Oñati International Institute for the Sociology of Law
Instituto Internacional de Sociología Jurídica de Oñati
Oñati Socio-Legal Series
ISSN: 2079-5971

Oñati Socio-Legal Series, v. 1, n. 4 (2011)
ISSN: 2079-5971

Comparing WTO Panelists and ICSID Arbitrators: the Creation of International Legal Fields

José Augusto Fontoura Costa [*]

Abstract

Who are people who make the decisions in trade and investment dispute settlement systems? In order to describe and analyze investment arbitrators and trade panelists, the whole populations of people nominated to ICSID's tribunals and committees as well as to WTO Panels from 1995 to 2009 were studied, considering their specialization in law, and their career backgrounds as public servants, academics or private professionals. Applying Pierre Bourdieu's concept of legal fields, the data suggested that both systems produce legitimacy but in quite different ways and, interestingly, that the one more similar to domestic legal systems takes that form due to political forces, not by an incremental process powered by people with legal backgrounds.

Key words

International legal fields, investment arbitration, dispute settlement systems.

[*] José Augusto Fontoura Costa, Full Professor of the São Paulo Law Faculty. Research for this present paper was funded by the Brazilian National Council for Scientific Research (CNPq), jafontouracosta@gmail.com

Table of contents

Introduction

The main objective of this article is to compare data between people who were appointed as panelists in the dispute settlement system (DSS) of the World Trade Organization (WTO) and as arbitrators and members of *ad hoc* committees of the International Center for Investment Dispute Settlement (ICSID) from 1995 to 2009. This comparison aims to approach questions about how legitimacy is constructed by testing some hypotheses regarding the effects of institutionalized legal schemes of dispute resolution through the composition of the sets of judicial decision makers that operate each DSS.

As a working definition, legitimacy is understood as the result of a political process of the consensual construction of the acceptance of authority. Further, legal legitimacy is here defined as a special type, which is obtained through a process performed by a specialized community generally recognized as having technical skills and knowledge to perform the impartial, if not neutral, application of a structured body of principles and rules legitimately discovered (natural law) or laid down (positive law), in order to settle private as well as public disputes. It is important to establish that legal legitimation technically presupposes the legitimacy of principles and rules, though in real social processes there are close interactions between judicial and legislative legitimacy.

This definition of legal legitimacy does not match in all respects the mainstream definition, expressed by Max Weber as an ideal type featuring in modern societies and as the result of the activities of an impersonal, technically established bureaucracy, whose specialization ensures the correctness of governmental decisions, while the formalized and meritocratic procedures of gatekeeping assure neutrality (Weber 1968, 640).

The definition in this paper is narrower in scope, since legal legitimacy covers only the judicial branch, which has important features that are not shared by all branches of government, though, of course, they also help to support the legitimacy of the state as a whole. Moreover, legitimation is not expected to be such a clear and clean result of the application of reason, but a social process backed by its ability to produce technical opacity and, consequently, the blind acceptance of a somewhat imposed order. In this sense, the concept employed hereby resembles the Niklas Luhmann's theory of legitimation through procedure (Luhmann 1983, 260), which follows Weberian traditions, although enhancing the role of a purely procedural logic as sufficient to produce the acceptance of legal decisions, which replaces the idea (and the ideal) of a rationality backed by shared consensus on material aspects. However, as Jürgen Habermas stressed in his first Tanner Lecture (Habermas 1988), the procedural Weberian conception of rationality cannot be accepted as the real touchstone of legality and a far most complex social process of legitimation would be necessary to ensure both efficiency and fairness.

Nevertheless, though somewhat linked to the Weberian heritage, the notion of legitimation process that is used in this paper refers to Pierre Bourdieu's idea of the legal field as a social structure that performs a symbolic violence that dresses the crude use of force by state in the disguise of a fair decision system performed by specialists who are able to correctly understand the ultimate meanings of a legal *corpus* of rules laid down by democratic processes and controlled by academic and professional interpreters. Since rationality, fairness and neutrality are presupposed in Bourdieu's perception of legitimacy, a main subject of study became the dynamics of processes, and the ways people construct the discourses through which symbolic violence is performed, as well as how they acquire and trade cultural capital in order to occupy central positions in the legal system.

So Pierre Bourdieu's concept of legal fields (Bourdieu 1986) is employed as an analytical tool that helps us to understand the international institutionalization of economic relations in issues as sensitive as trade and investment. Nevertheless, it

is necessary to stress that some aspects of the original theoretical design cannot be easily transferred to the processes of international legal legitimation. In fact, this theory originally dealt with the operation of domestic jurisdictional systems, which have a feature that is very weak in international environments: the centralization of power in, and the use of force by, the state is clear and does not need to be discussed. Therefore, the original theory of legal fields, though related to self-regulatory concerns, does not need to deal with problems of institution building. Domestic legal fields are organized around state institutions and the struggles for power and prominence are related to the conquest of central positions, which are located close to the jurisdictional system and to legal academia, whose function is to provide an aura of independence and technicality.

However, there are no presupposed legislative or adjudicative institutions in the international arena, and power is not concentrated in a single entity but scattered among several political actors. Therefore, elements of self-organization dealt with by the theory of fields must play an additional role in the analysis of international institutionalization: to help to explain socially cohesive structures capable of functioning as underpinnings to an incipient rearrangement of power, particularly its migration from state structures to international, interstate or transnational domains. In this context, the existence of a small and, most likely, cohesive group of arbitrators and panelists may be regarded as denoting the existence of a self-sustaining network, which defines its own centres, while wider and less concentrated groups may be less dependent less on an elitist leadership, since the power of decisions derives from bureaucratic arrangements.

In other words, it is possible to hypothesize that there is a structural relation between the degree of institutionalization and the features of fields that gravitate around such institutions. International legal systems that are linked to centralized strong DSSs may tend to be more similar to domestic legal systems and, consequently, may be operated by a set of functionally specialized actors who have no need to be leaders, but to perform their duties in the most neutral and technically correct fashions. On the other hand, loose DSSs have different features, and leaderships backed by a more general knowledge may substitute for the lower functional specialization.

So, *habitus* and cultural capital are valued differently in more or less centralized structures. Consequently, it would be possible to hypothesize that leaders who form the *habitus* and have the social capital that fits a loose DSS have no interest in the constitution of a more institutionalized system in order to preserve their highly valued positions. If this is so, it would be unreasonable to expect that these actors would press for any kind of incremental change towards centralized institutions.

A comparison of the development of international investment arbitration and the WTO's DSS may help to clarify the ways the construction of international legal fields may reinforce institutionalization in very different ways. Following the path opened up by Yves Dezalay and Bryant Garth (1996), international arbitration may be said to function as an escape from state regulation and, therefore, is mostly self-organized through networks and identity links to which contribute some private organizations, such as the International Chamber of Commerce (ICC) in Paris. On the other hand, WTO's DSS looks very much like a state adjudication system and the field may develop with close attention to admission rules, both formal and informal.

So, to discuss the influence of the profiles of arbitrators and panelists on international institutionalization through the construction of legal fields, this paper puts forward an analysis of the professional profiles of all the arbitrators nominated to ICSID disputes, as well as all WTO DSS panelists, considering a limited set of variables, namely the overlap among people nominated to ICSID tribunals, WTO panels and the WTO Appellate Body (AB); their work in public, academic and/or

Oñati Socio-Legal Series, v. 1, n. 4 (2011)
ISSN: 2079-5971

private sectors; the individual and general frequency of nominations; and their legal background.

Following a brief account of the general features of ICSID and the WTO's DSS, the paper will explain the categories and methods used to generate the data, which will then be analyzed, and then discussed in relation to the hypotheses sketched out in this Introduction.

1. General features of ICSID and WTO's DSS

Though both DSSs are part of a discernible international legal system governing economic issues, they have several differences regarding their scope, structure and functioning, as well as their historical origins. It is, therefore, necessary to describe their main features as well as some remarks about their development, to facilitate the interpretation of the data on arbitrators and panelists.

1.1. ICSID and investment arbitration

International arbitration between investors and states was born as a substitute for the legal regimes of capitulations as well as the diplomatic protection of foreigners. The decolonization process that followed the Second World War took place in an international environment where the traditional European colonial powers lost much of their international power and became less able to impose capitulations. At the same time, the tensions of the Cold War left no space for diplomatic protection, since the support of foreign investors would be regarded as an undue and wrongful intervention against the newly independent countries and could galvanize public opinion in undesirable ways. Consequently, investors and their supporting states made efforts to build new political and legal devices to protect assets from nationalization and socialization, as discussed in the paper by Sornarajah in this collection. Some of them were devoted to creating legal sets of principles and rules to protect foreigners against allegedly politically unstable and legally underdeveloped countries, such as the development of a careful and complex contractual architecture that includes wide stabilization clauses; the promotion of national statutes to protect foreign investments, and the diffusion of foreign investment promotion and protection agreements (FIPPAs). These efforts to build normative underpinnings for foreign investment protection were complemented by the exclusion of domestic judicial forums as being inadequate to settle investment disputes, and the resort to denationalized arbitration between a private party – the investor – and a public one – the state or a public company.

