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

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At the twentieth anniversary of the World Trade Organization (WTO), the WTO's dispute settlement system is celebrated as one of the organization's biggest achievements.[1] Although powerful members such as China, the European Union (EU), and the United States 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.[2] Compare this situation to investor-state dispute settlement (ISDS), centered 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 fire not only in capital-importing countries ranging from Ecuador, Indonesia, and South Africa but also in capital-exporting nations such as Australia, Germany, and the United States.[3] Indeed, in the ongoing EU-U.S. negotiations over a Transatlantic Trade and Investment Partnership (TTIP), ISDS emerged as one of the biggest bones of contention.[4]

How is it that today's perception of two parallel processes involving the legalization of world politics, and on two closely related subjects 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 one part of a possible explanation: the pool of individuals deciding WTO versus ICSID disputes.

A multitude of factors could potentially account for differences in perception between WTO dispute settlement and ISDS: (1) the content of the substantive rules (the ISDS regime

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[1] *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., 2015).

[2] *See* Greg Shaffer, Manfred Elsig & Sergio Puig, *The Extensive (but Fragile) Authority of the WTO Appellate Body*, LAW & CONTEMP. PROBS. (forthcoming 2016, presenting various empirical indicators of the Appellate Body's extensive authority).

[3] For a recent critique of ISDS, see GUS VAN HARTEN, SOLD DOWN THE YANGTZE: CANADA'S LOPSIDED INVESTMENT DEAL WITH CHINA (2015). For an overview of reform proposals, see *Reform of Investor-State Dispute Settlement: In Search of a Roadmap*, TRANSNAT'L DISP. MANAGEMENT (SPECIAL ISSUE) (2014), *at* http://www.transnational-dispute-management.com/journal-browse-issues-toc.asp?key=52.

[4] *See* Christian Oliver, *Public Backlash Threatens EU Trade Deal with the US*, FIN. TIMES (Jan. 13, 2015).

is often perceived as limiting the right to regulate), (2) 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), (3) a shift in ISDS regarding *what* is being challenged (a move from contract or direct-expropriation disputes to treaty claims against public laws and regulations), (4) a shift in ISDS regarding *who* is being sued (ISDS has only recently been invoked against developed nations, especially in sensitive areas such as environmental protection and measures taken in response to the 2008 financial crisis, a trend that set off alarms with both public authorities and civil society, especially in Europe),[5] and (5) whereas WTO dispute settlement is grounded in a multilateral treaty that sets out substantive principles shared by developed and developing countries and that is carefully calibrated after decades of experiential learning under the WTO's predecessor, the General Agreement on Tariffs and Trade (GATT) of 1947,[6] ISDS is relatively new (the first treaty-based claim was accepted only in 1990)[7] and is more loosely built on a contractual/commercial agreement to arbitrate, with minimal shared substantive rules. Yet, as this article will illustrate, part of the differences in perception also have to do with who decides the disputes.[8] By focusing on individuals, their background and relationships, rather than legal norms and institutions as such, this article approaches the WTO and ISDS as legal "fields"[9] or epistemic communities,[10] not legal "orders."[11] The competition among the different actors or players in these "fields" of WTO dispute settlement and ISDS simultaneously builds, first, the market for particular legal services, with each group promoting its own mix of "symbolic capital," and second, the legitimacy of the resultant law.[12] Although the legal "orders" of international trade and investment law may be converging, the legal "fields" remain, to date, surprisingly distinct.

[5] *See* EUROPEAN COMMISSION, ONLINE PUBLIC CONSULTATION ON INVESTMENT PROTECTION AND INVESTOR-TO-STATE DISPUTE SETTLEMENT (ISDS) IN THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP AGREEMENT (TTIP) (2015), *at* http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf.

[6] *See* Manfred Elsig & Jappe Eckhardt, *The Creation of the Multilateral Trade Court: Design and Experiential Learning*, 14 WORLD TRADE REV. 13 (2015).

[7] Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award (June 27, 1990).

[8] *See Investor-State Dispute Settlement: The Arbitration Game*, ECONOMIST (Oct. 11, 2014) (describing ISDS as giving "foreign firms a special right to apply to a secretive tribunal of highly paid corporate lawyers").

[9] As coined by Pierre Bourdieu and Loïc Wacquant, and used famously by Yves Dezalay and Bryant Garth in their study on international commercial arbitration, a legal field refers to "a symbolic terrain [social space or microcosm] with its own networks, hierarchical relationships, and expertise, and more generally its own rules of the game, all of which are subject to modification over time and in relation to other fields." YVES DEZALAY & BRYANT GARTH, DEALING IN VIRTUE 16 (1996) (citing PIERRE BOURDIEU & LOÏC WACQUANT, AN INVITATION TO REFLEXIVE SOCIOLOGY 94–100 (1992)).

[10] Peter Haas defines an "epistemic community" as "a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area." Peter Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1, 3 (1992).

[11] In Bourdieu's terms, "a symbolical order of norms and doctrines [such as the institutions of the legal field] . . . does not contain within itself the principles of its own dynamic," whereas "the [legal or] juridical field itself contains the principle of its own transformation in the struggles between the objective interests associated with these different perspectives." Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 816–17 (1987).

[12] *See* DEZALAY & GARTH, *supra* note 9, at 59.

When the WTO was created, prominent observers predicted ever more, unidirectional "legalization" and an unavoidable end to the existing "diplomatic ethos" of WTO dispute settlement. In particular, in lieu of appointing diplomats or ex-diplomats to WTO panels—persons highly dependent for their work on the WTO Secretariat—more-experienced jurists would be selected. As Joseph Weiler put it in 2001:

> [P]ersistence 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. . . .
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> . . . Juridification is a package deal. It 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.[13]

This prediction did not materialize. Twenty years after the creation of the WTO, its panelists continue to be predominantly diplomats or ex-diplomats, often without law degrees and mostly with relatively little experience. Even so, WTO dispute settlement has spawned a sophisticated and well-respected jurisprudence and enjoys broad support.[14] The WTO manages to have (something of a) rule of law *without* the rule of lawyers. By contrast, ICSID arbitrators are typically high-powered, elite jurists with a much deeper level of expertise and experience than the average WTO panelist. Yet, ISDS is in a state of crisis in many parts of the world, and much of the criticism is focused precisely on who is deciding ISDS cases.[15] The investment regime is said to be governed by arbitrators, rather than states. Arbitrators are labeled as "private judges" who operate in secrecy, are biased in favor of large multinationals, have no regard for conflicts of interest, and issue inconsistent decisions.[16] 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."[17] 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.

As I have argued elsewhere,[18] legalization of world politics is a bidirectional interaction between law and politics, not a unidirectional process moving from politics to law. More law, compulsory dispute settlement, and reduced options for countries to defect from or "exit" a regime are made possible by, and can only be sustained in, the presence of sufficient levels of

[13] Joseph Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35 J. WORLD TRADE 191, 194, 197 (2001).

[14] *See supra* notes 1, 2.

[15] *See* PIA EBERHARDT & CECILIA OLIVET, CORPORATE EUROPE OBSERVATORY, PROFITING FROM INJUSTICE, HOW LAW FIRMS, ARBITRATORS AND FINANCIERS ARE FUELLING AN INVESTMENT ARBITRATION BOOM (2013), *at* http://corporateeurope.org/sites/default/files/publications/profiting-from-injustice.pdf.

[16] *See, e.g.*, Gus Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration* (Osgoode Hall Law Sch., York Univ., Comparative Research in Law & Political Economy Research Paper No. 41/2012, 2012). In a different direction, see Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L.J. 435 (2009).

[17] *See* Cecilia Malmström (@MalmstromEU), TWITTER (Mar. 18, 2015, 7:30 a.m.), *at* https://twitter.com/malmstromeu/status/578201842678640641, with reference to a longer speech: Cecilia Malmström, European Commissioner for Trade, Speech at the Discussion on Investment in TTIP at the Meeting of the International Trade Committee of the European Parliament (Mar. 18, 2015), *at* http://europa.eu/rapid/press-release_SPEECH-15-4624_en.htm.

[18] Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1 (2005).

political support, participation, and opportunities for expressing preferences or "voice." In the WTO, this voice is expressed, in part, through the organization's panelists and Appellate Body (AB) members. From this perspective, WTO dispute settlement is successful not *despite* its being run by relatively inexperienced trade diplomats but *because* it is so run.

Conversely, until recently, ISDS operated as a largely technical, depoliticized process meant to fill deficiencies and gaps in the relatively weak domestic legal institutions of less developed countries,[19] with the process dominated by outside experts—specialized, elite private lawyers or legal academics who basically formed their own closed network, to a great extent removed from politics and government oversight. But given that ISDS is now also set up for, and initiated against, developed nations such as Australia, Canada, the United States, and European countries, which already have a firmly established rule of law, and given that it now scrutinizes public laws and regulations (rather than just contracts), the legal constraints inherent in ISDS require more, not less, politics, participation, and voice by both governments and civil society.[20] In this new context, what is needed from ISDS adjudicators is not so much (or only) technical expertise and experience to fill gaps in domestic court systems, but representativeness, inclusiveness, and trust by governments and other stakeholders so as to justify ISDS's intrusion in the domestic legal process. From this perspective, ISDS is under fire not *despite* its being run by highly specialized and experienced lawyers but *because* it is so run. As the political salience of an issue increases, the importance of traditional understandings among transnational expert communities—in this case, the closed network of specialist ISDS arbitrators and lawyers—declines.[21] What used to be the terrain of subject-matter specialists operating in a relative political vacuum becomes a matter of high public interest and attention. Similar developments occurred in the fields of international financial and tax regulation following the 2008 financial crisis.[22] As Helleiner and Pagliari put it in the context of transnational financial networks such as the Basel Committee on Banking Supervision: "The very feature of the networks that had been their strength before the crisis— their carefully cultivated autonomy—now became the subject of criticism from politicians who held the unelected international committees of technocratic officials at least partially responsible for the crisis."[23] But increased political salience also tends to broaden the regulatory agenda and substantially increases the likelihood that elected officials become directly involved in negotiations, thereby enhancing the possibility of reform. This dynamic is currently at work in the EU, where the political salience of ISDS resulted in concrete, ambitious reform proposals in the context of TTIP, including the proposal to create a new Investment Court System with a Tribunal of First Instance and an Appeal Tribunal with,

[19] *See* Ibrahim Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA*, 1 ICSID REV. 1 (1986).

[20] *See* THE ROLE OF THE STATE IN INVESTOR-STATE ARBITRATION (Shaheeza Lalani & Rodrigo Polanco Lazo eds., 2014); Martins Paparinskis, *The Limits of Depoliticisation in Contemporary Investor-State Arbitration*, *in* 3 SELECT PROCEEDINGS OF THE EUROPEAN SOCIETY OF INTERNATIONAL LAW 271 (James Crawford & Sarah Nouwen eds., 2010)

[21] *See* Eric Helleiner & Stefano Pagliari, *The End of an Era in International Financial Regulation: A Postcrisis Research Agenda*, 65 INT'L ORG. 169 (2011).

[22] *See* Itai Grinberg, *Breaking BEPS: The New International Tax Diplomacy*, GEO. L.J. (forthcoming 2016) (draft available at http://ssrn.com/abstract=2652894); Itai Grinberg & Joost Pauwelyn, *The Emergence of a New International Tax Regime: The OECD's Package on Base Erosion and Profit Shifting (BEPS)*, ASIL INSIGHTS (Oct. 28, 2015).

[23] Helleiner & Pagliari, *supra* note 21, at 182.

respectively, fifteen and six "publicly appointed judges," explicitly modeled on the WTO dispute settlement system.[24] If such a system were, even partly, to materialize,[25] not only the legal "orders" but also the legal "fields" of international trade and investment law are likely to grow closer together.

Part I of this article introduces and compares the world trade and investment regimes. Part II identifies striking differences between WTO adjudicators and ICSID arbitrators in terms of nationality, professional background, legal expertise, diversity, status, and ideology. The metaphor of Mars and Venus is used here only to push the point that adjudicators are "from different planets," not to attribute specific features of Mars or Venus to either WTO or ICSID decision makers.[26] 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 explores some of the possible consequences of these differences, a full assessment of which is left for future research. Part V concludes.

The contributions that this article makes are threefold. Its first goal is empirical: based on newly collected data, to demonstrate the differences between WTO and ICSID adjudicators. A second goal is explanatory: to highlight factors that explain these differences. The third goal is to present and defend a normative thesis: on matters of high political salience, the rule of law, or legalization, at the level of public international law requires "voice" and political participation; that is, with respect to adjudicators, matters of representativeness, inclusiveness, and trust tend to be more important than individual expertise and experience (the rule of law without necessarily the rule of lawyers). This thesis predicts relative *continuity* in the pool and attributes of WTO adjudicators, and *change* in who will decide ISDS cases in the future.

I. THE WORLD TRADE AND INVESTMENT REGIMES COMPARED

At the WTO's twentieth anniversary, I collected data on WTO panelists appointed between 1995, which was the date of entry into force of the WTO regime, and the end of 2014.[27] I compared these data to information on ICSID appointments from 1972, when the first ICSID dispute was registered, to 2014.[28]

[24] European Commission Press Release, Draft Text on Investment Protection and Investment Court System in the Transatlantic Trade and Investment Partnership (TTIP) (Sept. 16, 2015), *at* http://europa.eu/rapid/press-release_MEMO-15-5652_en.htm. In support, see Joost Pauwelyn, *Why the U.S. Should Support the EU Proposal for an Investment Court System*, THE SUMMIT (Nov. 24, 2015), *at* http://thesummit.gjil.org/2015/11/why-us-should-support-eu-proposal-for.html.

[25] On December 2, 2015, the EU concluded a free trade agreement with Vietnam that formally includes the EU's Investment Court System. *See* European Commission Press Release, The EU and Vietnam Finalise Landmark Trade Deal (Dec. 2, 2015), *at* http://trade.ec.europa.eu/doclib/press/index.cfm?id=1409.

[26] See JOHN GRAY, MEN ARE FROM MARS, WOMEN ARE FROM VENUS (1992) (similarly using the metaphor to highlight the differences between men and women in terms of their needs, desires, and behaviors) versus ROBERT KAGAN, OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER (2003) (attributing to the United States features of Mars, god of war, identified with realism or a Hobbesian world ruled by force, and comparing Europe to Venus, goddess of love, identified with idealism or a Kantian world governed by law and institutions).

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

[28] In total, 502 cases, 94 percent of which were registered in the last twenty years; 396 individuals; 1666 appointments.

WTO and ICSID are clearly different but also in some respects comparable. The two regimes developed largely independently, serve different objectives, and have different design features.[29] 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.[30] The ICSID Convention, by contrast, merely sets out institutional rules for settling investment disputes;[31] the substantive rules on cross-border investment protection and liberalization are found mainly in close to 2300 bilateral investment treaties (BITs), many of which include binding consent to ICSID arbitration for settling 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 among several forums (besides, in particular, arbitration under United Nations Commission on International Trade Law (UNCITRAL) rules hosted, for example, by the Permanent Court of Arbitration)—offers private standing to companies and individual investors, but lacks appellate review. ICSID awards are nevertheless subject to review by ad hoc annulment committees, albeit on limited procedural grounds. The jurisdiction of WTO panels is based on a multilateral treaty, that of ICSID arbitrators on contracts (including consent to arbitration expressed in an investor's notice of arbitration) between private investors and host states.

Differences between WTO and ICSID adjudicators are therefore to be expected. Today, however, these regimes are converging. One and the same law or governmental conduct can increasingly be challenged through either 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.[32]

At least three trends explain this convergence. First, from a business perspective, trade and investment operations are increasingly bundled together,[33] especially in so-called global supply

[29] *Compare* Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1 (2005), *with* 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 REV. 372 (2014).

[30] Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 UNTS 154.

[31] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Art. 52, Mar. 18, 1965, 17 UST 1270, 575 UNTS 159 [hereinafter ICSID Convention], *in* International Centre for Settlement of Investment Disputes, Convention, Regulations and Rules, ICSID Doc. ICSID/15 (Apr. 10, 2006).

[32] Australia's law has been challenged by five WTO members in WTO dispute settlement (see Ukraine in WT/DS434; Honduras, WT/DS435; Dominican Republic, WT/DS441; Cuba, WT/DS458; Indonesia, WT/DS467) and also by Philip Morris (Asia) under the Hong Kong–Australia bilateral investment agreement, Agreement Between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments, *opened for signature*, Sept. 15, 1993, 1748 UNTS 385, pursuant to UNCITRAL arbitration rules. *See* Notice of Arbitration (Nov. 21, 2011), *at* https://www.ag.gov.au/Internationalrelations/InternationalLaw/Documents/Philip%20Morris%20Asia%20Limited%20Notice%20of%20Arbitration%2021%20November%202011.pdf. UNCITRAL arbitrators in this case are Karl-Heinz Böckstiegel (president), Gabrielle Kaufmann-Kohler, and Donald M. McRae (all professors). WTO panelists are Alexander Erwin (chairman), François Dessemontet, and Billie Miller. For more examples, see Sergio Puig, *The Merging of International Trade and Investment Law*, 33 BERKELEY J. INT'L L. 1 (2015).

