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Birds of a Feather: Patterns of Judicial Decision-Making at the International Court of Justice, 1946-2015

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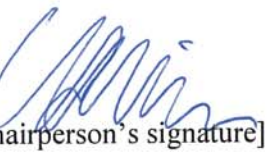

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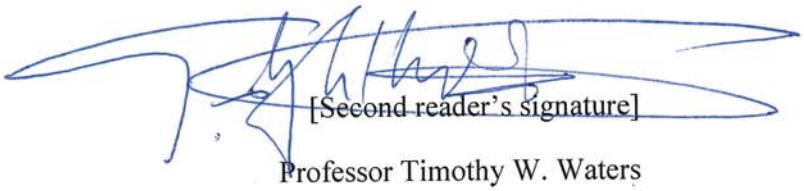

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Dedication

This dissertation is dedicated to my family and my beloved wife Yi-Ni Hsieh.

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Last but not least, I would like to express my deepest gratitude to my family: my parents Ruei-Chih Chang and Ming-Ju Chen, my grandparents Hsin-Tai Chang and Pi-Er (Lien) Chang, my siblings Katy Rue-Hsin Chang and Emily Han-Hsin Chang, and my caring and supportive wife Yi-Ni Hsieh. I could never have accomplished this dissertation without their warm love and endless support.

Abstract

The technical legal expertise of the International Court of Justice (ICJ), the principal judicial organ of the United Nations, is rarely questioned. However, from its inception critics have questioned its partiality by drawing attention to apparent extrajudicial influences on its decisions. While there has been no lack of research assessing the ICJ judges' voting behavior, methodological limitations of prior research designs have stymied empirical assessments of the extent and nature of extrajudicial factors' influence over the ICJ judges' voting behaviors. This dissertation challenges previous research concluding that political and military alignments have no effect on judicial decision-making. In contrast to previous research findings, this dissertation reports that ICJ judges vote closely with those from countries that have regional or military alignments with the countries that nominate or appoint them. Judges from countries with a similar degree of economic and democratic development, and with cultural or religious similarities, also voted closely with each other. This dissertation concludes with a consideration of the causes and implications of the influence of non-legal factors on the World Court's decisions.

Keywords: Bloc Voting, International Court of Justice, Cluster Analysis.

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Chapter 1 Introduction

As a student of international law, the International Court of Justice (ICJ) and its decisions are always the essential part of my study. As I was fascinated by how the prestigious judges in the World Court were able to mitigate and resolve disputes between states and had ruled against the superpower in cases like the *Nicaragua*, there were some moments that I believed that the ICJ would be the ideal solution to resolve disputes and prevent the occurance of wars. Unfortunately, it did not take long for me to realize that states are not particularly interested in using the international courts for dispute settlement. The idea that all disputes could be resolved peacefully through adjudication was the Utopian ideal, far from being realized. The countries in my region, the Asian States, in particular, are known to share little enthusiasm in settling interstate disputes through international adjudication.[1] Aside from cultural reasons, as advanced by some scholars as

[1] Only 13 cases brought before the ICJ are with the participation of Asian States (less than 10 percent of all cases), *see* Jin-Hyun Paik, *Asian States' Participation in International Adjudication: Comments*, EJIL: Talk!, Jan. 18, 2017, https://www.ejiltalk.org/asian-states-participation-in-international-adjudication-comments/ (last visited Sept. 18, 2017). For discussion about Asian countries reluctance to be involved with the International adjudication system, *see e.g.,* Geoffrey Palmer, *International Law and the Reform of*

the primary reason for Asian States' resistance to international adjudication,[2] Asian countries' passivity toward international adjudication was often attributed to their aversion

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the International Court of Justice, *in* LEGAL VISIONS OF THE 21ST CENTURY: ESSAYS IN HONOUR OF JUDGE CHRISTOPHER WEERAMANTRY 579, 579 (Antony Anghie & Garry Sturgess eds., 1998); Joseph L. Daly, *Is the International Court of Justice Worth the Effort*, 20(3) AKRON L. REV. 391, 403–404 (1987); Gillian Triggs, *Confucius and Consensus: International Law in the Asian Pacific*, 21 MELB. UNI. L. REV. 650, 656 (1997); J. J. G. SYATAUW, SOME NEWLY ESTABLISHED ASIAN STATES AND THE DEVELOPMENT OF INTERNATIONAL LAW 231, 233 (1961) (admitting that Asian states are reluctant to use the ICJ, but arguing that the older western powers show the same practices); Alexander Downer, Minister for Foreign Affairs and Trade, Commonwealth of Australia, Asian Regional Security Issues, Address to the Netherlands Atlantic Commission, The Hague (Jan. 27, 1997), *available at* https://foreignminister.gov.au/speeches/1997/atlantic.html (last visited Sept. 18, 2017). The reluctance to resolve disputes through international adjudication not only applies to the utilization of the ICJ but also to other international courts and tribunals. *See e.g.,* Cristine Chinkin, *Regional Problems*, *in* THE LAW OF THE SEA IN THE ASIAN PACIFIC REGION: DEVELOPMENT AND PROSPECTS 237, 257–59 (James Crawford & Donald R. Rothweel eds., 1995); Marcia D. Harpaz, *China and International Tribunals: Onward from the WTO*, *in* CHINA IN THE INTERNATIONAL ECONOMIC ORDER 43, 45 (Colin Picker, Jonathan Greenacre & Lisa Toohey eds., 2015) (pointing out that China's acceptance and use of the WTO DSB is a distinctive departure from its past policy); Karen J. Alter, *The New International Courts: A Bird's Eye View* 1, 2 (Buffet Ctr. for Int'l and Comparative Studies, Working Paper No. 09-001, 2009); Mark Findlay, *Sign Up or Sign off – Asia's Reluctant Engagement with the International Criminal Court*, 3 CAMBODIA L. & POL. J. 75 (2014).

[2] It has been advanced that the Confucian cultural legacy, which disfavors third party binding settlement on the basis of law, leads to such practice, *see* Ko Swan Sik, *the Attitude of Asia States Towards the*

to the conservative attitude of the Court.[3] Many Asian countries not only perceived the ICJ as a Euro-centric institution biased in favor of European and America states[4] but also viewed the ICJ's rulings as decisions that reflect the political purpose of the imperial states that harm the interests of other small and weaker nations.[5] In addition to Asian countries, countries in other regions share similar skepticism about the decision-making of the ICJ being influenced by the extrajudicial factor.[6] For example, throughout the ICJ's history,

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International Court of Justice Revisited, *in* JUDGE SHIGERU ODA: LIBER AMICORUM 165. 165 (Nisuke Andåo, Edward McWhinney & Rüdiger Wolfrum eds., 2002); Paik, *supra* note 1; for discussion about the influence of "cultural factors," see Veronica L. Taylor & Michael Pryles, *The Cultures of Dispute Resolution in Asia*, *in* DISPUTE RESOLUTION IN ASIA 1, 2–5 (Michael Pryles ed., 3rd ed. 2006). T

[3] *See e.g.*, Sik, *supra* note 2, 170; Findlay, *supra* note 1, at 91; Harpaz, *supra* note 1; *see also* infra n.4–5.

[4] Manohar Sarin, *The Asian-African States and the Development of International Law*, *in* THIRD WORLD ATTITUDES TOWARD INTERNATIONAL LAW 1, 3 (Frederick Snyder & Surakiart Sathirathai eds., 1987); Daly, *supra* note 1, at 404;

[5] ZHAO LIHAI, GUOCHIFA CHIBEN LILUN (国际法基本理论) [The Basic Theories of International Law] 65-68 (1990); *see also* JEROME A. COHEN & HUNGDAH CHIU, PEOPLE'S CHINA AND INTERNATIONAL LAW 1444 (1974) (*quoting International Court of Justice-A Shelter for Gangsters*, JEN-MIN JIH-PAO (人民日报) [PEOPLE'S DAILY], July 26, 1966, at 6); Sik, *supra* note 2, 173–74.

[6] Georges Abi-Saab, *The International Court as a world court*, *in* FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 3, 5 (Vaughan Lowe & Malgosia Fitzaurice eds., 1996); Shiv R. S. Bedi, *African Participation in the International Court of Justice, A Statistical Appraisal (1946–1998)*, 6 AFR. Y.B. INT'L L. 181, 183–84 (1998) (illustrating how the 1966 South West Africa case influenced the Afro-Asian group

the Soviet Union (and Russia currently) never accepted the compulsory jurisdiction of the court and was never a party before the ICJ. The Soviet politicians and scholars have also repeatedly advanced the claim that the ICJ is part of a political arena where the imperialist countries would promote their interests and denounce their political opponents.[7] In the United States, there are also similar criticisms stating that ICJ judges may decide cases based on their political preference instead of the law.[8] Although I am skeptical, or at least not fully convinced, about the truthfulness of these assertions that accuse the ICJ of being biased in favor of European and American countries, I am surprised by how this area remains understudied. Not only have international law scholars paid little attention to this question, but the question about extrajudicial factors' influence over the principle judicial organ of the United Nations has grasped the attention of few legal realist scholars.

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to change the imbalance in the ICJ's composition); A.O. Adede, *Judicial Settlement in Perspective*, *in* THE INTERNATIONAL COURT OF JUSTICE, ITS FUTURE ROLE AFTER FIFTY YEARS, 47, 51 (A.S. Muller, D. Raič & J.M. Thuránszky eds. 1997) (indicating that the ICJ was sought as "a white man's court, dispensing white man's justice")

[7] *See infra* n.110–115.

[8] DENISON KITCHELL, TOO GRAVE A RISK, THE CONNALLY AMENDMENT ISSUE 103-11 (1963); Jeane Kirkpatrick, *Law and Reciprocity*, addressed by Ambassador, Apr. 12, 1984, 78 AM. SOC'Y INT'L L. PROC. 59, 65 (1984) (expressing concerns for the U.S. accepting the ICJ's compulsory jurisdiction).

In the field of international law, the ICJ is certainly not understudied. Almost all textbooks relating to international law include a chapter or a section introducing the ICJ and its institutional design. The ICJ decisions have also been thoroughly analyzed by legal scholars and there are mounds of literature that have assessed the effectiveness of the Court, the procedural and evidence rules of the Court, and how the ICJ decisions have influenced the development of international law. Although states and scholars' concerns about the ICJ being affected by extrajudicial factors are widely noted in the literature, only a handful of scholars have attempted to address such concerns. The question about what extrajudicial factors have influenced the ICJ's decision-making remains unobserved. The same drought also happens in another set of literature that extensively observes the extrajudicial factors' influence over (international) judicial adjudication.

For long, legal formalists and realists have argued about the role and the impact of extrajudicial factors in judicial decision-making. In contrast to the legal formalists' argument that legal questions can, and should, be answered based on distinctly legal

materials[9] without considering non-legal factors,[10] legal realists such as Jerome Frank argue that the rational element in law is nothing but an illusion and that non-legal factors have always been an essential part of judicial decision-making.[11] Extending beyond the jurisprudential debates about which theory best describes the practice and function of the law, legal and political scientists have attempted to unravel the mystery of judicial decision-making through examining the judges' voting behaviors. Scholars have conducted empirical research to examine how social factors, such as the judges' ethnicity and social status, have influenced the conviction rate, assigning of punishment and sentencing in trial court decisions.[12] Others have also observed how the judges' gender[13] and policy

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[9] Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 16–20 (1983).

[10] *See e.g.,* Brian Leiter, *Legal Formalism and Legal Realism: What is the Issue?*, 16 LEGAL THEORY 111, 111 (2010); Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 181 (1986);

[11] JEROME FRANK, LAW AND MODERN MIND 131–35 (1930).

[12] *See e.g.*, Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH & LEE L. REV. 405 (2000); Cassia Spohn, *The Sentencing Decisions of Black and White Judges: Expected and Unexpected Similarities*, 24 L. & SOC'Y REV. 1197, 1211-14 (1990); Thomas M. Uhlman, *Black Elite Decision Making: The Case of Trial Judges*, 22 AM. J. POL. SCI. 884, 891-94 (1978).

[13] *See e.g.,* RUTH MACKENZIE, KATE MALLESON, PENNY MARTIN & PHILIPPE SANDS, SELECTING INTERNATIONAL JUDGES: PRINCIPLE, PROCESS, AND POLITICS 48–50 (2010); Claire S.H. Lim, Bernardo

preference affected the outcome of the case.[14] Among all factors, scholars were particularly interested in learning politics' influence over the decision-making of the court.[15] Although the debates between the legal formalist and realists have stipulated

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Silveira & James M. Snyder, Jr., *Do Judges' Characteristics Matter? Ethnicity, Gender, and Partisanship in Texas State Trail Courts*, 18(2) AM. L. & ECON. REV. 302 (2016); Lady Hale, *Making a Difference - Why We Need a More Diverse Judiciary*, 56 N. IR. LEGAL Q. 281, 286–292 (2005); *see also* GLEIDER HERNANDEZ, THE INTERNATIONAL COURT OF JUSTICE AND THE JUDICIAL FUNCTION 135–36 (2014) (pointing out that there is not a gender-based approach to international law found in the cases that Judge Rosalyn Higgins, the first female ICJ judge, presided over. But there may be such as additional women judges were elected to the court); Sue Davis, Susan Haire & Donald R. Songer, *Voting Behavior and Gender on the U.S. Courts of Appeals*, 77 JUDICATURE 129, 131–32 (1993).

[14] There are many more factors tested, such as the influence of collegiality, *see e.g.,* Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639 (2003); Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1358-62 (1998). *See also* Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, 26 LOY. L.A. L. REV. 993 (1993); Joel B. Grossman, *Social Backgrounds and Judicial Decision-Making*, 79 Harv. L. Rev. 1551, 1552 (1966); S. Sydney Ulmer, *The Analysis of Behavior Patterns on the United States Supreme Court*, 22 J. POL. 629 (1960); John Schmidhauser, *The Justices of the Supreme Court: A Collective Portrait*, 3 MIDWEST J. POL. SCI. 1 (1958); NANCY L. MAVEETY, THE PIONEERS OF JUDICIAL BEHAVIOR (2003); GLENDON SCHUBERT, QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR (1959); HERMAN PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937-1947 (1948).