ICSID appeared in this climate, since, propelled by its General Counsel, Aron Broches, the World Bank championed the creation of this international institution to deal with such mixed arbitrations between investors and states, concretized in the Washington Convention of 1965. As an international scheme backed by a treaty, ICSID has some advantages over purely private institutions, such as the International Chamber of Commerce of Paris (ICC) or the Stockholm Chamber of Commerce (SCC), since it (1) produces awards whose enforcement may be pursued in any member state, though respecting the local rules on immunities; (2) provides an international annulment scheme, which is unusual in arbitration; and (3) offer public facilities controlled by an international public organization, more transparent and immune from private control.

FIPPAs, the most common legal basis for investment arbitrations, first appeared in the 1960s – the first one between Germany and Pakistan, in 1959. The concept of a FIPPA includes bilateral investment agreements (BITs), investment chapters in free trade agreements (FTAs), regional agreements, and agreements on specific industries. There is no multilateral FIPPA that covers all kinds of investment and the OECD's attempt to promote the Multilateral Agreement on Investment (MAI) failed.

Moreover, though the Energy Charter Treaty is open to signature by any country, it only covers investments on energy and, as the effective list of members suggests, is *de facto* a regional treaty. Briefly, FIPPAs encompass (1) minimum standards of treatment (most favored nation, national treatment and fair and equitable treatment); (2) prohibition of expropriation unless for public purposes and accompanied by compensation; (3) the Hull formula of a prompt, adequate and effective compensation; (4) general provisions on transfers of capital, management and technical personnel, performance requirements, and full protection; as well as (5) consent to arbitration.

The legal immunization from politics through the international institutionalization achieved by both FIPPAs and ICSID was accepted by host countries, whose governments need foreign investment to foster their development projects and could justify their subordination to international standards and principles rather than to the desires of a colonial power, and desired by home countries, which do not need to face public criticism directed against international policies designed to protect national capitalists.

So, it can be said that the configuration of international law protecting foreign investments results from a complex historical substitution of capitulations regimes and diplomatic protection by a FIPPAs/arbitration system that combines private and public features, which is characterized by the convergence of a dense network of treaties, accelerating in the 1990s, and backed by international arbitration of disputes between states and foreign investors.

However, the international system of protection of foreign investments based on FIPPAs and the ICSID was latent from the 1960s to the 1990s. The recourse to private arbitration and general principles of law marked this whole period until, following the fall of the Berlin Wall and, therewith, of Soviet imperial power over Central Europe, a widespread tsunami of investment agreements flooded both transition and developing countries, whose need to review and change growth and development policies was shown by the debt crisis of the 1980s.

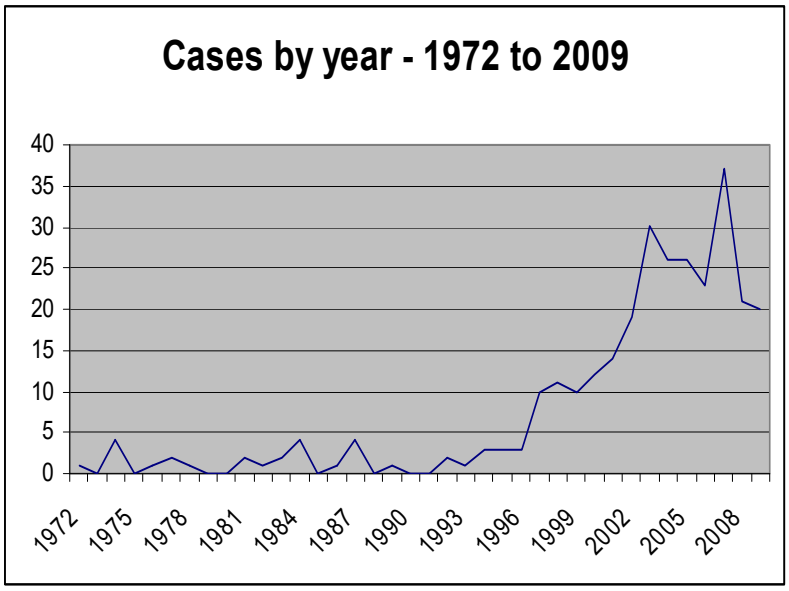
For instance, the South American countries, which said the "no of Tokyo" to ICSID in 1965, became members 30 years later: 8 of the 10 states that ratified the Washington Convention of 1965 did so after 1992 (COSTA, 2006)[1].

After that the caseload of ICSID grew steadily and reached more than 30 cases in 2007 and seems to have stabilized at around 20 new claims yearly, as Graph 1 shows:

[1] Brazil and Suriname never signed nor became members of ICSID.

Oñati Socio-Legal Series, v. 1, n. 4 (2011)
ISSN: 2079-5971

Graph 1



(From data in www.icsid.org, consulted June 10th, 2010)

Almost all claims are by investors against states, and both consent to jurisdiction and the applicable law are based on FIPPAs. Moreover, the private arbitration of investment disputes using the International Chamber of Commerce (ICC) or Stockholm Chamber of Commerce (SCC) rules and facilities are no longer the main way to deal with investor-state legal controversies. In fact, investment cases outside ICSID and UNCITRAL are less than 10% of the whole caseload[2].

Though it shares some features with commercial arbitration, as stressed by Yves Dezalay and Bryant Garth (1996), Claire Cutler (2003), Charles Leben (2003), Rubén Tempone (2003), Bernardo Cremades (2004), M. Sornarajah (2004) and Gus van Harten (2007a; 2007b), among many others, ICSID arbitration displays some international and public aspects that should be borne in mind. Firstly, the organization was created through an international treaty and its principles, procedures and substantive rules result from the will of states; secondly, unlike in most international arbitration schemes, it is possible to bring annulment procedures to be decided by *ad hoc* committees; and thirdly, though parties have complete freedom to choose arbitrators, if they fail to do so the person must be selected from a roster established by member states. A handful of additional special features could be mentioned, such as the rules of immunity and enforcement, but they are not very relevant to the present study.

Since the study of the body of nominated arbitrators and members of *ad hoc* committees is the subject matter of this paper, it is important to describe, briefly, the formal procedures for their selection: (1) each party choose one arbitrator, not necessarily from the roster; (2)

if any party fail to do so, the ICSID chairperson (the President of the World Bank), on the demand of the other party, chooses an arbitrator from the roster, who cannot be national of any of the parties in the controversy (Washington Convention, Articles 38 and 40); (3)

the third arbitrator, who is the president, is appointed by agreement of the parties; (4) if they fail to appoint the president, the chairperson chooses him or her, as described in (2); and (5) the members of *ad hoc* committees, always numbering three, are designated by the chairperson and shall not "have been a member of the

[2] UNCTAD/WEB/ITE/ITT/2004/2, p. 7.

Tribunal which rendered the [challenged] award, (…) be of the same nationality as any such member, (…) be a national of the State party to the disputes or of the State whose national is a party to the dispute, (…) have been designated to the Panel of Arbitrators by either of those States, or (…) have acted as conciliator in the same dispute" (Washington Convention, Article 52 (3)).

So, the parties play a central role in the nomination of the arbitrators and presidents of tribunals, while the chairperson acts only complementarily in this matter, but is the one who designates, from the roster (the "Panel of Arbitrators"), the members of *ad hoc* committees.

1.2. Dispute settlement in the WTO

The legend is well known: at the beginning, there were the diplomats, bound to the *Realpolitik* and ruthless masters of power games. Nevertheless, step by step, bureaucrats and lawyers concerned with a deeper institutionalization, filled each and every power vacuum left behind by political fissures among diplomats, until, through the WTO agreements, the power-based decision-making system was replaced by a rule-oriented one (JACKSON, 1997; 2009; YOUNG, 1995). However, like any oversimplified narrative, it is both true and false.

In fact, it is possible to identify an increasing institutionalization that could be described in terms of more differentiation and specialization of organs and bodies, clearer rules, defined and shorter terms, and compulsory jurisdiction. Nevertheless, some aspects should be stressed to allow a better understanding of the transformation of the dispute resolution system. Firstly, despite what the dichotomy between *power oriented* and *rule oriented* decision making systems may suggest, there is no clear boundary that separates these two categories, nor any historical process involving an immediate change from one to the other. Secondly, the actual process of increasing institutionalization cannot be described as a smooth path towards a steady improvement, but as a complex evolution driven by conflicts and tensions, as well as marked by stalls and setbacks.