[33] 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.

chains in which different components of a finished product are produced in different countries, thereby requiring both trade and investment across these countries.[34] Second, in terms of substantive disciplines, trade and investment commitments increasingly overlap. Think of national treatment, the prohibition of certain performance requirements, or the protection of intellectual property rights, all of which are 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 and continues in today's so-called mega-regionals: TTIP, the Canada-EU Comprehensive Economic and Trade Agreement, and the Trans-Pacific Partnership. 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.[35] 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, by contrast, has somewhat "privatized": although state-to-state only, private actors are, in many cases, pulling the strings and paying private law firms to do the litigation, before whatever forum or forums are best for the client: in some cases, it may be the WTO; in others, investor-state arbitration; in yet others, parallel proceedings.[36]

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 remain and can well be questioned. These matters transcend purely academic debate. *Who* decides—as much as what law applies—can guide forum choice, influence or even effectively determine litigation outcomes, and undercut the longer-term legitimacy and future of international trade and investment law. Legitimacy, for present purposes, is understood as "a quality that leads people (or states) to accept authority—independent of coercion, self-interest, or rational persuasion—because of a general sense that the authority is justified."[37] The legitimacy of ISDS or WTO dispute settlement can be approached or defined normatively (that is, does it "*have* the right to rule" based on presumably objective criteria such as valid consent to jurisdiction or compliance with other rules that are part of the system) or sociologically (that is, is the system "*believed* to have the right to rule," implying a subjective/empirical determination of whether a particular constituency or audience accepts the authority of a tribunal or believes this authority to be justified).[38] This article focuses on sociological

[34] Richard Baldwin, *21st Century Regionalism: Filling the Gap Between 21st Century Trade and 20th Century Trade Rules* (Centre for Economic Policy Research, Policy Insight No. 56, 2011), *at* https://ideas.repec.org/p/zbw/wtowps/ersd201108.html.

[35] Pursuant to some investment agreements, investor-state arbitrators are explicitly called upon to consider WTO treaty provisions (for example, when stating that compulsory licensing in line with the Agreement on Trade-Related Aspects of Intellectual Property Rights does not amount to compensable expropriation). Similarly, under the WTO treaty itself—for example, the most-favored-nation requirement in the General Agreement on Trade in Services—WTO panelists may have to take cognizance of a BIT. One and the same treaty provision may thus be interpreted by ICSID and 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 EUR. J. INT'L L. 749 (2009).

[36] *See* GREGORY SHAFFER, DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION (2003).

[37] Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?* 93 AJIL 596, 600 (1999); *see also* THOMAS FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990); Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 GEO. WASH. INT'L L. REV. 107, 115 (2009).

[38] *See* Nienke Grossman, *Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?*, 12 CHI. J. INT'L L. 647, 651 (2012).

legitimacy among both "insiders" that are part of the WTO/ICSID expert community and "outsiders," including parliaments, civil society, and the public at large.[39]

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 being 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.[40] Here, as well, lessons can be learned through a comparison of WTO and ICSID adjudicators.[41]

II. Are Investment Arbitrators from Mars, Trade Adjudicators from Venus?

Both WTO panels and ICSID tribunals typically comprise three individuals, all appointed ad hoc. As recently as 2013, Mavroidis wrote, "Paradoxically, there is little known about the identity of the WTO judges."[42] Based on an increasing number of empirical studies in the field, however, six major differences between WTO panelists and ICSID arbitrators have emerged. As noted earlier, the metaphor of Mars and Venus is used here only to push the point that adjudicators are "from different planets," not to attribute specific features of Mars or Venus to either WTO or ICSID decision makers. The data collected for this article (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[43] and the 251 appointed as WTO panelists, the overlap is minimal; only nine individuals are included in both groups.[44] This number amounts to only 2.3 percent of ICSID, and 3.6 percent of WTO, adjudicators. Strikingly, although the two regimes have more recently been converging, no evidence suggests any marked increase in the overlap over time: four overlaps occurred in the first ten years of the WTO, and five in the second ten years, with only one in the last five years. Notably, WTO Appellate Body members figure prominently in this overlap: three of the nine overlaps between WTO panelists and ICSID arbitrators have also served on the WTO AB; another five AB members subsequently served as ICSID arbitrators (but never served as WTO panelists), increasing the total of WTO-ICSID overlaps to fourteen (see Table 1 below). Indeed, of the

[39] *See* Weiler, *supra* note 13, at 193 (describing "insiders," or what he calls "internal sources of legitimacy," as "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"; compared to outsiders or external sources of legitimacy, which he describes as "the 'Real World' of States and their constitutional organs such as Parliaments, Governments and Courts as well as the world of multinational corporations, of NGOs, of the media and of citizens").

[40] *See supra* notes 5, 24.

[41] Some go as far as proposing to "move the ICSID into the WTO." Gary Hufbauer & Tyler Moran, *Investment and Trade Regimes Conjoined: Economic Facts & Regulatory Frameworks* 6 (July 2015) (on file with author).

[42] Petros Mavroidis, *Selecting the WTO Judges*, *in* WTO Litigation, Investment and Commercial Arbitration: Cross-fertilization and Reciprocal Opportunities 103, 103 (Jorge Huerta-Goldman, Antoine Romanetti & Franz Stirnimann eds., 2013).

[43] ICSID arbitrators are those nominated in pending and concluded cases (note that the list provided by ISCID includes both arbitrators and conciliators, though the number of conciliation procedures is extremely low: 9 out of 502). International Centre for Settlement of Investment Disputes, *Arbitrators, Conciliators and ad Hoc Committee Members*, *at* https://icsid.worldbank.org/apps/ICSIDWEB/arbitrators/Pages/CVSearch.aspx?gE=cases&cases=all; WTO panelists are those who have served on completed panels, *see* http://www.worldtradelaw.net/databases/panelists.php), or on ongoing disputes, *see* http://www.worldtradelaw.net/static.php?type=dsc&page=currentcases.

[44] Only 2 of these 9, Gonzalo Biggs and Donald McRae, were appointed to WTO panels more than once.

TABLE 1
TWO DIFFERENT PLANETS: OVERLAPPING WTO-ICSID APPOINTMENTS

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

[a] Excluding compliance proceedings.
[b] Claus-Dieter Ehlermann was not listed in the ICSID database as an arbitrator who served on a case. Although he was appointed in a case, he resigned and was replaced by Georges Abi-Saab.

twenty-five WTO AB members appointed in the first twenty years of the WTO, ten (40 percent)[45] have also served on investor-state tribunals (be it ICSID or UNCITRAL).[46] In all but one of these ten cases,[47] the overlap occurred *after* 2000. Therefore, if there is any recent trend of overlap, it is the appointment of former or serving AB members as ISDS arbitrators.

Nationality: Euro-American (ICSID) Versus Developing Countries (WTO)

Based on 1468 arbitrator appointments (spread across a total of 396 different individuals) in ICSID (including annulment proceedings),[48] Sergio Puig finds that the United States, France, and the United Kingdom—in that order, and by quite a stretch over other

[45] Abi-Saab, Bacchus, Baptista, Ehlermann, Feliciano, Janow, Lacarte, Ramirez, Sacerdoti, and Taniguchi (Bacchus and Lacarte under UNCITRAL, the others under ICSID). In *Comparing WTO Panelists and ICSID Arbitrators: The Creation of International Legal Fields*, 1 OÑATI SOCIO-LEGAL SERIES 1, 14 (2011), José Augusto Fontoura Costa also lists David Unterhalter as having been appointed as an ICSID arbitrator. The ICSID website does not include that appointment under ICSID, but Unterhalter is a well-known International Chamber of Commerce arbitrator. In addition, Seung Wha Chang has served as an arbitrator in commercial, but not investor-state, arbitration. Thus, if one includes commercial arbitration, the overlap is twelve out of twenty-five (or 48 percent).

[46] In eight out of ten cases, the ICSID appointments were subsequent to their WTO appointments. Only Feliciano and Baptisa served ICSID before serving the WTO.

[47] Feliciano overlapped in 1995.

[48] Sergio Puig, *Social Capital in the Arbitration Market*, 25 EUR. J. INT'L L. 387, 403 (2014) (ICSID-only appointments between 1972, year of the first ICSID dispute, and February 2014).

countries—top the ICSID nationality list. Taken together, these three countries represent close to one-third of all appointments.[49] Statistics by ICSID itself find that 43 percent of all arbitrator appointments were EU-28 nationals.[50] Updated to the end of 2014, 47 percent were from "western Europe" and 22 percent from "North America" (Canada, Mexico, United States)—a staggering 69 percent combined. "South America" is a distant third with 11 percent of appointments.[51] Waibel and Wu (using data up to 2011) find that, even though 95 percent of ICSID cases are filed against developing countries,[52] only 34 percent of all ICSID arbitrators in their data set are from developing countries.[53] The data gathered for this article, updated to 2014, indicate that 83 percent of all ICSID cases were filed against developing countries (as this group of countries is understood in the WTO).[54] By contrast, only 50 percent of ICSID arbitrators and less than 30 percent of ICSID appointments[55] are developing-country nationals.[56]

The situation is different in the WTO. Looking at 603 WTO panelist slots spread across a total of 251 different individuals (including panel appointments in compliance proceedings), one finds only fourteen U.S., one French, and six UK panelist appointments—which is less than 3.5 percent,[57] compared to nearly 32 percent in ICSID.[58] Only 2.3 percent (fourteen) of WTO panelist nominations were U.S. nationals, and 11.9 percent (seventy-two) EU-28 nationals.[59] Combined, these WTO figures represent a meager 14.2 percent, compared to

[49] *Id.* at 406 (11.5, 11, and 9.4 percent, respectively). Canada is a relatively distant fourth with 7.57 percent.

[50] World Bank, *The ICSID Caseload: Statistics (Special Focus—European Union)* 24 (April 2015), *at* https://icsid.worldbank.org/apps/icsidweb/resources/pages/icsid-caseload-statistics.aspx.

[51] World Bank, *The ICSID Caseload: Statistics (Issue 2015-1)* (2015) (as of December 31, 2014), *at* https://icsid.worldbank.org/apps/icsidweb/resources/pages/icsid-caseload-statistics.aspx; *see also* EBERHARDT & OLIVET, *supra* note 15, at 8: "Just 15 arbitrators, nearly all from Europe, the United States or Canada, have decided 55 percent of all known investment-treaty disputes."

[52] UNCTAD statistics, presented in its *Recent Trends in IIAs and ISDS* (Feb. 2015) (collecting all known ISDS cases from 1987 to 2014, not just ICSID cases, 608 in total), *at* http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf, show that 72 percent of all known investor-state arbitration cases were filed against developing countries or economies in transition. Only 28 percent of defendant countries were "developed," but this number has been rising in recent years. In 2013, for example, almost half of all known cases, 27 of 57, were filed against developed countries (especially the EU), and in 2014, 40 percent were filed against developed countries.

[53] Michael Waibel & Yanhui Wu, Are Arbitrators Political? 27 (2012), *at* http://www.wipol.uni-bonn.de/lehrveranstaltungen-1/lawecon-workshop/archive/dateien/waibelwinter11-12 (data set includes 388 cases, between 1972 and 2011, and 341 arbitrations).

[54] World Bank, *Country and Lending Groups* (2015), *at* http://data.worldbank.org/about/country-and-lending-groups.

[55] The number of developing country ICSID appointments is below 30 percent since, according to ICSID statistics, 69 percent of appointments are from western Europe or North America, and 5.6 percent from Australia (49) or New Zealand (44). Note, however, that people with more than one nationality have been counted twice (Donald McRae, for example, is counted as from both Canada and New Zealand), with the consequence that the total number of developed-country appointments may be inflated.

[56] For the number of ICSID cases filed against developing-countries, see ICSID case database at https://icsid.worldbank.org/apps/ICSIDWEB/cases/. For the number of developing-country arbitrators, see ICSID arbitrator database at https://icsid.worldbank.org/apps/ICSIDWEB/arbitrators/.

[57] These numbers amount to 2.3 percent, 0.16 percent, and 1 percent, respectively.

[58] *See supra* note 49.

[59] Of these seventy-two "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 fifty-eight of the seventy-two appointments went to EU-15 countries (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, United Kingdom).

53.5 percent in ICSID, even though 41.5 percent of all WTO complaints are either filed by or filed against either the EU or United States.[60]

By contrast, as presented in Figure 1, 52 percent[61] of WTO panelist positions are nationals from countries considered in the WTO as "developing"[62] (compared to less than 30 percent of ICSID appointments), even though the WTO has far fewer cases against developing countries (32 percent)[63] than does ICSID (83 percent). Put in another way, far more cases are filed against developing countries in ICSID than in the WTO (83 percent versus 32 percent, respectively), but the percentage of developing-country appointments in ICSID is considerably smaller than in the WTO (30 percent versus 52 percent).

When using not the broad WTO definition of "developing countries" but World Bank country classifications,[64] the contrast is not nearly as stark: 63.8 percent of WTO panelist appointments are nationals of high-income economies,[65] 26 percent of upper-middle-income economies, 10 percent of lower-middle-income economies, and only one appointment from a low-income economy (see Figure 2). The 63.8 percent high-income-economy appointments is considerably higher than the 48 percent 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 percent of appointments are from developing countries as the WTO defines them, only 36 percent are from middle- or low-income countries as defined by the World Bank. Developed WTO members[66] may therefore "tolerate" a situation in which a high percentage of developing-country panelists (52 percent) decide their disputes; many of these panelists (31.3 percent)[67] actually come from high-income developing countries.

In this new light, the 63.8 percent of high-income-economy panelist slots offers an interesting match with the fact that roughly 60 percent of all WTO cases are filed by and against high-income

[60] World Trade Organization, *WTO Dispute Settlement: A Statistical Overview: January 1995 to 31 December 2014* (2015). This number includes all WTO consultation requests, some of which did not lead to a WTO panel.

[61] This percentage represents 313 out of 603.

[62] All nationalities of the panelists are considered to be "developing" except Australia, Austria, Belgium, Bulgaria, Canada, Czech Republic, Finland, France, Hungary, Ireland, Italy, Japan, Germany, Iceland, Netherlands, New Zealand, Norway, Poland, Portugal, Slovenia, Sweden, Switzerland, United Kingdom, and United States. Although Bulgaria and Hungary are classified as "upper-middle-income economies" in the World Bank's regional system, we consider them "developed" because 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.

[63] Sixty-eight percent of WTO panels were cases against developed countries, and 59 percent of those cases were filed by developed countries. Note that in a good number of the cases filed by developed countries, the co-complainants may include developing countries. It is often the case, however, 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, gathering the factual evidence, and formulating and presenting the legal argument 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 percent of WTO panel cases involved at least one developing country, and 91 percent involved at least one developed country.

[64] World Bank, *Country and Lending Groups*, *supra* note 54.

[65] Taiwan is not listed as a separate country for the World Bank's World Development Indicators, but its data were added to the world aggregate and the high-income countries aggregate by the World Bank. *See* World Bank, *Data: Where Are Your Data on Taiwan?*, *at* https://datahelpdesk.worldbank.org/knowledgebase/articles/114933-where-are-your-data-on-taiwan. For the purpose of this article, Taiwan is included in the category "high-income economies."

[66] They are defendants in 68 percent of WTO panels, and the United States and the EU are defendants in 41.5 percent of all WTO consultation requests.

[67] This percentage represents 16.3 percent of the total number of panelists.

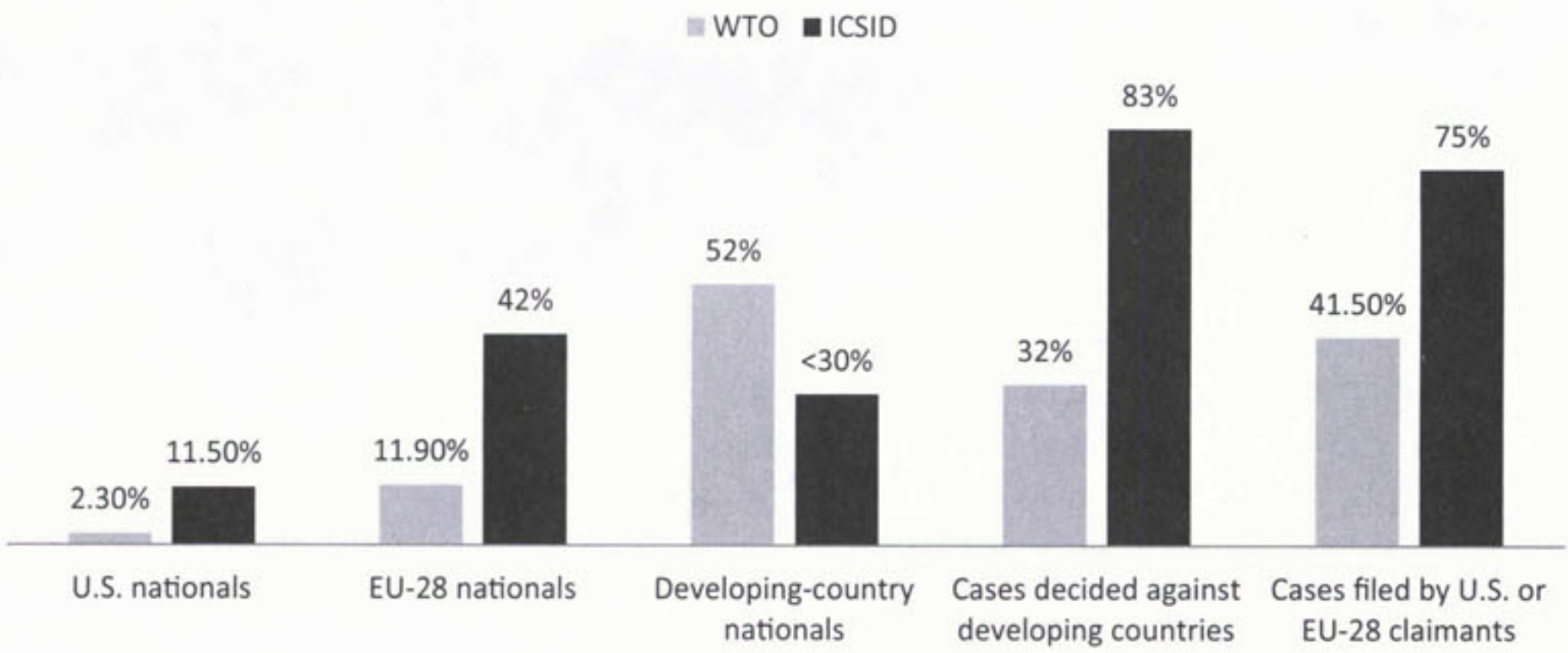

FIGURE 1. Nationality of ICSID versus WTO appointments.

economies.[68] Put differently, although there are surprisingly many developing-country panelist appointments (52 percent) compared to the number of panels against developing countries (32 percent), there is a much closer match between the percentage of high-income panelist appointments and the percentage of WTO cases filed by and against high-income economies.