[15] *See e.g.,* Gregory C. Sisk, Michael Heise, Andrew P. Morriss, *Charting The Influences On The Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377 (1998) (arguing that legal and extralegal factors both play an important role in shaping the judges' decision); Thomas J. Miles & Cass R.

scholars' interests to assess the impact of extrajudicial factors on adjudication empirically, most of the previous literature limited their studies to observing the judicial behaviors of domestic courts,[16] and have paid little attention to extrajudicial factors' impact on the behaviors of international tribunals. Owing to the scarcity of scholarship studying how extrajudicial factors influence the function of the ICJ, this dissertation aims to fill in the

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Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761 (2008) (arguing that the judges' political preferences influence the outcome of their review of agency decisions); Stephen J. Choi & G. Mitu Gulati, *Bias in Judicial Citations: A new Window into the Behavior of Judges?*, 37 J. LEGAL STUD. 87 (2008) (pointing out the judges' bias citation practices were sourced from the judges' political preference); CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006) (showing the splits between the judges appointed by the Republican and Democratic Parties and the political influence over their judicial behavior).

[16] Amongst the many studies, see e.g., Richard A. Posner, *The Supreme Court 2004 Term: A Political Court*, 119 HARV. L. REV. 31 (2005); Donald Songer & Stefanie Lindquist, *Not the Whole Story: The Impact of Justices' Values on Supreme Court Decision Making*, 40 AM. POL. SCI. REV. 1049 (1996); Tracey George & Lee Epstein, *On the Nature of Supreme Court Decision-Making*, 86 AM. POL. SCI. REV. 323 (1992); Claire S. H. Lim, *Media Influence on Courts: Evidence from Civil Case Adjudication*, 17(1) AM. L. & ECON. REV. 87 (2015); Shai Danzigera, Jonathan Levavb & Liora Avnaim-Pesso, *Extraneous factors in judicial decisions*, 108 PROC. NAT'L ACAD. SCI. U.S.A. 6889 (2011) (empirically examines how taking a break could influence the judges' mental resources and thus affects the outcome of the case)

gaps in the literature and assess and identify the extrajudicial factors affecting the decision-making of the ICJ.

(1) Deficiencies of the prior studies

In the handful of studies that have addressed the ICJ judges' voting behaviors, they provide limited information about the ICJ judges' collective voting behaviors. This is either because the scope of their research is limited to the voting preferences of individual judges or they are only able to assess the voting behaviors of the judges that have co-voting experience (that have decided a case together, this problem will be discussed in detail in Chapters 2 and 3).

After Hersch Lauterpacht pointed out that judges serving on international courts are keen to vote in favor of their home country and appointer,[17] scholars have been dedicated to confirming how the nationality attachment or the appointer-appointee relationship has influenced the decision-making of the ICJ judges that are from and appointed by the party states. In the studies of Thomas Hensley, William Samore, Il Suh, and also Adam Smith, scholars have consistently reported that ICJ judges from or appointed by party states (the

[17] HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 230–32 (1933).

'national judges'[18]) show a strong preference, and perhaps are biased to vote in favor of their home countries and appointers. However, because there will only be two or less national judges in a bench composed of fifteen judges,[19] and the votes of national judges are likely to cancel each other out, the national judges' only have limited influence on the outcome of the case. The studies over the national judges' voting behavior only provide

[18] The term 'national judges' is borrowed from Hensley where he generally refers to the regular (elected) judges from party states, or the ad hoc judges appointed by party states. *See* Thomas Hensley, *National Bias and the International Court of Justice*, 12 MIDWEST J. POL. SCI. 568 (1968) [hereinafter Hensley, *National Bias*]. For similar use, see Il Ro Suh, *Voting Behaviour of National Judges in International Courts* (1969) 63 AM J. INT'L L. 224 (1969). However, it should be noted that not all ad hoc judges are nationals of the party states as they are quite frequently selected from an unrelated country. In some studies, 'national judges' specifically refers to regular judges from party states and does not includes the ad hoc judges from and appointed by the disputing parties. *See* Stephen M. Schwebel, *National Judges and Judges Ad Hoc of the International Court of Justice*, 48(4) INT'L & COMP. L. Q. 889 (1999); Christian Tomuschat, *National Representation of Judges and Legitimacy of International Jurisdictions: Lessons From ICJ to ECJ?*, *in* THE FUTURE OF THE EUROPEAN JUDICIAL SYSTEM IN A COMPARATIVE PERSPECTIVE 183 (Ingolf Pernice, Juliane Kokott & Cheryl Saunders eds., 2006).

[19] This is only an approximate number. If there are ad hoc judges participating in the case, the number of judges may exceed 15; however, in the case that the judges were absent for personal or health concerns, the actual number of judges hearing over the case may be less than 15.

limited help in unraveling the mystery over the judicial decision-making in the ICJ and the voting behaviors of the judges' from non-party states remain unobserved.

Although some studies attempt to observe the collective voting behaviors of the ICJ judges, their ability to do so is seriously limited by their choice of analysis method. In these studies, most scholars calculate and compare the voting agreements between pairs of judges to examine the closeness between these judges' voting patterns. However, as this method is only suitable comparing judges that have co-voting experience, it is not an ideal method to examine the ICJ judges' collective voting behaviors since a portion of the ICJ bench is replaced every three years[20] and not all ICJ judges have co-voted with one another. Taking Hensley's study as an example, after excluding the judges that have no or very few co-voting experiences with each other from observation, the number of judges retained in his research for observation reduced from 48 to 14.[21] The co-voting requirement seriously limits the number of judges that can be observed in these studies and leaves the majority

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[20] Though they can be reelected. *See* Statute of the International Court of Justice, June 25, 1945, art. 13(1), 59 Stat. 1055, 1060 [hereinafter ICJ Statute].

[21] Thomas Hensley, *Bloc Voting on the International Court of Justice*, 22 J. CONFLICT RESOL. 39, 43 (1978) [hereinafter Hensley, *Bloc Voting*].

judges out of observation.[22] Recognizing that this constraint severely limits the interpretative power of the previous studies, it is also a challenge that this dissertation must overcome if I wish to observe and examine the voting behavior of ICJ judges.

(2) Research questions

In the existing literature, the question of how the ICJ is influenced by extrajudicial factors and what factors influence the ICJ's decision-making remains unexamined. There lacks research that studies the ICJ judges' collective voting behavior and that can address states parties' concerns about the extrajudicial factors' influence over the decision-making of the ICJ. With the goals to fill in the gaps in the literature and supplement the limited research over the ICJ judges' voting behavior, the goals of this dissertation are twofold. First, I aim to observe and report the cohesive voting behaviors among the ICJ judges. With

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[22] Hensley concluded that Communist judges voted cohesively in the ICJ and there are also voting blocs formed by European and American judges. *See id.* at 54–56. However, Terry argues that there is no evidence showing that the ICJ is dominated by a conservative faction, *see* G. Terry, *Factional Behaviour on the International Court of Justice: An Analysis of the First and Second Courts (1945-1951) and the Sixth and Seventh Courts (1961-1967)*, 10 MELB U. L. REV. 59, 117 (1975); Weiss identified a few voting blocs in the ICJ, but argues that these voting blocs are unrelated with regional or political influences, *see* Edith B. Weiss, *Judicial Independence and Impartiality: A Preliminary Inquiry*, *in* THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 123, 130 (Lori Fisler Damrosch ed., 1987)

the help of statistical and bloc analysis, I shall visualize the voting clusters that emerge in the court. In order to investigate how the judges' voting behaviors changed in different time-periods and how the emergence of different clusters corresponds to the rapidly changing world, time and dispute types shall be set as control variables and I shall assess the voting blocs that emerge in different periods of history and when the court hears different types of disputes. Second, through OLS regression analysis, I aim to identify the extrajudicial factors that correlate with the clustering behavior of the ICJ judges. In particular, I aim to report if and how regional, military, and social connections between the judges' home countries correlate with the judges' clustering behavior and how the influence of international politics is reflected in decision-making of the ICJ.

(3) Expected contribution

The contribution of this dissertation can be observed from both substantive and methodological aspects. From the substantive perspective, by reporting how the ICJ judges' voting behaviors reflect the influence of regional, military, and social factors of their home countries, this dissertation demonstrates the correlation between the influence of extrajudicial factors and the voting patterns of the ICJ decision-making. In addition to demonstrating the existence of the Communist and NATO blocs in the ICJ (which directly

challenges the findings of Weiss' earlier study), I shall further point out that ICJ judges from countries with similar levels of wealth and levels of democracy are also likely to vote closely with each other. The findings of this dissertation can not only supplement the understanding of the ICJ judges' voting behavior but can also enrich the realist scholars' understanding of the function of international adjudication. For the countries that are underrepresented in the ICJ, the findings of this dissertation also provide supporting evidence for them to argue that there is a need to reorganize the current distribution of the ICJ seats so the power and influence of extrajudicial factors can be mitigated.

From a methodological perspective, this dissertation contributes to the literature in two aspects. The first contribution to the scholarship is made through sharing the dataset of the ICJ judges' votes compiled in this dissertation with other researchers. Owing to the scarcity of the research that studies the ICJ judges' voting behavior and the yet-to-be-developed tradition of sharing dataset in the area of empirical legal studies, I was unable to acquire the ICJ judges' voting records from other scholars that have assessed the same question.[23] All datasets recording the ICJ judges' votes used in this research were collected

[23] I have contacted an author that has published in this area and ask if he is willing to share his dataset since the results found in this research is different with the conclusion of his study. At the beginning, the author

and compiled from scratch.[24] After personally experiencing the challenging and time-consuming data compiling and coding process, I feel it is a waste of time for all researchers studying this subject to go through the same process. I aim to remedy the situation by making the dataset that I have compiled publicly available[25] so that future scholars in need of such information no longer need to go through the same data collecting processes and can save valuable time and resources. More importantly, the disclosure of the data used in this dissertation can also ensure that other scholars can verify the findings of this research and thus it strengthens the validity the arguments made in this dissertation.

Lastly, as this dissertation does not assess the closeness between the judges voting patterns through calculating the voting agreements between them but through the

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replied positively and expressed his willingness to share the raw dataset. But after learning that my analysis reached conclusion different from his study, the author refused to make any further correspondence and I never received the dataset he used.

[24] Ginsburg and McAdams's work is one of the very few that discloses their coding data. Nevertheless, because I adopt a different research approach from Ginsburg and McAdam's work, their dataset only provides limited assistance to my research. *See* Tom Ginsburg & Richard McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1331–39 (2004).

[25] The dataset will be uploaded to an online depository system available for the public to utilize and examine.

difference between the judge's votes in relation to the judges from the permanent members of the Security Council, the scope of the research is no longer limited to judges with co-voting experience. This improvement over the previous analysis method allows this dissertation to compare the voting patterns between judges that served in the ICJ in a similar time period but never had the chance to vote together, which significantly expands the scope of analysis of this dissertation.

(4) Chapter plan

This dissertation contains six chapters. Chapter 1 is the introductory chapter. Chapter 1 explains this dissertation's research plans, the importance of this research, and the issues that will be discussed in each chapter. Chapter 2 provides an introduction to the ICJ's establishment, jurisdiction, caseloads, and also the composition of its bench. In the first part, I shall demonstrate how the usage of the ICJ decreased after its first twenty years and was slightly revived after the 1980s. Through highlighting the uneven distribution of the ICJ bench seats, I aim to flesh out the possible reasons that drove the states to distrust the ICJ and speculate about its impartiality. The second part of Chapter 2 reviews the prior studies that have assessed the ICJ judges' voting behavior. Aside from reporting the conclusions and arguments advanced in these studies, I also assess the analytical methods

used in these prior research to understand how this dissertation can build on the existing literature and improve the research methods used in these prior studies.

Chapter 3 introduces the research plan and analysis methods used in this dissertation. The first part of Chapter 3 illustrates how the Euclidean distance measuring method, the hierarchical cluster analysis, and OLS regression help this dissertation to measure and observe the cohesive voting behaviors among the ICJ judges. In particular, I explain how this dissertation is no longer bound by the co-voting requirement and can observe the voting distances between judges that have never voted together before. In the second part of Chapter 3, I explain the coding method I use to record the ICJ judges' votes and some of the problems that I have faced during this stage of research. The expected results and the limits of this study are reported in this Chapter.

Chapters 4 and 5 both report the analysis results. Chapter 4 starts with reporting the average supporting ratio of the ICJ cases to demonstrate that there are no constant and systematic confrontations between the ICJ judges. To assess the scale of confrontations

that appear in each type of dispute and proceeding separately, the contentious cases[26] and advisory opinions are further divided into six and three sub-categories, respectively. The second part of Chapter 4 reports the voting behavior of judges that come from or are appointed by party states. As earlier studies have consistently concluded that national judges are keen to vote in favor of their home country or appointer, my research does not attempt to challenge these conclusions. Instead, the purpose of this section is to provide an up-to-date assessment of the national judges' voting behavior and to examine if the national judges continue to vote in favor of their home country significantly more than the other judges, or if such preferences have diminished. In the last part of Chapter 4, by pointing out that *ad hoc* judges who do not share their nationality with their appointer voted for their appointer at a ratio similar to those with citizenship from the party states, I argue that nationality linkage is not the primary reason causing *ad hoc* judges to be keen to vote in favor of their appointers. In addition, I also report that party states do not have a strong

[26] 'Contentious case' refers to proceedings where state parties brought interstate disputes to the ICJ for adjudication. This is in contrast with advisory opinions, where the ICJ is only asked to provide opinions over international law questions but not to settle disputes between the countries.

preference in appointing their citizen as *ad hoc* judges as almost half of the *ad hoc* judges were selected from a third party.

Chapter 5 presents the main findings of this dissertation. The first section of Chapter 5 uses cluster analysis to identify and reports the voting blocs that emerge in the ICJ in different periods of history. Moreover, I visualize and present the judges' clustering behaviors through dendrogram graphs to make the voting blocs easier to identify and observe. In the second part of Chapter 5, I use the regression to assess the correlation between the voting distance between the judges and social connections between the judges' home countries. In particular, I argue that the judges from countries that share similar political ideology, economic development, military alignment, or geographical region voted more closely with each other than those without such connections at a statistically significant level. The NATO, Communist, OECD, and Christianity voting blocs identified in this dissertation are all indications showing how the decision-making of the ICJ correlates with the influence of extrajudicial factors.

