward trend can be detected, with a low of 57.1 in 2012. In 2014, average age stands at 59.6.

[91] Puig, p. 407, 419 and 423.
[92] Waibel and Wu, p. 28.
[93] Costa, p. 20, italics in original.
[94] Costa, p. 24, italics in original.
[95] Profiting, p. 35.
[96] Id., p. 36, referring to Van Harten, Gus (2012) Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration, Osgoode Hall Law Journal, Forthcoming, http://ssrn.com/abstract=2149207 [7-11-2012].
[97] Id., p. 36, referring to Kapeliuk, Daphna (2010) The Repeat Appointment Factor - Exploring Decision Patterns of Elite Investment Arbitrators,
Cornell Law Review 96:47, p. 77.
[98] Barker, Alyx (2012) Taking on the "inner mafia", Global Arbitration Review, 2 October, http://www.globalarbitrationreview.com/news/article/30863/taking-inner-mafia [7-11-2012].
[99] Profiting, p. 43. Even though WTO panelists who are government officials representing WTO members on other occassions may, in principle, have more (and more difficult to track) conflicts of interest than, for example, academics serving on ICSID panels, the issue of conflict of interest has not often been raised in WTO circles.
[100] For example, 34% of WTO appointments were ambassadors or government ministers.
[101] Elsig and Pollack, p. 394.
[102] Elsig and Pollack, p. 402.

FIGURE 3: Professional Experience of The Seven Serving WTO Appellate Body Members During First 20 Years of the WTO

Perhaps the most striking piece of evidence in support of the "higher status" of ICSID arbitrators as opposed to WTO panelists is the trend in WTO-ICSID overlaps discussed earlier. As summarized in Table 1 above, of the 15 individuals who served as adjudicators in both ICSID and the WTO, no less than 8 served on the WTO Appellate Body.[103]. If we include also UNCTRAL appointments, 10 of the to-date 25 AB members have served in investor-state arbitration. Most tellingly, for present purposes, 8 of these 10 AB members served on the AB first and were appointed as arbitrators only *after* their AB appointment (the exceptions are: Feliciano and Luiz Baptista who had been ICSID arbitrators before they were appointed on the AB). In other words, nomination on the AB seems to be an asset to start arbitrating investment disputes. In contrast, few of the top ICSID arbitrators were subsequently appointed as WTO panelists (the only exception is Orrego Vicuna with 34 ICSID appointments and a single WTO appointment). As Costa put it: "Reputation flows … from the WTO to arbitration and not in the other direction".[104]

6. Ideology: Polarized (ICSID) versus Relatively Homogeneous (WTO)

A last but arguably the most striking difference is that ICSID arbitrators tend to be polarized in two groups: many have either a "pro-investor" reputation or a "pro-state" outlook.[105] In contrast, the pool of WTO panelists is much more homogeneous: few individuals have or can be identified as either "pro-trade" or "protectionist". Even if amongst private trade law firms there tends to be a bifurcation along these lines (firms working predominantly for exporters v. those working for domestic industries seeking trade protection), it is not prevalent amongst WTO panelists. If anything, given their governmental background, mostly in trade ministries, WTO panelists tend to look favorably at trade but within the limits of political expediency. Generally speaking, they are not free trade radicals or ideologues, but trade specialists steeped in practical, policy experience and thereby sensitive to the need for policy space in favor of their government-employers.

TABLE 6: Investment Arbitrators Are From Mars, Trade Panelists Are From Venus

[103] Of these eight, five never served on a WTO panel.

[104] Costa, p. 14 («the exercise of a prestigious international function backed by the approval of states is an important asset to enter arbitration, while previous links to commercial and investment arbitration does not seem to be important to step into WTO's courtroom »).

[105] Puig, p. 413 and figure 5. Waibel and Wu, p. 7 and 21-23. A smaller number of arbitrators profile themselves as presidents, with a more neutral position.

	WTO PANELISTS	ICSID ARBITRATORS
1. Nationality	52% developing countries	69% W. Eur./N. America
2. Background	88% governmental service	76% private practice
3. Expertise	44% non-lawyers	99.6% lawyers
4. Diversity	"Relatively High" 2.1 repetition rate[106] 54% single shooters Top 10= 14.4% of appoint. Winner: 10 or 1.7% Women = 15.6%	"Low" 4.2 repetition rate 56% single shooters Top 10= 20% of appoint. Winner: 57 or 3.4% Women = 7 %
5. Status	"Faceless bureaucrats"	"Star arbitrators"
6. Ideology	Homogeneous	Polarized

Figures 4 and 5 below further summarize the network of WTO panelists. In each figure, dots represent individuals. Lines (or ties) between individuals mean that they served on at least one panel together. Using network analysis software, the more ties (or appointments) an individual has, the bigger his or her corresponding dot and the more central that dot is situated. Figure 4 represents developing country panelists in red; developed country panelists in black; US panelists in green. The picture shows that (i) the network of WTO panelists is relatively decentralized[107], (ii) a large proportion of panelists (including some of the most central figures) are from developing countries (red dots), and (iii) few WTO panelists (only 9), and not a single central figure, are US nationals.

[106] Excluding compliance proceedings.

[107] Compare to Figure 1, representing the ICSID network, in Puig, at p. 411, where the dots are centralized much more toward the middle.

FIGURE 4: The Network of WTO Panelists (1995-214): Red = developing country nationals; Black = developed country nationals; Green = US nationals

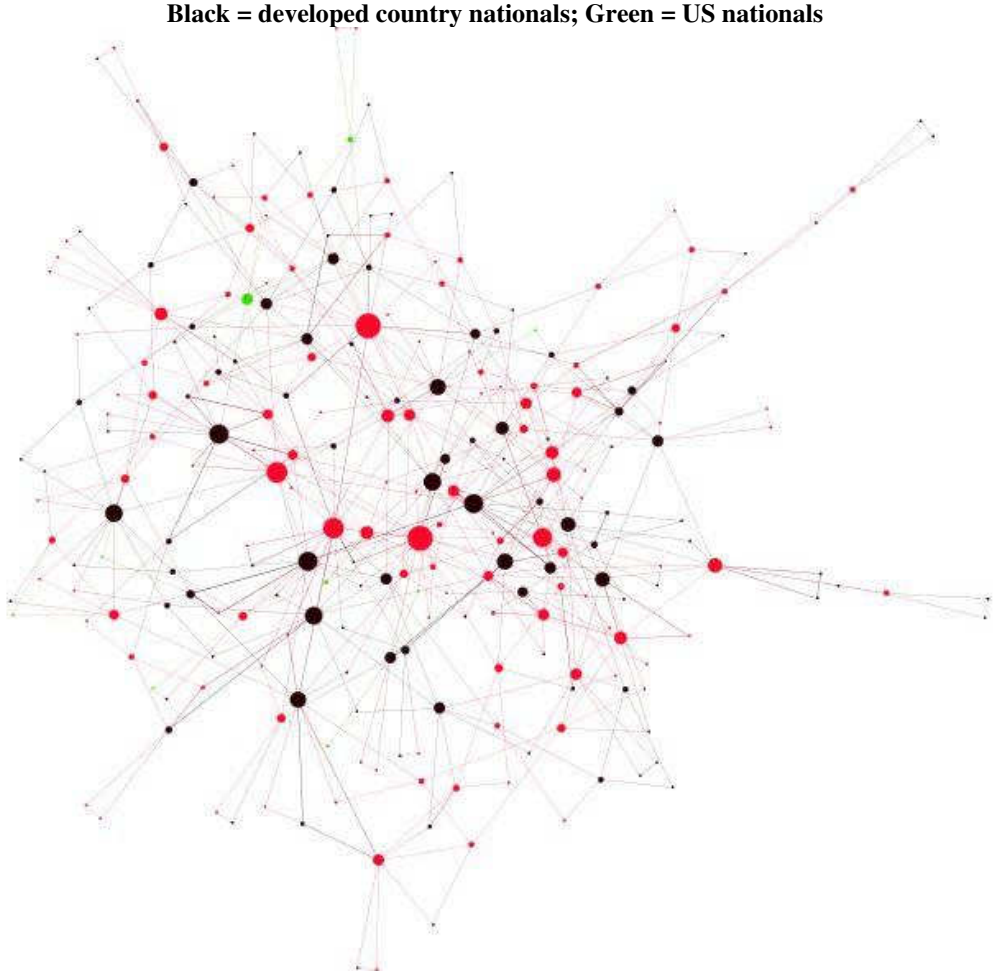
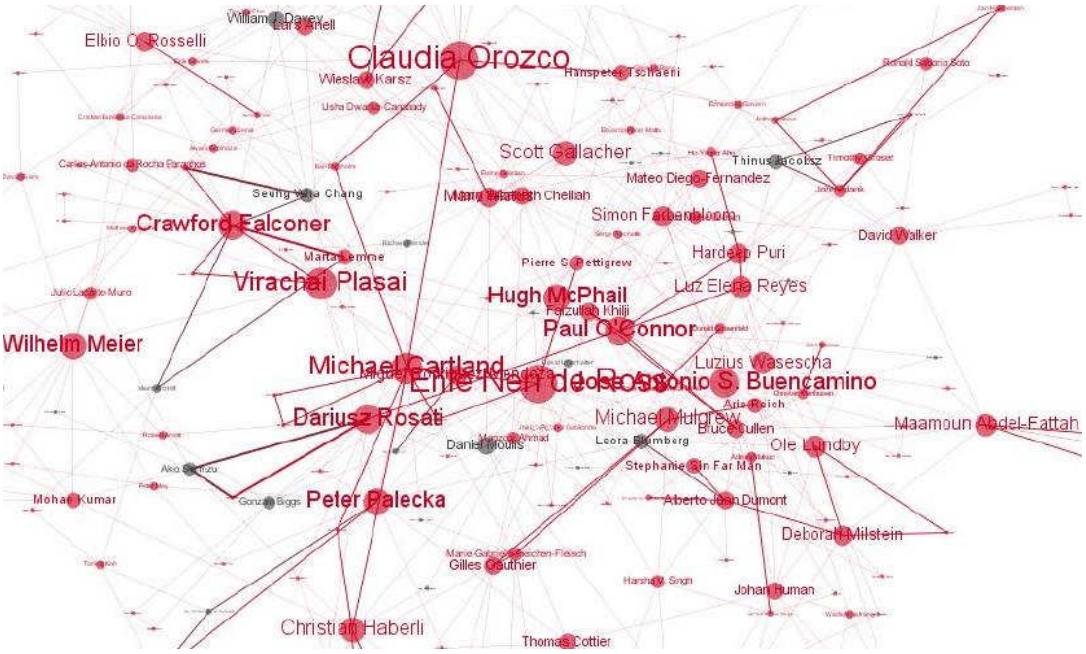


