

UGA International Law Colloquium
March 2, 2007

Competition and Control in International Adjudication

Jacob Katz Cogan

University of Cincinnati College of Law

This paper takes issue with the standard view among international law and international relations scholars that States have sufficient and effective tools to constrain international courts. Like international organizations generally, international courts have minds and interests of their own. As a result, they can be tempted to expand their powers beyond those provided for in their mandates or by informal expectations. At the same time, international courts are protected from external control because of the principle of judicial independence and because of structural constraints on international lawmaking and institutional reform. This combination of weak external control and imperfect self-control provides international courts with opportunities to exceed their mandates. It also makes States more likely not to consent *ex ante* to the jurisdiction of international courts, to withdraw from the jurisdiction of courts to which jurisdiction they had previously consented, and to disobey judicial decisions. In other words, weak judicial control mechanisms create weak dispute resolution mechanisms. This is not optimal, as the international system needs more not less opportunities for peaceful dispute settlement. In order to strengthen international courts, we need to think anew about how best to maintain control over them. The answer, though, is not, as some would have it, to decrease judicial independence by increasing State control. Instead, this paper argues that increasing competition among international courts will more effectively constrain international judicial power and, consequently, increase the likelihood that States will recognize and accede to international judicial authority. Competition among courts will also lead to better decisions. Therefore, in contrast to the received wisdom that international courts should be more respectful and deferential to each other, this paper claims that such “system-protective” doctrines are counterproductive. Instead of striving for uniformity, we should accept and develop a system of competitive adjudication in international law.