However, the WTO's DSS changed profondly the approach to resolution of international trade disputes. Several aspects of the DSS are strengthened by the Understanding on Rules and Procedures Governing the Settlement of Disputes of the WTO (USD), such as timetables, monitoring procedures and formal criteria for the choice of panelists. However, three changes produced the most important impact: (1) the need for a consensual decision of the Dispute Settlement Body (DSB), a political organ composed by the representatives of all members, to reverse a decision of a panel or the AB; (2) the compulsory submission of disputes to the jurisdiction of the DSS; and (3) the creation of an AB, which though in formal terms not a kind of supreme court, performs a very similar role.

The GATT system required the consent of all the CONTRACTING PARTIES to adopt a decision of a panel for it to become an international obligation and, as could be expected, this was virtually impossible, since the defeated party in the procedure was always able to block the adoption by its negative vote. Since the WTO system reversed the consensus rule, neither a single member, nor any kind of majority, can now block the conversion of a panel or AB report into a decision of the Dispute Settlement Body (DSB) – a political organ composed by all WTO members – as well as the authorization by this organ of the suspension of concessions and implementation of compensatory measures: only the consensus of all WTO members, included the winner, may reverse the results of a panel. Consequently, the political process of the discussion of the reports of panels, which under the GATT system was the way to push a contracting party to suspend a measure found to be invalid, is no longer a bar to the adoption of reports, though it still performs the role of a discussion forum. Moreover, the control of states over dispute

Oñati Socio-Legal Series, v. 1, n. 4 (2011)
ISSN: 2079-5971

settlement was also reduced by the obligatory jurisdiction, and by the more effective procedure for the selection of panelists if the parties do not reach an agreement.

The negative consensus rule, however, was foreseen by the negotiators of the WTO agreements as giving too much power to panels and, consequently, the AB was established as a counterweight. Originally it was expected that appellate procedures would be rare (HUDEC, 1999; HUGHES, 2009), but this was not confirmed by the actual caseload and it became normal to ask for review of panel reports.

Moreover, although established as an organ that was expected to be mostly inactive and meaning nothing more than a part time job for its members, the AB adopted a very proactive attitude toward the affirmation of its authority and importance. This took the form of (1) rules of the Working Procedures of the Appellate Body (WPAB) that aimed at the construction of internal consensus and gave an exceptional character to dissenting votes and opinions, mainly through collegiality (ÁLVAREZ-JIMÉNEZ, 2009); and (2) a strong commitment, informally established by the original members, to keep the eventual disagreements to internal discussions, and to project an image of legal and technical consistency to strengthen the legitimacy of the organ (LACARTE-MURÓ, 2007), which established the basis for a culture that seems to have been inherited by the succeeding generations of members.

Therefore, it may be asserted that the legal character of the WTO's DSS was reinforced both by (1) the weakening of political legitimation through the DSB due to the shift towards negative consensus and (2) the successful search by the AB for technical and formalist legitimacy.

However, this does not necessarily means that the *power oriented* or *diplomatic* nature of the DSS has faded away, since the political processes of selection of members of panels and AB may influence the decisions. A closer look at the profiles of decision makers is proposed here as a way to understand in more completely the actual meaning of these procedural and institutional changes. However, this paper focuses on members of panels because, due to their *ad hoc* nature, the nominations to them are more sensitive to reactive adjustments, and they also provide a far larger population.

It is also necessary to make clear that the procedures for choosing panelists are quite different from those of ICSID's system[3]: (1) Since a panel is established by the DSB, the Secretary proposes the panel composition to the parties, who can accept or reject the whole panel, not the individual members; (2) a party must give reasons for any rejection; (3) after a rejection, the secretary presents a new panel proposal, which may also be rejected; (4) the Director General appoints the members of a panel if (a) 20 days have elapsed since the establishment of the panel by the DSB and (b) a party files a request; (5) there is a list of potential panelists maintained by the WTO Secretariat, consisting of people nominated by member states, but need not be the source for either the Secretary's or the Director General's appointments.

In the GATT system panels could be nominated only with the agreement of the parties to the dispute. After the adoption of the WTO's DSS, nominations by the Director General became quite common and account for about 67% of the panels composed from 1995 to 2009.

[3] The description presented here follows the written rules of the DSU, though in practice the real procedures differ sharply from them, as described by James Flett in his contribution to this collection.

2. Terminology and criteria of data collection

This paper generally follows the terms employed by the international conventions that constitute ICSID and the WTO DSS. Consequently:

1. "panelist" is a person nominated to a WTO panel;
2. "member of the AB" is a person appointed to the WTO's Appellate Body;
3. "arbitrator", unless distinguished in the context, is used in this paper as meaning a sole arbitrator, a member of an ICSID tribunal, including the president, or a member of an *ad hoc* committee, since all these categories have merged into the same general population;
4. "president" is the president of an ICSID tribunal and is so designated only to distinguish him or her from "regular arbitrators"; and
5. "member of an *ad hoc* committee" is a person designated to such an ICSID annulment committee.

The population studied is composed of all nominations between 1995 and 2009 to WTO panels, ICSID arbitrations and ICSID annulment procedures. A nomination is the mention of the name of the panelist, arbitrator or member of *ad hoc* committee on the official website of the WTO or the ICSID.

Both nominations and people are classified in four categories:

Legal background: means a university degree or professional studies in law, admission to the bar, work as counsel or work as judge;

Governmental service: work as diplomat, judge, minister, state attorney, prosecutor, congressperson, a position in state agencies or state companies, and a representative in international conferences; however, consultancy or advisory services to states or state agencies or companies are not considered as governmental service;

Academia: work as professor, dean, president, coordinator, lecturer or tenured researcher in universities or research institutes; however, publications in journals and reviews, editorial work, lectures and addresses outside university or research institutes and other activities alike are not considered to be academic service; and

Private: partnership or work in law firms, private companies, consultancy firms, think-tanks, as well as any occupation not covered by (2) or (3).

The categories are not logically exclusive, which means that a single individual may belong to all 4 sets. Moreover, though category 4 is residual in relation to 2 or 3, the inclusion of an individual therein is not automatic in the sense that it requires a positive mention of the membership of the person in a law firm or other private occupation.

The list of individuals is the one made available in the official websites. ICSID arbitrators are those nominated in the pending and concluded cases in the links of the webpage http://icsid.worldbank.org. WTO panelists are those nominated in documents named "constitution of the panel" that can be found in http://www.wto.org/english/tratop_e/dispu_e/find_dispu_documents_e.htm. The name, as indicated in the websites, is an individual. A set of identical names is treated as a single person. When the names are not identical due to presentation styles, change of a maiden name or material errors, they have been united under a single person.

Links between the names and the categories defined by the above criteria were made through an internet search using the Google search engine, and a complementary search in the Lexis-Nexis database. Only data from official websites of (1) states or international organizations; (2) universities or institutes; (3) legal firms; (4) private companies; and (5) personal pages or (6) obituaries in reviews or newspapers, have been used.

The search was performed using the following protocol:

1. Google search with the complete name as a single argument, such as in "Brigitte Stern";
2. If no relevant match was found, a Google search with the name separated in as many arguments as applicable, such as "Brigitte" "Stern";
3. In any case, if the set of Google matches is very high or homonymous persons were found, the following arguments were added to (2): "WTO", "ICSID", "law", "legal", "LLP", "professor", "ambassador", "university", "arbitrator", "arbitration", "trade", "investment" and "international", as well as the corresponding terms in French and Spanish. The auxiliary languages were chosen since they are used in the WTO (French and Spanish) and ICSID (French) websites;
4. There were some relevant websites that did not confirm the relation between the name and the participation as arbitrator or panelist. These matches have not been actually excluded, though due attention was paid to possible mistakes and some subjective discretion was used in these cases, for instance to distinguish an immigration lawyer in Miami from a homonymous Ecuadorian diplomat. The use of such subjective criteria was applied in under 2% of collected data;
5. The Lexis-Nexis database was used as an ancillary search tool to help narrow the sets of names as well as to find people whose profile was not found using Google; and
6. All relevant data has been collected between March 1st and July 1st 2010.