Figure 5 adds names to each of the dots and zooms in on the individuals most central in the network. In Figure 5, lines between individuals are also thicker as they have more ties between them (i.e. the more two individuals sit on the same panel, the thicker the line between them). Individuals with a governmental background are in red; those without are in black. The picture illustrates that most WTO panelists, including those with most ties (appointments) and most central in the network (the largest dots), have a governmental background. The lines between the most central individuals also tend to be thicker (i.e. they sat on more than one panel together).

FIGURE 5: The Network of WTO Panelists (1995-214): Red = governmental background



III. RATIONALIZING THE DIFFERENCES BETWEEN WTO PANELISTS AND ICSID ARBITRATORS

Why is it that, on average, WTO panelists tend to be relatively low-key technocrats from developing countries (very few US/EU nationals), with a governmental background, often without a law degree or legal expertise, whereas ICSID arbitrators are likely high-powered, elite private lawyers or legal academics from Western Europe or the United States? Why is the pool of ICSID arbitrators an ideologically polarized, closed network with a very small number of individuals attracting most nominations, whereas the universe of WTO panelists is ideologically more homogeneous, with a relatively low reappointment or experience rate and nominations more evenly distributed?

Some of these differences are easily explained, others more subtle. Below I focus on two sets of explanatory factors: (i) appointment rules and conditions, (ii) broader institutional context.

1. Appointment Rules and Conditions

a) Who appoints?

The core factor explaining many of the differences resides in *who appoints* the adjudicators. In the WTO, no party gets to unilaterally appoint "its panelist". The WTO Secretariat (Legal Affairs or Rules Division, depending on the type of dispute) *proposes* candidates. Candidates are only appointed if *both parties* agree. At this stage, each party has a veto right.[108] Only if no mutual agreement can be found will the WTO Secretariat (formally, the WTO Director-

[108] Formally, Secretariat proposals can only be rejected for « compelling reasons » (DSU Art. 8.6). Yet, in practice, this has amounted to a de facto veto right without much probing as to the exact reason for the objection.

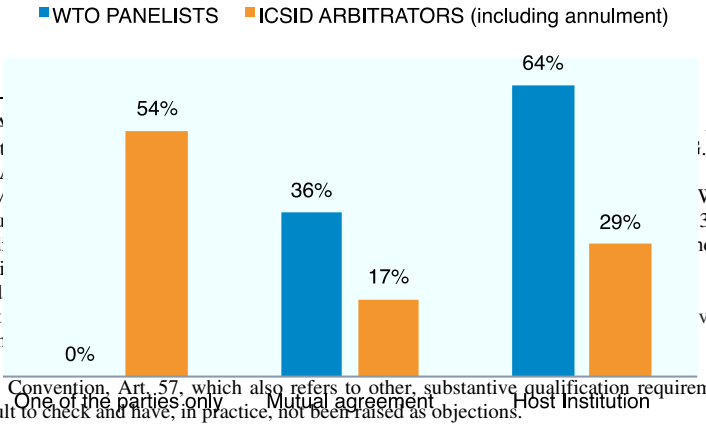
General (DG)) *appoint* panelists.[109] The number of panels composed by the DG (hence, without the mutual agreement of both parties) has steadily increased over time. Of all panels composed between 1995 and 2014, 64% were appointed by the DG. The DG, in turn, can only be appointed by consensus of all WTO members. When the DG appoints a panel, however, he formally appoints all three individuals even though the parties may have agreed on one or two of them. Hence 64% of *panels* is over-inclusive when it comes to the total number of *panelist slots*.[110]

Before the Secretariat either proposes candidates or the DG appoints panelists, the desiderata of the parties are heard and carefully taken into account. The Secretariat/DG certainly has some freedom to propose/appoint but this freedom is curtailed by the wishes (and before the DG gets asked to appoint, the veto right) of the parties.[111] An "Indicative List" of potential panelists exists, and each WTO member can add a limitless number of names to this list (subject to consensus approval by the WTO Dispute Settlement Body, but no proposal has, to date, been rejected). However, for someone to be appointed as a WTO panelist, there is no requirement to be listed on the Indicative List. Even when the DG appoints, he can appoint people outside of this list. Strikingly, 72% of panelist appointments were *not* on the Indicative List.[112] Only 18% of people on the Indicative List have actually served as WTO panelist.[113]

Under ICSID rules, in contrast, each party gets to appoint "its own arbitrator".[114] The opposing party cannot object, other than on grounds of conflict of interest or manifest lack of independence.[115] Only the third and presiding arbitrator is appointed by mutual agreement of the parties.[116] If either party fails to appoint "its arbitrator" or the parties cannot agree on a president, the Chairman of ICSID's Administrative Council (i.e., the World Bank President, in practice, upon recommendation of ICSID's Secretary-General) is granted appointing authority.[117] Importantly, ICSID must first consult with both parties[118] and can only appoint individuals from a closed "Panel of Arbitrators" appointed by ICSID member states (each member state can appoint only four individuals; the World Bank President can appoint another 10). Members of ICSID ad hoc annulment committees are exclusively appointed by the World Bank President from the same Panel of Arbitrators.[119] There is no requirement that *party*-appointed arbitrators are on ICSIS's Panel of Arbitrators, and many are not.

In practice, Puig shows that of all ICSID appointments[120], 27.2% are made unilaterally by investor-claimants, 26.7% unilaterally by respondent host states, 16.5% by ICSID (29.1% if one includes annulment proceedings) and only 11.7% by agreement of the parties (16.8% if one includes those appointed by agreement of the two party-appointed arbitrators).[121]

CHART 3: Who Appoints?