Chapter 6 summarizes this dissertation's findings. The concluding remarks and possible research directions for further studies are also provided in this section.

Chapter 2 The ICJ and the Studies on ICJ Judges' Voting Behaviors

Chapter 2 provides the an introduction to the ICJ and a summary of the prior literature that has empirically assessed the ICJ judges' voting behavior and performance. The first section begins with introducing the ICJ's establishment, the function of the ICJ's jurisdiction, and the composition of the bench. Information and data regarding the ICJ's caseload and the types of cases that are often brought before ICJ are also assessed. The second section of this chapter provides a review of the existing literature. The two main types of scholarship reviewed include (1) studies that assess national judges' keenness to vote in favor of their home country and appointer, and (2) studies that observe the bloc voting behaviors among the ICJ judges. In addition to summarizing the arguments and findings, I shall briefly explain the analytical methodology deployed in these earlier studies. Through assessing the pros and cons of the analysis methods of the prior research, I shall point out how this dissertation improves on the basis of the prior studies' contributions and is differentiated from these previous studies.

1. The International Court of Justice

1.1 The Establishment of the ICJ

After World War II, together with the creation of the United Nations and the Bretton Woods system, the global community aimed to secure and maintain international peace and security through establishing international political and economic cooperation, and creating a judicial adjudicative body to foster the peaceful settlement of interstate disputes.[27] With this three-prong design, it was hoped that war could be prevented and the international community could move toward a "rule of law" era instead of a world where the "law of the jungle" prevailed.[28] The ICJ was created to fulfill this mission and bears the responsibility to offer the "possibility of substituting orderly judicial processes for the

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[27] *See generally*, J. G. Collier, *The International Court of Justice and the peaceful settlement of disputes*, *in* FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 364 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996)

[28] NAGENDRA SINGH, THE ROLE AND RECORD OF THE INTERNATIONAL COURT OF JUSTICE 11, 319–20 (1989); Hans Corell, *Presentation*, *in* INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL COURT OF JUSTICE: PROCEEDINGS OF THE ICJ/UNITAR COLLOQUIUM TO CELEBRATE THE 50TH ANNIVERSARY OF THE COURT 6 (Connie Peck & Roy S. Lee eds., 1997); *The Rule of Law and the Role of the International Court of Justice in World Affairs* 6, Inaugural Hilding Eek Memorial Lecture by H.E. Judge Peter Tomka, President of the International Court Of Justice, at the Stockholm Centre for International Law and Justice, Monday 2 December 2013, *available at* http://www.icj-cij.org/presscom/files/9/17849.pdf.

vicissitudes of war and the reign of brutal force purpose to promote the pacific settlement of international disputes."[29]

The ICJ was established in June 1945 and began work in April 1946. According to Article 92 of the UN Charter and Article 1 of its statute, the ICJ is the principal judicial organ of the United Nations[30] and was created to promote peaceful settlement of disputes by adjudicating interstate disputes in accordance with international law and to provide advisory opinions on questions of international law. In the past seven decades, ICJ has adjudicated more than one hundred contentious cases and has delivered more than twenty advisory opinions.[31] The ICJ has served as an important international institution in resolving international disputes and is a symbol of the world's embracement of the rule of law notion.

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[29] Report of the Rapporteur of Committee IV/1 to Commission IV, Doc. 913 (June 12), 13 U.N.C.I.O. Docs. 381, at 393.

[30] U.N. Charter art. 92; *see also* ICJ Statute art. 1. Few have contested that the idea that ICJ serves as the principle judicial organ of the United Nation is exaggerated. *See* Edward Gordan, *The ICJ: On Its Own*, 40 DENV. J. INT'L L. & POL'Y 74, 83–84 (2012) (arguing that if the ICJ was not intended to be qualitatively from its predecessor, the Permanent Court of International Justice, and the ICJ's framers wished the Court to align its judgments and opinions with those prevailing in the political organs of the UN.)

[31] Data available at ICJ, http://www.icj-cij.org/homepage/.

1.2 The ICJ's Jurisdiction

The two types of cases the ICJ can hear are contentious cases submitted by state parties and requests for advisory opinions submitted by UN bodies. According to Article 65 of the ICJ Statute and Article 96 of the UN Charter, only UN bodies can request the ICJ to give advisory opinions on international legal questions. Although the advisory opinions have no legal binding force, they nevertheless are of great importance in assisting political organs settle disputes and provide authoritative guidance on points of international law.[32] With regard to contentious cases, pursuant to Article 34 of the ICJ Statute, only states may be parties in contentious cases before the ICJ, and the Court's jurisdiction is founded on a consensual basis.[33] In other words, states are not subjected to the ICJ's jurisdiction unless they have given their consent.[34]

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[32] IAN BROWLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 721 (7th ed., 2008).

[33] ROBERT KOLB, THE ELGAR COMPANION TO THE INTERNATIONAL COURT OF JUSTICE 185 (2014) [hereinafter KOLB, ELGAR COMPANION].

[34] *Id*. (indicating that states are the holders of sovereignty and sovereignty provides states the utmost human authority to decide on internal and external affairs. Even though states are bound by international law, they are not bound by any other human decision-making body unless their consent is given)

Primarily, there are three ways for states to consent to the ICJ's jurisdiction.[35] If states choose to consent to ICJ's jurisdiction before the dispute arises, they may do so by either entering into a treaty[36] or by adding a jurisdictional clause to a treaty expressing their willingness to accept the ICJ's jurisdiction.[37] In addition, Article 36 of the ICJ Statute also allows states to consent to the Court's jurisdiction for future cases through delivering a unilateral declaration.[38] Once the declaration is made, and the depositing procedures are completed, the state is then entitled to unilaterally initiate proceedings against any other

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[35] For a detailed illustration of how states can consent to ICJ's jurisdiction, see ROBERT KOLB, THE INTERNATIONAL COURT OF JUSTICE 382–558 (2013).

[36] For example, see *e.g.*, General Act for the Pacific Settlement of International Dispute of 1928, April. 28, 1949, 71 U.N.T.C. 912; Inter-American Treaty on the Peaceful Settlement of Disputes, April 30, 1948, 30 U.N.T.C. 449; Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, 326.

[37] For example, see *e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide art. IX, Dec. 9, 1948, 78 U.N.T.S. 278; United Nations Conventions on the Law of the Sea Part XV, Dec. 10, 1982, 1833 U.N.T.S. 397.

[38] ICJ Statute art. 36(2)–(4).

state that has also made a similar declaration.[39] The three methods mentioned above are also known as taking the Court's compulsory jurisdiction.[40]

At the beginning of the ICJ's establishment, the Soviet Union was the only permanent member of the Security Council that did not accepted the ICJ's compulsory jurisdiction. Contrarily, the United States, United Kingdom, France, and China all consented to the ICJ's compulsory jurisdiction. However, after the People's Republic of China (PRC) replaced the Republic of China (ROC) government in the United Nations in 1971, the PRC

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[39] The formality requirements for depositing a declaration are provided in Article 36(4) of the ICJ Statute. *See* ICJ Statute art. 36(4): "Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court."

[40] As consent is always required, the terms 'compulsory' and 'optional' refer to the scope of consent instead of the presence or absence of state consent. Accepting the compulsory jurisdiction of a forum indicates the state commits itself to use a designated forum for dispute settlement and accepts other states to bring a case against it in that forum at any time. *See* KOLB, ELGAR COMPANION, *supra* note 33, at 188. For further information on the compulsory jurisdiction, see VANDA LAMM, COMPULSORY JURISDICTION IN INTERNATIONAL LAW (2014) (the book provides a thorough review of compulsory jurisdiction, including its creation, how it is used, various ways states have declared acceptance of the jurisdiction and an analysis of how it works).

swiftly revoked the ROC's acceptance of the ICJ's compulsory jurisdiction.[41] In 1974, France also terminated its declaration accepting the ICJ's compulsory jurisdiction after Australia and New Zealand brought the *Nuclear Test* case against it.[42] In 1986, the United States also withdrew from the Court's compulsory jurisdiction after the initiation of the famous *Nicaragua* case.[43] Currently, 72 countries have deposited their declaration

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[41] *See* Julian Ku, *China and the Future of International Adjudication*, 27 MARYLAND J. INT'L L. 154, 159–60 (2012). The Republic of China accepted the ICJ's compulsory jurisdiction pursuant to Article 36 of the ICJ Statute in 1946.

[42] *See* Shigeru Oda, *The Compulsory Jurisdiction of the International Court of Justice: A Myth? A Statistical Analysis of Contentious Cases*, 49(2) INT'L & COMPAR. L. Q. 251, 264 (2000); Vanda Lamm, *New Nuclear Cases at the Hague Court*, 18 INLA CONGRESS REP. at 6–7 (2014); Don MacKay, *Nuclear Testing: New Zealand and France in the International Court of Justice*, 19 FORDHAM INT'L L.J. 1857, 1870 (1995).

[43] *See* U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the ICJ, Department Statement, Jan. 18, 1985, DET'P ST. BULL., No. 2096, March 1985, at 64. For discussion of great powers' reluctance to accept compulsory jurisdiction, *see e.g.*, Renata Szafarz, *State Attitudes towards Jurisdiction*, *in* FORTY YEARS INTERNATIONAL COURT OF JUSTICE: JURISDICTION, EQUITY AND EQUALITY 1, 8–23 (Arie Bloed & Pieter van Kijk eds., 1988); W. Michael Reisman, *Has the International Court Exceeded Its Jurisdiction?*, 80 AM. J. INT'L L. 128 (1986); Stanimir A. Alexandrov, *The Compulsory Jurisdiction of the International Court of Justice: How Compulsory Is It?*, 5 CHINESE J. INT'L L. 29, 33–34 (2006). The United States also withdrew from the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes. *See* John Quigley, *The United States' Withdrawal from International*

accepting ICJ's compulsory jurisdiction,[44] and the United Kingdom is the only permanent member of the UN Security Council among them.

Besides accepting the ICJ's compulsory jurisdiction, in a circumstance when a dispute has already occurred, the parties may still give their consent *ad hoc* and have the ICJ hear the dispute. Generally, the consent will take the form of a special agreement (*compormis*), and the parties shall define and address the scope of the dispute and the issues that they wish to entrust to the Court, and the Court's jurisdiction is limited to what is designated in the agreement.[45]

1.3 The Composition of the Bench

Pursuant to Article 3 of the ICJ Statute, the International Court of Justice consists of 15 judges.[46] Each judge shall serve for a term of nine years and may be re-elected.[47] To

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Court of Justice Jurisdiction in Consular Cases: Reasons and Consequences, 19 DUKE J. COMPAR. & INT'L L. 263 (2009).

[44] *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INTERNATIONAL COURT OF JUSTICE, http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3 (last visited March 3, 2017).

[45] KOLB, *supra* note 35, at 530.

[46] ICJ Statute art. 3.

[47] ICJ Statute art. 13. However, there are arguments urging abolishment of the rule permitting re-election as it is thought that this may enhance judges' independence and impartiality.

ensure the balance of the Court and the fairness between the parties, Article 3 of the ICJ Statute prohibits states from having more than one national serving on the Court.[48] Since all UN member states are *ipso facto* parties to the ICJ Statute,[49] except for the *ad hoc* judges, all ICJ judges are elected by the UN members. To be elected, the candidates shall first be nominated by the national group of their country[50] and shall secure an absolute majority of votes in the two separate voting proceedings held in the UN General Assembly

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[48] ICJ Statute art. 3. This was for the purpose of avoiding a single nationality being over-represented on the court. Taslim O. Elias, *Report, Does the International Court of Justice, as it is Presently Shaped, Correspond to the Requirement which Follow from its Function as the Central Judicial Body of the International Community*, *in* JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES 19, 20 (Hermann Mosler & Rudolf Bernhardt eds., 1974).

[49] UN Charter art. 93(1).

[50] ICJ Statute arts. 4–6. Each country has a different set of nomination procedures, including how the national group functions. For an introduction of U.S.'s nomination process, see Lori F. Damrosch, *The Election of Thomas Buergenthal to the International Court of Justice*, 94 AM. J. INT'L L. 579 (2000); Lori F. Damrosch, *Ensuring the Best Bench: Ways of Selecting Judges*, *in* INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL COURT OF JUSTICE: PROCEEDING OF THE ICJ/UNITAR COLLOQUIUM TO CELEBRATE THE 50TH ANNIVERSARY OF THE COURT 165, 191–97 (Connie Peck & Roy S. Lee eds., 1997). However, Robinson noted that most national groups are not independent of the government's control, see Davis R. Robinson, *The Role of Politics in the Election and the Work of Judges of the International Court of Justice*, 97 AM. SOC'Y INT'L L. PROC. 277, 279 (2003).

and the Security Council.[51] As a policy guidance, the electors are advised to ensure that "the main forms of civilization" and "the principal legal systems of the world" are represented in the Court.[52] However, this goal has never been fully realized.

Although most forms of civilization and principal legal systems of the world are represented in the ICJ, they are never equally represented. As scholars have observed, the distribution of ICJ bench seats is based on 'power and geography' instead of ensuring the fair representation of "main forms of civilization or principal legal system of the world."[53] Moreover, there is also a customary practice that guarantees the five permanent members of the Security Council (P5) are represented in the ICJ.[54]

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[51] ICJ Statute arts. 8, 10.

[52] *Id.* art. 9.

[53] Bardo Fassbender, *Organization of the Court: Article 9*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 261, 270 (Andreas Zimmerman, Christian Tomuschat & Karin Oellers-Frahm eds., 2006); Robinson, *supra* note 50, at 278–79.

