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### International Court of Justice: Voting and Usage Statistics

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# ALTERNATIVE PERSPECTIVES ON THE INDEPENDENCE OF INTERNATIONAL COURTS

The panel was convened at 12:30 p.m., Friday, March 31, by its chair, Richard H. Steinberg of the University of California at Los Angeles School of Law, who introduced the panelists: Eric A. Posner of The University of Chicago School of Law; Heiner Schulz of The University of Pennsylvania Department of Political Science; Judge Rosalyn Higgins of the International Court of Justice; and Karen J. Alter of the Northwestern University Department of Political Science.

## A MAP OF THE ISSUES

*by Richard H. Steinberg\**

Do international courts matter? More specifically, do international courts behave sufficiently independently of the interests of powerful states to have a meaningful effect on state behavior?

Two clear and opposing stances on this question developed in the early 1980s and have framed much of the debate that has followed. The structural realist stance has constituted the null hypothesis. Deducing from regimes theory, this view holds that international institutions and courts cannot act in contradiction to the interests of powerful states. If a court does so, then powerful states will withdraw consent to its jurisdiction, or take other action that will cause the international court to collapse or become irrelevant. Therefore, the argument goes, international courts can have no meaningful independent effect on state behavior. Institutionalists have offered a competing perspective. Using economic logic, some institutionalists argue that international courts may have a meaningful independent effect on state behavior insofar as they solve cooperation problems that would not otherwise be solved. Some other institutionalists, influenced by sociology, argue that courts may meaningfully affect state behavior through the normative or cognitive “pull power” of legitimate decisions.

Three sets of research questions have emerged from this initial framing of the problem. First, what functions are performed by independent international courts? Several functions have been suggested, usually to buttress an institutionalist stance. Commentators have suggested that courts may complete incomplete contracts, clarifying ambiguities and filling gaps in treaties. Others have argued that the establishment of a court and submission to its jurisdiction may demonstrate the credibility of powerful states’ commitment to a treaty. Still others have argued, particularly in the international criminal law context, that courts may help build or spread particular norms or principles embodied or implicit in a treaty.

Second, how should we conceptualize the extent to which international courts are constrained? Most commonly, a strictly formal analysis has been used: treaty rules and procedures are examined to identify the possibility of a check on or correction of a court. However, commentators have increasingly considered informal political factors that may constrain the independence of international courts, such as threats to halt budget contributions that support an allegedly activist court; threats to diminish or deny a court’s jurisdiction; establishing a conservative selection process for judges, such as use of a “litmus test” for their selection; limiting the tenure of judges; refusal to comply with court decisions; and threats to rewrite

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treaty rules to make it easier to formally check or correct a court. Less frequently, some have considered whether discursive factors might limit judicial independence, considering—for example—the extent to which courts may be constrained (or might constrain themselves) by various approaches to the rules of treaty interpretation. Finally, some commentators have embedded these factors in a particular framework for analysis of the independence question—most prominently, a principal-agent framework that treats an international court as an agent of states acting collectively. Using this analysis, some claim that judicial independence is an appropriate and intended exercise of agency (and these analyses assert a functional purpose of agency), while others see judicial independence as agency slack (and these analyses are typically critical of independence).

A third set of questions addresses the macro political-economic consequences of the independence of international courts. Some see independent international courts improving world order, deepening political-economic integration among parties to the treaty systems in which such courts operate, expanding international law and the authority of international institutions, and (if independence is exercised deftly) enabling an accretion of authority or legitimacy for the court itself. Others see independent international courts as weakening world order by catalyzing powerful states' withdrawal of political, economic, or jurisdictional support for such courts, diminishing such courts' legitimacy, or increasing noncompliance with their decisions. Of course, these two competing views on the consequences of independence correlate with the neorealist/institutionalist fracture line identified above.

All of these questions have been asked in particular empirical contexts, with highly contested answers. The independence of the European Court of Justice (ECJ) has perhaps been most studied, with some (such as Heiner Schulz, who is on this panel) taking an essentially realist stance as to the constraints on and behavior of the ECJ, and others (such as Karen Alter, who is also on the panel) taking an essentially institutionalist stance. Similar, parallel debates are taking place over the extent and implications of independence of the Appellate Body of the World Trade Organization, the International Court of Justice, the International Criminal Court, and the international criminal tribunals for the former Yugoslavia and for Rwanda.

Our panel presents a balanced range of views on these questions. Professors Posner and Schulz are widely identified as realists, whereas Judge Higgins and Professor Alter are seen as holding views closer to the institutionalist end of the spectrum. The conversation therefore highlights many of the contested positions that are central to debates over the independence of international courts.

## THE INTERNATIONAL COURT OF JUSTICE: VOTING AND USAGE STATISTICS

*by Eric A. Posner\**

The International Court of Justice (ICJ) is the preeminent international court but has a light docket and plays a very small role in international politics. Why might this be so? Some politicians and a few scholars have argued that the ICJ is biased, but this charge has never been subjected to a rigorous empirical study.

In a recent paper, my coauthor Miguel de Figueiredo and I report an attempt to statistically study the voting behavior of the ICJ judges.<sup>1</sup> We created a data set consisting of every vote

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<sup>1</sup> See Eric A. Posner & Miguel de Figueiredo, *Is the International Court of Justice Biased?* (The University of Chicago Law School John M. Olin Program in Law & Economics Working Papers, 2d Series, Working Paper No. 234, 2004).