[109] DSU A… A panelist proposed by the Secretariat but …

[110] Legal …

[111] Reto M… World Trade Justice, in Gabrielle Marceau … 314 ("the Secretariat never proposes cand… ndidates") and ("It is widely under-appreci…

[112] Own d…

[113] 70 out… version of the WTO Indicative List of par…

[114] ICSID…

[115] ICSID Convention, Art. 57, which also refers to other, substantive qualification requirements in Art. 14 but these are very difficult to check and have, in practice, not been raised as objections.

[116] ICSID Convention, Art. 37(2)(b).

[117] ICSID Convention, Art. 38.

[118] ICSID Convention Art. 38 and Arbitration Rule 4(4).

[119] ICSID Convention, Art. 52(3).

[120] 12.6% of these are annulment appointments.

[121] Puig, p. 406.

In sum, as Chart 3 above shows, ICSID arbitrators are predominantly appointed by one single party, whereas WTO panelists are more "neutrally" appointed, either by the DG (64%) or mutual agreement of both parties (36%). For one thing, this largely explains the more polarized pool of ICSID arbitrators -- many are either "pro investor", repeatedly appointed by investors; or "pro state", repeatedly appointed by host states -- and the (ideologically) more homogeneous pool of WTO panelists.

The fact that parties get to unilaterally appoint "their arbitrator" may also explain why the network of ICSID arbitrators is more closed and the reappointment rate higher. Each party has an incentive to appoint arbitrators with a proven track record, outlook and experience that enhance its chances to prevail in the dispute, rather than a novice with no disclosed preferences. The fact that many parties in ICSID, especially investors, are "single shooters" (in often "betting the firm" type of cases) makes this all the more likely. Unlike in the WTO, where most parties are repeat players (only 29 WTO members have ever been involved as main party before the AB[122]; the EU and US combined represent 41.5% of all WTO consultation requests filed and filed against), ICSID parties want to win the dispute at hand and are less motivated by broader systemic interests such as diversifying the pool of arbitrators. Before ICSID, experience and track record are then, indeed, probably more influential than nationality. This, in turn, may explain why only 50% of ICSID arbitrators and less than 30% of ICSID appointments are developing country nationals.

In contrast, mutual agreement or institutional appointments by the WTO itself tend to exclude individuals with an outspoken view or track record either in favor of trade or trade protectionism. It favors nomination of "neutrals" e.g. from countries like Switzerland or New Zealand. This results in a (ideologically) more homogenous pool with a lower reappointment/experience rate: in the WTO disclosed preferences lead to fewer, rather than more appointments. In case of institutional appointments by a relatively strong bureaucracy (as elaborated below, the WTO Secretariat plays a role not only in panel selection but also in the actual panel process and outcome), Costa also highlights the potential for competition or rivalry between, in this case, panelists and WTO bureaucratic bodies or secretariat officials. This may temper the appointment of high-status, star adjudicators[123] as "the inertial presence of specialized diplomats may be retained by the organizational bureaucracy".[124] Put differently, when it appoints panelists, the WTO Secretariat may be inclined to appoint individuals who agree with its perspective or are at least open to follow its proposals, rather than strong-minded individuals who will insist on making their own analysis or star adjudicators that risk outshining Secretariat skills or expertise.

In addition, the fact that 27.2% of ICSID appointments are made unilaterally by *private* investor-claimants, in cases filed exclusively against host state *governments* (unlike the WTO, ICSID gives standing to private entities[125]), goes a long way explaining why fewer ICSID arbitrators have a governmental background. As (former) government officials may be more susceptible to arguments made by governments, it seems rational for private investors to have a preference for private sector lawyers or legal academics.[126] The fact that it is frequently the private lawyers or law firms working for claimants (not claimants themselves, for lack of expertise) who appoint the claimant's arbitrator, may further explain why a large share of ICSID arbitrators, especially those appointed by claimants, are themselves private lawyers. Since at the WTO both sides are governments, more panelists with governmental experience can be expected. The individuals agreeing or objecting to WTO panelists on behalf of WTO disputing countries are, in most cases, trade diplomats themselves (and to a lesser extent law firm lawyers advising them).

[122] Joost Pauwelyn, *Minority Rules: Precedent and Participation before the WTO Appellate Body* in Establishing International Adjudicatory Authority in Trade Law (eds. Laura Nielsen and Henrik Palmer Olsen, forthcoming 2015), updated to end of 2013, counting the EU-28 as one member.

[123] Costa, p. 12.

[124] Costa, p. 17.

[125] Formally, also host states can sue private investors under ICSID, but for this a contract between the parties must be in place and, in practice, almost all ICSID cases where investor-state disputes.

[126] Waibel and Wu, p. 29, show that the average number of years worked in the executive is slightly higher for arbitrators appointed by host states as compared to those appointed by investors (3.6 versus 3.2). Their evidence (at p. 34) also supports the hypothesis that "arbitrators who also wear the hat of counsel to private investors are more likely to affirm jurisdiction".

They are, as a result, more likely to appoint their peers in the trade community. As Reto Malacrida, a member of the WTO Legal Affairs Division in charge of panel appointments puts it: "a current or former governmental panelist is 'one of them', as it were, because the parties' interests are represented before panels by government delegations. Seen in this light … panel review is … a kind of peer review. Most parties are comfortable with this idea most of the time … it renders a panel's decision pathway more predictable".[127]

b) Nationality Restrictions

A core factor explaining why (i) most WTO panelist slots (52%) are from developing countries (even though only 32% of WTO panels had developing countries as defendants) and (ii) most ICSID arbitrators (69%) are from Western Europe or North America (even though 83% of cases are filed against developing countries, see Chart 1 above) is *nationality* requirements. WTO panelists cannot be nationals of either the disputing parties or third parties who decided to join the dispute, unless the disputing parties agree.[128] As noted earlier, the EU and the US combined represent 41.5% of all WTO consultation requests filed and filed against.[129] They are also third parties in almost all WTO disputes. This largely explains the relative absence of US and EU nationals in the WTO panelist pool as well as the prominence of developing country nationals (especially those from "smaller" developing countries that are not often involved in WTO disputes themselves such as Hong Kong, Singapore or Israel; China, for example, has copied the EU/US practice of being a third party in almost all WTO disputes). In addition, Article 8.10 of the DSU provides that if a dispute is between a developed and a developing country (this has been the case in 68% of WTO panels), if the developing country so requests, the panel must include at least one panelist from a developing country.

Under ICSID rules, arbitrators cannot have the same nationality as nor be a national of either party unless the parties agree.[130] The same rule applies when ICSID appoints arbitrators.[131] When ICSID appoints members of ad hoc annulment committees, such individuals cannot have the nationality of either party, be appointed on the List of Arbitrators by either party, nor have the same nationality as that of any of the tribunal members who decided the award sought to be annulled.[132]

The fact that few ICSID cases have been filed against Western European or North American countries (respectively, 3% and 5%) may somewhat explain why nationals of these two regions have attracted the bulk (69%) of ICSID nominations (respectively, 47% and 22%). At the same time, most claimants hail from these two regions. UNCTAD figures (which include all investor-state arbitration cases up to 2013, not just ICSID cases) show that 75% of investor-claimants have either EU-28 or US nationality (respectively, 53% and 22%).[133] Two elements probably explain why these high (claimant) numbers have not stopped EU/US nationals from being appointed. First, unlike in the WTO, before ICSID, the nationality of *individual* EU member states is considered (the EU is not a party to ICSID): a Dutch investor-claimant does not prevent the appointment of a French or British arbitrator (hence, the fact that 53% of all cases were filed by EU investors, has not stopped 47% of ICSID nominations having Western European nationality). In the WTO, the EU itself is a WTO member and takes up the litigation on behalf of all 28 member-countries, thereby excluding nationals from any of these 28 countries whenever the EU is involved as a party or third party in a WTO dispute (which, in practice, is almost every WTO dispute). Second, as pointed out earlier, given that parties in ICSID get to appoint "their own arbitrator", they have an incentive to appoint someone with a proven track record, outlook and experience that

[127] Malacrida, at 330-331.
[128] DSU Art. 8.3.
[129] WTO legal affairs data, up to end of 2014.
[130] ICSID Convention, Art. 39 and Rule 3 of Arbitration Rules.
[131] ICSID Convention, Art. 38.
[132] ICSID Convention, Art. 52(3).
[133] UNCTAD, *Recent Developments in Investor-State Dispute Settlement*, April 2014, collecting all known ISDS cases up to 2013, not just ICSID, 568 in total) show that 85% of investor-state claims were filed by investors from developed countries, 75% are investors of either the EU or the US (EU: 53%; US: 22%). US, Dutch and British investors top the list with, respectively, 127, 61 and 43 cases.