[54] The practice of having super powers in the international adjudication body has been adopted since the times of the PCIJ. *See* SHABTAI ROSENNE, THE WORLD COURT, WHAT IT IS AND HOW IT WORKS 56 (5th edn, 1995). For arguments that P5 states should not be guaranteed a seat in the ICJ, see S. Gozie Ogbodo, *An Overview of the Challenges Facing the International Court of Justice in the 21st Century*, 18 ANN. SURV. INT'L & COMP. L. 93, 107–08 (2012); Suh, *supra* note 18, at 236; William Samore, *National Origins v. Impartiality Decisions: A Study of World Court Holdings*, 34 CHI.-KENT L. REV. 193 (1956). For

The decision to provide the superpowers a *de facto* guaranteed seat in the ICJ was out of the political consideration that the presence of the great powers would help to assure compliance with the decision and maintain the functions of the Court.[55] However, the contribution of having superpowers on the bench was never proven. Although studies have reported that parties complied with the ICJ decisions at a high rate,[56] none of the studies

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arguments that this practice may be abandoned at any time, see Edward McWhinney, *Law, Politics and "Regionalism" in the Nomination and Election of World Court Judges*, 31 SYRACUSE J. INT'L L. & COM. 1, 13, 17 (1986); Elias, *supra* note 48, at 26–27 (pointing out the change that happened in the 1967 election. However, Elias predicts that the increasing number of UN members from the Third World does not necessarily lead to the result that Western Europe would in the future be under-represented). However, it should be noted that in the most recent election, Judge Greenwood from the UK failed to be re-elected. This was the first time that a judge from a P5 state was not elected (between 1967 and 1985, there was also no ICJ judge from China. However, this was due to the more complicated representation disputes between Nationalist China in Taiwan (ROC) and Communist China in Mainland China (PRC)). *See e.g.,* Owen Bowcott, *No British judge on world court for first time in its 71-year history*, GUARDIAN, Nov. 20, 2017, https://www.theguardian.com/law/2017/nov/20/no-british-judge-on-world-court-for-first-time-in-its-71-year-history (last visited Dec. 2, 2017).

[55] *See* ROSENNE, *supra* note 54, at 56; Robinson, *supra* note 50, at 278–80; MACKENZIE, MALLESON, MARTIN & SANDS, *supra* note 13, at 26; Fassbender, *supra* note 53, at 282.

[56] *See* Aloysius P. Llamzon, *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, 18 (5) EUR. J. INT'L L. 815, 852 (2007); CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 403 (2004); Sara McLaughlin Mitchell & Paul R. Hensel, *International Institutions and Compliance with Agreements*, 51(4) AM. J. POL. SCI. 721, 735 (2007), the

affirm the correlations between the compliance rate and the appearance of P5 judges on the bench.

Aside from the five seats *de facto* guaranteed to the P5 countries, the rest of the seats are competed for by all others. As we shall later observe, the composition of ICJ's non-permanent seats shifted quite dramatically as more newly-independent countries joined the UN and sought more representation in the UN organs during the 1960s and 1970s. Nonetheless, the distribution of seats in the ICJ is still distant from the idea of having fair or equitable representation among the states.

The requirements and qualifications of the ICJ judges are provided in Article 2 of the ICJ Statute. A qualified candidate must be an individual with (1) high moral standards, (2) the capacity to ensure the independence of the Court, and (3) the experience of either serving as a judge at the highest judicial office or a legal advisor with expertise in international law.[57] Based on the contextual interpretation of the ICJ Statute, only national

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data used in their research can be found in *Compliance with ICJ/PCIJ Decisions on Territorial, River, and Maritime Issues*, 2007 AJPS Web Appendix, http://www.paulhensel.org/comply.html. *Cf.* Oda, *supra* note 42, at 264.

[57] The first two requirements are subjective and are assessed on an individual basis. KOLB, *supra* note 35, at 112.

judges of the highest juridical office, legal advisors, and academics are qualified candidates; but in practice, high-ranking diplomats are also considered qualified and are frequently elected.[58] As Robert Kolb has reported, about half of the ICJ bench is composed of academics and legal advisors, and national judges and diplomats each hold around 25 percent of the seats.[59]

Although named as an "international" court, for the first twenty years of its establishment, the ICJ was more like a "European" court than a world court.[60] As Table 2-1 shows, between 1946 and 1964, the majority of the bench was composed of judges from either Europe or the Americas (including North America, Latin America, and South America) while judges from Africa and Asia only accounted for a small proportion of the bench.[61] It is evident that the African and Asian countries were under-represented in the

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[58] *Id.* at 112.

[59] *Id.*

[60] R.P. Anand, *The Role of the International Court of Justice in the Peaceful Settlement of International Disputes*, *in* THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE 1, 9 (Leo Gross ed. 1976) [hereinafter Anand, Role of ICJ]; R.P. ANAND, *The International Court of Justice and Impartiality between Nations*, *in* STUDIES IN INTERNATIONAL ADJUDICATION 73, 113–19 (1969); KOLB, ELGAR COMPANION, *supra* note 33, at 104.

[61] LYNDELL V. PROTT, THE LATENT POWER OF CULTURE AND THE INTERNATIONAL JUDGE 52–54 (1979).

early periods of the Court,[62] and this imbalanced regional representation has seriously frustrated the countries in these regions.[63]

Table 2-1 Number of Judges from Each Region 1946-1964[64]

Year	1946	1949	1952	1955	1958	1961	1964
Africa	1	1	1	1	1	1	2
Asia	1	1	2	2	2	2	2
America	6	6	6	6	6	5	3
Eastern Europe	3	3	3	3	3	2	2
Western Europe	4	4	4	3	4	4	4
Oceania	0	0	0	0	1	1	1

Coinciding with movements to have the non-western states fairly represented in international organizations, the Afro-Asian group advocated for altering the ICJ's

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[62] MACKENZIE, MALLESON, MARTIN & SANDS, *supra* note 55, at 27–29; Abi-Saab, *supra* note 6, at 5. This phenomenon is not necessarily a reflection of bias against African and Asian states, as at that time, many of these regions were still going through the decolonization process and had not yet gained independence. KOLB, *supra* note 35, at 112.

[63] Abdulqawi A. Yusuf, *From Reluctance to Acquiescence: The Evolving Attitude of African States Towards Judicial and Arbitral Settlement of Disputes*, 28 LEIDEN J. INT'L L. 605, ¶ 2.3 (2015); Bedi, *supra* note 6, at 183; Anand, *Role of ICJ*, *supra* note 60, at 9.

[64] The information about ICJ judges is available at the ICJ website, *see* Members, INTERNATIONAL COURT OF JUSTICE, http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=2 (last visited March 3, 2017).

composition.[65] Starting from the triennial elections of 1966 and 1969, the ICJ started to accommodate more African and Asian judges.[66] Although the *de facto* guaranteed seats for the P5 countries primarily remain unaffected,[67] the non-permanent seats are now distributed in an equation similar to the 'equitable geographical distribution' used in the Security Council and other UN organs.[68]

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[65] ROSENNE, *supra* note 54, at 56–59; Renata Szafarz, *Changing State Attitudes towards the Jurisdiction of the International Court of Justice*, *in* FORTY YEARS INTERNATIONAL COURT OF JUSTICE: JURISDICTION, EQUITY AND EQUALITY 1, 26 (Arie Bloed & Pieter van Dijk eds., 1988); Abi-Saab, *supra* note 6, at 5; Edward McWhinney, *Western and Non-Western Legal Cultures and the International Court of Justice*, 65 874 WASH. U. L. Q. 873, 889–90 (1987) (pointing out that the 1966 decision caused the court to be criticized as "politically biased and prejudiced judgment" and delivered "a white man's decision, rendered by a white man's tribunal." P. Mweti Munya, *The International Court of Justice and Peaceful Settlement of African Disputes: Problems, Challenges and Prospects*, 7 J. INT'L L. & PRAC. 159, 178 (1998); Yusuf, *supra* note 63, at ¶ 2.2.

[66] Fassbender, *supra* note 53, at 271–73; ROSENNE, *supra* note 54, at 57–59; Elias, *supra* note 48, at 23–24 (noticing this was made at the expense of Latin American seats); Bedi, *supra* note 6, at 183–84.

[67] The British judge was not elected in the most recent election. However, it remains unclear if this is an exceptional instance or will be the new practice as it is still too crude to make the conclusion. *See supra* note 54.

[68] MACKENZIE, MALLESON, MARTIN & SANDS, *supra* note 55, at 28–29; Leo Gross, *Compulsory Jurisdiction Under the Optional Clause*, *in* THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 1, 19, 34–43 (Lori F. Damrosch ed., 1987); Elias, *supra* note 48, at 24. For development of UNSC's seat distribution, see U.N. Charter art. 23; United Nations General Assembly, *Question of Equitable*

Since the 1970s, the "equitable geographical distribution" has become the conventional way to compose the ICJ bench.[69] The current arrangement is to have three judges from Africa, two from Latin America, three from Asia, five from Western Europe and other states (including states from North America and Oceania), and two from Eastern Europe (including Russia).[70] As shown in Figure 2-1, although the percentages of judges from African and Asian states together has increased from 13% to 40%, the judges from Asia and Africa still represent twice as many countries as their European colleagues do. The equitable distribution arrangement of the ICJ seats does not comfort the dissatisfaction

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Representation on the Security Council and the Economic and Social Council, GA. Res. 1991 (XVIII), para 3; UN Security Council, Annotated Preliminary List of Items to be Included in the Provisional Agenda of the Sixty-Third Regular Session of the General Assembly, UN Doc. A/63/100, para 105. Yusuf, *supra* note 63, at ¶ 2.3.

[69] Yusuf, *supra* note 63, at ¶ 2.3.; Bedi, *supra* note 6, at 184.

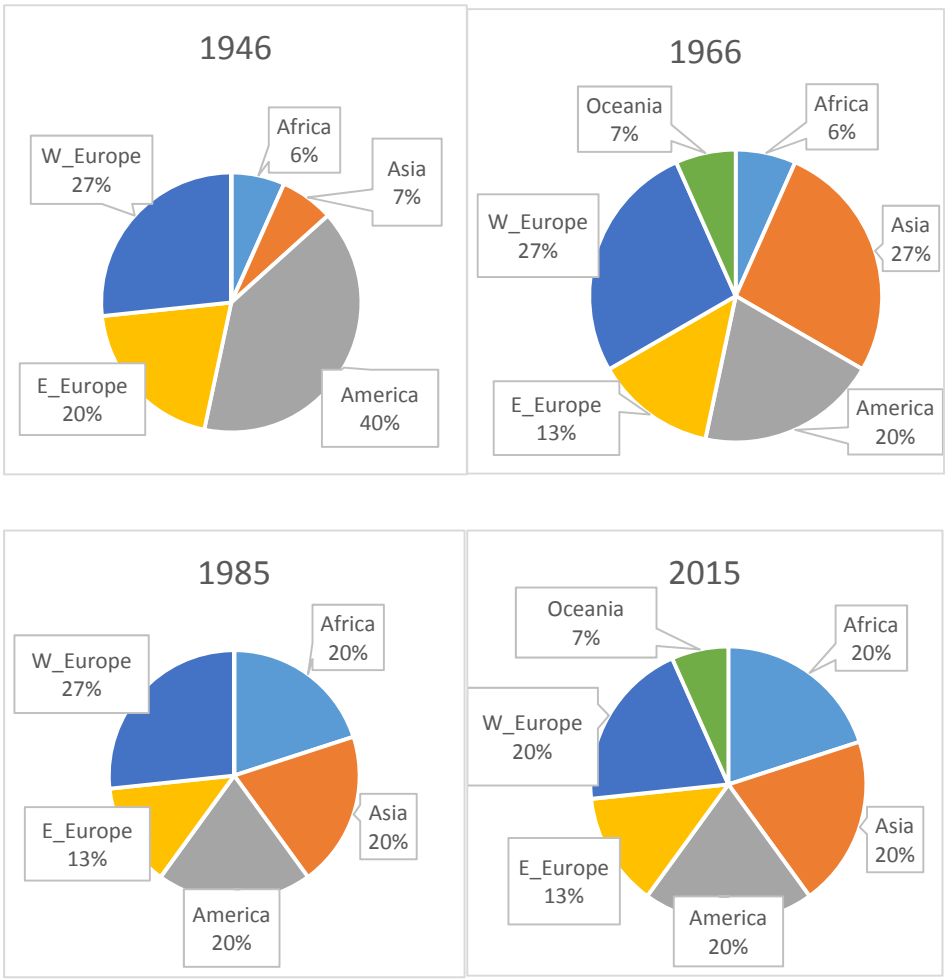
[70] MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS ¶ 1.5, at 6 (Philip Sands, Cesare Romano, Ruth Mackenzie & Yuval Shany eds., 2nd ed. 2010); SHABTAI ROSENNE, ROSENNE'S THE WORLD COURT, WHAT IT IS AND HOW IT WORKS 45 (Terry D. Gill ed., 6th ed. 2003). For discussion of the adequacy of this arrangement, see Chittharanjan F. Amerasinghe, *Judges of the International Court of Justice - Election and Qualification*, 14 LEIDEN J. INT'L L. 335, 347 (2001) (arguing that the current distribution of seats on the court contradicts the purpose of Article 9 of the ICJ Statute).

of the under-represented states,[71] and these countries still call for expanding the bench to allow more judges from the under-represented regions to serve on the Court.[72]

[71] William J. Aceves, *Critical Jurisprudence and International Legal Scholarship: A Study of Equitable Distribution*, 39 COLUM. J. TRANSNAT'L L. 299, 392–93 (2001) (arguing that although equitable distribution policies play an important role in promoting equality in an unequal world, it may, in fact, be responsible for the further erosion of this seminal principle since the institutional design of the international system is to perpetuate the Westphalian balance of power.)

[72] This includes having more forms of legal tradition represented in the court. *See supra* note Janina Satzer, *Explaining the Decreased Use of International Courts – The Case of the ICJ*, 3 REV. L. & ECO. 11, 19 (2007).

Figure 2-1 Distribution of Judge's Origin (1946, 1966, 1985, 2015)



1.4 *Ad hoc* Judges

Another unique institutional arrangement in the ICJ is the *ad hoc* judge system inherited from its predecessor, the Permanent Court of International Justice (PCIJ).[73]

[73] KOLB, ELGAR COMPANION, *supra* note 33, at 111.

While the ICJ Statute prohibits states from having more than one judge serving on the bench,[74] the *ad hoc* judge system guarantees that states without a national serving on the bench may have a judge of its own choice join the bench to equalize the imbalance.[75] Thus, pursuant to Article 31 of the ICJ Statute, the party without a national on the bench may select a judge of its own choice to join the adjudication of that case. In cases where neither party has a national on the Court, both parties would have the right to select a judge of their own choice to join the adjudication of that dispute. Although it is not mandatory for the party to select an *ad hoc* judge, it is rare for a party to waive such right.[76]

The first reason provided for the ICJ to adopt the *ad hoc* judge system is that this arrangement could help to mitigate the equality problem if one of the parties has a national

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[74] ICJ Statute art. 3(1).