The WTO nationality list (considering EU member states individually) is topped by New Zealand (55), followed by Australia (46) and Switzerland (44).

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 position. Even members of the WTO AB, appointed for a once-renewable fixed term of four years, are employed part time and paid for 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 AB members) to 863 ICSID arbitration nominations (including ad hoc annulment committee members).[69] Distinguishing between government service,[70] academia,[71] and private sector (especially law firms), and realizing that one person may have a background in all three, Costa finds that a staggering 80 percent of WTO panelists have a government background.[72] The data gathered for this article (1995–2014) go even further: 88 percent of WTO panelists have a substantial government background,[73] and 57 percent of panelists were at some point in their careers Geneva-based diplomats. Only 15 percent of WTO panelists have substantial experience in private law

[68] Sixty-one percent of complainants, and 58 percent of defendants. *See* http://www.worldtradelaw.net/databases/classificationcount.php (as of January 23, 2015).

[69] Costa, *supra* note 45.

[70] *Id.* at 10. Costa defines "governmental service" as including employment for any branch of government (diplomats, plus the executive, judicial, and legislative branches) but excluding advisory or consultancy services to states.

[71] *Id.* Costa defines "academic" as "work as professor, dean, president, coordinator, lecturer or tenured researcher in universities or research institutes."

[72] *Id.* at 17, 21 ("their share of the population seems to have stabilized at around 80 percent"). Costa also finds that only 19 percent are from the private sector.

[73] Minimum three years in government as diplomats, negotiators, bureaucrats, ministers, and so on.

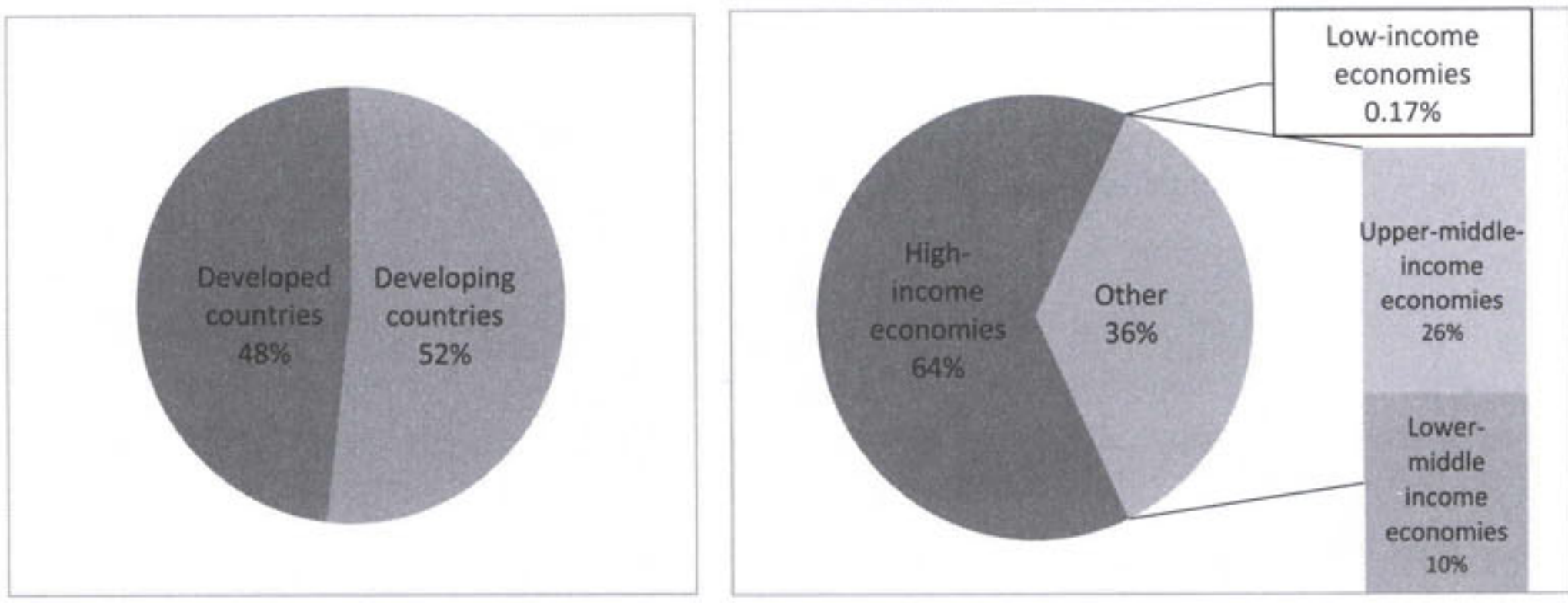

FIGURE 2. WTO panelist appointments by country classification.

firms;[74] only 18 percent have academic backgrounds;[75] and a mere 3 percent have judicial experience in their home countries (see Table 2). Even considering the twenty-five WTO AB members appointed to date (1995–2014), 72 percent (eighteen) were formerly in the service of one of the WTO member governments (the seven who never worked for a government were academics or former international civil servants).

In ICSID, by contrast, Costa finds that the most common background is private sector (76 percent), followed by academia and, in third place, government service.[76] Waibel and Wu's data set shows that 63 percent of ICSID arbitrators are full-time practitioners with law firms and that 26 percent are full-time academics.[77] Moreover, multiple or combined backgrounds are considerably more common in ICSID than in the WTO. According to Costa, individuals on ICSID tribunals averaged participation in 2.0 of the three fields, compared to 1.3 for WTO panelist.[78] Ninety percent[79] of ICSID tribunals combine the three professional links among the three arbitrators.[80]

Costa does not detect significant changes over time in the background of ICSID arbitrators.[81] Equally striking is that, over time, the percentage of WTO panelist appointments with a government background has remained stable; if anything, it has slightly increased, from 87 percent in 1995–99, to 90 percent in 2010–14. By contrast, the percentage of panelist appointments with a private law background has increased considerably, from only 9 percent to 25 percent in the same two time periods. Conversely, as time passed, fewer academics have been appointed to WTO panels (from 22 percent to 15 percent). The number of panelists that are past or present judges in their home countries has remained consistently low, between 2 percent and 4 percent.[82]

[74] Minimum three years of experience with a law firm either before or after the WTO appointment.
[75] Tenured or tenure-track academic appointment at a university—that is, full-time academics.
[76] Costa, *supra* note 45, at 23.
[77] Waibel & Wu, *supra* note 53, at 27.
[78] Costa, *supra* note 45, at 19. Our updated data put the figure for WTO panelists at 1.24.
[79] Ninety-five percent from 2005 to 2009.
[80] Costa, *supra* note 45.
[81] *Id.*
[82] If anything, the last five years provide the lowest proportion: 2.31 percent.

TABLE 2
PROFESSIONAL BACKGROUND OF WTO PANELIST APPOINTMENTS

	Substantial government background	Geneva-based diplomat	Academic background	Private law background	Judge in home country
1995–99	87%	65%	22%	9%	2%
2000–04	85%	53%	20%	14%	3%
2005–09	91%	60%	12%	15%	4%
2010–14	90%	52%	15%	25%	2%
1999–2014	88%	57%	18%	15%	3%

Looking at WTO AB membership (see Figure 3), a drop in government background can be seen as of 2000 (dropping from six to five), with a low point in 2007 (two only). Since 2007, however, the number of AB members with a former government affiliation has moved back up to six (out of seven).

Legal Expertise: Required (ICSID) Versus Optional (WTO)

Although both ICSID and WTO dispute settlement are law-based proceedings, where increasingly complex procedural and substantive legal questions need to be answered, Costa finds that 45 percent of WTO panelists (1995–2009) have no legal background.[83] Updated data (1995–2014) show that slightly more panelist appointments—but still only 56 percent—have law degrees (see Table 3). Even on the WTO AB, three of the twenty-five members appointed to date (12 percent) have no law degree. Only four of the twenty-five had any prior court experience as judges. By contrast, based on Costa's data, 99.6 percent of ICSID arbitrators have law degrees.

Interestingly, the percentage of WTO panelists with legal backgrounds has been slowly increasing: from 47 percent in the first five years (1995–99), to 69 percent in the last five years (2009–14). Moreover, in recent years the number of panels without at least one lawyer serving on them is close to zero.[84] That said, given that the percentage of panelists in government service has remained stable (at around 88 percent), the increase in lawyers on WTO panels has mainly come from diplomats or government officials with law degrees.[85] Especially in this light, having a law degree is only a rough proxy for up-to-date and fine-tuned legal expertise. The legal credentials of a diplomat 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 among WTO panelists).

Diversity: Closed Network (ICSID) Versus More Evenly Distributed (WTO)

The pool or network of ICSID arbitrators is more closed than that of WTO panelists, and has a much higher repetition rate (that is, the average number of cases that each individual has

[83] Costa, *supra* note 45, at 15 ("no links to any legal background or professional activity").

[84] Reto Malacrida, *WTO Panel Composition: Searching Far and Wide for Administrators of World Trade Justice*, *in* A HISTORY OF LAW AND LAWYERS IN THE GATT/WTO 311, 322 (Gabrielle Marceau ed., 2015) ("panels invariably include at least one lawyer").

[85] 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, by contrast, has decreased.

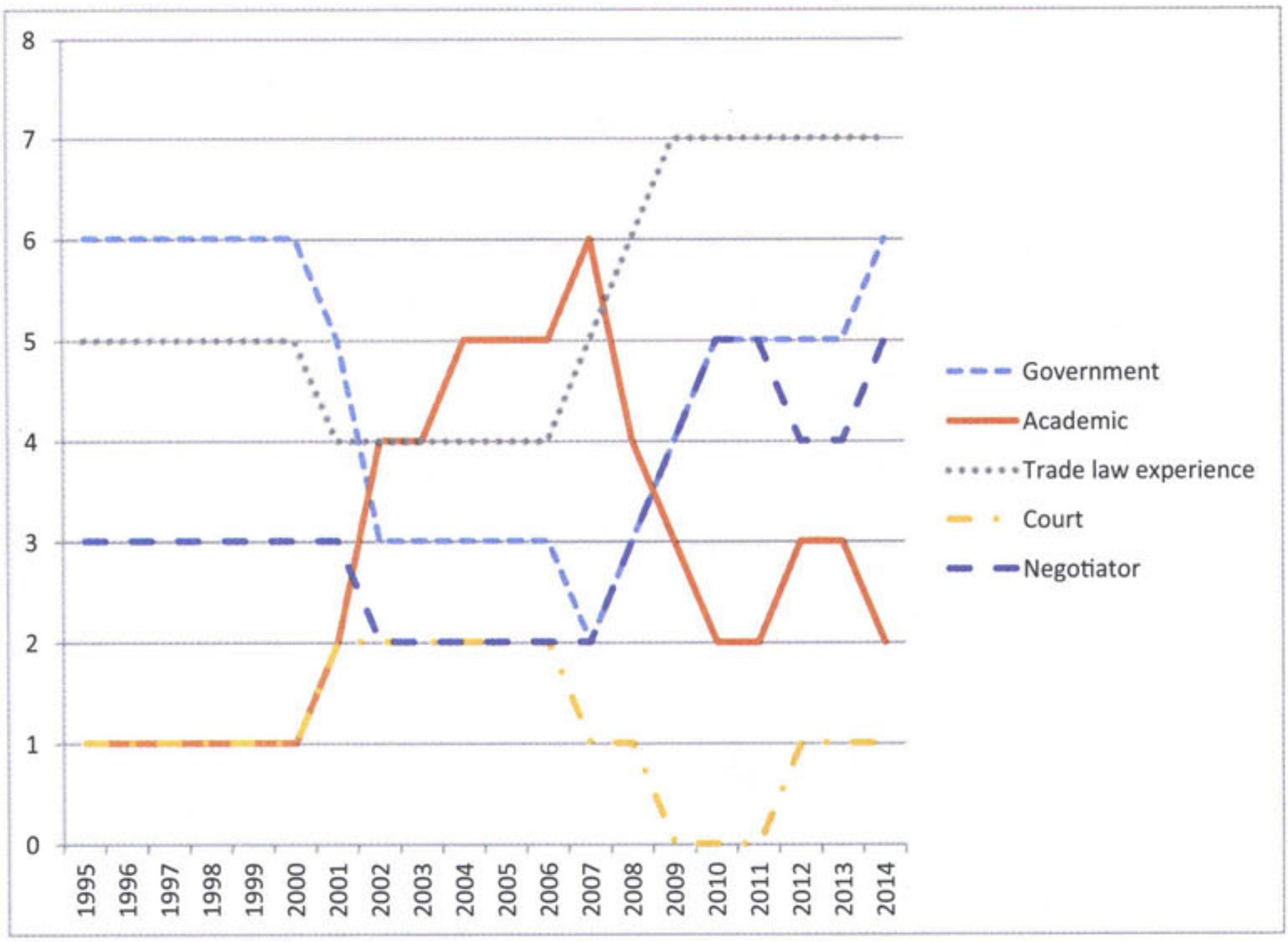

FIGURE 3. Professional experience of the seven serving WTO Appellate Body members during the first twenty years of the WTO.

served on). Costa's data (1995–2009) show a repetition rate of 3.2 for ICSID arbitrators and only 2.0 for WTO panelists.[86] Updated data for WTO panelists put the repetition rate at 2.4.[87] Excluding appointments in compliance proceedings, however—which, by default, are the same three panelists as those who served on the original panel[88]—the repetition rate drops to 2.1. Updated data for ICSID appointments[89] show an even higher repetition rate than that found by Costa: 4.2.[90] 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, in both ICSID and the WTO, around half of adjudicators served only once: 56 percent[91] of ICSID arbitrators are "single shooters"[92] and 54 percent of WTO panelists.[93]

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

[87] The 603 appointments have gone to 251 individuals.

[88] *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 21.5, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, *supra* note 30, Annex 2, 1869 UNTS 401 [hereinafter DSU].

[89] The 1666 appointments have gone to 396 individuals.

[90] See *The ICSID Caseload: Statistics (Issue 2015-1)*, *supra* note 51, at 20, for the total number of appointments.

[91] Using the data from Puig's study, *supra* note 48, 235 of 419.

[92] *Id.* at 419. Puig defines "single shooters" as arbitrators who have three or fewer "ties" with other arbitrators—that is, who have served ICSID with three or fewer different individuals (serving on one tribunal, as it is composed of three individuals, gives a person two ties; if one of these is subsequently replaced, an additional tie is created).

[93] Using Puig's definition of "single shooters," 136 of 251, or 54.2 percent, of WTO panelists have three or fewer "ties" with other panelists. Defining single shooters as having only two ties gives 43 percent in ICSID; 50.2 percent in the WTO. If one does not count ties, but rather number of panels served on, 46.2 percent (116 out of 251) served

TABLE 3
LEGAL BACKGROUND OF WTO PANELIST APPOINTMENTS

Appointment period	With a law degree
1995–99	47%
2000–04	52%
2005–09	61%
2010–14	69%
1999–2014	56%

Repeat players 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):[94] many individuals have one or few appointments, and an elite group of individuals have many.

The "small-world properties" of both the WTO and ICSID adjudicator network are illustrated in Figures 4 and 5. They plot the proportion of adjudicators (vertical axis; where, for example, 0.5 represents 50 percent 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 two individuals on the tribunal/panel (unless the individuals already served together on a previous dispute). As Figure 4 shows, in the WTO, for example, 54 percent[95] of adjudicators have ties with three or fewer other adjudicators; eighteen panelists (7 percent of the network) have attracted ten or more ties; and only two individuals (0.8 percent of the network) have the maximum number of seventeen ties. In the ICSID network (Figure 5, using Puig's data), the "tail" is even longer: 56 percent of those in the network have three or fewer ties, and 8 percent—or 33 of the 419 arbitrators, whom Puig refers to as "power brokers"—have twenty or more ties. Another study finds that fifteen elite arbitrators were appointed in no less than 55 percent[96] of all investor-state treaty disputes.[97] At least one of these fifteen was appointed in 64 percent of the disputes with at least U.S.$100 million at stake. Updated data confirm 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[98] (56 percent) than WTO panelists (54 percent); the logical inference is that fewer ICSID arbitrators attract more of ICSID appointments.

In the WTO, the distribution of appointments is, indeed, more even.[99] Of a total of 603 appointments, not one person attracted more than ten appointments (see Table 4), and only three individuals were appointed ten times (1.7 percent of appointments): Michael Cartland, Crawford Falconer, and Claudia Orozco. Excluding appointments in compliance proceedings, Orozco and Enie Neri de Ross top the list with nine appointments. The top ten WTO

on one WTO panel only. If one excludes compliance panels as a second panel served on, 53 percent of WTO panelists served on only one case.