enhance their chances to prevail in the dispute. Experience and track record -- which, in practice and for partly historical reasons, often refers back to EU/US arbitrators -- are then probably more influential than nationality.

c) Remuneration

WTO panelists who are government officials do not get any compensation other than reimbursement of their expenses including a subsistence allowance or per diem.[134] Working time spent on the case is, therefore, on the clock and payroll of the government employing the panelist. For this reason, DSU Article 8.8 states that "Members shall undertake, as a general rule, to permit their officials to serve as panelists". Non-governmental panelists also see their expenses covered and in addition get a relatively small payment of 600 CHF (about 600 US$) per day. All panelist expenses and compensations, as well as the cost related to secretariat staff assisting panels, are paid out of the WTO budget. The disputing parties themselves do not pay anything other than their regular contribution to the WTO budget. All Appellate Body costs and compensations also come out of the WTO budget. ABMs are not full-time employed; they do not normally live in Geneva and most continue to do other work (academic or private sector, including, for some of them, sitting on ICSID arbitrations); their travel and subsistence (per diem) while in Geneva are paid, plus a compensation for days worked and a monthly retainer (7'000 CH/month). Since ABMs are not WTO "staff" they do not participate in the WTO pension plan.

This remuneration scheme explains a number of the differences described above. Firstly, if governmental panelists must not be paid, there may be a financial incentive for both the parties and the WTO Secretariat to appoint governmental panelists. Secondly, if panel expenses are put on the WTO (not the parties') budget, there is an incentive for the Secretariat (who appoints 64% of panels) to appoint panelists in government employment and/or relatively close to Geneva, thereby favoring governmental/Geneva-based insiders. Thirdly, 600 CHF per day for non-governmental panelists is not an attractive fee for high profile/status individuals outside of the government, especially private lawyers most of whom earn more per hour (the same is true, albeit to a lesser extent, for the compensation package of ABMs). Private lawyers may accept a panel appointment to gain the reputational experience. They are less likely to accept repeat appointments, as time spent on a WTO case cannot be dedicated to more lucrative client work. This partly explains the relatively low number of private sector appointments in the WTO (15% but trending upwards over time; 25% during 2000-2014) as well as the relatively low repetition rate (2.1 when excluding compliance proceedings, compared to 4.2 at ICSID). The same considerations may apply to academics (18% of total appointments and trending downwards over time; only 15% during the last five years) but to a lesser extent as academics tend to be less motivated by financial rewards (they have a fixed academic salary) and more sensitive to the prestige and experience they stand to gain from panel appointments.

ICSID remuneration stands in stark contrast to that of the WTO. Besides expenses, ICSID arbitrators get a compensation of 3000 US$ per day worked on the case. This is more than 4.5 times as much as what non-governmental WTO panelists get paid; governmental panelists get nothing. ICSID arbitrators make on average 200'000 US$ per case.[135] Other arbitration venues (such as the LCIA[136] or ICC[137]) pay an even higher rate or fees as a proportion of the amount in dispute. Puig claims that some arbitrators with a private law background consider ICSID work as "pro bono work" and refuse to take many cases.[138] One can only guess what these arbitrators would think of WTO panel work. In any event, ICSID remuneration rates must go some way in explaining that (i) more private sector and high prestige/status individuals are in the ICSID arbitrator pool and (ii) repetition rates in ICSID are higher than in the WTO. The remuneration difference may also explain

[134] DSU Art. 8.11. To compensate even governmental panelists somewhat, a practice has developed allowing payment of 600 CHF/day also to governmental panelists who certify that they are doing their panelist work outside normal office hours, e.g. during weekends.

[135] Puig, p. 398.

[136] London Court of International Arbitration.

[137] International Chamber of Commerce.

[138] Puig, p. 398, footnote 61.

why conflict of interest and impartiality are such hotly debated topics in ICSD but hardly discussed in the WTO: low compensation comes with low pressures to seek reappointment and low temptations to be predisposed, biased or corrupted especially when it comes to government officials who already have a stable wage and for whom appointment on a panel is "service", "no more than a compliment" [139] and being reappointed too often may, if anything, be interpreted as punishment.

d) Other Qualification Requirements

The WTO treaty also refers to a number of substantive, content-based qualification requirements for panelists other than nationality and independence.[140] The problem is that, in practice, these are not enforced and very difficult to check. Although parties are supposed to offer "compelling reasons" when objecting to nominations by the WTO Secretariat[141], it has proven hard for the latter to probe, let alone adjudicate on, the "compelling nature" of a member country objection. In practice, the Secretariat accepts any objection that is somewhat substantiated. To the extent they are influential in panel selection, these requirements underline the drafters' preference for governmental trade specialists, with some insider experience in the workings of the GATT/WTO (prior work on a panel or in the secretariat, experience as a governmental representative to the GATT/WTO). This is in line with (i) the 88% governmental background of WTO panel appointments, (ii) the generally low-key technocratic caliber of the WTO panelist pool highlighted earlier, and (iii) the fact that 57% of panelist slots have been Geneva-based diplomats. Interestingly, the WTO treaty does not require that panelists have a law degree or legal expertise and, as noted earlier, 44% did not have a law degree. At the same time, the number of lawyers appointed has increased considerably over time (69% in the last five years) and this without a change in qualification requirements. It is driven by party/WTO Secretariat preferences.[142]

ICSID also lists qualification requirements for arbitrators other than nationality and independence. They "shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance … Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators". More than in the WTO, legal expertise is stressed (though not formally required) for ICSID arbitrators. This is borne out in the numbers as 99.6% of ICSID arbitrators (compared to 56% of WTO panelists) have a law degree.[143]

e) Can the WTO/ICSID Secretariat Influence Appointment Patterns?

The WTO Secretariat not only *proposes* panelists in all disputes (for approval by the parties). It also *appoints* 64% of WTO panels (where the parties cannot agree on panel appointment[144]). Importantly, in neither case is the WTO Secretariat bound by the Indicative List of Panelists established by WTO members. On its face, this gives the WTO Secretariat considerable flexibility to pursue its own agenda both in the type or caliber of people that get appointed and in terms of repetition rates. The DG could, for example, increase his re-appointment rate and thereby

[139] In support, Costa, p. 22.

[140] DSU Art. 8.1: «Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member". DSU Art. 8.2: "Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience".

[141] DSU, Article 8.6.

[142] DSU Art. 17.3 states that « The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally". However, as noted earlier, this has not prevented that 2 of the 24 ABMs appointed to date had no law degree (although one cannot always equate a law degree with "expertise in law").

[143] But see Puig, pointing out that in the early ICSID years, a number of arbitrators were non-lawyers.

[144] Recall, however, the caveat that although 64% of panels were appointed by the DG, in some of these cases the parties may have agreed on 1 or 2 of the panelists before asking the DG to appoint the third person. No data is available on the precise number.

create a de facto semi-permanent panel system with more experienced panelists, without any reforms to the DSU. Yet, in practice, as noted earlier, Secretariat selection is heavily driven by criteria and desiderata laid out to it by the parties before proposals are made or before the DG appoints. Evidence shows nonetheless that the network of panelists appointed by the DG is somewhat tighter, with a higher reappointment rate, than that of non-DG appointments.[145] The same is true comparing panelists in Rules Division disputes to Legal Affairs Division disputes: an average Rules Division panelist sits on 2.2 cases while an average Legal Affairs Division panelist sits on only 1.7 cases. This may be explained not only by Secretariat (Rules v. Legal Affairs Division) appointment strategies, but also by the highly technical and specific nature of Rules Division disputes, namely: trade remedies (anti-dumping and countervailing duties) which is a sub-field of trade law, an area where a smaller pool of experts is available.