3. Concentration by nominations and cases

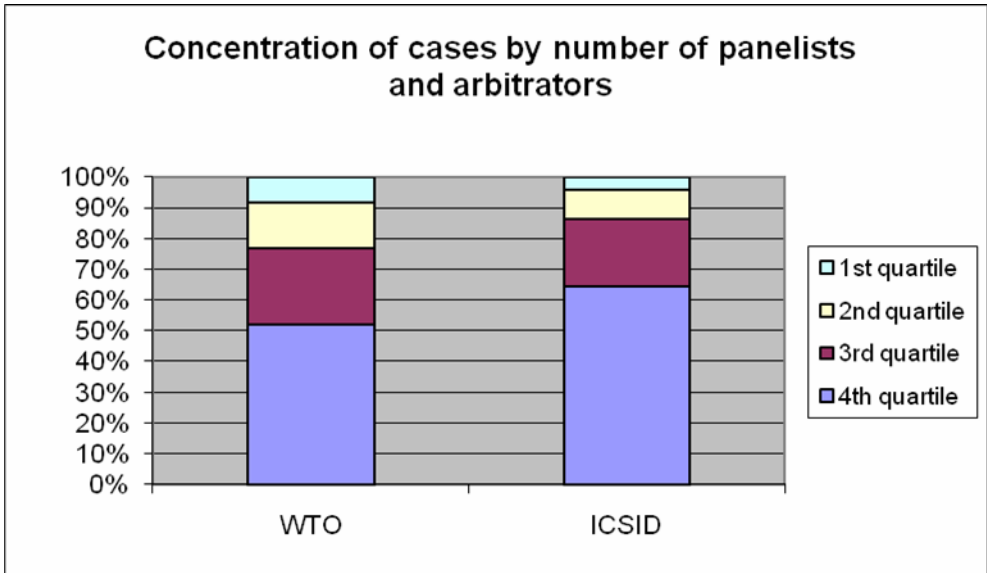
Repeated nominations of the same person are far more common among ICSID arbitrators than among WTO panelists. Assuming homogeneous distributions and an unlimited number of potential people (those whose social and cultural capital is enough to make a nomination possible, though were not nominated), it would be expected that the average number of times each person is nominated (the repetition rate) would be 1.0. Figures over 1.0 indicate a more selective choice, which means the use of criteria that restrict the set of potential individuals. Consequently, the higher a repetition rate is, the narrower the entrance gate.

There are 863 nominations and 273 people in the set of ICSID arbitrators and 430 nominations and 212 people in the set of WTO panelists; hence, the repetition rates are 3.2 and 2.0, respectively. If the set of potential people were the same for both, the higher level of repetition would be easily explained by the bigger size of the ICSID set, roughly double that of the WTO. However, since the overlap between both sets of individuals is relatively low, as shown below, there is no reason to presuppose that the repetition rates are a function of the size of populations in the case under analysis, and it is correct to assert that the higher rate indicates a higher selectivity.

The distribution of nominations among arbitrators also points at interesting differences between ICSID and WTO systems. For instance, group of only 12 arbitrators (4.4%) of the ICSID population accounts for about a quarter of nominations, while 17 of WTO panelists (7,65%) respond for the analogous quartile. Graph 2 shows the proportions of panelists and arbitrators divided into four quartiles that represent the four respective groups of more often nominated people. For each DSS, the total of nominations has been divided into four parts, which were distributed to the four sets of arbitrators and panelists, organized accordingly to their respective numbers of nominations. So, the first quartile of each column represents the group of people who were nominated most often and account for a quarter of the whole set of nominations, and so on. It suggests the

conclusion that an élite accounts for a higher proportion of nominations in ICSID than in WTO DSS.

Graph 2



However, it is also important to observe that the 12 people (first quartile) who account for over a quarter of the ICSID nominations are present in 60% of the tribunals, i.e. in 158 out of 263 tribunals. In other words, the group of more frequent arbitrators spreads their influence not only on a quarter of tribunals, but well over half of them.

Which could be the reasons for this? Though other hypotheses are possible, two of the more obvious are discussed briefly below.

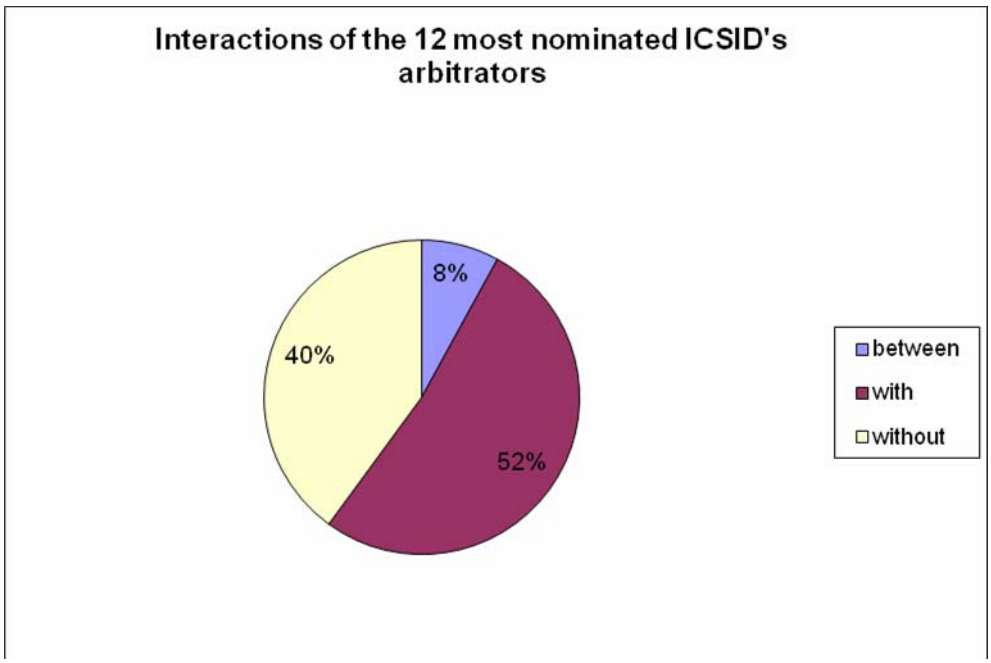
Who nominates? Since it is not possible to know how many arbitrators have been nominated by parties or by the ICSID chairperson, it is not possible to compare these figures with the WTO rate of nomination by the Director General, which covers 63% of the population. Nevertheless, it is correct to presuppose a minimum of 33% and a maximum of 90% of nominations by parties to ICSID, since it would be very odd that the claimant fails to nominate an arbitrator to the tribunals, and the *ad hoc* committees, which represent about 10% of the population, are entirely nominated by the chairperson. Though this range is very wide, the maximum of estimated nominations by the chairperson – 67% – is not very far from the effective WTO rate, but it is very reasonable to expect that in ICSID the choice by parties is far more common than by the chairperson. Consequently, if it is correct to suppose that the choices of a person or an organ are more prone to fall into a stricter group of possibilities, a higher concentration in WTO panels would be expected, which does not happen at all. On the other hand, since parties put their interests at stake in dispute settlement by third parties, it may be expected that they prefer, in order to manage risks, to appoint an arbitrator or panelist whose behavior is predictable on the basis of former judgments. This hypothesis is corroborated by the data.

Oñati Socio-Legal Series, v. 1, n. 4 (2011)
ISSN: 2079-5971

Leadership and institutionalization. The WTO DSS and ICSID arbitration involve different degrees of institutionalization. The WTO's normative system comprises a single comprehensive set of substantive rules, the entire regulation of procedures and mandatory instruments to establish panels and enforce decisions. The ICSID only organizes arbitration; the substantive and procedural rules may be determined by the parties in the disputes. Though it is most common to use ICSID's own arbitration rules, the sets of substantive rules and consent to arbitration varies. In a less regulated and institutionally weaker system – FIPPAs/ICSID – a strong non-formal leadership is more necessary, since legitimacy must be asserted case by case, as well as being easier to establish, since there is no competition between an informal elite and the bureaucratic bodies. Since social cohesion based on face-to-face relations or shared consensus are supposedly an inverse function of the number of members of the group, frequent arbitrators would be able to become a hard core, reinforced by high rates of social direct interactions and networks of diffusion of behavioural standards. A more institutionalized DSS scheme does not need such an underlying social structure.

These hypotheses are not incompatible and it is possible to identify the parties' interest in controlling risks as a push towards a higher selectivity based both on the valuation of experience and predictability of behaviour as positive assets. Nevertheless, the small number of leading arbitrators also enables them to reinforce their *habitus* through face-to-face encounters not only in the tribunals (63 interactions[4] in ICSID tribunals) but also in other arenas, such as conferences and associations. At the same time, they spread an *habitus* through interactions with other arbitrators – 411 out of 726 interactions in ICSID tribunals – in several environments. Curiously, the number of interactions that involve any of the 12 most nominated arbitrators – 474 – represents 60% of the total of interactions, as showed in Graph 3, suggesting plenty of opportunities to reinforce *habitus*.

Graph 3



[4] An interaction is defined here as a nomination of two arbitrators to the same tribunal, discarding arbitrators who resigned or left the tribunal for any other reason. There are an aggregate of 789 interactions. This does not mean, however, an actual interaction in audiences or gatherings, since every nomination – even the ones to tribunals that did not start functioning due to a negotiated solution – have been taken into account.