[94] An accessible explanation of heavy-tailed distributions can be found at https://en.wikipedia.org/wiki/Heavy-tailed_distribution.

[95] The number is 136 of 251 arbitrators.

[96] The number is 247 of 450 disputes.

[97] EBERHARDT & OLIVET, *supra* note 15, at 38.

[98] Defined as having three or fewer ties.

[99] Excluding compliance proceedings: panelists with one appointment, 53 percent; with two to five, 43 percent; and with six to ten, 4 percent.

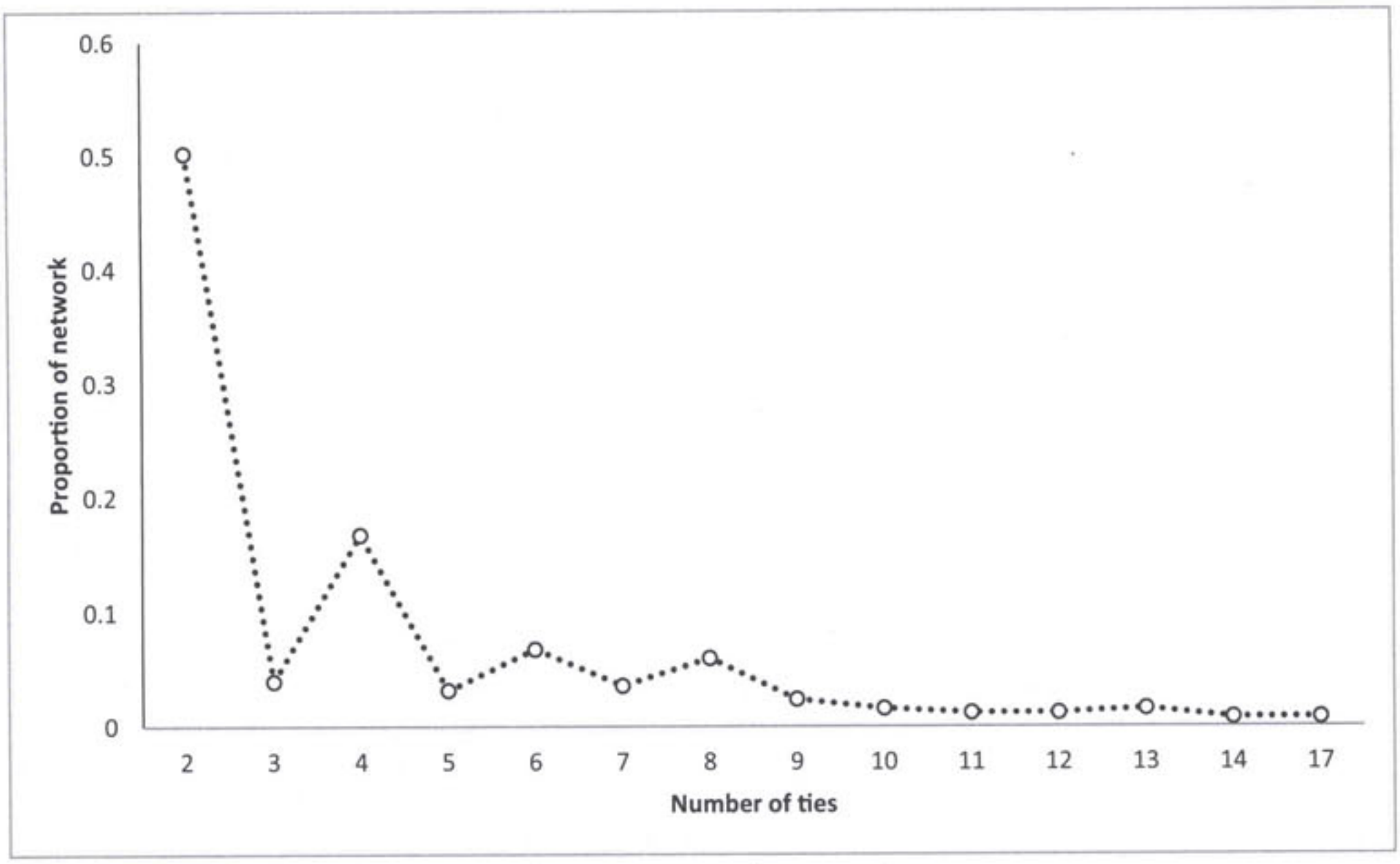

FIGURE 4. Degree/ties distribution of the WTO panelist network.

panelists attract a total of 14.4 percent[100] of appointments. Excluding compliance proceedings, the proportion is even lower, at 12.8 percent. In ICSID, by contrast, a 2012 study finds that the top ten arbitrators represent 20 percent[101] of all appointments, with the number one arbitrator (Brigitte Stern of France) attracting thirty-nine appointments (2.9 percent). Updated to the end of 2014, Stern has been appointed fifty-seven times (3.4 percent), compared to Cartland's ten WTO appointments (1.7 percent).[102] In other words, the top ICSID arbitrator has a percentage share of total appointments that is exactly double that of the top WTO panelist. Table 4 shows the top fifteen WTO panelists by number of appointments: nine of them are from developing countries; four are women; and all fifteen have a substantial government background.

In both systems, 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 practice increases the level of experience of adjudicators and may also enhance consistency. It can also lead to criticisms, however, that the networks are closed and elitist. That said, the phenomenon—and the resulting, skewed distribution of adjudicators in the network—is much more pronounced in ICSID than in the WTO.

The higher diversity of WTO panelists versus ICSID arbitrators is also apparent in the relative proportions of women: 15.6 percent in the WTO,[103] versus 7 percent in ICSID.[104] Making matters worse, in ICSID, two women (Brigitte Stern and Gabrielle Kaufmann-Kohler)

[100] The number is 87 of 603 appointments.

[101] The number is 270 of 1350 appointments.

[102] EBERHARDT & OLIVET, *supra* note 15, at 38. See also Costa, *supra* note 45, at 11, finding that a group of only twelve arbitrators (4.4 percent) of the ICSID population accounts for about a quarter of nominations, whereas seventeen WTO panelists (7.65 percent) correspond to the same quartile.

[103] The number is 94 of 603 appointments.

[104] Puig, *supra* note 48, at 404–05.

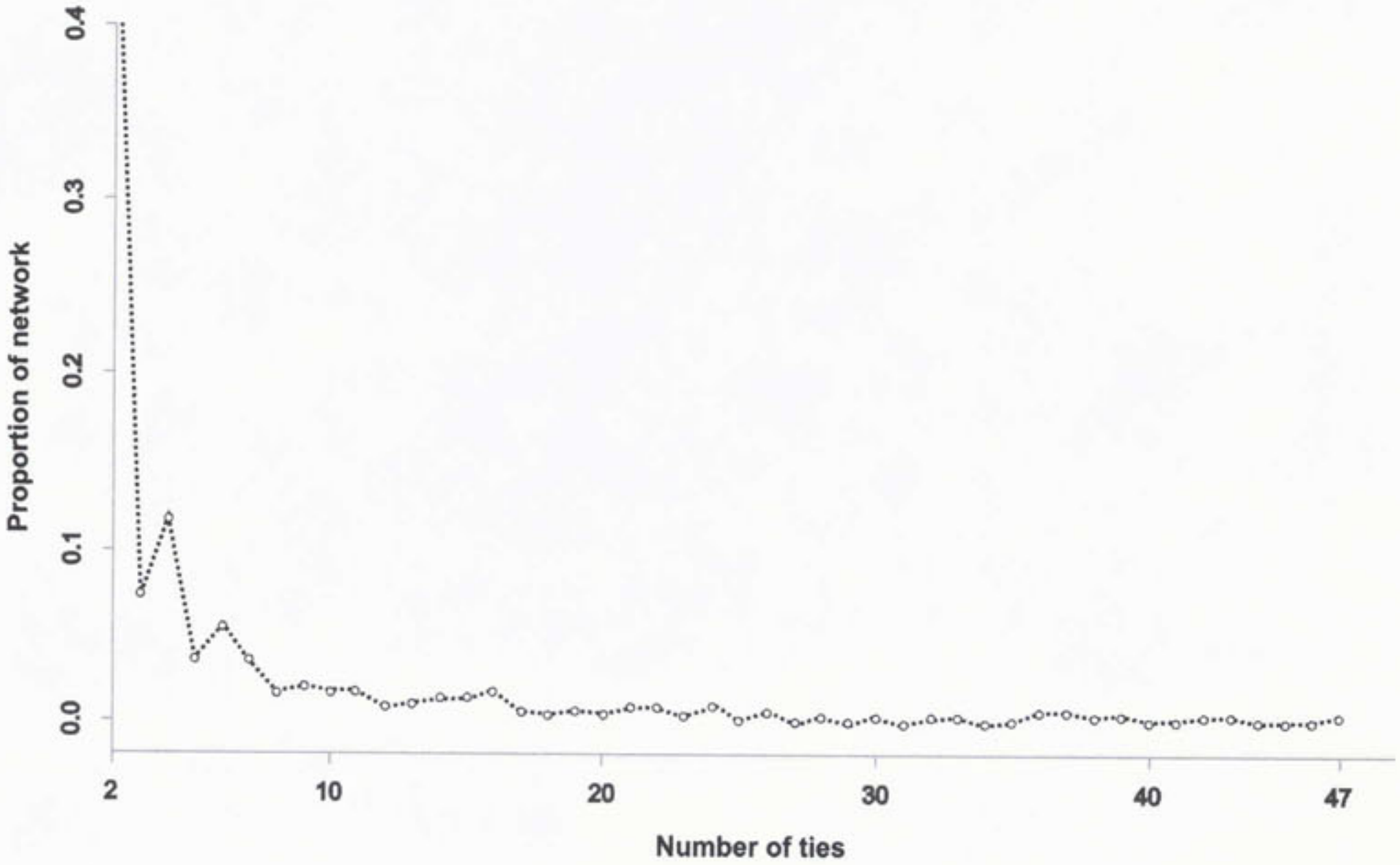

FIGURE 5. Degree/ties distribution of the ICSID network. Reproduced, with permission, from Sergio Puig, *Social Capital in the Arbitration Market*, 25 EUR. J. INT'L L. 387, 421 (2014).

attracted three-fourths of all female appointments; in the WTO, the top two women attracted only 20 percent of all female appointments.

Status: "Star Arbitrators" (ICSID) Versus "Faceless Diplomats" (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 diplomats. This is, of course, a generalization, with many and notable exceptions. Writing in 2001, Weiler (a prominent legal academic who has himself been twice appointed a 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.[105] 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."[106] When it comes to WTO panelists, Weiler may be somewhat more diplomatic but remains as critical,[107] as have other commentators. Mavroidis, writing in 2013, notes that

[105] Weiler, *supra* note 13, at 201–02.

[106] *Id.* at 197 (emphasis added).

[107] *Id.* at 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.").

TABLE 4
RANKING OF WTO PANELISTS (TOP 15) BY NUMBER OF APPOINTMENTS

	Panelist	Number of appointments	Share of total	Cumulative share of total (as one moves down list)	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

> 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.[108]

The data gathered for this article confirm that 88 percent of WTO panelist appointments have a substantial government background, a number that has gone up—not down—over time (from 87 percent in 1995–99 to 90 percent in 2010–14; see Table 2). In addition, 57 percent 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 percent in the earlier period to 52 percent in the later (see Table 5). 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 such as ambassadors or government ministers. This proportion has slightly receded, however, from 37 percent in 1995–99 to 35 percent in 2010–14.

Manfred Elsig and Mark Pollack provide what is ultimately a similar account of recent, 2006–11 WTO AB nominations, backed up by interviews and other evidence. They find that if the first wave of AB appointments "demonstrates a concern for the eminence and expertise of the candidates,"[109] the third wave (2006–11) "favored candidates with non-controversial positions and those who had been careful in the past not to make enemies in Geneva," with

[108] Mavroidis, *supra* note 42, at 103.

[109] Manfred Elsig & Mark Pollack, *Agents, Trustees, and International Courts: The Politics of Judicial Appointment at the World Trade Organization*, 20 EUR. J. INT'L REL. 391, 404 (2014).

TABLE 5
WTO PANELIST APPOINTMENTS: GENEVA-BASED AND HIGH POLITICAL FUNCTION

Appointment period	Geneva-based diplomat	High political function
1995–99	65%	37%
2000–04	53%	30%
2005–09	60%	35%
2010–14	52%	35%
1999–2014	57%	34%

representatives of WTO members limiting their support to "candidates whose views were not too distant from their own."[110] One successful candidate is reported to have said that "if you want to become [an AB member], I would advise against writing on the subject matter."[111]

The overall reputation or individual prestige level of ICSID arbitrators stands, once again, in stark contrast (notwithstanding, as noted above, the many exceptions to this generalization, going both ways). Puig refers to ICSID arbitrators as "Grand Old Men" and "Formidable Women," "exceptional professionals," and a "small group of socially prominent actors."[112] Waibel and Wu claim that 30 percent of individuals appointed as ICSID arbitrators (336 observations) are "graduates from elite law schools" (for the purposes of their list: Cambridge, Harvard, Oxford, Stanford, and Yale).[113] Costa likewise concludes that "the social *status* associated with the [ICSID] arbitrators is higher than that of panelists,"[114] adding that "the arbitrators' *star system* is very different from the bureaucratic profiles of most of the WTO's panelists."[115]

To the extent that ICSID arbitrators get criticized, it is not for being "faceless bureaucrats." On the contrary, they get referred to as "elite lawyers,"[116] "ambitious investment lawyer[s] keen to make a lucrative living,"[117] a "mafia,"[118] "super arbitrators" who are "not just the mafia but a smaller, inner mafia,"[119] 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").[120]

The distinction between WTO and ISCID adjudicators can be supported empirically. Eighty-eight percent of WTO panelist appointments have a government background, mostly working (or having worked) for diplomatic missions or trade bureaucracies (57 percent have

[110] *Id.* at 407.
[111] *Id.* at 408.
[112] Puig, *supra* note 48, at 407, 419, 423.
[113] Waibel & Wu, *supra* note 53, at 28.
[114] Costa, *supra* note 45, at 20.
[115] *Id.* at 24.
[116] EBERHARDT & OLIVET, *supra* note 15, at 35.
[117] *Id.* at 36 (citing Gus Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration*, 50 OSGOODE HALL L.J. 211 (2012)).
[118] *Id.* at 36 (citing Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 CORNELL L. REV. 47, 77 (2010)).
[119] Alyx Barker, *Taking on the "Inner Mafia,"* GLOBAL ARB. REV., Oct. 2, 2012.
[120] EBERHARDT & OLIVET, *supra* note 15, at 43. Even though WTO panelists who are government officials representing WTO members on other occasions 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.

been Geneva-based diplomats). Although they may excel in what they do,[121] they are, by profession, mostly technocrats or political appointees operating in large bureaucracies, where team play and policy, rather than individualism and honed legal skills, are valued. By contrast, ICSID arbitrators generally come from more egocentric, star-driven professions—private law practice, legal academia—where individual performance, reputation, and legal craftsmanship are key factors in advancement.

In support of their claim of "increasing politicization of the [Appellate Body] selection process,"[122] 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)."[123] Updated statistics on AB membership show (see Figure 3) that, even though the proportion of AB members with government background and trade law/negotiator experience had temporarily dipped, this trend has more recently (as of 2007) been reversed, with more members having government background or trade law/negotiator experience, and fewer with academic or court experience. The average age—and thus years of experience—increased during the 1995–2000 period (starting at 65.4 years and peaking at 69.5). Thereafter, a downward trend can be detected, with a low of 57.1 years in 2012. In 2014, average age stands at 59.6 years.

Perhaps the most striking piece of evidence in support of the "higher status" of ICSID arbitrators versus WTO panelists is the trend in WTO-ICSID overlaps discussed earlier. As summarized in Table 1 above, of the fifteen individuals who served as adjudicators in both ICSID and the WTO, no fewer than eight served on the WTO AB.[124] If we also include UNCITRAL appointments, ten of the (to date) twenty-five AB members have served in investor-state arbitration. Most tellingly for present purposes, eight of those ten AB members served on the AB first and were appointed as arbitrators only *after* their AB appointments (the exceptions are Feliciano and Baptista, who had been ICSID arbitrators before they were appointed to the AB). In other words, nomination on the AB seems to be an asset to start arbitrating investment disputes. By contrast, few of the top ICSID arbitrators were subsequently appointed as WTO panelists (the only exception is Francesco 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."[125]

Ideology: Partisan (ICSID) Versus Relatively Nonpartisan (WTO)

A last, but arguably the most striking, difference is that ICSID arbitrators tend to be divided into two groups: many have either a "pro-investor" reputation or a "pro-state" outlook.[126] As discussed below, ICSID arbitrators can be appointed by the investor, host state, agreement of

[121] For example, 34 percent of WTO appointments have been ambassadors or government ministers.

[122] Elsig & Pollack, *supra* note 109, at 394.

[123] *Id.* at 402.

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

[125] Costa, *supra* note 45, at 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").

