

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.¹ We created a data set consisting of every vote

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¹ 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).

in every case (other than cases providing advisory opinions), and we sought to discover whether judges' votes reflected correlations between characteristics of the judge's nation and characteristics of the parties. The raw data are as follows.

When a judge's nation is a party to the case, the judge votes in favor of his nation 83 to 90 percent of the time. When a judge is an ad hoc appointee, he votes in favor of the appointing nation about 90 percent of the time. In the aggregate, judges vote in favor of the party they are associated with about 89 to 90 percent of the time.

When a judge's nation is not party to the case, the judge generally votes in favor of the party that is more similar to his nation. The following statistics show the probability that the judge votes in favor of a nation when the judge's nation and that nation share the listed characteristic, and the other nation does not.

- Region: no bias.
- NATO: 52 to 64 percent.
- OECD: 60 to 72 percent.
- Security council: no bias.
- Language: 58 to 76 percent.
- Religion: 62 to 67 percent.

We also constructed continuous variables that show the "distance" between the wealth level of the judge's nation and the wealth levels of the parties; and between the democracy level (from 0 to 10) of the judge's nation and the democracy levels of the parties. As the judge's nation becomes less like the respondent and more like the applicant, the probability that the judge votes in favor of the applicant rises from about 40 percent to almost 80 percent, for wealth; and from about 25 percent to about 60 percent for democracy.

Regression analysis in large part confirms these findings. Our findings that judges favor their own nation, and nations whose wealth matches their own nations, are statistically significant and robust. Our findings that judges favor nations whose democracy level matches their own nations, and whose language and religion match those of their own nations, are also relatively strong.

Thus, to the extent that these political, economic, and cultural relationships are not relevant to the proper resolution of a case, we find "bias." However, our results are subject to numerous qualifications. None of our proxies for bias are perfect; selection effects are a problem; and there are various other statistical problems that we try to deal with but cannot solve in a wholly satisfactory way. In addition, it is possible that the judge-level biases cancel out, and that the court, as a whole, renders relatively impartial decisions. Indeed, when the parties are similar along the relevant dimensions, our results provide no reason to think that the judges' voting is biased.

Still, our results should give pause to those who claim that the ICJ is impartial. And the results are suggestive as an explanation for another fact about the ICJ: its long-term decline.

Most international law scholars believe that the ICJ is flourishing; this belief is probably due to the rapid increase in filings after the end of the Cold War in 1989. But the truth is more complex. Consider the following facts:²

- There were thirty-six filings during the ICJ's first twenty years (1946–1965); there were fifty-three filings during the ICJ's last twenty years (1985–2004) (including ten

² See Eric A. Posner, *The Decline of the International Court of Justice* (The University of Chicago Law School John M. Olin Program in Law & Economics Working Papers, 2d Series, Working Paper No. 233, 2004).

filings emerging from essentially the same event, the intervention in Kosovo). But the number of UN member states increased by more than three times during this period (from 55 in 1946 to 191 in 2004). Thus, the number of filings per state dropped quite substantially.

- The fraction of states that are subject to compulsory jurisdiction has dropped from about two-thirds to about one-third.
- The fraction of permanent members of the Security Council that are subject to compulsory jurisdiction has dropped from four-fifths to one-fifth.
- During the ICJ's first twenty years, states entered treaties that provided for ICJ jurisdiction at a rate of almost ten per year; today the rate is less than two per year.³ The United States has apparently not agreed to treaty-based ICJ jurisdiction in over thirty years.
- The ICJ's only bright spot is a rise in special agreement jurisdiction. Even here, however, the development of four-judge panels suggests that states are not happy with the performance of the body as a whole. And, in any event, the ICJ's role in special agreement cases is far from that of a traditional court with compulsory jurisdiction, as envisioned by its founders.
- Although compliance is hard to measure, the compliance rate with ICJ judgments appears to have declined steeply, from about 80 percent during the ICJ's first twenty years, to about 30 percent during the ICJ's last twenty years.

It is not clear that the two phenomena—bias and decline—are related. A simple hypothesis is that the ICJ has not worked out as envisioned by its founders because the national loyalties of its judges have interfered with impartial voting. There are two related notions here. First, the major Western powers that sponsored the ICJ may have assumed that the judges would favor their interests, but as the number of states increased, and the membership of the ICJ changed, a decreasing portion of the bench could be depended on to vote for the West. Second, the major Western powers might have assumed that the ICJ judges would vote impartially, and then been disappointed when this turned out not to be the case.

These are only conjectures, and more research needs to be done before we will have a clear picture of the ICJ's operations and effects. Several avenues of research suggest themselves. One possibility is to see whether voting in advisory opinions reflects national biases. Another is to compare ICJ voting patterns with the voting patterns of other international courts that reveal vote counts. The larger question is whether international tribunals can or cannot be used successfully to adjudicate disputes arising in treaty regimes, and whether any biases that exist can be corrected through better institutional design.

THE POLITICAL FOUNDATIONS OF DECISION MAKING BY THE EUROPEAN COURT OF JUSTICE

*by Heiner Schulz**

Decision making by the European Court of Justice (ECJ) has an important political dimension, which is not sufficiently appreciated in European and international legal scholarship.

³ The number may be somewhat higher; data limitations prevent an accurate count.

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