4.Population Overlaps

The comparison between the ICSID and WTO lists of arbitrators, members of *ad hoc* committees, panelists and AB members shows a relatively narrow set of persons who have participated in both systems. The number of people who were nominated to ICSID tribunals and committees is 273, while 212 people take part in WTO panels. Nevertheless, the overlap is of only 8 people. Considering the number of individuals, this set represents 2.8% of WTO individuals and 4.7% of ICSID's.

However, when the ICSID nominees are compared to the WTO's AB members a very different picture arises: the overlap reaches the number of 6 persons. This still represents a relatively thin slice of ICSID's tribunals – only 2.4% of individuals.However, it represents 28.8% of past and present AB members, a far more significant figure.

The list of overlaps includes, as can be seen in Table 1, one of the leading ICSID arbitrators (Orrego Vicuña) but none of the most common panelists. Interestingly, the designation to be a member of the AB seems to be an asset to start arbitrating investment disputes because out of 21 nominations, apart from one, that of Luiz Olavo Baptista in 1997, all others happened after nomination to the AB, 15 during the process and 5 thereafter.

Table 1

	ICSID	WTO	WTO - AB
Armand de Mestral	1	1	0
Claus-Dieter Ehlermann	1	0	1
David Unterhalter	4	3	0
Florentino P. Feliciano	6	1	1
Francisco Orrego Vicuña	22	1	0
Georges Abi-Saab	7	0	1
Giorgio Sacerdoti	4	0	1
Gonzalo Biggs	1	3	0
Guillermo Aguilar Alvarez	4	1	0
Luiz Olavo Baptista	2	1	1
Merit Janow	1	1	1

The leadership hypothesis above is, again, useful to interpret these data. The Appellate Body plays a very important role for the assertion of the legal legitimacy of WTO's DSS and the choice of its members reflects the need to reach supposedly high standards of technical precision and quality. For its higher dispute resolution technical body, WTO also needs people who contribute to the institution as they bring their personal cultural assets to it.

Nevertheless, the sequential analysis of nominations points in quite a different direction: 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.

This means that leadership from the arbitration field is not easily transferred to WTO's institutions and, as a matter of fact, the AB gains no extra prestige in

including experienced investment arbitrators. Reputation flows – as the data suggest – from the WTO to arbitration and not in the other direction.

5.Legal background

Virtually all ICSID arbitrators and *ad hoc* committees members have some legal background, since only 0.4% of the whole population is of individuals who had not at least studied law. On the other hand, WTO figures are very different: 45% of panelists and 10% of AB members have no links to any legal background or professional activity.

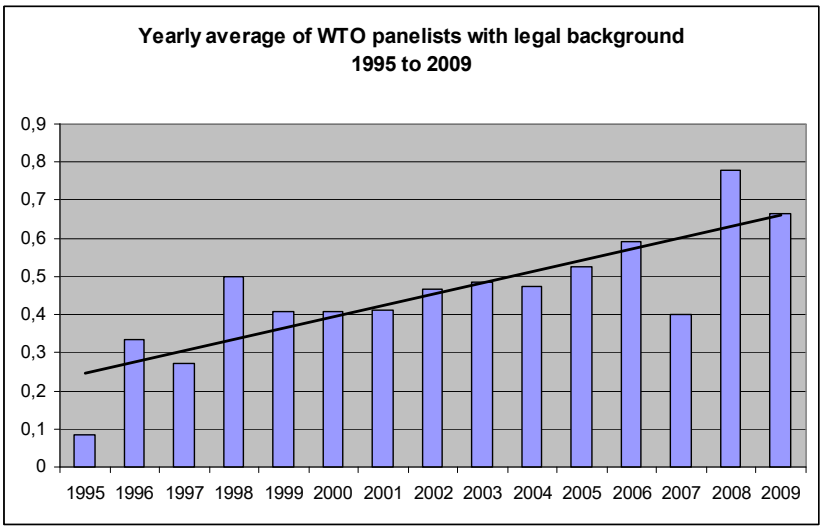
However, the participation of individuals with legal backgrounds has increased in WTO panels, as shown in Graph 4, and it is also important to draw attention to the fact that the number of panels with no member having a law degree or legal experience tends to zero, as Graph 5 shows. In fact, from 2005 to 2009 only a single panel out of 37 (2.7%) has no such member.

In fact, the hypothesis of a growing legalization of WTO's DSS has grown stronger over the years, though it is not possible yet to assert that there is a clear tendency towards a complete takeover by panelists with a legal background. Though it is sometimes asserted that the normative structure of WTO instituted the legalization of the international trade system (Young 1995; Jackson 1997), the complete construction of a legal field depends on the social establishment of a specific way to deal with rules and institutions to legitimate power relations under the veil of neutral and correct application of a *corpus* of principles and rules. The increasing appointment of people with legal backgrounds to WTO panels seems highly motivated by the need to change from a legitimating scheme based on the political compromise between countries' representatives to a legal system that depends on interpretative skills and legal training to be properly driven, since legality is now assured by the AB, closely watched by a global public – the new audience of legitimating actors.

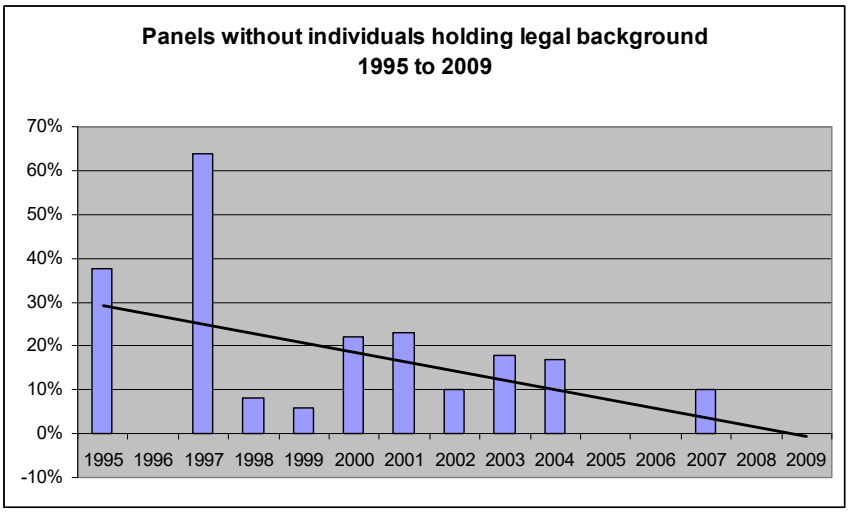
However, there are significant differences in the figures of arbitrators and panelists with legal backgrounds. Would it not be expected that a less formalized system, such as that of the FIPPAs/ICSID, would need less legal specialization, since appeal and annulment procedures are looser and the free choice of parties may prefer specialists other than jurists? Why, comparing both systems, does the less institutionalized one need more people with legal backgrounds than the other?

Proper responses to these questions cannot be provided without looking at the historical construction of both systems and, particularly, at the inertial effects present in the transformation of the GATT into the WTO.

Graph 4



Graph 5



The WTO panels come from GATT panels, which traditionally were composed of Geneva trade diplomats. When the new system entered into force, there were inertial momentums which kept diplomats as the main operators of the DSS. In fact, experience in former panels – though under a different regime – and expertise in trade issues represent, at least at first, assets more valuable than legal knowledge and experience in judicial or arbitral procedures. Nevertheless, as will be discussed later, the presence and functioning of the AB, which resembles a court of appeal, created pressures towards a wider resort to legal personnel, who also gained experience and expertise in international trade disputes.

Investment adjudication, on the other hand, has its ties with commercial arbitration. Though, from a legal viewpoint, investment arbitration must be clearly distinguished from the commercial variant, the most frequent investment arbitrators usually take part in that kind of private dispute resolution as well. Certainly, a substantial change happened in investment arbitration since the early 1990s, as can be easily perceived from Graph 1 above, but it can be interpreted as a mere quantitative change triggered by the weakening of political West-East tensions since the fall of the Berlin Wall, that left almost unchallenged the strong links to commercial arbitration and the high value of cultural assets such as experience in arbitration, academic credentials and a personal reputation for impartiality.

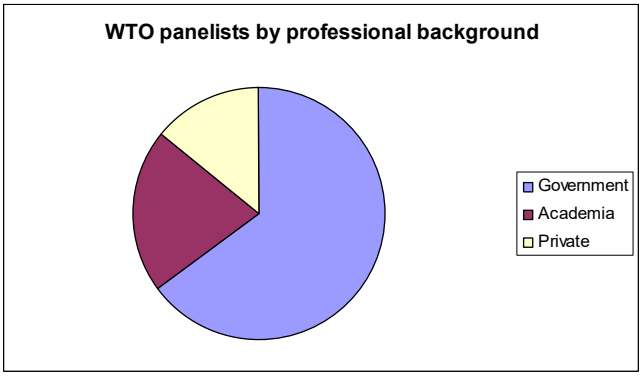
Oñati Socio-Legal Series, v. 1, n. 4 (2011)
ISSN: 2079-5971

Since the DSS for investment is, today, institutionally as dense as ever and each case is politically sensitive for the host country, the need to build legitimacy on a case by case basis demands a professional profile of arbitrators who can provide technically correct decisions and the special aura given by sanctified arbitrators. The history of the WTO's DSS is quite different, since deep institutional changes happened after the GATT period and an institutionally denser decision making scheme does not need to be operated by arbitration stars; moreover, the inertial presence of specialized diplomats may be retained by the organizational bureaucracy.