[126] Puig, *supra* note 48, at 413 (including Figure 5); Waibel & Wu, *supra* note 53, at 7, 21–23. A smaller number of arbitrators profile themselves as presidents, with a more neutral position.

the parties, or ICSID itself. Of the forty-five most frequently appointed ICSID arbitrators,[127] twenty-two (49 percent) have been appointed 50 percent or more of the time by either investors or host states. Sixteen (36 percent) were appointed by either investors or host states more than 70 percent of the time. Only fifteen (33 percent) were appointed "neutrally" (by agreement of the parties or by ICSID itself) 50 percent or more of the time. As a result, a third group of more "neutral" arbitrators can be identified (often appointed as tribunal presidents). Yet, even within this group of "neutrals," all but three have been appointed twice as much by one side (investors or host states) as by the other; only three were appointed in equal numbers by investors and host states.[128] The same is true for the remaining eight arbitrators, who were not, for 50 percent or more of the time, appointed by investors, by host states, or neutrally. Only one of those eight attracted the same number of appointments by investors and host states.[129] For all the others, the percentage difference in appointments by investors versus host states was 8 percent or more, and for four of those eight arbitrators, the difference was more than 20 percent. As a result, all but four of the top forty-five ICSID arbitrators, have been appointed considerably more often by investors than host states, or vice versa.[130] If investors and states had variably been claimants and defendants, there would be nothing unusual about being appointed predominantly by one side or the other. In ISDS, however, investors are consistently claimants (arguing for broad investor rights), and host states invariably defendants (arguing for broad regulatory authority).

By contrast, the pool of WTO panelists is much less polarized or partisan. Few individuals have been or can be identified as either pro-trade or protectionist. Even if private trade-law firms tend to divide along these lines (firms working predominantly for exporters versus those working for domestic industries seeking trade protection), this same division is not common among WTO panelists. If anything, given their government backgrounds, which are mostly in trade ministries, WTO panelists tend to look favorably at trade but within the limits of political expediency. Generally speaking, they are not strongly partisan or ideological, but trade specialists steeped in practical policy experience and thereby sensitive to the need for policy space in favor of their government-employers.

Figures 6 and 7 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 6 represents developing-country panelists in red, developed-country panelists in black, and U.S. panelists in green. The picture shows that (1) the network of WTO panelists is relatively decentralized,[131] (2) a large proportion of panelists (including some of the most central figures) are from developing countries (red dots), and (3) few WTO panelists (only nine) and not a single central figure are U.S. nationals. Figure 7 adds names to each of the dots and zooms in on the individuals most central in the network. In Figure 7, lines between individuals are also

[127] Eight or more appointments, excluding appointments on ad hoc annulment committees.

[128] Yves Derains, Gilbert Guillaume, and V. V. Veeder.

[129] Alexis Mourre, who is also the only person of the forty-five top arbitrators who was appointed in equal numbers by investors (four), host states (four) and neutrally (four).

[130] For a more detailed discussion of these numbers, see Sergio Puig, *Blinding International Justice* (on file with author).

[131] Compare to Figure 1, representing the ICSID network, in Puig, *supra* note 48, at 411, where the dots are centralized much more toward the middle.

TABLE 6
INVESTMENT ARBITRATORS ARE FROM MARS, TRADE PANELISTS FROM VENUS

	WTO PANELISTS	ICSID ARBITRATORS
Nationality	52% developing countries 63.8% high-income economies	69% western Europe or North America
Background	88% governmental service	76% private practice
Expertise	44% nonlawyers	99.6% lawyers
Diversity	"Relatively High" 2.1 repetition rate[a] 54% single shooters Top 10 = 14.4% of appointments Most appointments: 10, or 1.7% Women = 15.6%	"Low" 4.2 repetition rate 56% single shooters Top 10 = 20% of appointments Most appointments: 57, or 3.4% Women = 7%
Status	"Faceless diplomats"	"Star arbitrators"
Ideology	Homogeneous	Polarized

[a] Excluding compliance proceedings.

thicker as they have more ties between them (that is, the more that two individuals sit on the same panels, the thicker the line between them). Individuals with a government background are in red, and those without such a background are in black. The figure illustrates that most WTO panelists, including those with most ties (appointments) and most central in the network (the largest dots), have a government background. The lines between the most central individuals also tend to be thicker (that is, they have sat on more than one panel together).

III. RATIONALIZING THE DIFFERENCES BETWEEN WTO ADJUDICATORS AND ICSID ARBITRATORS

Why is it that, on average, WTO panelists tend to be relatively low-key diplomats from developing countries (very few U.S./EU nationals), with a government background, and 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 divided, closed network with a small number of individuals attracting most nominations, whereas the universe of WTO panelists is ideologically more homogeneous, with a relatively low reappointment rate and nominations more evenly distributed (with the consequence that panelists, on average, have relatively little experience)?

Some of these differences are easily explained, but others are more subtle. Below I focus on two sets of explanatory factors: (1) appointment rules and conditions, and (2) broader institutional context.[132] These differences are summarized in Table 7.

[132] These factors do not explain everything. Other explanations may play a role, too—for example, the type of work of, and skills generally required from, WTO versus ICSID adjudicators. Given that all claims under the WTO treaty automatically fall under the compulsory jurisdiction of the DSU, whereas consent to ICSID jurisdiction must be found case-by-case in the relevant BIT or contract, ICSID disputes generally involve more procedural matters. The importance of such legal matters may partly explain why more lawyers, including private lawyers and legal academics, are appointed to ICSID tribunals than to WTO panels. The latter focus more on substantive trade questions, which are typically limited to the four corners of the WTO treaty (not public international law or domestic law, as is more often the case in ISDS)—questions that government officials with trade expertise can more easily handle.

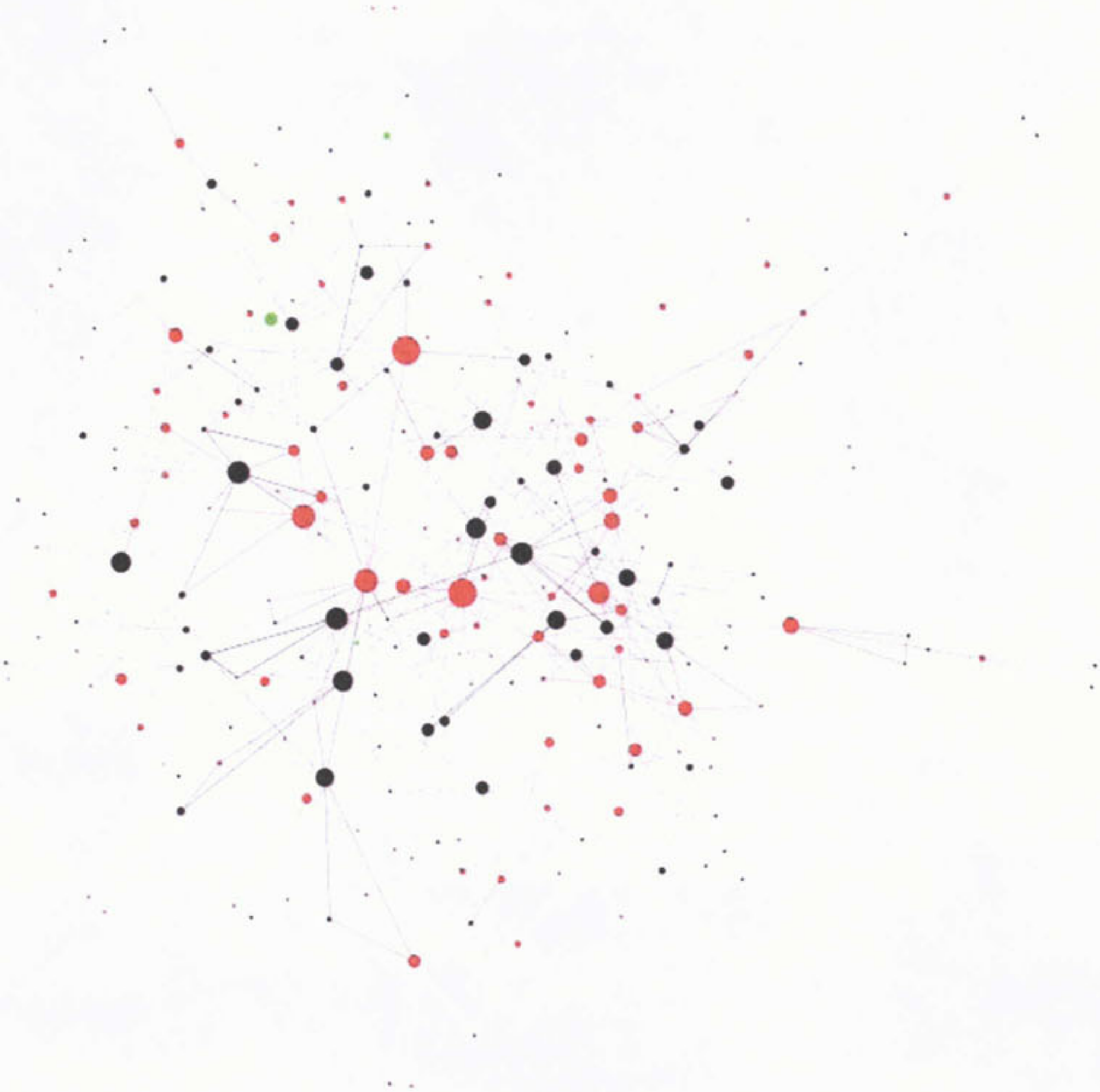

FIGURE 6. The network of WTO panelists (1995–2014). Red = developing-country nationals. Black = developed-country nationals. Green = U.S. nationals.

Appointment Rules and Conditions

Who appoints? The core factor explaining many of the differences resides in *who appoints* the adjudicators. In the WTO, no party is able to unilaterally appoint "its panelist." The WTO Secretariat (Legal Affairs or Rules Division, depending on the type of dispute) *proposes* candidates. Candidates are appointed only if *both parties* agree. At that stage, each party has a veto right.[133] Only if no mutual agreement can be found will the WTO Secretariat (formally, the WTO director-general (DG)) *appoint* panelists.[134] The number of panels composed by the DG (hence, without the mutual agreement of the parties) has steadily increased over time. Of

[133] Formally, secretariat proposals can be rejected only for "compelling reasons." DSU, *supra* note 88, Art. 8.6. Yet, in practice, this authority to reject has amounted to a de facto veto right, and without much probing as to the exact reason for the objection.

[134] *Id.*, Art. 8.7 (if so asked by either party, at least twenty days after the panel was established). A panelist proposed by the secretariat but rejected by one of the parties is traditionally not subsequently appointed by the DG.

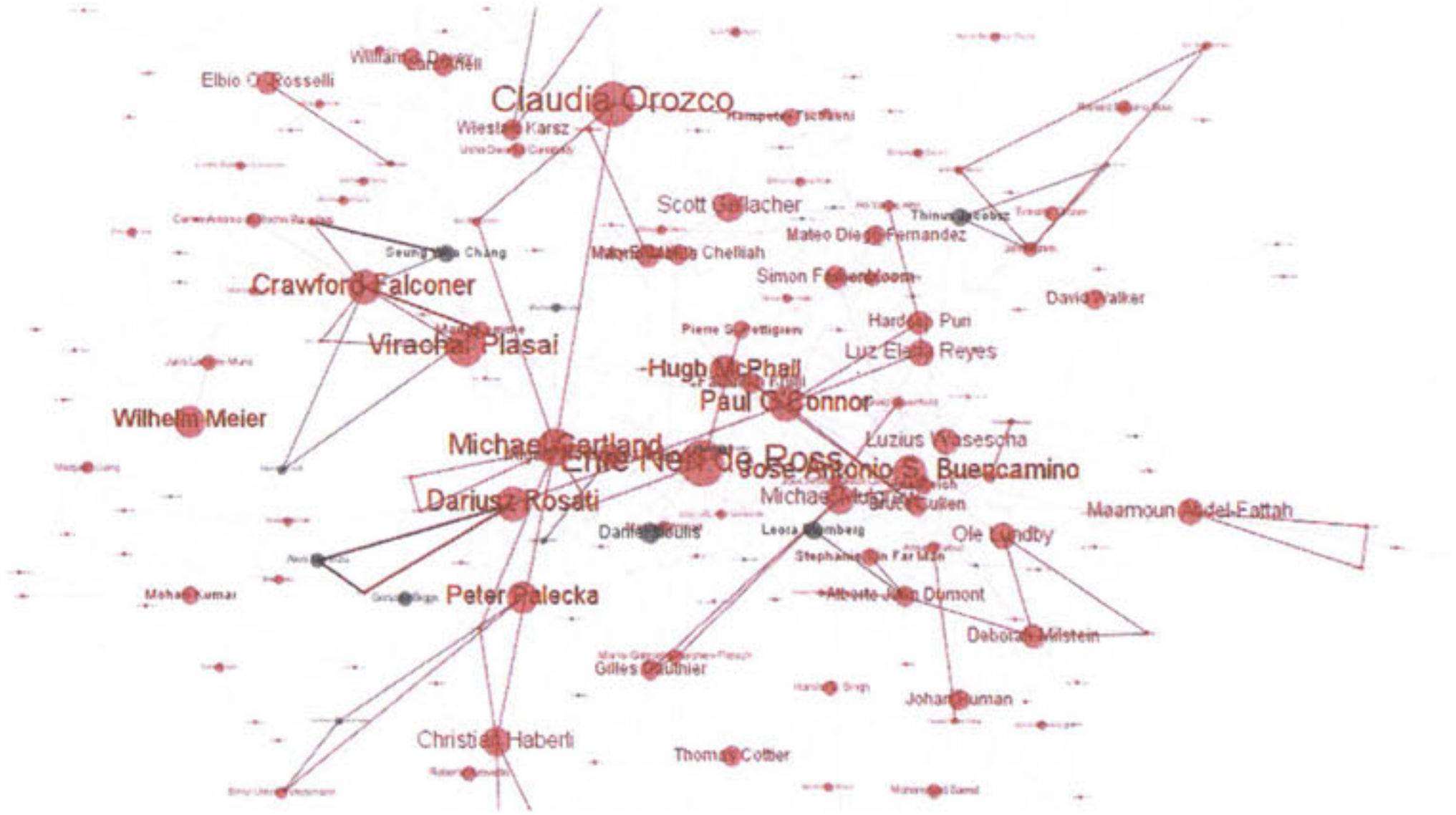

FIGURE 7. The network of WTO panelists (1995–2014). Red = governmental background.

all panels composed between 1995 and 2014, 64 percent were appointed by the DG[135] (who is appointed by a consensus of all WTO members). This figure, however, requires further interpretation. Even when the parties may have agreed on one or two panelists but cannot agree on the remaining slot(s), the entire panel is considered to have been formally appointed by the DG. Hence, the 64 percent of *panels* appointed by the DG significantly overstates the proportion of *panelist slots* about which the parties disagreed.[136]

Before the WTO Secretariat proposes candidates or the DG appoints panelists, the desiderata of the parties are heard and carefully taken into account. The secretariat and DG certainly have some freedom to propose and appoint, but this freedom is curtailed by the wishes (and before the DG is asked to appoint, the veto right) of the parties.[137] The secretariat does maintain an "indicative list" of potential panelists, to which any WTO member can add a limitless number of names (subject to consensus approval by the WTO Dispute Settlement Body (DSB), but no proposal has, to date, been rejected). But inclusion on the indicative list is not a prerequisite for being appointed (even by the DG) as a WTO panelist. Strikingly, 63 percent of panelist appointments were *not* from the indicative list,[138] and only 18 percent of those on the indicative list have actually served on WTO panels.[139]

By contrast, under ICSID rules, each party is able to appoint its own arbitrator.[140] The opposing party cannot object, other than on grounds of conflict of interest or manifest lack

[135] DG appointments in 129 out of 201 cases.

[136] *WTO Dispute Settlement: A Statistical Overview*, *supra* note 60.

[137] Malacrida, *supra* note 84, at 314 ("the Secretariat never proposes candidates until after it has consulted with the parties on the desired profile of any candidates"), 317 ("It is widely under-appreciated just how prominently the parties' preferences feature at the DG-stage.").

[138] Of the 603 appointments, 381 were not from the list.

[139] Of the 382 on the list, 70 have served. The 382 figure comes from the latest version of the indicative list available in 2014. *See Indicative List of Governmental and Non-governmental Panelists*, WT/DSB/44/Rev.29 (Nov. 21, 2014).

[140] ICSID Convention, *supra* note 31, Art. 37(2)(b).

TABLE 7
EXPLAINING THE DIFFERENCES BETWEEN WTO AND 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., New Zealand, Swiss); fewer reappointments; easier to diversify; star djudicators less likely	More polarized; closed network; higher reappointment rate; more experience (e.g., from EU/U.S.) and disclosed preferences
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 and star/ experienced adjudicators
Member-composed roster **WTO:** secretariat can appoint outside indicative list **ICSID:** ICSID must appoint from roster	63% of appointments not on indicative list; easier for WTO Secretariat to diversify	Harder for ICSID Secretariat to diversify
Other qualification requirements **WTO:** stress on trade experience **ICSID:** stress on legal experience	Governmental, Geneva-based, low-key diplomats; 44% nonlawyers	99.6% legal background; star adjudicators
Appeals procedure **WTO:** yes (68% of panels), with no nationality restrictions and EU & U.S. de facto holding seats on Appellate Body **ICSID:** no (annulment only)	Increase in number of lawyers; few EU/U.S.; more low-key; broader network of panelists	Smaller pool of repeat, star arbitrators to seek consistency, authority
Role of the secretariat **WTO:** very active, substantive, many EU/U.S. nationals **ICSID:** relatively passive, administrative	Alleviates lack of lawyers, experience, expertise, EU/ U.S. panelists; bureaucratic rivalry may temper star appointments	Requires & facilitates more experienced, star arbitrators
Broader regime **WTO:** embedded in broader diplomatic/lawmaking activity **ICSID:** largely stand-alone	More governmental; does not need arbitration stars or closed network of panelists	Needs star arbitrators; closed network to compensate

of independence.[141] Only the third, presiding arbitrator is appointed by mutual agreement of the parties.[142] If either party fails to appoint "its arbitrator," or if the parties cannot agree on a president, the chairman of ICSID's Administrative Council is granted appointing

[141] *Id.*, Art. 57 (which also refers to the other, substantive qualification requirements in Article 14, though these additional requirements are difficult to check and have not, in practice, been raised as objections).

