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ICSID and the WTO: Comparing Institutionalization and Leadership Concentration

Roger Alford (General Editor) (Notre Dame Law School) · Wednesday, June 8th, 2011

José Augusto Fontoura Costa of the São Paulo Law Faculty has just published a [fascinating paper](#) analyzing the process by which WTO panelists and ICSID arbitrators are nominated. What is most interesting about his thesis is that he offers a different conception of why we have elite arbitrators, but not an elite cadre of WTO panelists. Unlike the highly-bureaucratic World Trade Organization, the legitimacy of the entire ICSID system rests on the shoulders of the arbitrators.

The paper posits that there is a structural relationship between institutionalization and adjudicator concentration. Leaders in less centralized structures (such as ICSID) have no interest in establishing more institutionalized systems in order to preserve their highly-valued positions. By contrast, strongly centralized systems of dispute settlement (such as the WTO) tend to be similar to domestic legal systems and are less dependent on concentrated leadership. “The existence of a small and ... 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 ... on elitist leadership, since the power of decisions derives from bureaucratic arrangements.” (p. 4). In other words, if a dispute settlement system is institutionally weak, the result is stronger concentrations of leadership.

The empirical data of WTO and ICSID nominations from 1995 to 2009 bear this out: ICSID arbitration is much more concentrated than WTO dispute settlement. With ICSID arbitration, there were 863 nominations appointing 273 individuals, a repetition rate of 3.2; with WTO dispute settlement, there were 430 nominations selecting 212 panelists, a repetition rate of 2.0. With ICSID, only 12 arbitrators (4.4% of the pool) accounted for a quarter of the nominations and were involved in 60% of ICSID tribunals. By contrast, 17 WTO panelists (7.65% of the pool) accounted for a quarter of the nominations. Second and third quartiles show similar results: a small elite account for a much higher proportion of nominations in ICSID than in the WTO.

Fontoura Costa summarizes his findings by arguing that “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.... 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.” (p. 20) By contrast, the WTO “looks very much like domestic legal systems.... The legitimating process, contrary 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.” (p. 22) In conclusion, “the WTO system stays close to bureaucratic and formalized rational legitimacy, while investment arbitration seeks more support from charisma ... and tradition.” (p. 24).

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This entry was posted on Wednesday, June 8th, 2011 at 6:49 pm and is filed under [Appointment of arbitrators](#)

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