[75] ICJ Statute arts. 31(2), (3). For the policy consideration behind this article, see Iain Scobbie, *"Une Heresie En Matiere Judiciaire"? The Role of the Judge Ad Hoc in the International Court*, 4 L. & PRAC. INT'L COURTS & TRIBUNALS 421, 422–23 (2005); Schwebel, *supra* note 18, at 889–90; THOMAS FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 324 (1995).

[76] *E.g.,* Certain Phosphate Lands in Nauru (Nauru v. Australia), 1992 ICJ 240; Temple of Preah Vihear (Cambodia v. Thailand) 1961 ICJ 17; Sovereignty over Certain Frontier Land (Belg./Netherlands) 1959 I.C.J. 209.

serving on the Court while the other party does not.[77] It was also thought that if the national judges have a strong tendency to support their own country, states would feel more comfortable utilizing the Court if they could have a judge of their choice on the bench to monitor the bench's deliberation and to ensure that their arguments have been duly considered.[78] Aside from ensuring equality between the parties and encouraging states to utilize the ICJ, it is thought that the Court would also benefit from having someone knowledgeable in the municipal laws or certain facts of his/her own country and the *ad hoc* judge system may thus enrich the deliberations of the Court.[79]

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[77] Suh, *supra* note 18, at 224; KOLB, ELGAR COMPANION, *supra* note 33, at 111.

[78] Schwebel, *supra* note 18, at 889–90. This position is advanced by Judge *ad hoc* Lauterpacht in his dissenting opinion delivered in the *Genocide* case between Bosnia and Serbia. He indicates that it is the *ad hoc* judge's responsibility to "endeavor to ensure that, so far as is reasonable, every relevant argument in favour of the party that has appointed him has been fully appreciated in the course of collegial consideration and, ultimately, is reflected – though not necessarily accepted – in any separate of dissenting opinion that he may write." Application of the Convention for the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Provisional Measures, order of 13 Sept. 1993, 1993 I.C.J. 325, 409 (dissenting opinion of judge *ad hoc* Lauterpacht).

[79] *See* KOLB, ELGAR COMPANION, *supra* note 33, at 111; SERENA FORLATI, THE INTERNATIONAL COURT OF JUSTICE, AN ARBITRAL TRIBUNAL OR A JUDICIAL BODY 34 (2014); SINGH, *supra* note 28, at 193–94.

The qualification requirements for *ad hoc* judges are identical to those of regular judges. *Ad hoc* judges are also expected to share the same competence and expertise in international law and perform their duty independently and impartially (though we shall later observe that they rarely meet such requirement).[80] With regard to nationality, the disputing parties may freely select its own national or a national of a third state for the position. In practice, states also frequently nominate retired ICJ judges to serve as *ad hoc* judges in the case.[81]

As many studies have pointed out, *ad hoc* judges and regular judges from the party states both vote in favor of their home countries and appointers at a high rate[82] and are

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[80] KOLB, ELGAR COMPANION, *supra* note 33, at 111.

[81] For instance, Judge Enrique c. Armand-Ugon of Uruguay who served in the ICJ as regular judge from 1951-1961 was appointed as *ad hoc* judge by Spain in the Barcelona Traction case; Judge Mohammed Bedjaoui of Algeria who served in the court as regular judge from 1982-2001 was later appointed as *ad hoc* judge in the *Diallo* case, the *Territorial and Maritime Dispute* between Nicaragua and Colombia, the *Frontier Dispute* between Benin and Niger, and also the case relating to *Cessation of the Nuclear Arms Race and to Nuclear Disarmament* raised by the Marshall Islands.

[82] Karin Oellers-Frahm, *International Courts and Tribunals, Judges and Arbitrators*, *in* ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *available at* http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e45?rskey=oHQViJ&result=4&prd=EPIL (last visited March 3, 2017). It was said that the *ad hoc* judges

speculated to be biased.[83] Although the high tendency of *ad hoc* judges to support their appointers attracts concerns about the *ad hoc* judges' impartiality[84] and ignites discussions

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are seriously influenced by the state that nominates them. *See* "[o]f all influences to which men are subject, none is more powerful, more persuasive or more subtle than the tie of allegiance that binds them (judges) to the land of their homes and kindred and to the great sources of the honors and performances for which they are so ready to spend their fortune and to risk their lives." Fourth Annual Report of the Permanent Court of International Justice, 1928 P.C.I.J. (ser. E), No. 4, at 75 (cited in Suh, *supra* note 18, at 225).

[83] Samore, *supra* note 54, at 201; Suh, *supra* note 18, at 225; Hensley, *National Bias*, *supra* note 18, at 571–72, 580; Adam Smith, *"Judicial Nationalism" in International Law: National Identity and Judicial Autonomy at the ICJ*, 40 TEX. INT'L L.J. 197, 218–20 (2005).

[84] *See* Ogbodo, *supra* note *54*, at 108–09; Suh, *supra* note 18, at 225. *Cf. supra* note 18, at 892–95 (arguing that judges' preferences for voting for their appointers and against the majority should not be viewed as suggestive of bias since it has already been proven that the court/majority also makes mistakes over the law and the facts and may not always be right.)

of abandoning the *ad hoc* judge system,[85] the system remains intact.[86] In Chapter 4, this dissertation shall provide an updated assessment of the voting preferences of the judges appointed or nominated by the party states.

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[85] For discussion that the ad hoc judge system should be abandoned, see Ogbodo, *supra* note *54*, at 108–09; Weiss, *supra* note 22, at 124. For arguments that having ad hoc judges on the bench does not affect the court's function, primarily taking the position that the votes of party-appointed adjudicators eventually neutralize one another, see SHABTAI ROSENNE, LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920–1996 124– 25 (1st edn. 1997); Yuval Shany, *Squaring the Circle? Independence and Impartiality of Party Appointed Adjudicators in International Legal Proceedings*, 30 LOY. L.A. INT'L & COMP. L. REV. 473, 490 (2008); Smith, *supra* note 83, at 204; K. Tanaka, *Independence of International Judges*, 13 COMUNICAZIONI E STUDI 855, 864 (1975).

[86] The *ad hoc* judge system was also adopted by other international courts such as the International Tribunal of the Law of the Sea (ITLOS) and the Inter-American Court of Human Rights. *See* Statute of the International Tribunal for the Law of the Sea, Annex VI of the United Nations Convention on the Law of the Sea arts. 2, 8, 11 Dec. 10, 1982, 1833 U.N.T.S. 397; Statute of the Inter-American Commission on Human Rights art. 10, O.A.S. Gen. Ass. Res. 447 (IX-0/79), Jan. 1, 1980, *available at* http://www.oas.org/en/iachr/mandate/Basics/statuteiachr.asp. Of course, some international courts have abandoned this practice, such as the European Court of Justice and the World Trade Organization dispute settlement body. For comparison of designs between international courts, see Tom Dannenbaum, *Nationality and the International Judge: The Nationalist Presumption Governing the International Judiciary and Why it Must Be Reversed*, 45 CORNELL INT'L L.J. 77, 90–101 (2012).

1.5 The ICJ's Caseload

A total of 136 cases were submitted to the ICJ in the past seventy years. The Court delivered decisions over 101 of them;[87] 24 cases were discontinued and removed before any adjudication take place. As of 2015, eleven cases are still pending. Statistics relating to the ICJ's usage since 1946 are shown in Figure 2-2.[88]

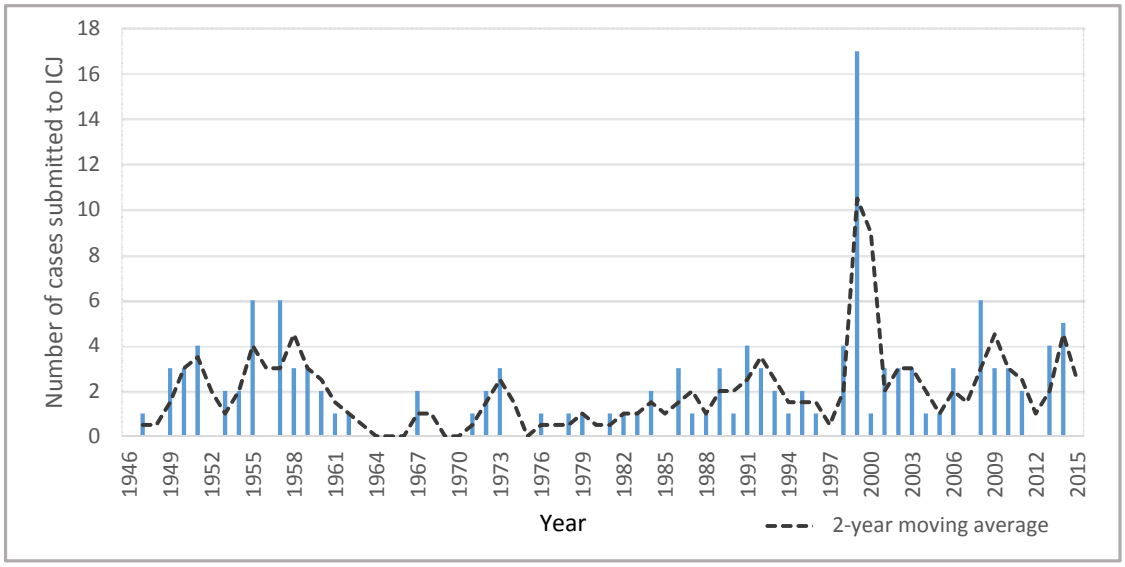

Figure 2-2 ICJ Filings - Number of Cases Filed

In Figure 2-2, the bars show the number of cases filed in a given year, which range from 0 to 17; the dashed line shows the two-year moving average. Despite the decrease in

[87] Data was last updated on 24 March 2015.

[88] Data available at the ICJ website, http://www.icj-cij.org/docket/index.php?p1=3&p2=3 (last visited March 1, 2017).

usage between the 1960s and 1980s, the ICJ's caseload increased drastically during the late 1980s. From an overall perspective, the average number of cases submitted to the ICJ is increasing. But just as Eric Posner and Janina Satzer argued, the trend shown in Figure 2-2 is somewhat deceptive since the usage of ICJ is evaluated without eliminating cases that are later revoked by the parties and those that arise out of the same incident but are counted multiple times due to separate proceedings being initiated by the parties.[89] Hence, after taking the factors mentioned above into consideration, the adjusted observation over the ICJ's usage is shown in Figures 2-3.

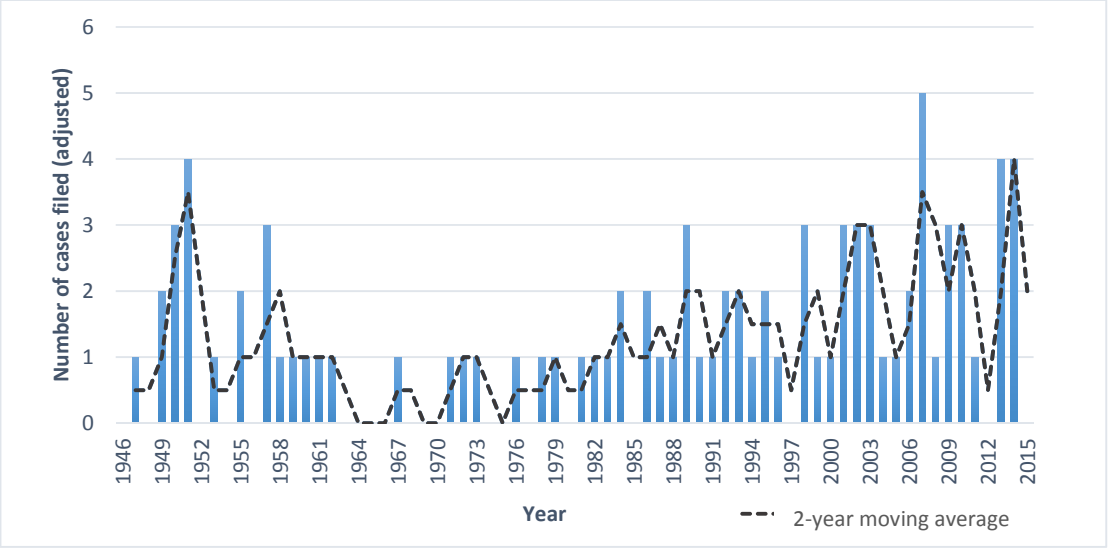

Figure 2-3 ICJ Filings Adjusted – duplicated and removed cases

[89] Eric Posner, *The Decline of the International Court of Justice*, *in* INTERNATIONAL CONFLICT RESOLUTION 111 (Stefan Voigt, Max Albert, and Dieter Schmidtchen eds. 2006)..

In Figure 2-3, the data is adapted to exclude the cases that were submitted to the ICJ but later removed by the parties, and also the cases that arose out of the same incident but became separate cases. From Figure 2-3, a U-shape trend over the ICJ's usage shows that the number of cases submitted to the ICJ significantly decreased during the 1960s but later recovered in the late 1980s. Although the observation still shows that the usage of ICJ has increased in the past two decades, the trend is not as exaggerated as we see in Figure 2-2.[90]

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[90] Satzer also argues that the number of UN members should be taken into consideration when evaluating the usage. In her argument, if the number of cases submitted to the ICJ did not increase along with the expansion of its potential users, this signals a decline of the ICJ's importance. Other factors that can be considered are discussed in Satzer's research, see Satzer, *supra* note 72, at 21–33. However, I disagree with Satzer's idea. The logic of setting the number of UN members as an adjustment factor is based on the assumption that a positive correlation exists between the number of UN members and the number of interstate disputes. However, there lacks evidence proving the existence of such positive correlation and this assumption should not be sustained. Also, the newly established regional and specialized international tribunals such as the European Court of Justice, the World Trade Organization Dispute Settlement Body, and the International Tribunal on the Law of the Sea established in the1990s also compete with the ICJ and may also have caused the usage of the ICJ to decrease. Accordingly, unless one can prove the positive correlation between the numbers of UN members and the number of interstate disputes and also evaluate the impact of the other international courts, I believe it is not necessary to take the increase in UN membership into consideration.