[142] *Id.*, Art. 37(2)(b).

authority.[143] Importantly, ICSID must first consult with both parties[144] and can appoint individuals only from a closed "Panel of Arbitrators" appointed by ICSID member states (each member state can appoint four individuals; the World Bank president can appoint another ten). Members of ICSID ad hoc annulment committees are exclusively appointed by the World Bank president from the same Panel of Arbitrators.[145] Arbitrators appointed by the parties need not be listed on the Panel of Arbitrators, and many are not.

In practice, Puig shows that of all ICSID appointments,[146] 27.2 percent are made unilaterally by investor-claimants, 26.7 percent unilaterally by respondent host states, 16.5 percent by ICSID (29.1 percent if one includes annulment proceedings), and only 11.7 percent by agreement of the parties (16.8 percent if one includes those appointed by agreement of the two party-appointed arbitrators).[147]

In sum, as Figure 8 shows, ICSID arbitrators are predominantly appointed by one single party, whereas WTO panelists are more "neutrally" appointed, either by the DG (64 percent) or mutual agreement of both parties (36 percent). This difference largely explains the more ideologically polarized pool of ICSID arbitrators—many are either pro-investor and repeatedly appointed by investors, or pro-state and repeatedly appointed by host states—in comparison to the ideologically more homogeneous pool of WTO panelists.

Each party's unilateral appointment of "its 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 an arbitrator 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. Given that many parties in ICSID, especially investors, are "single shooters" (often in "betting the firm"–type cases), this approach to appointments becomes all the more attractive. Unlike in the WTO, where most parties are repeat players (only twenty-nine WTO members have ever been involved as main party before the AB,[148] with the EU and United States together representing 41.5 percent 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, then, there is every reason for experience and track record to be more influential than nationality—which may explain why only 50 percent of ICSID arbitrators and less than 30 percent of ICSID appointment slots are developing-country nationals.

By contrast, mutual agreement or institutional appointments by the WTO itself tend to exclude individuals with outspoken views or track records in favor of either trade or trade protectionism. It favors nomination of "neutrals"—for example, from countries like New Zealand or Switzerland. The result is an ideologically more homogenous pool with a lower reappointment rate and generally less experience: in the WTO, disclosed preferences lead to fewer, rather

[143] *Id.*, Art. 38. Under Article 5 of the ISCID Convention, the president of the World Bank is chairman of ICSID's Administrative Council.

[144] *Id.*, Art. 38; Rules of Procedure for Arbitration Proceedings, r. 4(4), *in* International Centre for Settlement of Investment Disputes, Convention, Regulations and Rules, *supra* note 31.

[145] ICSID Convention, *supra* note 31, Art. 52(3).

[146] Of these, 12.6 percent are annulment appointments.

[147] Puig, *supra* note 48, at 406.

[148] Joost Pauwelyn, *Minority Rules: Precedent and Participation Before the WTO Appellate Body*, *in* ESTABLISHING JUDICIAL AUTHORITY IN INTERNATIONAL TRADE LAW (Joanna Jemielniak, Laura Nielsen & Henrik Palmer Olsen eds., forthcoming 2016) (updated to end of 2013, counting the EU-28 as one member).

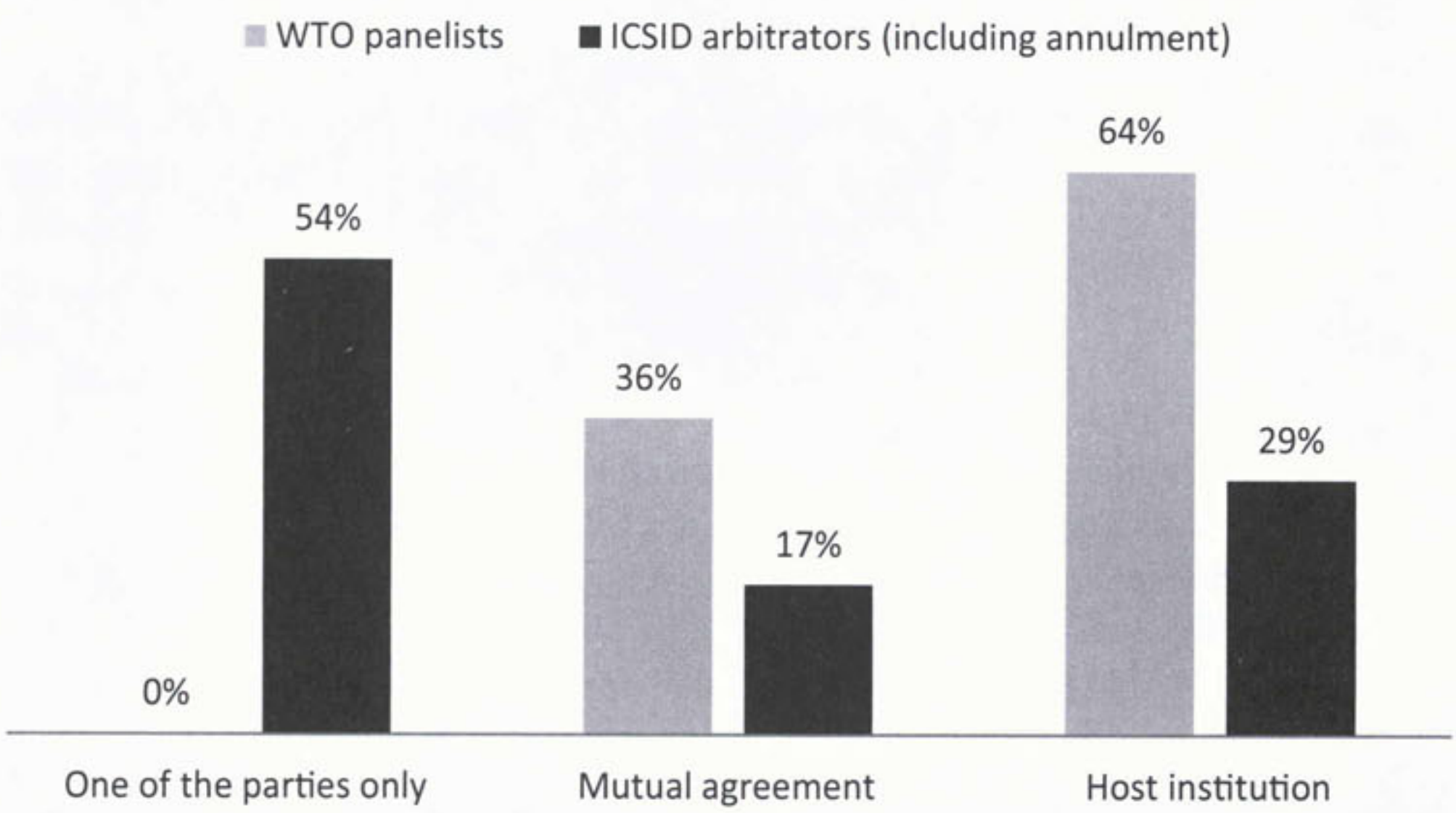

FIGURE 8. Who appoints?

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 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[149] as "the inertial presence of specialized diplomats may be retained by the organizational bureaucracy."[150] Put differently, when it appoints panelists, the 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 who risk outshining secretariat skills or expertise.

In addition, the fact that 27.2 percent 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[151]—goes a long way in explaining why fewer ICSID arbitrators have a government background. As (former) government officials may be more susceptible to arguments made by governments, it seems rational for private investors to prefer private sector lawyers or legal academics.[152] The fact that claimants' arbitrators are often appointed by the private lawyers or law firms working for claimants (and not by claimants themselves, for lack of expertise) may further help to explain why a large share of ICSID arbitrators, especially those appointed by claimants, are themselves private lawyers. By contrast,

[149] Costa, *supra* note 45, at 12.

[150] *Id.* at 17.

[151] Formally, also host states can sue private investors under ICSID, but for that purpose, a contract between the parties must be in place. In practice, almost all ICSID cases have been investor-state disputes.

[152] Waibel and Wu, *supra* note 53, at 29, show that the average number of years worked in the executive is slightly higher for arbitrators appointed by host states than for those appointed by investors (3.6 percent versus 3.2 percent, respectively). Their evidence, *id.* at 34, also supports the hypothesis that "arbitrators who also wear the hat of counsel to private investors are more likely to affirm jurisdiction."

since both sides of WTO disputes are governments, more panelists with government experience can be expected. The individuals agreeing or objecting to WTO panelists on behalf of the disputing countries are, in most cases, trade diplomats themselves (and to a lesser extent law firm lawyers advising them). They are, as a result, more likely to favor the appointment of 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 panellist 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. . . . [I]t renders a panel's decision pathway more predictable . . . .[153]

Nationality restrictions. A core factor explaining why (1) most WTO panelist slots (52 percent) are from developing countries (even though only 32 percent of WTO panels had developing countries as defendants) and (2) most ICSID arbitrator slots (69 percent) are from western Europe or North America (even though 83 percent of cases are filed against developing countries, see Figure 1 above) involves *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.[154] As noted earlier, the EU and United States combined represent 41.5 percent of all WTO consultation requests filed and filed against.[155] They are also third parties in almost all WTO disputes. This largely explains both the relative absence of EU and U.S. nationals in the WTO panelist pool and 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, Israel, and Singapore; China has copied the EU/U.S. practice of being a third party in almost all WTO disputes). In addition, Article 8.10 of the Dispute Settlement Understanding (DSU) provides that if a dispute is between a developed and a developing country (which has been the case in 68 percent of WTO panels),[156] the panel must, if the developing country so requests, include at least one panelist from a developing country.[157]

Under ICSID rules, arbitrators cannot have the same nationality as, or be a national of, either party unless the parties agree.[158] The same rule applies when ICSID appoints arbitrators.[159] When ICSID appoints members of ad hoc annulment committees, such individuals cannot have the nationality of either party, cannot have been appointed to the ICSID's list of arbitrators by either party, or cannot have the same nationality as any of the tribunal members who decided the award sought to be annulled.[160]

The fact that few ICSID cases have been filed against western European or North American countries (respectively, 3 percent and 5 percent) may somewhat explain why nationals of these

[153] Malacrida, *supra* note 84, at 330–31.
[154] DSU, *supra* note 88, Art. 8.3.
[155] *WTO Dispute Settlement: A Statistical Overview*, *supra* note 60.
[156] In 143 out of 211 cases.
[157] DSU, *supra* note 88, Art. 8.10.
[158] ICSID Convention, *supra* note 31, Art. 39; Rules of Procedure for Arbitration Proceedings, *supra* note 144, r. 3.
[159] ICSID Convention, *supra* note 31, Art. 38.
[160] *Id.*, Art. 52(3).

two regions have attracted the bulk (69 percent) of ICSID nominations (47 percent and 22 percent, respectively). At the same time, however, 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 percent of investor-claimants have either EU-28 or U.S. nationality (53 percent and 22 percent, respectively).[161] Two elements probably explain why these high (claimant) numbers have not stopped EU/U.S. nationals from being appointed. First, before ICSID, unlike the WTO, the nationality of *individual* EU member state 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, although 53 percent of all cases were filed by EU investors, 47 percent of those nominated as ICSID arbitrators have been EU nationals. By contrast, the EU itself is a WTO member and takes up the litigation on behalf of all twenty-eight member-states, thereby excluding nationals from any of these twenty-eight countries whenever the EU is involved as a party or third party in a WTO dispute (which, in practice, is almost every WTO dispute). Importantly, now that the EU has competence in the field of foreign investment and has started signing investment agreements, this situation may change over time, with EU-wide membership or signature leading to fewer EU-28 nationals as ISDS arbitrators.[162] Second, as noted above, given that parties in ICSID are able to appoint "their own arbitrators," they have an incentive to appoint someone with a proven track record, outlook, and experience that enhance their chances to prevail in the dispute. Experience and track records—which, in practice and for partly historical reasons, often refer back to EU/U.S. arbitrators—are then probably more influential than nationality.

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.[163] 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: "Members shall undertake, as a general rule, to permit their officials to serve as panelists." Nongovernmental panelists also see their expenses covered and, in addition, receive a relatively small payment of 600 CHF (about U.S.$600) per day. The expenses and compensation of all panelists, as well the costs incurred by the secretariat staff in 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 AB expenses and compensation also come out of the WTO budget. AB

[161] *See* UN Conference on Trade and Development, *Recent Developments in Investor-State Dispute Settlement* (Apr. 2014). The report, which collects all known ISDS cases up to 2013 (not just ICSID; 568 in total), shows that 85 percent of investor-state claims were filed by investors from developed countries and that, of those claims, 75 percent were by investors of either the EU (53 percent) or United States (22 percent). U.S., Dutch, and British investors top the list with, respectively, 127, 61, and 43 cases.

[162] The EU is not, and is unlikely to soon become, a party to ICSID (as the EU is not a state, the ICSID Convention would need to be amended). Thus, based on ICSID rules alone, nationality restrictions are unlikely to change. However, free trade agreements and BITs that provide consent to ICSID arbitration or other forms of ISDS may impose additional nationality restrictions. For example, the investment chapter of the Canada-EU Comprehensive Economic and Trade Agreement (Article X.25, paragraphs 3–4), *at* http://ec.europa.eu/trade/policy/in-focus/ceta/, states that when ICSID is asked to appoint arbitrators, it "may not appoint as presiding arbitrator a national of either Canada *or a Member State of the European Union* unless all disputing parties agree otherwise" (emphasis added). The sub-list of the arbitrator roster for presiding arbitrators under that agreement must be "neither nationals of Canada nor the Member States of the European Union."

[163] DSU, *supra* note 88, Art. 8.11. To provide some compensation to governmental panelists, a practice has developed that allows payment of 600 CHF/day to governmental panelists who certify that they are doing their panelist work outside normal office hours (for example, during weekends).

members are not employed full time; 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 compensation for days worked and a monthly retainer (7000 CHF/month). Since AB members are not WTO staff, they do not participate in the WTO pension plan.

This remuneration scheme explains a number of the differences described above. First, given that governmental panelists are not paid, both the parties and the WTO Secretariat have an incentive to appoint governmental panelists. Second, given that panel expenses are borne by the WTO (not the parties), the secretariat (which appoints 64 percent of panels) has an incentive to appoint panelists who are either in government employment or who reside relatively close to Geneva, thereby favoring governmental and Geneva-based insiders. Third, 600 CHF per day for nongovernmental panelists is not an attractive fee for high-profile/status individuals outside of the government, especially private lawyers, most of whom earn more than that per hour (the same is true, albeit to a lesser extent, for the compensation package of AB members). Private lawyers may accept a panel appointment to gain the reputational experience (or once they are comfortably retired). They are less likely to accept repeat appointments (unless they are already retired from private practice), as time spent on a WTO case cannot be dedicated to more lucrative client work. This issue of compensation partly explains both the relatively low number of private sector appointments in the WTO (15 percent but trending upward over time; 25 percent during 2000 to 2014) and the relatively low repetition rate (2.1 when excluding compliance proceedings, compared to 4.2 at ICSID). Similar considerations may apply to academics (18 percent of total appointments and trending downward over time; only 15 percent during the last five years), though 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 are compensated U.S.$3000 per day worked on the case. That is more than 4.5 times as much as what nongovernmental WTO panelists get paid, and governmental panelists get nothing. ICSID arbitrators make on average U.S.$200,000 per case.[164] Other arbitration venues (such as the London Court of International Arbitration or International Chamber of Commerce) pay either a higher rate or fees as a proportion of the amount in dispute. Puig reports that some arbitrators with a private law background consider ICSID work to be "pro bono work" and therefore refuse to take many cases.[165] One can only guess what these arbitrators would think of WTO panel work. In any event, ICSID remuneration rates must partially explain why (1) more private sector and high prestige/status individuals are in the ICSID arbitrator pool and (2) repetition rates in ICSID are higher than in the WTO. The remuneration difference may also explain 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 for government officials who already have a stable wage and for whom appointment on a panel is a form of service and "no more than a compliment";[166] being reappointed too often may, if anything, be interpreted as punishment.

[164] Puig, *supra* note 48, at 398.

[165] *Id.* at 398 n.61.

[166] In support, see Costa, *supra* note 45, at 22.

Other qualification requirements. The WTO treaty refers to a number of substantive, content-based qualification requirements for panelists other than nationality and independence—including various forms of governmental and nongovernmental trade-related work, and teaching or publishing on international trade law or policy.[167] In practice, however, these requirements are not explicitly implemented, and they are, in any event, difficult to check. Although parties are supposed to offer "compelling reasons" when objecting to nominations by the WTO Secretariat,[168] it has proven hard for the latter to probe, let alone adjudicate, the "compelling nature" of a member-country's objection; in practice, the secretariat accepts any objection that is somewhat substantiated. Insofar as the DSU can be understood as expressing the drafters' implied 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), WTO panel appointments can be taken to reflect that preference: (1) 88 percent of WTO panel appointments have governmental backgrounds, (2) the WTO panelist pool comprises generally low-key diplomats from developing countries, as noted earlier, and (3) 57 percent of panelist slots have gone to Geneva-based diplomats. Interestingly, the WTO treaty does not require that panelists have law degrees or legal expertise, and 44 percent have not, as we have seen, had law degrees. Nevertheless, the proportion of lawyers appointed has increased considerably over time (up to 69 percent in the last five years), without a change in qualification requirements; the change has been driven by the preferences of parties and the WTO Secretariat.[169]

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."[170] More than in the WTO, legal expertise is stressed (though not explicitly required) for ICSID arbitrators. This is borne out in the numbers as 99.6 percent of ICSID arbitrators (compared to 56 percent, overall, of WTO panelists) have law degrees.[171]

Can the WTO/ICSID Secretariats influence appointment patterns? The WTO Secretariat not only *proposes* panelists in all disputes (for approval by the parties), it also *appoints* 64 percent

[167] Article 8.1 of the DSU, *supra* note 88, provides:

> 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.