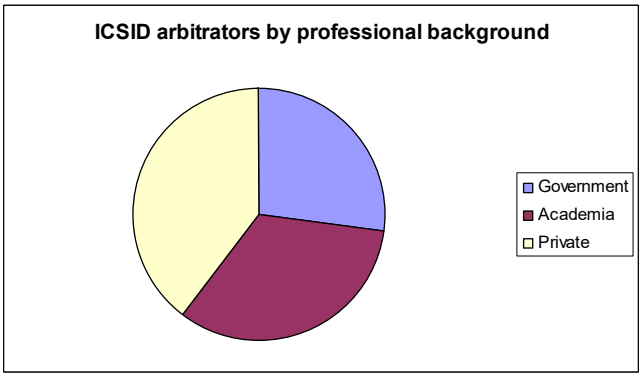
6. Professional profiles

After the interpretation of population overlaps and the distribution of the legal background, a higher rate of individuals who have held public positions, such as diplomats and judges, is expected among panelists than ICSID arbitrators. In fact, as shown in Graphs 6 and 7, the distribution among the three professional categories is quite different in panels and arbitration tribunals. The multiple profiles have been treated cumulatively, since, firstly, the influence of a professional profile as cultural capital is assumed to increase in tandem and, secondly, the accuracy would not increase through the application of criteria to determine predominant profiles, since the mixes also vary from very clear to quite blurred distributions for each person.

Graph 6

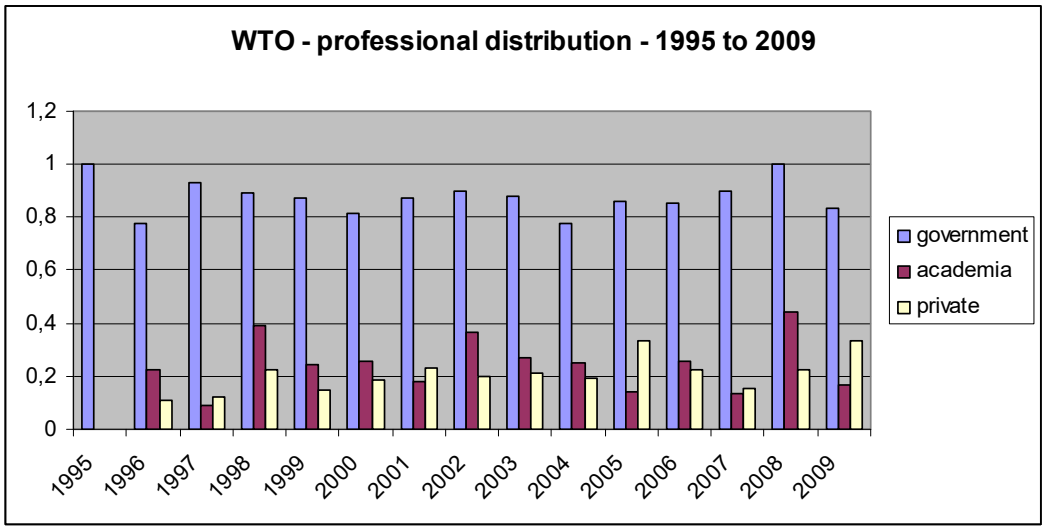


Graph 7

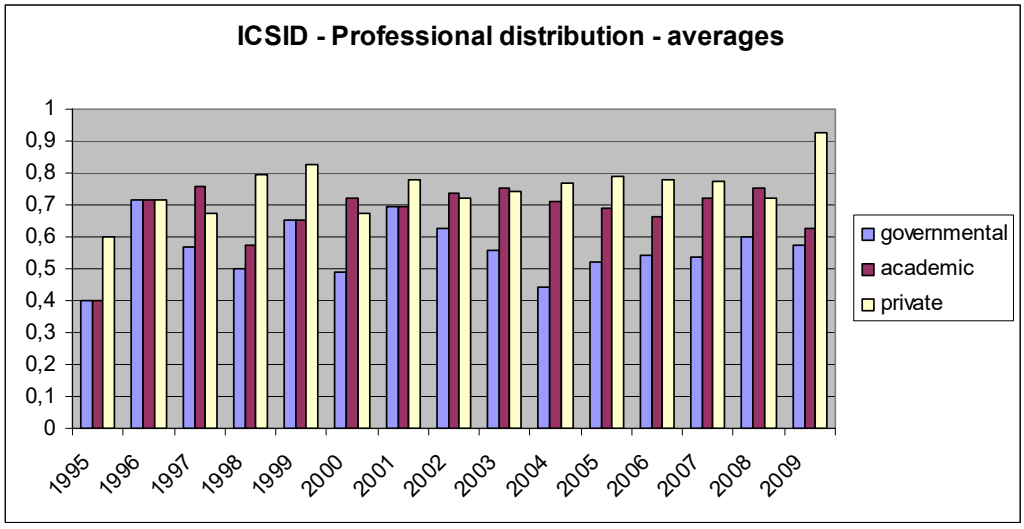


Also as observed above, more extensive transformations in the professional mix are to be expected among WTO panelists than among ICSID arbitrators. These tendencies can be seen in Graphs 8 and 9.

Graph 8



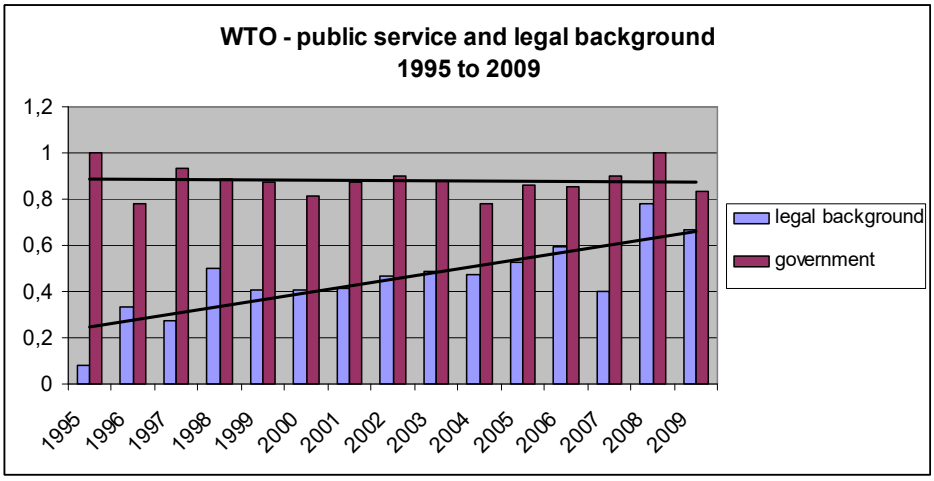
Graph 9



The evolution of WTO panels' professional distribution shows no clear pattern, at least not as clear as the growth of panelists holding legal background. So, the steady growth of the proportion of legal panelists cannot be strongly linked to the growth of academics or lawyers: this seems to happen clearly in the early years, when the increase of legal personnel is complementary to the decline of public – mainly diplomatic – careers. However, the data as a whole tell a different story: a stable high rate of individuals from public service associated with a growing rate of individuals having any legal background suggests that a substantial part of the "legalization of panelists" is due to the preferential choice of diplomats with legal diplomas. To illustrate this tendency, Graph 10 compares the averages of the population with legal background with the average of the population from public services.

Oñati Socio-Legal Series, v. 1, n. 4 (2011)
ISSN: 2079-5971

Graph 10



Regarding ICSID tribunals, indeed, the professional distribution seems more stable throughout the years. It is interesting, however, to stress that multiple profiles have always been very common in this DSS, while less frequent in WTO panels. The average of professional affiliation by individual is 2.0 in ICSID tribunals and 1.3 in WTO panels.