1.6 The Composition of the ICJ's Caseload

To assess the type of cases most frequently submitted to the ICJ, I replicate the categorization methods used in Tom Ginsburg and Richard McAdams' research.[91] The contentious cases are disaggregated into the following seven categories: (1) Aerial Incident, [92] (2) Territorial/Maritime Boundary Delimitation, [93] (3) Property Rights

[91] *See* Ginsburg & McAdams, *supra* note 24. This categorization method is also used by Posner and Figueiredo, see Eric A. Posner & Miguel F. P. de Figueiredo, *Is the Intemational Court of Justice Biased?*, 34 J. LEGAL STUD. 599, (2005).

[92] For example, the case of Aerial Incident of 10 August 1999 between Pakistan and India, or the Lockerbie case between Libya and United Kingdom.

[93] For example, the North Sea Continental Shelf case between Germany, Denmark and the Netherlands, or the case of Temple of Preah Vihear between Cambodia and Thailand.

(including Diplomatic Protection),[94] (4) Trusteeship,[95] (5) Use of force,[96] (6) Diplomatic Relation,[97] and (7) Other.[98]

Table 2-2 Types of Cases Referred to the ICJ[99]

Type of Dispute	Number of Cases
Aerial Incidents	4
Territorial/ Boundary Delimitation	31
Property Rights	12
Trusteeship	5
Use of force	28
Diplomatic Relations	9
Other	14

[94] For example, the Ambatielos case between Greece and the United Kingdom, or the Nottebohm case between Liechtenstein and Guatemala.

[95] For example, the *South West Africa* case between Liberia, Ethiopia and South Africa, or the Northern Cameroons case between Cameroon and United Kingdom.

[96] For example, the *Corfu Channel* between the United Kingdom and Albania, the *Nicaragua* case between Nicaragua and the United States, or Use of Force case between Serbia and the NATO states.

[97] For example, the *LaGrand* case between Germany and United States, or the Asylum case between Colombia and Peru.

[98] For example, the *Nuclear Test* case between France, New Zealand and Australia, or the Gabcikovo-Nagymaros Project case between Hungary and Slovakia.

[99] Our data includes twenty-six more cases than the Ginsburg and McAdam study and twenty-nine cases more when compared with Posner and Figueiredo's research.

As Table 2-2 shows, territorial demarcation and use of force disputes are the two types of cases most frequently submitted to the ICJ for adjudication. However, because 10 of the 28 cases relating to the use of force related to NATO's action in the Balkan conflicts during the 1990s, the number of use of force cases observed is inflated.[100] But even after the adjustment is made, use of force cases are still the second most frequent cases seen in the ICJ docket. Moreover, in the past two decades, except for the *East Timor* case,[101] no cases relating to aerial incidents and trusteeship issues have been brought before the ICJ. In short, territorial/maritime demarcation issues are the only type of case that was constantly referred to the ICJ throughout the Court's history.

2. The Research Question: Is the decision-making of the ICJ and its judges influenced by extra-legal factors?

In the past seventy years, the ICJ has delivered more than one hundred decisions over contentious cases and requests for advisory opinions. The Court's contribution to the

[100] This number will be adjusted in a later part of the dissertation when we observe the usage and popularity of the ICJ.

[101] East Timor (Portugal v. Aus.), Judgment, 1995 I.C.J. 90.

development of international law is widely recognized.[102] Nevertheless, the ICJ's performance does not share the same compliment. As Gary Born commented, considering its usage and the ineffectiveness of its jurisdiction, "it is impossible to conclude that the ICJ has played a significant role in international affairs over the course."[103] However, among the many criticisms that ICJ faces,[104] the one that fundamentally challenges its

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[102] See e.g., Stephen M. Schwebel, Preliminary *Rulings by the International Court of Justice at the Instance of National Courts*, 28 VA. J. INT'L L. 495, 499 (1988); Robert Y. Jennings, *The United Nations at Fifty: The International Court of Justice After Fifty Years*, 89 AM. J. INT' L. 493, 493 (1995); Manfred Lachs, *Some Reflections on the Contribution of the International Court of Justice to the Development of International Law*, 10 SYRACUSE J. INT'L L. & COM. 239, 245 (1983)

[103] Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775, 805, 807–08 (2012). *See also* Posner, *supra* note 89; Satzer, *supra* note 72. *Cf.* Llamzon, *supra* note 56, at 852 (arguing that "pessimism regarding the future of the Court is entirely unwarranted, so long as expectations are managed realistically.")

[104] This includes the efficiency of the court, the effectiveness of the court, problems enforcing the court's judgment, etc. *See generally* SCHULTE, *supra* note 56, at 403; Colter Paulson, *Compliance with Final Judgments of the International Court of Justice since 1987*, 98(3) AM. J. INT'L L. 434, 460 (2004); JOHN COLLIER & VAUGHAN LOWE, THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW: INSTITUTIONS AND PROCEDURES 178 (2000); Ginsburg & McAdams, *supra* note 24. For studies on pre-1978 compliance, *See* Jonathan I. Charney, *Disputes Implicating the Institutional Credibility of the Court: Problems of Non-Appearance, Non- Participation, and Non-Performance*, *in* THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 288, 296, 300 (Lori F. Damrosch ed., 1987).

legitimacy is the concern that the ICJ and its judges' are biased and partial, and that the decision-making of the Court is influenced by extra-legal factors. It is also reported that the impartiality concerns have undermined states' willingness to utilize the ICJ as a dispute settlement forum.[105]

As in domestic courts, judicial impartiality and independence are crucial to maintaining the legitimacy of international tribunals.[106] However, skepticism about the impartiality of judges serving on the ICJ or its predecessor, the PCIJ, is no new news. In 1933, Hersch Lauterpacht first cautioned that the judges serving in the international court may not be as impartial as expected, as he observed that the PCIJ judges showed a high

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[105] See Elias, *supra* note 48, at 22–28; Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 300–01, 303–04, 312–14 (1997); *See e.g.*, Anand, *Role of ICJ*, *supra* note 60, at 2–3; Richard Falk, *The South West Africa Cases: An Appraisal*, 21 INT'L ORG. 1 (1967). Cf. Hambro's opinion in the Symposium on the Judicial Settlement of International Disputes, see JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES 57 (Hermann Mosler & Rudolf Bernhardt eds., 1974).

[106] YUVAL SHANY, *Judicial Independence and Impartiality*, *in* ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS 97, 104 (2014); Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CALIF. L. REV. 899, 914 (2005); Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT'L L.J. 271, 271 (2003)

tendency to support their own country whenever they were parties to the dispute.[107] A separate study conducted by Manley Hudson in 1943 over the PCIJ judges' voting preferences reached a similar conclusion and reported that the PCIJ judges tended to hold contentions similar to the positions of their governments or the states that appointed them.[108]

The speculation held against the World Court did not fade away as the ICJ replaced the PCIJ in 1946. States continued to have doubts about the ICJ's impartiality and distrusted the judges serving in new institution.[109] The Soviet Union's attitude towards the ICJ is a classic example of those who have doubts in the ICJ. Throughout the ICJ's history, the Communist states showed no enthusiasm for utilizing international court(s) for dispute

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[107] LAUTERPACHT, *supra* note 17, at 230–32.

[108] MANLEY HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942 355 (1943)

[109] The U.S. Secretary of the State Elihu Root once stated that: "[t]he great obstacle to universal adoption of arbitration … is rather the apprehension that the tribunal selected will not be impartial." Quoted in Edward Gordon et al., *The Independence and Impartiality of International Judges*, 83 AM. SOC'Y INT'L L. PROC. 508, 508 (1989). After the Permanent Court of International Justice was replaced by the International Court of Justice, the speculation that the judges were biased remained. *See* KITCHELL, *supra* note 8, 103–11 (arguing that the "Communist judges are disciplined servants of the Communist party", thus, if the United States' accedes to the jurisdiction of the court, its interests may be endangered).

settlement purposes.[110] It has further been pointed out that the Soviets felt that they would be in a disadvantaged position if they were to appear before a court primarily composed of Western European judges.[111] The Soviet countries not only rejected international adjudication because they felt that "only an angel could be unbiased in judging Russian affairs,"[112] their anxiety also stemmed from the Marxist-Leninist teaching which indicates that there will be an inevitable "conflict between social orders built on different class structures and economic interest"[113] and the ICJ would eventually be the continuation of

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[110] Elena E. Vilegjanina, *The Principle of Peaceful Settlement of Disputes: A New Soviet Approach*, *in* PERESTROIKA AND INTERNATIONAL LAW: CURRENT ANGLO-SOVIET APPROACHES TO INTERNATIONAL LAW 119, 120 (Anthony Carty & Gennady Danilenko eds. 1990).

[111] Zigurds L. Zile, *A Soviet Contribution to International Adjudication: Professor Krylov's Jurisprudential Legacy*, 58(2) AM. J. INT'L L. 359, 364–65 (1964); Arthur W. Rovine, *The National Interest and the World Court*, *in* THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE VOL. I 313, 315 (Leo Gross ed. 1976); EDWARD MCWHINNEY, CONFLICT AND COMPROMISE. INTERNATIONAL LAW AND WORLD ORDER IN A REVOLUTIONARY AGE 53–70 (1981); McWhinney, *supra* note 65, at 877–78. In the This distrust over the non-Soviet judges even extended to international adjudication between private parties, see Samuel Pisar, *The Communist System of Foreign-Trade Adjudication*, 72 HARV. L. REV. 1409, 1413–15 (1959).

[112] Litvinov's Statement at the Conference on Russian Affairs, The Hague, July 12, 1922, *in* LOUIS B. SOHN, CASES AND MATERIALS ON WORLD LAW 1046 (1950).

[113] Zile, *supra* note 111, at 364–65.

the "imperialist voting machine" in the United Nations.[114] As Zigurds Zile observed, most Soviet international legal scholars commonly took the viewpoint that "the reactionary classes will … manipulate the institution of international adjudication to their advantage and against historical progress."[115]

Perhaps because of adhering to the same Marxist-Leninist teaching, the People's Republic of China (PRC) holds a similar attitude against international adjudication.[116] The PRC revoked the Republic of China (ROC) government's acceptance of the ICJ's

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[114] Galina G. Shinkaretskaya, *International Arbitration in the External Policy of the Soviet Union*, *in* PERESTROIKA AND INTERNATIONAL LAW: CURRENT ANGLO-SOVIET APPROACHES TO INTERNATIONAL LAW 110, 113 (Anthony Carty & Gennady Danilenko eds. 1990); POLIANSKY, MEZHDUNARODNYI SUD [THE INTERNATIONAL COURT] 233 (1951) (cited in Zile, *supra* note 111, at 367); *see also* Korovin, *Mezhdunarodnyi sud na sluzhbe anglo-amerikanskogo imperializma [The International Court in the Service of Anglo-American Imperialism]*, SOVETSKOYE GOSUDARSTVO I PRAVO [THE SOVIET STATE AND LAW] 57 (1950) (cited in Shabtai Rosenne, *The Role Of The International Court of Justice in Inter-State Relations Today*, 20 REVUE BELGE DE DROIT INTERNATIONAL 275, 288 (1987); Lisovsky, Mezhdunarodnoe pravo [International Law] 150 (1955) (cited in Zile, *supra* note 111, at 367).

[115] Zile, *supra* note 111, at 367.

[116] See Zhao Haifeng (赵海峰), *Zhongguo yu Guoji Sifa Jigou Guanxi de Jiangzuo* (中国与国际司法机构的演进) [Evolution of the Relationship Between China and International Judicial Organizations], 26 FAXUE PINGLUN (法学评论) [WUHAN UNI. L. REV.] 3 (2008); JEROME ALAN COHEN & HUNGDAH CHIU, PEOPLE'S CHINA AND INTERNATIONAL LAW 1444 (1974).

compulsory jurisdiction soon after it prevailed in the struggle against the ROC to become the legitimate representative of China in the United Nations. The PRC has also never presented itself as a party before the ICJ. Among Chinese academics, even prestigious Chinese international law scholars like Zao Lihai and Wang Tieya – who later served as judges of the International Tribunal on the Law of the Sea (ITLOS) and the International Criminal Tribunal for the Former Yugoslavia (ICTY) – also published and criticized the international courts for being biased and partial.[117]

During the decolonization period, another set of frustrations arose from the Afro-Asian states.[118] Aside from dissatisfied about being underrepresented in the Court,[119] frustration accumulated after the deliverance of the 1966 South West Africa decision[120] where the ruling of the ICJ limited the states' ability to sue former colonial powers for their

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[117] ZHAO, *supra* note 5, at 65-68; WANG TIEYAI (王铁崖), GUOCHI FA (国际法) [International Law] 610 (1995).

[118] Yusuf, *supra* note 63; Bedi, *supra* note 6, at 183.

[119] *See also* Rovine, *supra* note 111, at 315; WILLIAM COPLIN, THE FUNCTION OF INTERNATIONAL LAW: AN INTRODUCTION TO THE ROLE OF INTERNATIONAL LAW IN THE CONTEMPORARY WORLD 81 (1966).

[120] South West Africa Case Second Phase (Eth. v. S. Afr.; Liber. v. S. Afr.), Judgment, 1966 I.C.J. 6 (July 18).

maladministration.[121] Because the ICJ was thought to be too conservative, and perhaps too pro-western, to support the claims advanced by the developing countries,[122] this concern again links back to the problem that non-European/American countries are underrepresented in the ICJ and have thus been made to feel vulnerable and disadvantaged when they litigate against any colonial counterparts in the ICJ.[123] As Professor Abi-Saab observes, the 1966 South West Africa case turned out to be 'the disaster of 1966' and shattered the developing and Third World countries' confidence in the Court.[124]

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[121] LESLIE JOHNS, STRENGTHENING INTERNATIONAL COURTS, THE HIDDEN COST OF LEGALIZATION 92 (2015); Adede, *supra* note 6, at 50–61.

[122] JOHNS, *supra* note 121, at 92.

[123] Abi-Saab, *supra* note 6, at 5; Bedi, *supra* note 6, at 183–84 (illustrating how the 1966 South West Africa case influenced the Afro-Asian group to change the imbalance in the ICJ's composition); Adede, *supra* note 6, at 51 (indicating that the ICJ was thought of as "a white man's court, dispensing white man's justice").