Article 8.2 of the DSU provides: "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." In terms of the argument presented in the remainder of the paragraph above, it should be noted that only the GATT/WTO work is described in detail. By comparison, the mention of teaching and publication is little more than an aside.

[168] *Id.*, Art. 8.6.

[169] Article 17.3 of the DSU provides: "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." As noted earlier, this provision has not prevented the appointment of three (of twenty-five, overall) AB members who had no law degree (although "expertise in law" does not necessarily require the possession of a law degree).

[170] ICSID Convention, *supra* note 31, Art. 14(1).

[171] But see Puig, *supra* note 48, who notes that in the early ICSID years, various arbitrators were nonlawyers.

of WTO panels (when the parties cannot agree on panel membership).[172] Importantly, in neither case is the WTO Secretariat bound by the indicative list of panelists established by WTO members. On its face, this situation gives the WTO Secretariat considerable flexibility to pursue its own agenda, both in the type or caliber of people that are appointed and in terms of repetition rates. The director-general could, for example, increase his reappointment rate and thereby create a de facto semi-permanent panel system with more experienced panelists, and without needing to modify 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.[173] The same difference can be seen in comparing panelists in disputes concerning the Rules Division versus Legal Affairs Division: an average Rules Division panelist sits on 2.3 cases,[174] whereas an average Legal Affairs Division panelist sits on only 1.8 cases.[175] One likely explanation for this difference (other than a deliberate strategy within the Rules Division to reappoint a smaller pool of people) is the highly technical and specific nature of Rules Division disputes; namely, they concern trade remedies (antidumping and countervailing duties), which is a subfield of trade law, an area in which a smaller pool of experts is available.

The possibility for ICSID to influence selection patterns is more limited. In 71 percent of appointments (unilateral party appointments and appointments by agreement), ICSID 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 percent of cases,[176] ICSID's appointing authority is limited to individuals that ICSID state parties themselves have put on the Panel of Arbitrators.[177] Consequently, and unlike the WTO Secretariat, it is much harder for ICSID to diversify or rejuvenate its arbitrator pool, especially since many ICSID state parties have failed to nominate or renew arbitrators for the Panel of Arbitrators. Moreover, if state parties continue to nominate a certain type of individual for inclusion on the list, ICSID has little opportunity to change appointment patterns. ICSID statistics indicate that the ICSID Secretariat has made some effort to diversify the pool of ICSID appointments: whereas 26 percent of party-appointed adjudicators[178] are from North America, ICSID itself appointed only 11 percent from North America. That said, when it comes to western Europe, the difference is minimal: 48 percent versus 46 percent, respectively.[179] A similar picture emerges when considering only appointments made in 2014: ICSID allocated only 8 percent

[172] Recall, however, that although the DG appointed 64 percent of panels, the parties may have previously agreed on one or two of the panelists before asking the DG to appoint the third person. No data are available on the precise number.

[173] An average DG-appointed panelist has 3.7 ties, whereas an average non-DG-appointed panelist has 3.3 ties. These figures translate into 1.85 cases per panelist for the former and 1.65 cases per panelist for the latter.

[174] There have been 315 appointments for 138 panelists.

[175] There have been 288 appointments for 162 panelists.

[176] Twelve percent of them are in annulment proceedings.

[177] Only ten are appointed by ICSID itself.

[178] *The ICSID Caseload: Statistics (Issue 2015-1)*, *supra* note 51, at 19. Statistics, up to the end of 2014, include conciliation and annulment proceedings: 1188 have been party appointed.

[179] World Bank, *The ICSID Caseload: Statistics (Issue 2015-2)* (2015), at 19. Of the 478 appointed by ICSID, 220 (46 percent) have been from western Europe and 55 (11.5 percent) from North America.

to North America, compared to 19 percent by the parties. In the same year, however, western Europe continued to represent 50 percent and 46 percent, respectively, of party- and ICSID-appointed adjudicators.[180]

Broader Institutional Context

Three broader institutional factors play a key role in explaining the differences between WTO and ICSID appointments: (1) the existence (or not) of a second-level appeals proceeding, (2) the role of the WTO/ICSID Secretariats, and (3) the embeddedness (or not) of the tribunal in a thicker normative/bureaucratic regime or community.

The existence of an appellate body. A key factor 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.[181] 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)[182] largely explains the increasing proportion of lawyers on WTO panels (from only 47 percent of appointments in the first five years, to 69 percent in 2010–14). As Costa put it, since the AB "became the new audience to be convinced by [WTO] panelists"—contrary to the GATT years, WTO members cannot unilaterally block adoption of panel and AB reports—"a legal background was transformed into a valuable asset."[183] The existence of an appellate body may also further explain, or at least make more palatable, the relative absence of EU/U.S. nationals on WTO panels. Both the EU and the United States have de facto reserved seats on the seven-member AB. Nationality does not prevent an AB member from sitting on an AB division deciding a particular case (composed of three randomly selected AB members (out of a total of seven)). The U.S. AB member can therefore hear appeals by or against the United States. Moreover, the prominent EU/U.S. presence on the AB may well compensate for the infrequent inclusion of EU/U.S. nationals on panels—especially if one takes into account that 68 percent of all panel reports are appealed,[184] with the AB modifying or reversing in 84 percent of the appeals.[185] Also worth noting is that the existence of a permanent, more prestigious and experienced AB (with the individual members appointed by consensus of all WTO members, for a four-year term, renewable once) may alleviate resentment or concerns that important trade cases are being decided by panelists who have comparatively little experience, who are usually not reappointed (a key way of gaining further experience), and who have relatively low levels of professional prestige and status.

By contrast, ICSID's lack of an appeals system (which is usually perceived as producing more consistent, authoritative decisions) may partly explain or justify repeat appointments of the same small pool of star ICSID arbitrators: through arbitrator selection, a certain level of centralization and consistency is thereby achieved organically. Indeed, from this perspective, the

[180] *Id.* at 31 (107 and 48, respectively).

[181] ICSID Convention, *supra* note 31, Art. 52.

[182] DSU, *supra* note 88, Art. 17.6.

[183] Costa, *supra* note 45, at 21.

[184] *See* http://www.worldtradelaw.net/databases/appealcount.php. This proportion, valid as of April 13, 2015, includes compliance panels.

[185] *WTO Dispute Settlement: A Statistical Overview*, *supra* note 60 (81 percent modified; 3 percent reversed).

elite group of fifteen arbitrators that, according to one study,[186] was appointed in 55 percent of all investor-state treaty disputes, can then be considered 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 reappointments, this elite group can shape the case law and thereby inject at least some degree of consistency and authority into the investment regime.

The role of the WTO/ICSID Secretariats. A major difference between dispute settlement at the WTO and before ICSID is that in the WTO, as directed in the WTO treaty,[187] 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 is assigned at least one legal officer and one staffer from an operational division focusing on the particular agreement at issue.[188] 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). The AB is assisted by its own secretariat staff with a similar role. At ICSID, by contrast, the secretariat's role has traditionally been largely administrative, although in recent years its input has been more substantive, depending on the arbitrators involved. Many tribunals or individual arbitrators do have their own legal secretaries or assistants, but they are typically not part of the ICSID Secretariat.[189] Consequently, and unlike what happens in WTO disputes, there is no institutional memory or collective secretariat input. In some ISDS disputes, arbitrators have sharply criticized the ICSID Secretariat for allegedly overstepping its mandate.[190] In others, extensive use of arbitral assistants has been invoked as a ground to set aside the arbitral awards in domestic courts.[191] Whereas the secretariat's substantive influence is widely known and openly tolerated at the WTO, in international arbitration "[a] central premise of the role of the secretary is that he or she may not assume the tribunal's (or an arbitrator's) functions and may not influence the tribunal's decision."[192]

The above characterization of the WTO Secretariat's role has four relevant consequences. First, the presence of a strong, highly qualified and experienced WTO legal secretariat alleviates, and makes palatable, the relative absence of lawyers on WTO panels.[193] Second, that presence may also alleviate, and make palatable, the relatively low level of

[186] EBERHARDT & OLIVET, *supra* note 15, at 38.

[187] DSU, *supra* note 88, 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.").

[188] *See* Håkan Nordström, *The WTO Secretariat in a Changing World*, 39 J. WORLD TRADE 819 (2005).

[189] Constantine Partasides, *The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration*, 18 ARB. INT'L 147 (2002).

[190] *See* Additional Opinion of Professor Jan Hendrik Dalhuisen Under Article 48(4) of the ICSID Convention (July 30, 2010) (appended to *Compañía de Aguas del Aconquija S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Annulment Proceeding (Aug 20, 2007). For a critique, see Susan L. Karamanian, Case Report: Compañía de Aguas del Aconquija S.A. & Vivendi Universal S.A. v. Argentine Republic, 105 AJIL 553 (2011).

[191] *See, e.g.*, Jarrod Hepburn, *Battling $50 Billion Yukos Awards on Two Fronts, Russia Focuses on Claimants' Alleged Fraud and Linguistic Analysis of Tribunal Assistant's Alleged Role in Drafting Awards*, INV. ARB. REP. (Nov. 3, 2015), *at* http://www.iareporter.com/articles/battling-50-billion-yukos-awards-on-two-fronts-russia-focuses-on-claimants-alleged-fraud-and-linguistic-analysis-of-tribunal-assistants-alleged-role-in-drafting-awards/.

[192] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2000 (2d ed. 2014).

[193] That secretariat lawyers may influence legal reasoning or outcomes as much as panelists may also explain why conflict-of-interest concerns regarding panelists have attracted little attention. If the secretariat is basically calling the shots, why focus too much on the impartiality of panelists or AB members. By the same token, however, more

experience or expertise of WTO panelists. Secretariat officials can make up for the experience or knowledge that panelists lack. Third, as noted out earlier, the potential competition or rivalry between panelists and a strong legal secretariat—one that has an important role in the selection of panelists—may also temper the appointment of high-status, star adjudicators[194] and perpetuate the appointment of low-key diplomats with relatively little legal or court experience. The secretariat may decide not to reappoint panelists who have underperformed, and it may also be reluctant to reappoint panelists who have strong opinions or who tend not to follow secretariat advice. Fourth, many secretariat officials servicing panels are themselves EU/U.S. nationals or have been trained in the EU or United States. This background may compensate for, and make somewhat more acceptable, the absence of EU/U.S. nationals on the panels themselves.

Importantly, the relation between weak panelists and a strong secretariat is self-reinforcing: disputing parties may accept weak panelists because they know the secretariat is available and at work; the regular appointment of weak, inexperienced panelists strengthens the power and importance of the secretariat (if panelists do not have the time or resources or background to do the work, the secretariat will do it, if only to meet the strict WTO deadlines, deadlines that are absent in ICSID cases); and a stronger secretariat may, for various reasons, be happy to continue appointing weak panelists. Only the disputing parties themselves are likely able to break this circle—for example, by insisting on the appointment of higher caliber, more experienced panelists. Given that disputing parties have yet to make any such demands, it is reasonable to infer that they remain comfortable with the important role now played by the WTO Secretariat.[195] For the long-term legitimacy[196] of judicial decision making at the WTO, however, a tipping point may be reached, where the unappointed staff in the secretariat (as expert and conscientious as they are) becomes too strong, and the appointed, formal adjudicators—who are supposed to be deciding WTO disputes—are perceived as too weak. To go beyond that tipping point—that is, if WTO dispute settlement comes to be generally perceived as controlled by the secretariat, not the panelists or AB members—is to risk undermining the legitimacy and effectiveness of the entire WTO dispute settlement system.

Embeddedness 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, ten meetings per day)[197] in the guise of the WTO General Council, specialized committees or subcommittees, and informal

attention should then be paid to the impartiality of secretariat lawyers—an issue that also has attracted little or no attention.

[194] Costa, *supra* note 45, at 12.

[195] Indeed, at this moment, the WTO is going through a mini-crisis of its own: there are too many WTO panels and not enough secretariat members to staff them, leading to long delays (with waiting periods of up to fifteen months before a WTO panel can start its work). Rather than appointing panelists who themselves would do the bulk of the work or taking a critical look at the role now played by the secretariat, WTO members are looking, instead, into hiring more secretariat staff or making secretariat support more efficient. *See* WTO Press Release, Azevêdo Seeks WTO Members' Views on How to Meet Increasing Demand for Dispute Settlement (Oct. 28, 2015) (address to the WTO Dispute Settlement Body), *at* https://www.wto.org/english/news_e/spra_e/spra94_e.htm.

[196] For this article's definition and approach to legitimacy, see *supra* notes 37–39 and accompanying text.

[197] *See* Gregory Shaffer, *Power, Governance and the WTO: A Comparative Institutional Approach*, *in* POWER IN GLOBAL GOVERNANCE 130, 134 (Michael Barnett & Bud Duvall eds., 2005).

sessions of various sorts. 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 who, both before and after their panel appointments, walk the very same halls but wearing a different hat—that of country negotiator. Likewise, many AB members have been trade diplomats or were stationed in Geneva in prior careers. More broadly (in terms of institutional context), WTO panel and AB reports have no legal value unless and until they are adopted by the WTO's Dispute Settlement Body, on which all 162 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, by 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, the North American Free Trade Agreement, or the Energy Charter Treaty—agreements 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. Its 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. Whereas WTO dispute settlement is grounded in a multilateral treaty elaborating substantive principles that are shared by developed and developing countries and that have been carefully calibrated after decades of experiential learning under the WTO's predecessor, the 1947 GATT,[198] ISDS is relatively new (the first treaty-based claim was accepted only in 1990)[199] and is more loosely built on a contractual/commercial agreement to arbitrate, with minimal shared substantive rules.

This lack of embeddedness or institutionalization of ICSID (including a much smaller role for the ICSID Secretariat) means that legitimacy[200] must, at least in part, come from other sources—in particular, from the expertise, standing, exceptional character, and social cohesiveness of the individuals appointed on ICSID tribunals. 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."[201] This situation "demands a professional profile of arbitrators who can provide technically correct decisions and the special aura given by sanctified arbitrators."[202] 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."[203] 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

[198] *See* Elsig & Eckhardt, *supra* note 6.

[199] Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award (June 27, 1990).

[200] *See supra* note 196.

[201] Costa, *supra* note 45, at 13.

[202] *Id.* at 17.

[203] *Id.* at 13.

appointed, star arbitrators. By contrast, the more embedded and institutionalized WTO dispute settlement system (including a strong WTO Secretariat) "does not need such an underlying social structure."[204] It "does not need to be operated by arbitration stars."[205] 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.[206]

IV. Possible Consequences and Questions for Further Research

Whether the differences are random or can be rationally explained (as I tried to do in part III), does it actually matter that ICSID arbitrators are from Mars, WTO adjudicators from Venus? Are adjudicators, including those on international tribunals, not simply applying the law, irrespective of their backgrounds, 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).[207] But mounting empirical evidence shows the contrary.[208]

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.[209] Looking at the International Court of Justice, Eric Posner and Miguel de Figueiredo find that its judges favor the particular states that appointed them and states whose level of wealth is close to that of their own states.[210] Unilaterally (one party only) appointed arbitrators tend to issue more dissents[211] and

[204] *Id.*

[205] *Id.* at 17.

[206] *Id.* at 22. "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)." *Id.* at 24.

[207] For notable exceptions, see Georges Abi-Saab, *The Appellate Body and Treaty Interpretation*, *in* THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM (Giorgio Sacerdoti, Alan Yanovich & Jan Bohanes eds., 2006), which discusses the "judicial politics" of the AB, and RICHARD POSNER, LEE EPSTEIN & WILLIAM M. LANDES, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE (2013).

[208] In the U.S. context, see 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 445 (Jeffrey Dunoff & Mark Pollack eds., 2013).

[209] Waibel & Wu, *supra* note 53, at 39, 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 L. REV. 47 (2010).

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

[211] The 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* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 821 (Mahnoush Arsanjani, Jacob Cogan, Robert Sloane & Siegfried Wiessner eds., 2011); Jeffrey Dunoff & Mark Pollack, International Judicial Dissent: Causes and Consequences (draft of paper prepared for presentation at the European Union Studies Association Biennial Conference, Boston, MA, Mar. 5–7, 2015), *at* https://eustudies.org/conference/papers/download/84.

almost invariably issue their dissents in favor of the party that appointed them.[212] Erik Voeten empirically demonstrates, in the context of the European Court of Human Rights, that former diplomats tend to be, as judges, more supportive of national governments.[213] In the same context, Fred Bruinsma shows that former diplomats also interpret treaty obligations imposed on governments more leniently.[214] Marc Busch and Krzysztof 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. . . . [T]he impact of the experience of the other two panelists is statistically insignificant."[215] Malacrida points at the legitimacy-conferring impact of WTO panels being appointed by the director-general, rather than by agreement of the parties, and notes that thirty-five DG-appointed panels, compared to only eighteen party-selected panels, have been accepted without appeal.[216]

Using the various attributes described in part II, 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, and 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). In addition, if the WTO Secretariat is compensating for the lack of expertise and experience of WTO panelists or AB members, who are the individuals getting legal jobs in the WTO Secretariat, and what are their backgrounds and other attributes? And how does the WTO Secretariat compare to the ICSID Secretariat or ad hoc legal secretaries or assistants servicing ICSID tribunals?