The possibility for ICSID to influence selection patterns is more limited. In 71% of appointments (unilateral party appointments and appointments by agreement) it has no influence whatsoever, not even in terms of proposing names (a right of initiative that the WTO Secretariat does have in each and every dispute). In addition, in the remaining 29% of cases[146], ICSID's appointing authority is limited to individuals that ICSID state parties themselves have put on the "Panel of Arbitrators".[147] Unlike the WTO Secretariat, ICSID, therefore, has a much harder time to diversify or rejuvenate its arbitrator pool: many ICSID state parties have failed to nominate or renew arbitrators on the "Panel of Arbitrators". Moreover, if state parties continue to nominate a certain type of individuals on the list, ICSID has little wiggle room to change appointment patterns. ICSID statistics indicate some effort on behalf of the ICSID secretariat to diversify the pool of ICSID appointments: whereas 26% of party-appointed adjudicators[148] are from North America, ICSID itself only appointed 11% from North America. That said, when it comes to Western Europe the difference is minimal: 48% versus 46%.[149] A similar picture emerges when considering only appointments made in 2014: ICSID allocated only 8% to North America, compared to 19% by the parties. Yet, Western Europe continues to represent 50% and 46% of, respectively, party and ICSID appointed adjudicators.[150]

2. Broader Institutional Context

There are also three broader institutional factors that play a key role in explaining the differences between WTO and ICSID appointments: (i) the existence (or not) of a second-level appeals proceeding; (ii) the role of the WTO/ICSID secretariats; (iii) the embeddedness (or not) of the tribunal in a thicker normative/bureaucratic regime or community.

a) The Existence of an Appellate Body

Absolutely key is the existence of an Appellate Body in the WTO, which is absent in ICSID proceedings. Awards by ICSID tribunals cannot be appealed, they can only be annulled by an ICSID annulment committee on largely procedural grounds such as manifestly exceeding tribunal jurisdiction, corruption or failure to state reasons.[151] The existence (or threat) of a WTO Appellate Body (considering only issues of law or legal interpretation and following a de facto rule of precedent[152]) largely explains the increasing number of lawyers on WTO panels (from only 47%

[145] The average weighted degree is higher in the DG-appointed network which means that these panelists on average sit on more cases. In other words, they are more likely to be reappointed. An average DG-appointed panelist has 3.7 ties, an average non-DG-appointed panelist has 3.3 ties. This translates into 1.85 cases per panelist for the former and 1.65 cases per panelist for the latter.

[146] 12% of them are in annulment proceedings.

[147] Only 10 are appointed by ICSID itself.

[148] ICSID, Caseload 2015-1, p. 19. Statistics, up to the end of 2014, include conciliation and annulment proceedings: 1188 party appointed.

[149] ICSID, Caseload 2015-2, p. 19: 478 ICSID appointed, of which 220 (46%) are from Western Europe; 55 (11.5%) are from North-America.

[150] Ibid., p. 31: total party-appointed: 107; ICSID appointed: 48.

[151] ICSID Convention, Art. 52.

[152] DSU Art. 17.6.

of appointments in the first five years, to 69% between 2010-2014). As Costa put it, since "the Appellate Body became the new audience to be convinced by WTO panelists", not WTO members or their diplomats (panel and AB reports are automatically adopted without veto rights), "a legal background was transformed into a valuable asset".[153] The existence of an Appellate Body may also further explain, or at least make more palatable, the relative absence of EU/US nationals on WTO panels. Both the EU and the US have a de facto reserved seat on the seven-members Appellate Body. Nationality does not prevent an ABM to sit on an Appellate Body division deciding a particular case (composed of 3 randomly-selected ABMs out of a total of 7). The US AB member can therefore hear appeals by or against the US. The fact that few EU/US nationals are on panels may thus be somewhat compensated by a prominent EU/US presence on the Appellate Body, especially if one knows that 68% of all panels get appealed[154] and the AB reverses or modifies in 84% of all appeals.[155] In addition, the existence of a permanent, more prestigious and experienced Appellate Body (four year term, renewable once) may alleviate resentment or concerns that may exist related to the relatively low level of experience and reappointment rate or prestige/status level of panelists.

In contrast, the lack of an appeals system which tends to come with more consistency and authority, may partly explain or justify repeat appointments of the same small pool of star ICSID arbitrators: through arbitrator selection, a certain level of centralization is thereby achieved organically. Indeed, from this perspective, the elite group of 15 arbitrators that, according to one study[156], was appointed on no less than 55% of all investor-state treaty disputes, can then be considered as a type of "de facto Appellate Body", not in the sense that it can directly overrule lower tribunal awards, but in the sense that, through re-appointments, this elite group can shape the case law and thereby inject at least some degree of consistency and authority into the investment regime.

b) The Role of the WTO/ICSID Secretariat

A major difference between dispute settlement at the WTO and before ICSID is that in the WTO, as directed in the WTO treaty[157], the WTO Secretariat (Legal Affairs Division or Rules Division depending on the type of case) plays an important role in the preparation, deliberation and drafting of panel reports. Each WTO panel gets attributed at least one legal officer and one staffer from an operational division focusing on the particular agreement at issue.[158] Secretariat officials provide guidance on prior case law or negotiating history or practice, explain technical or economic studies to the panelists and help craft legal outcomes (by circulating pre-hearing issues papers, proposing legal solutions, and drafting the actual reports). At ICSID, in contrast, the role of the Secretariat is largely administrative.[159] Where the ICSID Secretariat pushes its views, arbitrators push back, in one case, sharply criticizing the Secretariat for overstepping its mandate.[160]

This has four consequences for present purposes. First, the presence of a strong and highly qualified and experienced WTO legal secretariat alleviates, and makes palatable, the relative absence of lawyers on WTO panels.[161] Second, it may also alleviate, and make palatable, the

[153] Costa, p. 21.

[154] http://www.worldtradelaw.net/databases/appealcount.php, visited, 13 April 2015. This number includes compliance panels.

[155] Legal Affairs stats, up to December 2014: 81% modified, 3% reversed.

[156] Profiting from Injustice, 2012, at 38.

[157] DSU Art. 27.1 (« The Secretariat shall have the responsibility of assisting panels, especially on the legal, historical and procedural aspects of the matters dealt with, and of providing secretarial and technical support").

[158] See Nordström, Håkan, *The WTO Secretariat in a Changing World*, 39 Journal of World Trade (2005), 819–853.

[159] Many tribunals or individual arbitrators do have their own legal secretaries or clerks, however, but they are normally not part of the ICSID Secretariat.

[160] See Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Annulment Proceeding, Dissent by Professor Jan Hendrik Dalhuisen, August 2007.

[161] That secretariat lawyers may influence legal reasoning or outcomes as much as panelists may also explain why conflict of interest concerns of panelists have attracted little attention : if the secretariat anyhow decides, why focus too much

relatively low level of experience or expertise of WTO panelists. Experience or knowledge that panelists lack can be made up by Secretariat officials. Third, as pointed out earlier, competition or rivalry between panelists and a strong legal secretariat that has an important role in the selection of panelists may also temper the appointment of high-status, star adjudicators[162] and perpetuate the appointment of low-key diplomats with relatively little legal or court experience. The Secretariat may decide not to reappoint panelists that have under-performed. It may also be hesitant to reappoint panelists with strong opinions or a tendency not to follow Secretariat advice. Fourth, many secretariat officials servicing panels are themselves EU/US nationals or have been trained in EU/US countries. This may compensate, and make somewhat more acceptable, the absence of EU/US nationals on panels as such.

Importantly, the relation between "weak" panelists and a "strong" Secretariat feeds itself and goes both ways: Disputing parties may accept "weak" panelists because they know there is always the Secretariat; at the same time, repeatedly appointing "weak", inexperienced panelists, strengthens the power and importance of the Secretariat (if panelists do not have the time or resources to do the work, the Secretariat will do it) and a stronger Secretariat may, in turn, as noted earlier, be inclined to continue to appoint "weaker" panelists. Only the disputing parties themselves are likely able to break this circle by, for example, insisting on the appointment of higher caliber, more experienced panelists. The fact that they have not done so to date indicates that disputing parties are quite comfortable with the important role now played by the WTO Secretariat. However, for the long-term legitimacy of judicial decision-making at the WTO, a breaking point may be reached where the un-appointed staff in the Secretariat (as expert and conscientious as they may be) becomes "too strong", and the appointed, formal adjudicators supposed to decide WTO disputes "too weak". Going beyond that tipping point -- that is, dispute settlement generally perceived as controlled by the Secretariat, not the panelists or ABMs -- risks undermining the legitimacy and effectiveness of the entire WTO dispute settlement system.

c) Embeddednes in a Thicker Normative/Bureaucratic Regime or Community

Lest it be forgotten, the WTO does more than dispute settlement. It is also a broader negotiation and monitoring forum where trade diplomats meet on a daily basis (on average 10 meetings per day) in the guise of the WTO General Council, specialized committees or sub-committees as well as informal sessions. The WTO both makes and enforces the substantive rules. Panels and the AB meet in the same building in Geneva where trade negotiations and monitoring (trade policy review) meetings are held. Many of the panelists are trade diplomats walking the same halls before and after their panelist appointment with a different (country negotiator) hat on. Many ABMs have been trade diplomats or were stationed in Geneva in prior careers. WTO panel and AB reports have no legal value unless they are adopted by the WTO's Dispute Settlement Body (DSB), a diplomatic body on which all 160 WTO members have a seat. Although DSB adoption is virtually automatic (one single vote in favor suffices), DSB meetings are religiously attended, members provide formal feedback on reports and the DSB plays a prominent role in monitoring implementation.