It is possible to interpret the different rates of multiple profiles as related to the strength of institutionalization in both DSSs. As discussed in relation to legal backgrounds and the overlap of populations, in investment arbitration there is a more frequent need to stress the legitimacy of arbitration tribunals. A double or triple profile may enhance the confidence in the arbitration, since the strengths of each activity may be invoked for the sake of technical correctness and moral rectitude. In fact, 90% (95% from 2005 to 2009) of ICSID arbitration tribunals and *ad hoc* committees combine the three professional links. So, should also be stressed that this factor is important to affirm legitimacy against the argument that these tribunals entail a privatization of dispute resolution. There is not enough data to assert this, but the triple profiles could hardly be regarded as an element of a structure devoted to equating private and public interests, mediated by neutral academics, and legitimating discourses may be constructed around this.

7. ICSID's arbitration and the construction of a legal field

As initially stated, Bourdieu's notion of legal fields is constructed around domestic legal systems where it is easy to recognize a relatively strong and clear centralization of the use of force in the state. Hence, legal fields are designed to legitimate state power structures through a discourse of technical correctness, ideological neutrality and impartiality.

Investment arbitration, though resulting from international public instruments such as the FIPPAs and the ICSID, cannot be viewed as organizing itself in the same way as a domestic legal system. There is no state power to legitimate, nor any kind of centralized power. There is no need to replace, or disguise, crude force through symbolic violence. So, the FIPPA/ICSID system articulates power in a distinct fashion, mainly by restricting state powers to regulate foreign investments and investors, since standards and rules are established in the treaties to protect them against excessive exercise of state powers. In other words, the legitimacy of the system still deals with the classical problem of capitulations régimes, diplomatic protection and autonomous *lex mercatoria*: how to deal with disputes outside the states' statutory and judicial structures and maintain an aura of fairness and correctness.

The sanctions behind FIPPAs – payment of compensation and loss of international confidence – are not dealt with in the same way as in criminal convictions or civil judgments, which are orders to use state force. Due to sovereign immunities from jurisdiction and enforcement it is not easy to ensure the payment of compensation by states and, in fact, it is far more common that countries pay in good faith, or at least due to the fear of international discredit and negative effects on investment inflows. So even compensation ultimately relies upon reputational sanctions and doubtful awards may be highly damaging.

The role of investment arbitration, therefore, is to offer technical legitimacy (1) in each and every case as well as (2) to the FIPPAs/ICSID system. Consequently, there is a great need for arbitrators who are technically qualified and beyond any doubt, to give support to a discourse of fairness and rectitude. That is, probably, one of the reasons for the immediate strong reactions against any attempt to even discuss bias in investment arbitration by leading international legal experts in these issues.

Consequently, the legitimating discourse is centered on the image of arbitrators who are highly technically prepared, who have outstanding careers as professors and lawyers, though sometimes also having some former experience in public affairs. The guarantee against possible bias or corruption, it is argued, comes exactly from (1) the relatively low role arbitration plays in individual careers, though most arbitrators now declare themselves to be such, contrarily to the "grand old men" of an earlier generation, and (2) the need to keep the technical and moral reputation beyond any doubt. Since the parties play the main role in the selection of arbitrators and nomination by ICSID organs is quite rare, strategies to be renominated do not focus on the international or domestic bureaucracy, but on the projection of an image of high standards of knowledge and morality associated with professional networking.

Since there is no strong institutional basis, nor a stable bureaucracy, it is necessary and easier to construct web networks based on leadership. In fact, as shown in section 4, a small group of arbitrators constitute a legal elite, incorporating the spirit of international arbitration and being directly responsible for the confidence in the system.

It is possible to hypothesize that the centrality of the legal field of international protection of foreign investment is defined by these leaders, who are not faceless and disseminate patterns of career structure and professional commitments that are constitutive of an *habitus* followed in less central parts of the field.

At this point, the overlap between ICSID and WTO populations is very revealing: though there is little overlap between arbitrators and panelists, the number of AB members who are nominated as ICSID arbitrators is very high and suggests that the social *status* associated with the arbitrators is higher than that of panelists and, moreover, that very central positions in the trade legal field are not separated from that of investment, since they give prestige and legitimacy to the investment field, as the timing of appointments show.

So, the strategies relating to international adjudication on foreign investments do not happen in a highly institutionalized environment. Therefore, the system depends very much on the personal characteristics of the decision makers, as well as on the discourse that distinguishes investment cases from domestic affairs as well as from interstate relations. Since the defence of the field and the struggles for centrality therein must be performed at the same time, due to the absence of a centralized jurisdiction, the formalism appropriate to the legitimating processes through symbolic violence and a strong depoliticization are performed by the identification of the technical use of a legal *corpus* and the decision making processes. There is no judge presupposed to be legitimate; arbitrators, and

investment arbitrators in particular, contribute the legitimating capabilities from their personal curricula.

8. WTO's DSS and the construction of a legal field

The AB was created as a substitute for the political control by the CONTRACTING PARTIES of the GATT. The Dispute Settlement Body (DSB), the political organ of the WTO that needs a consensus to reject a panel or AB report, has no competence to verify that the panel decisions are confirmed by the proactive strategy of AB members. Moreover, the recourse to this organ proved far more common than expected. In its first two years there was no case which was not appealed and the historical average of recourse to appeals is 68% (WTO 2010).

It is very common, therefore, that panel reports are challenged. This situation pushes both panelists and other bureaucratic bodies – such as the Secretariat and the Director-General – to pursue compliance with the AB's precedents. As the surveyed data suggest, the growth of the share of panelists with a legal background may be a reaction to the prevalence of appeals and the need to comply with the AB's standards.

The chronological analysis of panels data reveals a steady trend of growth of the share of the population with (1) a legal background and (2) panels where at least one of the members presents this feature. These aspects, however, do not strongly counterbalance the preponderance of diplomats as WTO panelists, since their share of the population seems to have stabilized at around 80%.

Strategies of adaptation performed by the choice of specific profiles when nominating panelists, considering that the AB built its legitimacy through a formalist legal approach akin to the symbolic violence of domestic legal fields, face some important conditions. These are: (1) convincing parties to the dispute became less important in the WTO's DSS since it became virtually impossible to block DSB decisions and the legal discourse gained momentum as a legitimating tool; and (2) since the AB became the new audience to be convinced by the panelists, not the DSB, a legal background was transformed into a valuable asset, since it facilitates adherence to the AB's precedents, though they are not formally obligatory.

The legalist approach, characterized by the objectivist epistemology and formalist style adopted by the AB (PICCIOTTO 2005), is backed by technical legal parameters that are very similar to domestic ones. In this sense, and considering that the composition of panels reacts steadily in order to adapt to the more legalist standards, it is possible to assert that the institutional changes since 1994 modified the DSS of international trade in a way that increased the institutionalization and legalization of international institutions, resulting in an organizational support for the formation of an international legal field. However, the predominance of diplomats in the population of panelists could be regarded with suspicion: could it be a way to reintroduce political control through the backdoor?

At first sight, an affirmative response to this question seems completely correct. Yes, to control outcomes by opting for profiles that are both adapted to the formalist legal discourse and the political constraints of governmental activities stabilizes cognitive expectations of the field. The claim to political neutrality of state judges, which enables technical legitimacy through legal discourse, does *not* mean any *actual* lack of a political dimension. Bourdieu's field theory shows this clearly, revealing that power disputes occur all over legal fields; both as internal conflicts for centrality and influence and as an external struggle for legitimacy. The presence of diplomats with a legal background in panels is an element of a strategy towards external legitimacy through formalization and stabilization of expectations coherent with state goals.

It is not yet bureaucratically controlled by its own judges, as in some domestic systems, and the *ad hoc* character of the panelists' nomination means that these organs remain very far from a professionalized judiciary. However, the choice of diplomats with legal backgrounds offers (1) stabilization due to homogeneous profiles and experiences that may substitute, at least partially, for the sense of corporate cohesion of jurisdictional groups as well as (2) relatively low pressures on panelists to seek to be renominated, as well as low temptations to be corrupted, since the public wages are generally stable and participation in international tribunals is no more than a compliment, and (3) a reasonable balance between the political experience of diplomatic careers and the legal background that values positively formalist legitimating schemes.

So, the differentiation among lawyers, professors and diplomats, with the predominance of the latter in the panels, are elements of resemblance to domestic legal fields, not of an odd process schizophrenically divided between lawyers and diplomats. The predominance of diplomats with legal backgrounds in the population of panelists is, therefore, indicative of the construction of an international legal field through the institutionalization performed by states through international organizations.

The WTO's DSS looks very much like domestic legal systems. Legitimating discourses are strongly based on depoliticization, namely that which results from the negative consensus rule and the centrality of the AB's role. The diminution of the DSB's powers to obstruct the adoption of panel or AB reports, as well as countervailing and compensatory measures, is generally seem as a legalizing process that replaced politics between state representatives in large assemblies. As was stressed, this does not mean that the functioning of a legal system is a purely technical, non-political process. However, the use of symbolic violence and the articulation of the legal field, including the aspects resulting from the specialization of its operators, are clearly political. The legitimating process, contrarily to what happens in arbitration, does not depend on the quality of the decision makers, but on the quality of the system as a neutral and technical one. Access struggles and strategies to reach the field's center, consequently, are less linked to a strategy to maintain the system as a whole.