[124] Abi-Saab, *supra* note 6, at 5–6; Szafarz, *supra* note 65, 3, 26 (Szafarz argues that the ICJ has gradually regained the African states' confidence, from the fact that several African states submitted cases to the court on the basis of special agreement); Yusuf, *supra* note 63, at ¶ 2.2 (Judge Yusuf indicates that relations between the ICJ and the African bloc improved after the deliverance of the decisions on Namibia and West Sahara); Johns, *supra* note 121, at 90; Adede, *supra* note 6, at 51 ([the African states'] confidence in the ICJ was rudely destroyed); Falk, *supra* note 105, at 1; Rosenne, *The Composition of the Court*, *in* THE

In the 1980s, a new skepticism about the ICJ being biased against the United States and the western powers emerged. Following the *Nicaragua* decision where the United States' actions in Nicaragua were found to be in violation of international law by the ICJ, Jeane Kirkpatrick, then the United States Ambassador to the United Nations, publicly challenged the impartiality of the ICJ and stated that the ICJ judges reflect the political bias and proclivities found in the political organs of the UN.[125] Scholars like Edward McWhinney and Gregory Raymond also argue that an "anti-Western" bias emerged in the ICJ as the judges' philosophies shifted to challenge the rules of international law favored by powerful states.[126]

FUTURE OF THE INTERNATIONAL COURT OF JUSTICE VOL. I 377, 426 (Leo Gross ed., 1976); Bedi, *supra* note 6, at 183.

[125] Kirkpatrick, *supra* note 8. The U.S. Secretary of State Elihu Root also claimed that states would mistrust a court composed of foreign judges instinctively. Procds-Verbaux of the Proceedings of the Advisory Committee of Jurists, 24th Meeting, 14 July 1920, 528-29, (quoted in Schwebel, *supra* note 18, at 889-90). *Statement by Department of States on U.S. Withdrawal from Nicaragua Proceedings, 18 January 1985*, 79 AM. J. INT'L L. 438 (1985) (stating that the U.S. will not risk its national security by presenting sensitive material before a Court that includes two judges from Warsaw Pact Nations).

[126] See EDWARD MCWHINNEY, JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES 19, 64–65, 79 (1991); GREGORY RAYMOND, CONFLICT RESOLUTION AND THE STRUCTURE OF THE STATE SYSTEM 98 (1980); *see also* Edward Gordon, *Observations on the Independence and Impartiality of the Members of the*

Although politicians and scholars have repeatedly charged the ICJ judges with being biased and have deemed their decisions to be influenced by extra-legal factors,[127] most of

International Court of Justice, 2 CONN. J. INT'L L. 397, 397–98 (1987); Weiss, *supra* note 22, 123–33. Adede observed that the Nicaragua case brought African states to the ICJ as the case signaled the ICJ's willingness to rule against a superpower. *See* Adede, *supra* note 6, at 55; However, this confidence was again diminished after the *Lockerbie* case, see *id.* at 58.

[127] For scholarships on the impartiality and bias of ICJ judges, *see e.g.,* Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. 1, 6-7 (2005); Davis R. Robinson, *Politics and Law in International Adjudication*, 97 AM. SOC'Y INT'L L. PROC. 277, 280–81 (2003) (using the *Gulf of Maine* case as reference to claim that the disputing parties may prefer to have a case adjudicated only by judges that they mutually agree on to avoid the possibility that non-party-state judges may consider their own nation's interests in the outcome of a dispute between other states); Edward Gordon et al., *supra* note 109, at 519 (Richard Falk indicates that in the Nicaragua case, it is clear that the opinions expressed by U.S. Judge Stephen Schwebel are unpersuasive and the evidence he uses are handouts from the U.S. government); Zile, *supra* note 111 (questioning the Soviet Judge Krylov's opinions often reflect the idea of its government); Eberhard P. Deutsch, *A Plan for Reconstitution of the International Court of Justice*, 49(6) A.B.A. J. 537, 539-40 (1963). Contrarily, some hold that the ICJ is independent and believe that adjudication by the Court ensures the greatest degree of impartial consideration of an international dispute on the basis of law. *See* Christopher Greenwood, *The Role of the International Court of Justice in the Global Community*, 17(2) U.C. DAVIS J. INT'L L. & POL'Y 233, 248 (2011); Manfred Lachs, *To the Editor In Chief: American Journal of International Law, August 17, 1989*, 84 AM. J. INT'L L. 231 (1990); Leo Gross, *Some Observations on the International Court of Justice*, 56 AM. J. INT'L L. 33 (1962); However, Gross admits that during the judge election process, voting blocs and geopolitics do come into play, *see* Leo Gross *The International Court of Justice: Consideration of Requirements for Enhancing Its Role in the*

these allegations derive from observations of a single case like the *Nicaragua* case or the *South West Africa* case and lack the support of concrete evidence. Because these unproven allegations seriously denounced the reputation of the ICJ and may have also affected states' willingness to utilize the ICJ, there is a pressing need to address these concerns empirically.

Across the ICJ's history, only a handful of studies have tried to sketch and record the ICJ judges' voting behaviors through an empirical approach. However, due to the limited power of the analytical methods deployed, they were unable to report a comprehensive and satisfactory observation of the ICJ judges' voting behavior. Thus, it is the intent of this dissertation to supplement the scholarship over the performance of the ICJ through conducting an empirical study of its judges' voting behaviors.

In this dissertation, I aim to report on the voting blocs formed by the judges, to observe the potential political behavior reflected in the judges' decision-making, and also to determine the factors that correlate with the ICJ judges' voting patterns. With the help of cluster analysis, I shall visualize the judges' voting patterns and observe if the distribution

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International Legal Order, 65(2) AM. J. INT'L L. 253, 282 (1971). Paul B. Stephan, *Courts, Tribunals and Legal Unification – The Agency Problem*, 3 CHINESE J. INT'L L. 333, 337-38 (2002); Karan J. Alter, *Agents or Trustees? International Courts in their Political Context*, 14(1) EUR. J. INT'L REL. 33 (2008).

of the ICJ judges' votes reflects the contentions between the East and West, the North and South, or the political divisions reported in the UN General Assembly voting records, and shall observe the voting blocs that emerge across different periods and types of cases. With the help of regression analysis, this dissertation aims to identify the variables and factors that correlate with the ICJ judges voting behavior.

3. Literature Review

As there is a rich literature on the ICJ's establishment, its function, its procedural and evidentiary rules, its decisions on specific issues, and the enforcement and compliance of its decisions,[128] this section will only review the literature that empirically assesses the ICJ

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[128] *See e.g.,* ROSENNE, *supra* note 54; LAMM, *supra* note 40; Mojtaba Kazazi, Burden of Proof and Related Issues (1996); B.A. AJIBOLA, COMPLIANCE WITH JUDGMENTS OF INTERNATIONAL COURTS 7–46 (M.K. Bulterman & M. Kuijer eds. 1996); STANIMIR A. ALEXANDROV, RESERVATIONS IN UNILATERAL DECLARATIONS ACCEPTING THE COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE (1995); D.W. BOWETT ET AL., THE INTERNATIONAL COURT OF JUSTICE: PROCESS, PRACTICE AND PROCEDURE (1997); SCHULTE, *supra* note 56; EDWARD MCWHINNEY, JUDGE MANFRED LACHS AND JUDICIAL LAW-MAKING (1995); ANNA RIDDELL & BRENDAN PLANT, EVIDENCE BEFORE THE INTERNATIONAL COURT OF JUSTICE (2009); JUAN JOSE QUINTANA, LITIGATION AT THE INTERNATIONAL COURT OF JUSTICE: PRACTICE AND PROCEDURE (2015); GERALD FITZMAURICE, THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE VOLS. I & II (1986); A, MARK WEISBURD, FAILINGS OF THE INTERNATIONAL COURT OF JUSTICE (2016).

judges' voting behaviors. Based on the issues discussed, these prior studies that have assessed ICJ judges' voting preference or patterns can be further divided into two categories.

The first set of literature assesses the voting behavior of judges from party states (including *ad hoc* judges) with the aim to examine if the party state judges are keen to support their government whenever they are parties to the dispute. In particular, this set of studies aims to address how nationality or appointee-appointor relationships serve as a linkage connecting the judges and their home countries/appointors and how this connection may affect the judges' judicial behavior.[129] The second set of research that assesses the ICJ judges' voting patterns looks more broadly at the voting behavior of all judges with the goal of identifying the alignments formed between the judges. Studies have also

[129] "National bias" is used to describe judges' preferences to support their own country. This is also called "national judicial allegiance." *See* Smith, *supra* note 83, at 199; *see also* Posner & de Figueiredo, *supra* note 91, at 609. Hensley differentiates between "national bias" and "partiality" where the former is "defined in terms of the consideration of national interest and the effect of culturally inculcated values" and the latter is to introduce "national interests in to the decision-making process." *See* Hensley, *National Bias*, *supra* note 18, at 581.

attempted to examine how political alignments and ideological similarities between the judges' home countries are reflected in the co-voting behaviors between the ICJ judges.

3.1 Literature on National Bias and the Voting Behavior of Party State Judges

(a) William Samore's 1956 study

After Lauterpacht and Hudson showed that the judges from party states serving in the Permanent Court of International Justice (PCIJ) were keen to vote in favor of their home country and may not have performed their duties impartially,[130] William Samore continued to study the ICJ and PCIJ judges' voting patterns in 1956. Of all the previous literature on this subject, Samore was the first to use statistical figures to indicate how the ICJ judges nominated and appointed by disputing parties (generally referred to as "national judges") have frequently voted in favor of their appointors or nominators.[131]

Samore's project assesses national judges' votes in 42 contentious cases and 13 advisory opinions delivered by the PCIJ and ICJ between 1922 and 1955.[132] The goal of

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[130] LAUTERPACHT, *supra* note 107, at 230–32; HUDSON, *supra* note 108, at 355.

[131] Samore, *supra* note 54. One of his earlier studies focused on the election process of the ICJ judges and how the World Court's Statute manages the impartiality of ICJ judges. *See* William Samore, *The World Court Statute and Impartiality of the Judges*, 34 NEB. L. REV. 618 (1955).

[132] The PCIJ was replaced by ICJ in 1946.

the project was to observe the difference between the voting patterns of national judges and the rest of the bench. In this research, Samore reports that regular and *ad hoc* judges both voted for the states that nominated or appointed them approximately 80 percent of the time; among which, regular judges supported their home countries at a rate of 69 percent and *ad hoc* judges supported their appointors at a rate of 90 percent.[133] Samore also notes that no *ad hoc* judge had ever issued a dissenting opinion against a judgment that ruled in favor of its appointor while regular judges had twice done so.[134]

In sum, Samore argues that the national judges' preference for supporting their own country "cannot be regarded as a mere coincidence" and that the sentiment of nationality may have influenced the national judges' decision-making.[135] While Samore admits that the two party state judges' votes are likely to counter-balance one another, his primary concern is that unfairness would appear in situations when the dispute involves multiple parties and the two disputing groups do not have an equal numbers of judges on the bench. In circumstances when one party has multiple regular judges serving on the Court while

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[133] Samore, *supra* note 54, at 201.

[134] *Id.* at 201.

[135] *Id.* at 201, 204–05.

the opposite party does not have the same number of regular judges on the bench and is only allowed to appoint one *ad hoc* judge, this obviously leaves the party that has fewer judges on the bench in a disadvantaged position.[136]

As Samore reports, the problem of having an unbalanced bench has already appeared in cases like *S.S. Wimbledon* and *Monetary Gold*.[137] In the more recent case where Serbia/Yugoslavia sued the NATO states for their military actions in the Balkans during the 1990s, because the defendant group, the NATO countries, had five regular judges serving on the bench, the fact that Yugoslavia/Serbia was given the right to appoint an *ad hoc* judge of its preference did not counter-balance the tilted scale. It is apparent that the NATO states were in an advantageous position for having more judges serving on the bench.

Lastly, although Samore admits that it is nearly impossible for a court to obtain absolute impartiality, he still urges the ICJ's institutional design be adjusted to ensure

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[136] *Id.* at 210–11.

[137] The four contentious cases Samore identified are: (1) the S. S. "Wimbledon" case, P.C.I.J., Ser. A, No. 1, (1929-30); (2) the Statute of Memel (jurisdiction), P.C.I.J., Ser. A/B, No. 47 (1932); (3) Statute of Memel (merits), P.C.I.J., Ser. A/B, No. 49 (1932); and (4) the Monetary Gold Removed from Rome (jurisdictional), 1954 I.C.J. 19. *See* Samore, *supra* note 54, at 210–11.

fairness between the parties. The Court should reduce, if not eliminate, the chance of leaving the case to a bench of partial judges.[138]

(b) Thomas Hensley's 1968 research

The next comprehensive survey of the ICJ judges' national bias was Thomas Hensley's 1968 research.[139] With data covering ICJ's contentious cases and advisory decisions on 54 claims between 1946 and 1964, Hensley's dataset includes 638 votes cast by the ICJ judges.[140]

Hensley reports that in contentious cases, the votes of judges from or appointed by party states deviate from the votes of other Court members by 44 and 22 percentage points,[141] and the voting records for the advisory opinions report similar deviations. Accordingly, Hensley argues that the judges from party states are biased and such national

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[138] Samore, *supra* note 54, at 207.

[139] Hensley, *National Bias*, *supra* note 18.

[140] 94% of national judges' votes and 79% of the other judges' votes were included in Hensley's research. The reason for having incomplete data was because in pre-1978 ICJ decisions, judges' votes were not identified in the judgments and the Rules of Court does not compel judges to attach opinions when they dissent. The judges' votes can only be observed when they choose to attach a concurring or dissenting opinions. *See Id.* at 571–72, 580.

[141] *Id.* at 572–73, 580.

bias affects the judges' decision-making. By highlighting the difference between the voting patterns of the national judges and the other members of the Court, Hensley concludes that in addition to nationality allegiance (national bias),[142] the judges' voting preference might also be affected by the cultural values and the national interests of their home country, and also the ICJ judges' selection process.[143] Furthermore, while the *ad hoc* judges were observed to show greater support to their appointer, Hensley argues that *ad hoc* judges display a much stronger bias than the other judges.[144]

(c) Il Suh's 1969 study

In 1969, with data consisting of 54 contentious cases and 9 advisory opinions in which national judges have participated,[145] Il Suh reexamined the national judges' preference to vote in favor of their appointers.[146] In addition to statistically observing if national judges show a strong preference in voting for their country, Suh also qualitatively scrutinizes if

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[142] *Id.* at 580.