ICSID, in contrast, is simply a set of arbitration rules serviced by a small number of World Bank officials based in Washington, DC. The substantive rules applied by ICSID tribunals were made outside of ICSID, in state contracts, bilateral investment treaties, NAFTA or the Energy Charter Treaty, negotiated and monitored all over the world. ICSID state parties meet only once a year, on purely institutional or procedural matters. No substantive investment treaty negotiations are held at ICSID. ICSID tribunals may meet in Washington but also often meet in Paris or elsewhere. Arbitration awards have self-standing value, no diplomatic meeting at ICSID or elsewhere needs to adopt them and no formal feedback on awards is provided.

In short, there is a genuine "WTO community" and no "ICSID community" to speak of. WTO panels and the AB are embedded in a thicker normative, bureaucratic regime part and parcel

on the impartiality of panelists/ABMs ; however, more attention should then be paid to impartiality of secretariat lawyers, an issue that also has attracted little or no attention.

[162] Costa, p. 12.

of the same organization, with two-way communication mechanisms (such as the DSB) between WTO members and the judicial branch. ICSID tribunals operate on a thin institutional platform with no substantive foundations and no diplomatic community surrounding or interacting with it on a regular basis. In the WTO, there is by definition a contract between the disputing parties, namely, the WTO treaty. In ICSID, most claimant-investors do not even have a prior contractual relationship with the host state (so-called, "arbitration without privity") as only in 19% of ICSID cases the basis of consent is an investment contract between the investor and the host state (in most other cases, the basis of consent is a treaty).[163] Yet, as noted in Part II above, both regimes decide politically sensitive, public disputes, at times on the exact same matter.

This lack of embeddedness or institutionalization of ICSID means that legitimacy must, at least in part, come from other sources, in particular, the expertise, standing, exceptional character and social cohesiveness of the individuals appointed on ICSID tribunals. Apart from arbitrators and a small, largely administrative secretariat in Washington, ICSID is not much else. As Costa put it, "in a less regulated and institutionally weaker system … a strong non-formal leadership is more necessary, since legitimacy must be asserted case by case".[164] This "demands a professional profile of arbitrators who can provide technically correct decisions and the special aura given by sanctified arbitrators".[165] Elite, frequently reappointed arbitrators must "be able to become a hard core, reinforced by high rates of social direct interactions and networks of diffusion of behavioural standards". Hence, the high prestige/status level of ICSID arbitrators (who also cumulate a broader variety of backgrounds than WTO panelists) and the closed, less evenly distributed network of frequently appointed, star arbitrators. In contrast, the more embedded and institutionalized WTO dispute settlement system "does not need such an underlying social structure".[166] It "does not need to be operated by arbitration stars".[167] In WTO dispute settlement, the legitimating process depends less on the quality of the decision makers, more on the quality of the broader system including its diplomatic context and the WTO Secretariat.[168] With the current stalemate in WTO diplomatic negotiations, however, one of the core pillars of this legitimacy is threatened.

TABLE 7: Explaining The Differences Between WTO & ICSID Adjudicators

EXPLANATORY FACTOR	WTO PANELISTS	ICSID ARBITRATORS
Who Appoints WTO: mutual agreement (36%) and WTO secretariat (64%); parties mostly repeat players ICSID: one-party appointments (54%); 27% by private investors; fewer parties are repeat players	More homogeneous, neutral (e.g. Swiss, New Zealand), fewer reappointments, easier to diversify, star adjudicators less likely	More polarized, closed network, higher reappointment rate, more experience (e.g. from EU/US) and disclosed preferences

[163] The ICSID Caseload - Statistics, Issue 2014-2, p. 10.
[164] Costa, p. 13.
[165] Costa, p. 17.
[166] Costa, p. 13.
[167] Costa, p. 17.
[168] Costa, p. 22 and at p. 24 : « the WTO system stays close to bureaucratic and formalized rational legitimacy, while investment arbitration seeks more support from charisma (maybe through the special attributes of arbitrators) and tradition (maybe from the strong links to commercial arbitration)".

Nationality restrictions No nationals of parties or third parties unless agreement WTO: EU as single party ICSID: EU not a party	Few US/EU panelists; more from developing countries/neutrals (e.g. Swiss)	More EU appointments (42%)
Remuneration WTO: low, no pay for governmental; out of WTO budget ICSID: 4.5 times higher; paid by disputing parties	More governmental, Geneva-based, lower repetition rate	More private sector, more star/experienced adjudicators
Member-Composed Roster WTO: Secretariat can appoint outside Indicative List ICSID: ICSID must appoint from roster	72% of appointments not on Indicative List; easier for WTO secretariat to diversify	Harder for ICSID secretariat to diversify
Other Qualification Requirements WTO: stress trade experience ICSID: stress legal experience	Governmental, Geneva-based, low-key technocrats, 44% non-lawyers	99.6% legal background, star adjudicators
Appeals Procedure WTO: yes (68% of panels), with EU & US de facto seat and no nationality restrictions ICSID: no (annulment only)	Increase in number of lawyers; makes few EU/US, more low-key & broader network of panelists more palatable	Smaller pool of repeat, star arbitrators to seek consistency, authority
Role of the Secretariat WTO: high, substantive, many EU/US nationals ICSID: low, administrative	Alleviates lack of lawyers, experience, expertise, EU/US panelists; bureaucratic rivalry may temper star appointments	Requires & facilitates more experienced, star arbitrators
Broader Regime WTO: embedded in broader diplomatic/law-making activity ICSID: largely stand-alone	More governmental; does not need arbitration stars, nor closed network of panelists	Needs star arbitrators, closed network to compensate

IV. POSSIBLE CONSEQUENCES AND QUESTIONS FOR FURTHER RESEARCH

Random or rationally explained (as I tried to do in Part IV above), in the end of the day, does it really matter that ICSID arbitrators are from Mars, WTO panelists are from Venus? Are adjudicators, also those on international tribunals, not simply applying the law, irrespective of their background, particular expertise, who appointed them or who else is serving on the tribunal? The idea of almost divine, neutral application of the law, with no scope for personal direction ("we

simply take the law as we found it"), may still be prominent in some quarters (including in public statements by adjudicators themselves[169]). Mounting empirical evidence shows the contrary.[170]

Waibel and Wu show that ICSID arbitrators repeatedly appointed by investors/host states are more likely to make decisions in favor of investors/host states.[171] In the ICJ context, Posner and de Figueiredo find that ICJ judges favor the appointing state and states at similar levels of development with a related political system.[172] Unilaterally (one party only) appointed arbitrators tend to issue more dissents[173] and almost invariably issue their dissent in favor of the party who appointed them.[174] When it comes to the governmental background of most WTO panelists, Voeten empirically demonstrates in the context of the European Court of Human Rights that former diplomats tend to be more supportive of national governments.[175] In the same context, Bruinsma shows that former diplomats also interpret treaty obligations imposed on governments more leniently.[176] Busch and Pelc underscore the impact of experience – or lack thereof – in the case of WTO panelists. They find that a panel ruling is far more likely to be overturned by the AB when the panel is relatively inexperienced but add that "all of the effect of judicial experience identified … is attributable to the chair of the panel … the impact of the experience of the other two panelists is statistically insignificant".[177] Reto Malacrida points at the "legitimacy-conferring" impact of WTO panels being appointed by the DG, rather than by agreement of the parties and notes that 35 DG-appointed panels (compared to only 18 party-selected panels) have been accepted without appeal.[178]

Using the various attributes described in Part III, more empirical work needs to be done on what precise impact these different characteristics may have on adjudication outcomes. Variables to be examined can include final outcome, dissents/collegiality, writing style, length or complexity/clarity of the ruling. For example, where Secretariat officials, rather than professional arbitrators or experienced panelists, draft the rulings, one may expect that the rulings tend to be longer, more detailed and complex, with more references to precedent, but often less clear and less accessible to a larger audience. Where adjudicators are less opinionated, less ideologically divided and more willing to be led by the Secretariat, one could predict fewer dissents (dissents in the WTO are, indeed, far less common than in ICSID awards).