V. Conclusion

Given the diverse history, goals, and design features of the WTO and ICSID, 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 acutely important. On average, and obviously with many individual exceptions to this general rule, WTO panelists tend to be relatively low-key diplomats from developing countries (very few U.S./EU nationals), with government backgrounds, often without law degrees or legal expertise. ICSID arbitrators, by contrast, are likely high-powered,

[212] *See* Alan Redfern, *Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly*, 20 ARB. INT'L. 223 (2004); Eduardo Silva Romero, *Brèves observations sur l'opinion dissidente*, *in* LES ARBITRES INTERNATIONAUX 179 (Société de législation comparée 2005).

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

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

[215] Marc Busch & Krzysztof Pelc, *Does the WTO Need a Permanent Body of Panelists*, 12 J. INT'L ECON. L. 579, 589, 590 (2009).

[216] Malacrida, *supra* note 84, at 319 n.13.

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 small number of individuals attracting most nominations. The universe of WTO panelists, by contrast, is ideologically more homogeneous, with relatively little experience and a relatively low reappointment or experience rate, and with nominations more evenly distributed. Although the legal "orders" of international trade and investment law may be converging, the legal "fields"[217] remain, to date, surprisingly distinct. This separation between the epistemic community or "field" of WTO dispute settlement versus ISDS may, in turn, explain why convergence in WTO/ISDS case law or jurisprudence has considerably lagged the convergence of WTO and ISDS norms. Although both regimes include, for example, commitments of national and most-favored-nation treatment and allow for necessity-based exceptions, so far, relatively little cross-fertilization has occurred.[218]

That said, differences between WTO panelists and ICSID arbitrators can be 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 of international tribunals are (1) whether the adjudicators are appointed unilaterally by the parties or neutrally by agreement or governing institutions, (2) whether the parties are exclusively states or also private actors, (3) whether the system is a stand-alone dispute settlement institution or embedded in a broader diplomatic community, (4) how the adjudicators are remunerated, (5) whether an appeals procedure is available, (6) whether the system is supported by a strong secretariat, (7) whether nationality restrictions are imposed, especially in relation to who is involved in the disputes, and (8) whether adjudicators must come from a roster or can be more freely appointed?

In sum, system features influence the adjudicator pool. That pool, in turn, may not only determine litigation outcomes in specific disputes (a research agenda that this article left largely open) but also influence the system and how it is perceived, accepted, or contested. As Dezalay and Garth phrased it in their study of international commercial arbitration, "institutions impose themselves on actors while the institutions themselves are also the product of the actors' continuing struggles. Institutions have no reality other than the strategic use that is made of them by different social groups."[219]

Returning to the contrast painted in the introduction—between WTO dispute settlement broadly accepted, and ISDS 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? The predominant "symbolic capital" of ICSID arbitrators—a high level of expertise and experience—tends to come at the expense of their representativeness and impartiality. In the WTO, it is quite the opposite: representativeness and impartiality constitute the key "symbolic capital" of WTO adjudicators, but they risk coming at the

[217] *See supra* notes 9, 11.

[218] See Kurtz, *supra* note 35, although there are also substantive arguments not to transpose WTO jurisprudence too quickly to ISDS cases. *See* Joost Pauwelyn & Nicolas DiMascio, *Non-discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, 102 AJIL 48 (2008). Where cross-fertilization has occurred, it often involved adjudicators active in both fields. *See Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9 (Sept. 5, 2008) (interpreting Argentina's necessity defense with reference to AB case law on GATT Article XX necessity) (with Giorgio Sacerdoti, a former AB member, as president).

[219] DEZALAY & GARTH, *supra* note 9, at 16–17.

expense of expertise and experience. In ISDS, disclosed preferences (for example, in favor of or critical of investor protection) are likely to lead to *more* appointments; in the WTO, disclosing one's preferences (for example, publishing in the field or being outspoken for or against free trade) are likely to *prevent* appointments. Yet, in the WTO, lack of expertise and experience of WTO panelists is compensated by (1) a strong secretariat, (2) the existence of a standing appellate body (albeit, itself, composed of mainly ex-diplomats rather than experienced jurists), and, most importantly, (3) dispute settlement deeply embedded in a broader diplomatic trade community in Geneva. ISDS is, to date, devoid of all three of these features.

More law, compulsory dispute settlement, and reduced options for countries to defect from, or "exit," a regime are made possible by, and can only be sustained in, the presence of sufficient levels of political support, participation, and opportunities for expressing preferences, or "voice." In the WTO, effective voice is achieved, in part, through the organization's panelists, who (1) are appointed by agreement or neutrally by the WTO director-general, who himself is appointed by consensus of all WTO members and (2) are predominantly diplomats or ex-diplomats embedded in the Geneva trade community. From this perspective, WTO dispute settlement is successful not *despite* it being run by relatively inexperienced trade diplomats but *because* it is so run. Conversely, now that the political salience of ISDS has dramatically increased, including in the developed world, the legal constraints inherent in ISDS require more, not less, political support, participation, and voice by both governments and civil society. In this new context, what is needed from ICSID adjudicators is not so much (or only) technical expertise and experience to fill gaps in domestic court systems, but representativeness, inclusiveness, and trust by governments and other stakeholders so as to justify ISDS's intrusion in the domestic legal process. From this perspective, ISDS is under fire not *despite* it being run by highly specialized and experienced lawyers but *because* it is so run.

In the WTO, legitimacy[220] flows from *within* its diplomatic, governmental surroundings.[221] 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 that we continue to 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"[222]—has *not*, or at most only partly, materialized. Over time, more (not fewer) panelist appointments have a substantial government background, more than half continue to be either current or former Geneva-based diplomats, and around a third are current or former ambassadors or government ministers. Over time, more WTO panelists do have law degrees, and more have professional experience with law firms. But fewer are academics, and only a tiny fraction has any judicial experience in their home countries. Equally, if not more, important, the trend for appointments to the WTO AB is in favor of "trade insiders" (former negotiators, with trade law experience and a government background) and against academics, former judges, or individuals with a public international law background. In this way,

[220] *See supra* note 196.

[221] Weiler defines "internal" sources of legitimacy as 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." *See* Weiler, *supra* note 13, at 193.

[222] *Id.* at 197: "It would be nice if one could take the rule of law without the rule of lawyers. But that is not possible."

the WTO has managed to achieve (something of a) rule of law *without* the rule of lawyers. Thus, in the trade regime, one can not only observe continuity, but predict ongoing continuity, in the pool and attributes of WTO adjudicators.

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. Given the types of WTO adjudicators now prevailing (relatively inexperienced; current or former diplomats), we can, indeed, detect limits as to what the WTO legal system itself can achieve or was set up to achieve. It was not to be an adjudicator-driven, carefully designed "constitutional" legal system with sophisticated, long-term, economics-based, albeit easy-to-read, rulings that compel rule compliance following a "logic of appropriateness"[223]—the kind of system that many WTO commentators, including Joseph Weiler,[224] John Jackson,[225] Ernst-Ulrich Petersmann,[226] Petros Mavroidis,[227] and David Unterhalter[228] have hoped to achieve.[229] Instead, what we have is 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.[230] That may actually be the secret of the WTO dispute settlement system's success so far, and may also serve to define the system's limits; its goals have, in this context, been realistic and not overly ambitious.

Even so, this relatively limited normative regime is itself at risk today. With a larger and more diverse membership (162 members at the end of 2015, including China, Russia, and Saudi Arabia, compared to 128 in 1994), keeping the diplomatic engine and communication channels running between negotiators/members and adjudicators has proven increasingly difficult. In the first twenty years of WTO operation, members have generally failed to agree on new rules or to formally clarify existing ones. The Doha Round of trade negotiations launched in 2001 remains unfinished. Also, informal steering by members of WTO panels and the AB

[223] Decisions based on a "logic of appropriateness" are biased toward what social norms (here, WTO rules) deem right rather than what cost-benefit calculations (here, a WTO member's national interests) consider best. The latter is referred to as a "logic of consequences." *See* JAMES G. MARCH & JOHAN P. OLSEN, REDISCOVERING INSTITUTIONS (1989).

[224] *See supra* note 13.

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

[226] ERNST-ULRICH PETERSMANN, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW (2004).

[227] Petros Mavroidis & Damien Neven, *Land Rich and Cash Poor: The Reluctance of the WTO Dispute Settlement System to Entertain Economics Expertise: An Institutional Analysis*, *in* THE USE OF ECONOMICS IN INTERNATIONAL TRADE AND INVESTMENT DISPUTES (Marion Jansen, Joost Pauwelyn & Theresa Carpenter eds., forthcoming 2016).

[228] Farewell Speech of AB Member David Unterhalter (Jan. 22, 2014), *at* https://www.wto.org/english/tratop_e/dispu_e/unterhalterspeech_e.htm.

[229] For a different narrative of the world trade system, based on a bidirectional interaction between law and politics (not a unidirectional process of ever more legalization), see Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1 (2005).

[230] See the recent U.S. settlements in *United States—Subsidies on Upland Cotton* (DS267) and *United States—Measures Affecting the Production and Sale of Clove Cigarettes* (DS406), pursuant to which the United States kept the nonconforming cotton subsidies and tobacco-control measures in place, paid Brazil U.S.$300 million in cash, and granted unrelated trade concessions to Indonesia. See also the U.S.-EU settlement in *European Communities—Measures Concerning Meat and Meat Products (Hormones)* (DS26). *See* Simon Evenett & Alejandro Jara, *Settling WTO Disputes Without Solving the Problem: Abusing Compensation*, VOX (Dec. 4, 2014), *at* http://www.voxeu.org/article/settling-wto-disputes-without-solving-problem-abusing-compensation.

through, for example, DSB comments and feedback on dispute reports, has stalled: there is too much diversity and disagreement among WTO members for panels or the AB to receive guidance from members. If the system's internal/diplomatic sources of stability, problem solving, and 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 for more than a decade now may also explain why governmental panelists or Geneva insiders continue to be appointed on WTO panels and the AB: they have more time available and, crucially, maintain the umbilical cord between the WTO legislative branch and its dispute settlement arm. Another potential weak spot in the WTO's dispute settlement system, as noted earlier, is its heavy reliance on secretariat staff and the risk that the staff, rather than members of panels or the AB, are controlling the system and its decisions, and consequently undercutting its legitimacy.

Legitimacy at ICSID comes, traditionally, from a different source: the individual neutrality, expertise, and status of adjudicators, originally meant to fill deficiencies and gaps, and to counteract bias, in the relatively weak domestic legal institutions of less developed countries.[231] If the individuals lacked these qualities—and, for example, a crisis arose involving an outright conflict of interest—the system could collapse. Given what is at stake, it is no surprise that the selection and identity of ICSID arbitrators has attracted major attention; by contrast, in the WTO (with the possible exception of AB members), these matters are scarcely discussed. Like the WTO's main source of legitimacy, ICSID's is also *internal*. But it derives not from the collective/diplomatic processes at work in an organization, but from the individual characteristics of the arbitrators themselves. The closed group of repeatedly appointed, star arbitrators—not ICSID member states or the ICSID Secretariat—provide the main source of ICSID's authority.

Nevertheless, if ICSID's legitimacy depends on the individual quality and impartiality of its arbitrators, the predispositions of, and ideological divides between, those arbitrators represent serious risks. In response, many recent investment agreements have strengthened conflict-of-interest rules for arbitrators.[232] More broadly, fifty 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, however, investor-state tribunals are performing a predominantly public function; more than 70 percent of ICSID cases are based on treaties. In view of this public function, and in areas of high political salience, the current model of private adjudication needs rethinking, in terms of transparency and openness to the public (on which both UNCITRAL and ICSID are making major advances), and also in terms of adjudicator appointments (although eliminating party-appointed arbitrators remains a taboo).[233] Instead

[231] *See* Ibrahim Shihata, *The Settlement of Disputes Regarding Foreign Investment: The Role of the World Bank, with Particular Reference to ICSID and MIGA*, 1 AM. U. INT'L L. REV. 97, 116 (1986) (describing ICSID's value as "an effective and truly neutral forum where disputes are to be settled according to objective non-political criteria"); Sergio Puig, *Recasting ICSID's Legitimacy Debate: Towards a Goal-Based Empirical Agenda*, 36 FORDHAM INT'L L.J. 465 (2013) (arguing that ICSID's legitimacy is based on its claim to offer expert, specialized, and neutral settlement of investment disputes).

[232] *See, e.g.*, Comprehensive Economic and Trade Agreement, *supra* note 162.

[233] For an influential argument against unilaterally appointed arbitrators, see Jan Paulsson, *Moral Hazard in International Dispute Resolution*, 25 ICSID Rev. 339, 352 (2010), 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.").

of relying on a closed group of repeat arbitrators to achieve a modicum of consistency and predictability, a more structured appellate system is now being seriously considered.[234]

Another recent trend in ISDS is that state parties to investment treaties are expressing more "voice" and seeking more control and substantive oversight of investor-state arbitration. Examples in recent treaty practice include the following: more carefully worded treaty provisions; the use of annexes in response to, and potentially copying from, past tribunal awards; ex post interpretation mechanisms or treaty-based joint commissions that would allow the parties to clarify their intentions; gatekeeping or denial-of-benefits provisions that give some control back to states, including the opportunity for input, before or during investor-state proceedings (for example, 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; and, finally, initiating state-to-state arbitration in an effort to affect prior, parallel, or future investor-state disputes.[235] This "return of the state" builds important bridges and communication channels between treaty parties and adjudicators. It is likely to strengthen 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. In 1996, Dezalay and Garth recognized that "the market of business disputing can be organized around two poles—the jurisdictions of the state and those of the business world."[236] Their study—which focuses not on diplomats versus lawyers (as this article does) but on "generational warfare" between the grand old men of European academia and the younger, U.S.-style "arbitration technocrats"[237]—concludes that international commercial arbitration, centered around the International Chamber of Commerce, "operated with the state more or less off to one side."[238] Yet, in their final chapter, Dezalay and Garth admit that "new approaches and institutions [with explicit reference here to the EU, North American Free Trade Agreement, and GATT] may facilitate the recomposition of this field of practice closer to the pole of the state." Such a change is possible because "the market is inevitably unstable."[239] In the specific context of ISDS, which is of course not covering all of international commercial arbitration, this is exactly what is happening now:

> As states assume more importance, legal professionals and large enterprises tend to move, almost by definition, closer to the pole of the state . . . . Those with ties to the state . . . are more likely to play the public card in business conflicts. That is to say, their expertise and connections will lead them to channel conflicts toward the state, contributing thereby to the acceleration of the recomposition of the field of business conflicts around the state.[240]

[234] See the EU Commission proposal, *supra* note 24, and Anna Joubin-Bret, *Why We Need a Global Appellate Mechanism for International Investment Law* (Columbia Center on Sustainable Development, FDI Perspectives No. 146, Apr. 27, 2015), *at* http://ccsi.columbia.edu/files/2013/10/No-146-Joubin-Bret-FINAL.pdf.

[235] *See* Wolfgang Alschner, *The Return of the Home State and the Rise of 'Embedded' Investor-State Arbitration*, *in* THE ROLE OF THE STATE IN INVESTOR-STATE ARBITRATION 192 (2014).

[236] DEZALAY & GARTH, *supra* note 9, at 311.

[237] *Id.* at 10.

[238] *Id.* at 311–12.

[239] *Id.* at 312.

[240] *Id.* at 315.

If the above ISDS reforms materialize—more rule of law (and "state"), less rule of lawyers (and "business world")—the legitimacy capital of investor-state arbitration can be considerably broadened, enabling it to move beyond its current foundation in the individual neutrality, expertise, and status of adjudicators, and to rise to a level that matches its heightened, and increasing, political salience. Whereas one observes and can expect *continuity* in the pool of WTO adjudicators, shifts in the nature and underlying goals of ISDS foreshadow and require *change* in the pool of ICSID arbitrators, with less of a focus on individual expertise and experience (away from the pole of "lawyers"), and more attention to representativeness, inclusiveness, neutrality, and government oversight (toward the pole of "diplomats").[241] In that case, not only the legal "orders" but also the legal "fields" of international trade and investment law may slowly converge.

[241] Article XX.25 of the Canada-EU Comprehensive Economic and Trade Agreement, *supra* note 162, provides for a roster of fifteen arbitrators appointed solely by the government parties, and stresses arbitrator neutrality. For other proposals to this effect, including the establishment of a permanent investment court or appellate review system, see EU Commission, *Concept Paper: Investment in TTIP and Beyond—the Path for Reform* (May 2015), *at* http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF (proposing a requirement that all arbitrators are chosen from a roster preestablished by the parties to the investment treaty), and the communication by France to the EU Commission on ISDS, *Vers un nouveau moyen de régler les différends entre etats et investisseurs* (May 2015), *at* https://www.april.org/sites/default/files/267400569-20150530-isds-Papier-Fr-Vf.pdf (calling for arbitrators to be selected from government-appointed rosters, administered by a permanent investment court, and prohibiting arbitrators on the roster from serving also as counsel in any investment-treaty dispute). *See also* Hans von der Burchard, *Germany Pitches Plan to Break TTIP Stalemate*, POLITICO (May 4, 2015), *at* http://www.politico.eu/article/germany-pitches-plan-to-break-ttip-stalemate/.