9.Legal fields in ICSID and WTO

This concluding section, loosely summarized in Table 2, aims to bring together the partial discussions and conclusions expressed so far. Beginning with the concepts of legitimacy and field, it discusses further how the data about arbitrators and panelists' profiles shed some light on important questions about how international legal fields are constructed and how they perform their legitimating roles in different ways in the investment and trade legal arenas.

As discussed above, the notion of legal field deals with two separate, though complementary, sets of questions, namely (1) the way power is legitimated through the symbolic violence that derives from the social action of judges, lawyers and academics and (2) the way people belonging to the field help to establish its structure through the competition for inclusion and centrality cemented in *habitus* and strategies that result both in good results in terms of legitimacy (strengthening the field) and successful careers.

The set of data presented here aims to help understand features of the *habitus* in each field, as well as which, and how, cultural capital may be earned inside or outside the field, and be imported into it. Data on the concentration and overlap of populations help to understand how closed a field is, suggesting that a higher amount of cultural assets may be necessary to take part in it and, consequently, that the *habitus* is more sophisticated and under stricter control. In this regard, considering the set of arbitrators and panelists, investment dispute settlement seems to be more demanding on its participants.

However, WTO dispute settlement is a far more institutionalized system. Hence, is is necessary to bear in mind that panelists are quite different from AB members, while arbitrators and *ad hoc* committees members are more homogeneous. There are some structural differences that help to explain why there is a strong hierarchy between panels and the AB, and quite a loose one, if any, between ICSID tribunals and annulment committees. Firstly, the AB is a permanent body, while, as indicated by their names, committees are *ad hoc*. This marks very clear boundaries between panelists and AB members, which are blurred in the investment arbitration world. Secondly, appeal is almost the default response to panel reports while annulment is very exceptional. Consequently, if arbitrators feel free to decide as they want, panelists and lawyers are supposed to pay attention to former AB decisions, a fact that is reinforced by the permanence of this organ. Thirdly, investment arbitration is less functionally specialized. This is because it is quite common that lawyers wear two hats, as arbitrators (or panelists) in some cases and counsel in others. Since the average of lawyers in the arbitrators' population is 76% and only 19% among panelists, it is easy to conclude that trade panelists and trade lawyers come from completely different origins, and also reasonable to surmise that the overlap between investment arbitrators and counsel is much higher.

Therefore, conclusions about arbitrators reveal more about the whole field of investment dispute settlement than panelists' profiles reveal about the WTO DSS's effective operation. Nevertheless, the much higher functional specialization of dispute resolution on trade along with the steadily increasing number of panelists with legal backgrounds help to tell the story of a successful legal institutionalization that resembles domestic legal fields much more than the blurred and fuzzy architecture of international arbitration.

However, the picture of ICSID's arbitration that the data help to develop shows profiles which are very stable along the chronological axis, both as to the presence of arbitrators with legal backgrounds and also regarding the triple balanced distribution between lawyers, public servants and academics. It is true that historical inertia and the close ties to commercial arbitration are elements that help to explain this stability in comparison with panelists. However, there is no visible pressure towards a more institutionalized system. This suggests that the self-regulated legal network that composes the legal field of international dispute settlement on investment issues, though importing domestic cultures and credentials, does not push changes in the direction of an international legal institution more similar to the domestic one; or, in other words, its stable figures and features suggest that further institutionalization depends on new sets of rules being imposed from outside the field.

Table 2

	ICSID	WTO
Legal technological skills	+ +	+
Other technological skills	0	+
Multiple careers	+ +	+
Functional specialization	0	++

Concentration by quarters	+ +	+
Changes	0	+ +
Privatization	+	0
Field consolidation	+ +	+
Institutionalization	+	+ +

The analysis of profiles of arbitrators and panel members does point to different forms of field construction and operation. The arbitrators' *star system* is very different from the bureaucratic profiles of most of the WTO's panelists.

There seems to be a strong structural relation between the firm formal institutionalization of the WTO's DSS and its operational resemblance to domestic systems, as well as of the loose institutionalization of investment arbitration and, consequently, the resort to an allegedly technical legal legitimacy, which is a possible substitute for legally established organizations. To use the Weberian ideal-type legitimating schemes, it could be said that 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). Curiously, however, one of the most important claims in the legitimating discourse of international arbitration is based on the rationality of legal forms, but this rationality is not the result of well established procedures or the generalization of social consensus; it results from confidence in a strict control of legal techniques associated with moral pulchritude.

References

ÁLVAREZ-JIMÉNEZ, Alberto, 2009. The WTO Appellate Body decision-making process: a perfect model for international adjudication?. *In*: *Journal of International Economic Law*. v. 12. n. 2. Oxford: Oxford University Press.

BOURDIEU, Pierre, 1986. The Force of Law : Toward a Sociology of the Juridical Field. In. *Hastings Law Journal*, 38 (5).

COSTA, José A. F., 2006. CIADI y arbitraje en contratos con el Estado. *In* (BIOCCA, Stella Maris, Ed.) *Jurisdicción internacional en las relaciones jurídicas y económicas en que el Estado es parte***.** Bahía Blanca: EdiUNS.

CREMADES, Bernardo M., 2004. Disputes arising out of foreign direct investment in Latin America: a new look at the Calvo Doctrine and other jurisdictional issues. *In*: *Dispute Resolution Journal*, v. 59, n. 2.

CUTLER, A. Claire, 2003. *Private power and global authority: transnational merchant law in the global political economy*. Cambridge: Cambridge.

DEZALAY, Yves. GARTH, Bryant, 1996. *Dealing in virtue: international commercial arbitration and the construction of a transnational legal order*. Chicago: Chicago University Press.

HABERMAS, Jürgen, 1988. Lecture one: How is legitimacy possible on the basis of legality. In Sterling McMurrin (ed), *The Tanner Lectures on Human Values – Vol 8*. Cambridge: Cambridge University Press.

HARTEN, Gus van, 2007a. *Investment treaty arbitration and public law*. Oxford: Oxford University.

_____. 2007b. The public-private distinction in the international arbitration of individual claims against the state. *In*: *International and Comparative Law Quarterly*. v. 56, n. 2.

HUDEC, Robert E., 1999. The new WTO dispute settlement procedure: an overview of the first three years. *In*: *Minnesota Journal of Global Trade*. n. 8. v. 1.

HUGHES, Valerie, 2009. The institutional dimension. *In*: BETHELEHEM, Daniel; McRAE, Donald; NEUFELD, Rodney; VAN DAMME, Isabelle (Orgs.). *The Oxford handbook of International Trade Law*. Oxford: Oxford University Press.

JACKSON, John H., 1997. *The world trading system: law and policy of international economic relations*. Cambridge (MA): MIT Press.

_____. 2009. The evolution of the world trading system: the legal and institutional context*. In*: BETHELEHEM, Daniel; McRAE, Donald; NEUFELD, Rodney; VAN DAMME, Isabelle (Orgs.). *The Oxford handbook of international trade law*. Oxford: Oxford University Press, 2009.

LACARTE MURÓ, Julio A., 2007. Os primeiros anos do Órgão de Apelação e do sistema de solução de controvérsias na OMC: uma perspectiva histórica. *In*: BAPTISTA, Luiz O.; CELLI JÚNIOR, Umberto; YANOVICH, Alan. *10 anos de OMC: uma análise do sistema de solução de controvérsias e perspectivas*. São Paulo: Aduaneiras.

LEBEN, Charles., 2003. La Théorie du Contrat d'État et l'Évolution du Droit International des Investissements. *In*: *Recuil des Cours*. Leiden: Martinus Nijhoff Publishers. n. 302, p. 200-386.

LUHMANN, Niklas., 1983. *Legitimation durch Verfahren*, 2nd ed. Frankfurt: Suhrkamp Verlag.

PICCIOTTO. Sol, 2005. The WTO's Appelate Body: legal formalism as a legitimation of global governance. *In School of Public Policy Working Paper Series*, n. 14. London: University College.

SORNARAJAH, M., 2004. *The International Law of Foreign Investment*, 2nd Edition. Cambridge: Cambridge University Press.

TEMPONE, Rubén E., 2003. *Protección de inversiones extranjeras*. Buenos Aires: Ciudad Argentina.

WEBER, Max, 1968. *Economy and Society*, V. I. Berkley: Berkley University Press.

WTO. 2010. *Appellate Body annual report to 2009*. WT/AB/13. Geneva: WTO/AB.

YOUNG, Michael K., 1995. Dispute resolution in the Uruguay Round: lawyers triumph over diplomats. *In***:** *The international lawyer*. n. 29.