[169] For notable exceptions, see Georges Abi-Saab, "The Appellate Body and Treaty Interpretation" in Giorgio Sacerdoti, Alan Yanovich and Jan Bohanes (eds.), The WTO at Ten: The Contribution of the Dispute Settlement System (Cambridge University Press, 2006), discussing the "judicial politics" of the AB; and Richard Posner (*The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice*. Harvard University Press, 2013, with Lee Epstein and William M. Landes).

[170] In the US context : Cass R. Sunstein, Are Judges Political? : An Empirical Analysis of the Federal Judiciary (2006). See also: Joost Pauwelyn & Manfred Elsig, *The Politics of Treaty Interpretation: Variations and Explanations Across International Tribunals*, in International Law and International Relations: Taking Stock (J. Dunoff and M. Pollack, eds.), Cambridge University Press, 2013, 445-473.

[171] Waibel and Wu, p. 39 and p. 33-34 (« arbitrators with a track record of past appointments by investors are more likely to affirm jurisdiction than the average arbitrator, and arbitrators with track record of appointments by the host country are less likely to uphold jurisdiction than the average arbitrator"). But see for nuance, Daphna Kapeliuk, The Repeat Appointment Factor: Exploring Decision Patters of Elite Arbitrators, 96 Cornell Law Review (2010) 47.

[172] Eric Posner & Miguel de Figueiredo, *Is the International Court of Justice biased?* 34 J. LEG. STUD. 599 (2005).

[173] Number of dissents by WTO panelists is, indeed, much smaller than that of ICSID arbitrators. See Albert Jan van den Berg, "Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration", in Mahnoush Arsanjani et al. (eds.), Looking to the Future: Essays on International Law in Honor of W. Michael Reisman.

[174] See Alan Redfern, "Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly," 2003 Freshfields Lecture, 20 Arb. Int'l 223 (2004); Eduardo Silva Romero, "Brèves observations sur l'opinion dissidente," in Les Arbitres Internationaux, Colloque du 4 février 2005, 8 Centre Français de Droit Comparé 179 (Soci.t. de L.gislation Compar.e 2005).

[175] Erik Voeten, *The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights*, 61 INT"L ORG. 669 (2007).

[176] Fred Bruinsma, *The Room at the Top: Separate Opinions in the Grand Chambers of the ECHR* (1998-2006), 28 RECHT DER WIRTSCHAFT 7 (2007).

[177] M. Busch & K. Pelc, Does the WTO Need A Permanent Body of Panelists, 12 JIEL (2009) at p. 589 and 590.

[178] Malacrida, at 319, footnote 13.

V. CONCLUSION

Litigants devote an inordinate amount of time and resources to researching and selecting WTO panelists and ICSID arbitrators. Even when it comes to WTO Appellate Body members, where the three division members are randomly selected, parties are known to have timed their appeals strategically so as to attract or avoid specific ABMs. Who decides matters.

Given their diverse history, goals and design features, it should be no surprise that the universe of WTO adjudicators is different from that of ICSID arbitrators. However, with the increasing convergence of, and forum shopping between, the two systems, these differences have become striking. On average, and obviously with many individual exceptions to this general rule, WTO panelists tend to be relatively low-key technocrats from developing countries (very few US/EU nationals), with a governmental background, often without a law degree or legal expertise. ICSID arbitrators, in contrast, are likely high-powered, elite private lawyers or legal academics from Western Europe or the United States. The pool of ICSID arbitrators is an ideologically polarized, closed network with a very small number of individuals attracting most nominations. The universe of WTO panelists, in contrast, is ideologically more homogeneous, with a relatively low reappointment or experience rate and nominations more evenly distributed.

That said, differences between WTO panelists and ICSID arbitrators can be rationally explained. They are not the result of some dark conspiracy, hidden from the public. Formal qualification requirements play some role, but far more important as determinants for the adjudicator pool are: (i) who appoints the adjudicators (unilateral party appointments versus neutral appointments by agreement or governing institutions); (ii) are the parties exclusively states or also private actors, (iii) is the system a stand-alone dispute settlement institution or embedded in a broader community, (iv) how are adjudicators remunerated, (v) is there an appeal's procedure, (vi) is the system supported by a strong secretariat, (vii) are there nationality limitations, how is membership defined and who is most commonly involved in disputes, (viii) must adjudicators come from a roster or can they be more freely appointed?

In sum, system features influence the adjudicator pool. The adjudicator pool, in turn, may not only determine litigation outcomes in specific disputes (a research agenda this article left largely open). The adjudicator pool also influences the system and how it is perceived, accepted or contested.

Returning to the contrast painted in the introduction – between WTO dispute settlement broadly accepted, and ISDS heavily under fire – how can one explain that a regime with adjudicators that ostensibly have less expertise and experience (WTO dispute settlement) can outshine a regime (ISDS) with, on its face, higher quality decision-makers? Differences in perception between WTO dispute settlement and ISDS are due to a multitude of factors including the content of the substantive rules and the question of who has standing to sue. Yet, part of the difference has to do with who decides the disputes. In ICSID, the high level of expertise and experience of ICSID arbitrators comes at the expense of their representativeness and impartiality. In the WTO, the average level of expertise and experience is lower but the pool of WTO panelists is more representativeness and inclusive and less ideologically divided or predisposed. In addition, lack of expertise and experience of WTO panelists is compensated by (i) a strong WTO secretariat, (ii) the existence of a standing Appellate Body (albeit, itself, composed of mainly ex-diplomats rather than experienced jurists) and, most importantly, (iii) dispute settlement deeply embedded in a broader diplomatic trade community in Geneva. ISDS is, to date, devoid of all three of these features.

As I have argued elsewhere[179], legalization of world politics is a bi-directional interaction between law and politics, not a uni-directional from-politics-to-law story. More law, compulsory dispute settlement and reduced options for countries to defect from or "exit" a regime, are made possible, and can only be sustained, in the presence of sufficient levels of politics, participation and abundant opportunities for expressing preferences or "voice". The fact that WTO panelists (i) are appointed by agreement or neutrally by the WTO Director-General who, himself, is appointed by

[179] Joost Pauwelyn, *The Transformation of World Trade*, 104 MICHIGAN LAW REVIEW (2005) 1-70.

consensus of all WTO members and (ii) are predominantly diplomats or ex-diplomats embedded in the Geneva trade community, is one way of expressing this "voice". From this perspective, WTO dispute settlement is successful not *despite* it being run by relatively inexperienced trade diplomats but *because* it is so run.

In the WTO, legitimacy flows from *within* its diplomatic, governmental surroundings.[180] The relative inexperience or lack of status of WTO panelists is compensated by the existence of an Appellate Body, a skilled Secretariat and the overall control of, and continuous interaction of adjudicators with, WTO members through WTO diplomatic channels. That explains and makes palatable the type of WTO panelists we now see. Weiler's prediction, in 2001, that WTO dispute settlement was destined to legalize further and to move away from its "diplomatic ethos" in order to gain more "external legitimation" – since "the rule of law requires the rule of lawyers"[181] – has *not*, or at best only partly, materialized. Over time, more (not less) panelist appointments have a substantial governmental background, more than half continue to be serving or former Geneva-based diplomats and around a third are serving or former ambassadors or government ministers. Over time, more WTO panelists do have a law degree and more have professional experience with a law firm, but fewer are academics and only a tiny fraction has any judicial experience in their home country. Equally, if not more, important, also when it comes to appointments on the WTO Appellate Body, the trend is in favor of "trade insiders" (former negotiators, with trade law experience and a governmental background) and against academics, former judges or individuals with a public international law background. In this way, the WTO has managed to achieve (something of a) rule of law *without* the rule of lawyers.

At the same time, this relative status quo in the diplomatic/insider ethos of WTO dispute settlement also points at its current limits and fragility. With the types of WTO adjudicators now prevailing (relatively inexperienced, serving or former diplomats), we can, indeed, detect limits as to what the WTO legal system itself can achieve, or was set up to achieve: Not an adjudicator-driven, carefully designed "constitutional" legal system with sophisticated, long-term, economics-based, but easy to read, rulings that compel rule compliance following a logic of appropriateness (the kind of system many WTO commentators including Joseph Weiler[182], John Jackson[183], Ernst-Ulrich Petersmann[184], Petros Mavroidis[185] and David Unterhalter[186] hoped for or continue calling for[187]). Instead, a relatively ad hoc, party-driven mechanism to settle disputes under the cautious control of government members, based on lengthy, often impenetrable rulings that only insiders can understand and where politically sensitive cases against big players result in diplomatic, give-and-take settlements with trade or cash compensations rather than rule compliance.[188] That may be the

[180] As Weiler (p. 193) defines « internal » sources of legitimacy, coming from «the world of the WTO itself and its principal institutional actors: the Delegates and delegations, the Secretariat, the Panels, and even the Appellate Body among others".

[181] Weiler, p. 197: "It would be nice if one could take the rule of law without the rule of lawyers. But that is not possible".

[182] See note 8 above.

[183] JOHN JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 110 (2D ED. 1997).

[184] E.U.PETERSMANN, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW, HIGHER EDUCATION PRESS (HEP) 2004.

[185] P. Mavroidis and D. Neven, *Land Rich and Cash Poor : The Reluctance of the WTO Dispute Settlement System to Entertain Economics Expertise: an Institutional Analysis* in J. Pauwelyn, M. Jansen, T. Carpenter, The Use of Economics in International Trade and Investment Disputes, CUP, 2016 (forthcoming).

[186] See Unterhalter's Farewell Speech, 2014, available at https://www.wto.org/english/tratop_e/dispu_e/unterhalterspeech_e.htm.

[187] For a different narrative of the world trade system, based on a bi-directional interaction between law and politics (not a unidirectional process of ever more legalization), see Joost Pauwelyn, *The Transformation of World Trade*, 104 MICHIGAN LAW REVIEW (2005) 1-70.

[188] See the recent US settlements in *US – Cotton* and *US – Clove Cigarettes* pursuant to which the US kept the non-conforming cotton subsidies and tobacco control measures in place and paid Brazil US$ 300 million in cash and granted unrelated trade concessions to Indonesia. See also the US-EU settlement in *EC – Hormones*. See Simon Evenett and Alejandro Jara, *Settling WTO Disputes Without Solving the Problem: Abusing Compensation*, VOX, 4 December 2014, available at http://www.voxeu.org/article/settling-wto-disputes-without-solving-problem-abusing-compensation.

secret of the WTO dispute settlement system's success so far. It may also be its relatively unambitious limits.

And today even this relatively limited normative regime stands at risk. With a larger and more diverse membership, keeping the diplomatic engine and communication channels running between negotiators/members and adjudicators, has proven increasingly difficult. Without broader diplomatic activity and some successful negotiations coming out of the WTO, WTO dispute settlement is unlikely to survive in its current guise. Also informal steering by members of the WTO judiciary through, for example, DSB comments and feedback, has stalled: there is too much diversity and disagreement amongst WTO members for the judiciary to detect guidance. If the system's internal/diplomatic sources of legitimacy continue to dwindle, the long-term survival of WTO dispute settlement is at risk unless a way is found to tap into new, complementary sources of legitimacy. That WTO political negotiations have stalled may also explain why governmental panelists or Geneva insiders continue to be appointed on WTO panels and the Appellate Body: They have more time available and, crucially, maintain the umbilical cord between the WTO legislative branch and its dispute settlement arm.

Legitimacy at ICSID comes, traditionally, from a different source: the individual neutrality, expertise and status of adjudicators.[189] Without it (for example, in case a major conflict of interest crisis were to explode), the system risks collapse. This explains why, in ICSID, arbitrator selection and identity has attracted major attention; in the WTO (with the possible exception of ABMs), it is a topic hardly discussed. Like the WTO's main source of legitimacy, ICSID's is also *internal*. But it is of an individual/adjudicator, not a collective/diplomatic, nature. The repeat appointment of a very closed group of experienced, star arbitrators, as objectionable as it may seem at first sight, can be explained by the fact that parties get to unilaterally appoint "their arbitrator" which more often than not leads a party to appoint an arbitrator with a proven track record and prior disclosed preferences (rather than a novice with no reputation amongst her peers) so as to maximize a party's chances of success. Arbitrators, in turn, accept repeat ICSID appointments since the rewards are much higher than in the WTO. The closed network of ICSID arbitrators also compensates for the absence of an Appellate Body or strong Secretariat: through arbitrator selection, a certain level of centralization (consistency and authority) is thereby achieved organically.

If ICSID's legitimacy, indeed, depends on the individual quality and impartiality of its arbitrators, the ideological divide and predisposition of arbitrators represents a serious risk. In response, many recent investment agreements have strengthened conflict of interest rules for arbitrators.[190] More broadly, 50 years ago, when ICSID was created mainly with contract disputes in mind, the model of private (commercial) arbitration, where each party gets to appoint "its arbitrator" may have been appropriate. Today, investor-state tribunals are performing a predominantly public function (more than 70% of ICSID cases are based on a treaty). Where fulfilling a public function, the model of private adjudication needs rethinking both in terms of transparency and openness to the public (on which both UNCITRAL and ICSID are making major advances) and in terms of adjudicator appointments (where doing away with party-appointed arbitrators remains, however, a taboo[191]). Instead of relying on a closed group of repeat arbitrators

[189] See Ibrahim Shihata, The Settlement of Disputes Regarding Foreign Investment: The Role of the World Bank, with Particular Reference to ICSID and MIGA, 1 American University International Law Review (1986), 97-116 at 116 (describing ICSID's value as « an effective and truly neutral forum where disputes are to be settled according to objective non-political criteria ») and Sergio Puig, Recasting ICSID's Legitimacy Debate: Towards a Goal-Based Empirical Agenda, 36 Fordham International Law Journal 465 (2013) (arguing that ICSID's legitimacy is based on its claim to offer expert, specialized and neutral settlement of investment disputes).

[190] See, for example, CETA.

[191] For an influential argument against unilaterally appointed arbitrators, see Jan Paulsson, Moral Hazard in International Dispute Resolution, 25 ICSID Review (2010), 339, at p. 352, concluding: "The only decent solution—heed this voice in the desert!—is thus that any arbitrator, no matter the size of the tribunal, should be chosen jointly or selected by a neutral body").

to achieve a modicum of consistency and predictability, a more structured appellate system is now seriously considered.[192]

Another recent trend in ISDS is that of state parties to investment treaties seeking more control and substantive oversight of investor-state arbitration, for example, by means of more carefully worded treaty provisions or annexes in response to, or copying from, past tribunal awards; ex post interpretation mechanisms or treaty-based joint commissions allowing the parties to clarify their intentions; gatekeeping or denial of benefits provisions that give some control or input back to states before or during investor-state proceedings (e.g. on taxation issues or treaty reservations or exceptions); allowing non-state parties (be it home states or third states) to submit briefs in investor-state proceedings; or, finally, instigating state-to-state arbitration so as to affect prior, parallel or future investor-state disputes.[193] This "return of the state" builds important bridges and communication channels between treaty parties and adjudicators. It is likely to thicken the institutional platform on which ICSID tribunals operate and may create the type of diplomatic culture or community that has been the foundation and major success of WTO dispute settlement.

If the above reforms materialize – more rule of law, less rule of lawyers -- the legitimacy capital of investor-state arbitration can be considerably broadened, beyond the individual neutrality, expertise and status of adjudicators where it is now concentrated.

[192] See, Anna Joubin-Bret, Why we need a global appellate mechanism for international investment law, Columbia FDI Perspectives, No. 146, April 27, 2015.

[193] See Wolfgang Alschner, The Return of the Home State and the Rise of 'Embedded' Investor-State Arbitration, in S. Lalani/ R. Polanco (eds), The Role of The State in Investor-State Arbitration (Martinus Nijhoff/BRILL, 2014), 192-218.