[143] *Id.* at 581.

[144] *Id.* at 576–77.

[145] Suh, *supra* note 18, at 227.

[146] *Id.*

the national judges' votes echo the contentions expressed by the judges' home countries to examine if the judges' opinions align with the positions of their government.

Based on the data, Suh finds that regular judges disagree with their governments more than *ad hoc* judges do. Accordingly, Suh concludes that regular judges show a greater sense of responsibility toward their judicial duties than the *ad hoc* judges since they are less keen to support their governments.[147] Nevertheless, in average, Suh still reports that the national judges voted for their governments around 82 percent of the time.[148] While Suh agrees that the judges' voting behaviors may be influenced by the national interests of their home countries, he concludes that these impacts are limited since the ICJ decisions are rarely reached by close votes. In sum, Suh concludes that the voting preferences of the national judges do not threaten the harmony of international justice.[149]

(d) Adam Smith's 2005 study

36 years after Suh's study, in 2005, Adam Smith revisited the question concerning the impartiality of ICJ's national judges.[150] The analysis methods used in Smith's research are

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[147] *Id.* at 230.

[148] *Id.* at 229–31.

[149] *Id.* at 233.

[150] Smith, *supra* note 83.

identical to Il Suh's work, the only difference being that Smith addresses the question with updated data.[151]

Empirically, Smith's findings are not very different from the previous scholarship. Smith also reports that the judges voted in line with the national interests of their government around 80 percent of the time when their home country was a party to the dispute.[152] The *ad hoc* judges are also found to show even greater support for their nominators than the regular judges.[153] Because the ratio of national judges voting against their government has gradually increased from 18 to 24 percent,[154] Smith argues that this is an indication of the growth of ICJ judges' independence and that the governments have gradually lost their influence over the judges.[155]

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[151] *Id.* at 220. It should also be noted that Smith coded the data different from Suh. Unlike Suh, who coded the data on a claim-basis, Smith coded the data with a case-based methodology. The differences between claim-based and case-based coding methodology, including its cons and pros, will be further discussed in a later section.

[152] *Id.* at 218.

[153] *Id.* at 218–20.

[154] This conclusion was reached by comparing to the findings of Suh's 1969 research.

[155] Smith, *supra* note 83, at 222.

Additionally, Smith reports a decrease in voting agreements between the judges from Western Europe and those from Russia after the end of the Cold War.[156] On such basis, Smith argues that the ideological chasm between the East and West is not the dominating factor influencing judges voting behavior; otherwise the voting agreement between the judges from the East and the West should have increased instead of decreased after the end of the Cold War.[157] In sum, Smith argues that the growing awareness and recognition of international legal ethics and the creation of the community of international jurists has all helped to prevent nationality bias to gain real influence in the chamber and the impartiality of the ICJ is thus secured.[158]

(e) Eric Posner and Miguel de Figueiredo: What are the variables influencing ICJ judges' voting behavior?

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[156] *Id.* at 220.

[157] *Id.* at 220–21. Smith also rebuts this hypothesis by showing judges do not always show a high level of agreement within either the Western or Eastern bloc.

[158] *Id.* at 223–25.

Eric Posner and Miguel de Figueiredo's work published in 2005 is by far the most comprehensive study of the individual ICJ judges' voting behavior.[159] Aside from assessing the national judges' preferences for voting for their home country, Posner and de Figueiredo's study also aims to assess if ICJ judges vote for countries that share strategic interests with the judges' home country.[160]

In the observations regarding the national judges' voting preferences, Posner and de Figueiredo report that the judges from non-party states showed no particular preferences in voting for the applicant nor the respondent, but the judges from party states voted for their appointers about 90 percent of the time.[161] Although the numbers reported in Posner and de Figueiredo's study are slightly different from Smith's,[162] they nevertheless provide consistent evidence showing national judges' strong preference for voting for their appointer.

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[159] However, it should be noted that their study only covers judges' decisions over contentious cases, and not advisory opinions.

[160] Posner & de Figueiredo, *supra* note 91.

[161] *Id.* at 615. Posner and de Figueiredo refer to judges who are nationals of one of the state parties and *ad hoc* judges appointed by one of the state parties as "party judges". This is similar to what other scholars referred to as "national judges". To unify the use of terms, this paper refers to them as national judges.

[162] Smith finds that judges vote for their country 80% of the time. *See* Smith, *supra* note 83, at 218.

With regard to the question of what factors are likely to influence the ICJ judges' voting preferences, Posner and de Figueiredo use regression analysis to observe if judges voted more for states that share strategic interests with their home country. In other words, instead of observing the voting clusters through comparing judges' actual votes, Posner and de Figueiredo categorized the judges into social and political groups based on the characteristics of their country of origin and observed if the judges are keen to vote for countries that share social and political connections with the judges' home country. The types of alignment tested in Posner and de Figueiredo's analysis include regional, political, and military collaboration, alignment in international organizations, common language and culture shared between the judges' home countries, and the similarity between the states' degree of democracy and wealth.[163]

Based on the regression analysis results, Posner and de Figueiredo report that the judges are likely to vote for the party that shares a closer degree of wealth and level of democracy with his or her home country.[164] Their study also reports that judges are more apt to support the party that practices the same religion or shares a common language with

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[163] Posner & de Figueiredo, *supra* note 91, at 609–10.

[164] *Id.* at 616, 624.

his or her home country.[165] However, surprisingly, geographical, political and military alignments are reported as weak factors in influencing judges' voting preference, and Posner and de Figueiredo conclude that "the safest conclusion is that we cannot reject the null hypothesis that judges are not biased by NATO and regional matches."[166]

3.2 Literature on ICJ Judges' Group Voting Behaviors

(a) Thomas Hensley: What are the voting blocs in the ICJ?

In 1978, Hensley published his second empirical study assessing the ICJ's impartiality. This time, the research question centered on the bloc voting behaviors within the Court.[167] In the research, Hensley uses the Rice-Beyle cluster bloc analysis method to calculate voting agreements between pairs of judges and then identifies pairs of judges that have frequently agreed with one another.[168]

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[165] *Id.*

[166] *Id.* at 622.

[167] Hensley, *Bloc Voting*, *supra* note 21.

[168] The Rice-Beyle analysis method is commonly used to observe bloc voting behaviors. This analysis method calculates the index agreements between pairs of subjects to observe the similarity between their decisions and thus observes the closeness between voting patterns. *See* Arend Lijphart, *The Ananlysis of Bloc Voting in the General Assembly: a Critique and a Proposal*, 57(4) AMER. POL. SCI. REV. 902 (1963); Peter Willetts, *Cluster-bloc analysis and statistical inference*, 66(2) AMER. POL. SCI. REV. 569 (1972); Kul

Hensley's research data include the ICJ judges' voting records over 81 non-unanimous claims from both contentious cases and advisory opinions. Using the Rice-Beyle analysis method, Hensley identifies several voting blocs within the ICJ. The largest bloc identified in Hensley's study consists of three Western European judges from Belgium, Norway, and France.[169] Based on the geographical and political ideology connections, Hensley reports that the judges from Latin American and Communist states also formed into separate blocs.[170] In general, the judges from Western European states also share a prominent level of agreement with each other.[171]

Although Hensley's research identifies several voting blocs consisting of judges from countries sharing similar political, cultural, or geographical characteristics, some of the blocs that he identifies consist of judges from countries with weak cultural and political

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B. Rai, *Lijphart's IA and Pearson's r for studying UN voting*, 6(1) COMPARATIVE POL. STUDIES 511 (1974); Hensley, *Bloc Voting*, *supra* note 21, at 42–43.

[169] The group includes Judge de Visscher from Belgium, Judge Klaestad from Norway, and Judge Basdevant from France. *See id.* at 46.

[170] The Latin American group was formed by Judge Guerrero from El-Salvador and Judge Alvarez from Chile. The Communist group was formed by Judge Krylov from the Soviet Union and Judge Winiarski from Poland. *See id.* at 45–46.

[171] *Id.* at 46.

connections. While Hensley's study suggests that the political or cultural ties between the countries may be one of the factors causing the judges to form into alignments, his analysis nevertheless indicates that political alignment and cultural similarity between the judges' home countries do not necessarily transform into an alignment among the judges.[172] Moreover, as Hensley finds that the judges from countries with the same legal traditions do not share higher levels of agreement than those from foreign legal traditions, he argues that legal traditions are not an influential factor affecting judges' voting behavior.[173] In sum, Hensley reports that there are significant differences between the voting patterns of the judges from Western European states and those from Communist states,[174] and such difference is especially noticeable when the case relates to Cold War issues.[175]

(b) G. Terry: Do conservative judges dominate the ICJ?

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[172] As a side note of his research on the nomination and election process of the ICJ bench and the qualification of the ICJ judges, Padelford reached a similar conclusion that judges do not consistently vote together with their allies against others. *See* Norman Padelford, *The Composition of the International Court of Justice: Background and Practice*, *in* THE RELEVANCE OF INTERNATIONAL LAW: ESSAYS IN HONOR OF LEGO GROSS 219, 248 (Karl W. Deutsch & Stanley Hoffmann eds., 1968).

[173] *See* Hensley, *Bloc Voting*, *supra* note 21, at 50.

[174] *Id.* at 54.

[175] *Id.*

After the 1966 *South West Africa* case, G. Terry assessed the newly arising complaint that the Court is dominated by conservative judges and judges oriented towards the *status quo* to maintain the power and rights of the Western powers.[176] Using statistical analysis to compare the ICJ's works between 1945-1951 and 1961-1967, Terry aims to answer two questions held against the ICJ: First, is there persistent alignment between the ICJ judges? If so, what does this alignment looks like and what are the dominating groups within the Court? Second, what are the factors influencing the judges to be conservative or progressive?[177]

Terry analyzed the ICJ judges' votes and opinions in 22 contentious cases and advisory opinions both quantitatively and qualitatively.[178] Because Terry finds that the vast majority of ICJ judges take approaches on both ends of the progressive and conservative spectrum, and only very few judges are consistent in being on either spectrum,[179] he argues that the allegations that conservative judges dominated the ICJ

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[176] *See* Falk, *supra* note 105; *see also*, C. M. Dalfern, *The World Court in Idle Splendour: The Basis of States' Attitudes*, 23 INT'L J. 124, 133 (1968); Terry, *supra* note 22, at 60, 117 (1975).

[177] Terry, *supra* note 22, at 65.

[178] *See id.* at 65–75; for illustration of how the cases were analyzed, see *id.* at 75.

[179] *Id.* at 94–95.

were groundless.[180] Also, while the statistical findings indicate that the judges from Communist countries agree with those from Communist and non-Communist countries at a similar rate, Terry challenges the traditional speculation that the judges from Communist states consistently align with each other and confront the judges from NATO states.[181] Terry's finding of non-alignment among Communist judges also runs contrary to Hensley's 1978 research in which Hensley argues that there is a significant difference between the voting patterns of Western European and Communist judges over Cold War issues.[182]

Lastly, Terry also identifies a voting bloc consisting of seven judges — mostly from Western European states[183] — that consistently share high voting agreement with each other between 1945 and 1961. Although Terry was unable to identify the mechanism

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[180] *Id.* at 117.

[181] *Id.* at 97.

[182] *See* Hensley, *Bloc Voting*, *supra* note 21, at 54.

[183] Including Judges Guerrero, Basdevant, Hackworth, De Visscher, McNair, Klaestad and Hsu Mo. *See* Terry, *supra* note 22, at 93–94.

motivating these seven judges to share high agreement with one another[184], the finding that these seven judges "supplied the core of the majority on virtually all of the cases before the Court" for 16 years still indicates how the ICJ may be predominated by particular groups of judges.[185]

(c) Edith Weiss: Are the ICJ anti-U.S. and pro-developing countries?

Following the 1984 and 1986 *Nicaragua* decisions,[186] a new speculation that the ICJ was anti-U.S. and pro-developing countries emerged.[187] In response to this rising rumor, Edith Weiss addressed the question using statistical analysis methods and believes that since "the question of judicial independence and impartiality is in significant part an

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[184] Even though Terry identifies these seven judges as the core of the court, they are not considered to constitute a faction since a conscious group behavior cannot be identified. *See id.* at 94–95. In contrast, the group consisting of Judges Read and McNair is likely to be deem as a faction. *See id.* at 94.

[185] Terry, *supra* note 22, at 93–94.

[186] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, 1984 I.C.J. 392 (Nov. 26); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

[187] Christine Gray, *The Use and Abuse of the International Court of Justice: Cases concerning the Use of Force after Nicaragua*, 14 EUR. J. INT'L L. 867, 885 (2003)

empirical one,"[188] any sustained bias (against the U.S. or other countries) should be detectable by the statistical analysis methods.[189]

In her study, Weiss identifies several cohesive voting patterns in the ICJ. For instance, Weiss reports that between 1966 and 1975, the judges from U.S., West Germany, U.K., and Uruguay all voted alike whenever they were on the bench together.[190] Similar cohesive voting patterns were also found between the judges from USSR, Italy, Japan, and India.[191] Nonetheless, despite finding some similar voting patterns among the ICJ judges, Weiss concludes that no significant regional or political voting alignment can be identified.[192] In her observation, there are neither voting blocs formed by the developed or the developing states, nor any blocs formed by the NATO or the Warsaw Pact countries.[193] In contrast to the persistent voting alignment found among countries in the UN General Assembly voting

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[188] Weiss, *supra* note 22, at 129.

[189] *Id.*

[190] *Id.* at 130.

[191] *Id.*

[192] *Id.* at 131.

[193] *Id.*

record,[194] Weiss reports no similar alignment among the ICJ judges and thus concludes that the ICJ functioned impartially and independently.[195]

3.3 Brief Conclusion

To briefly conclude, in the studies assessing the voting preferences of the party-state judges, scholars have consistently reported that these national judges have a strong preference to vote in favor of their own country. Among the national judges, *ad hoc* judges are found to show greater keenness to vote in favor of their appointers than the regular judges from party states. Despite the fact that most studies indicate this voting preference as a form of '*bias,*' scholars do not think this '*bias*' would affect the function or the

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[194] For studies regarding bloc voting in the UN General Assembly, see e.g., Lijphart, *supra* note 168; Erik Voeten, *Clashes in the Assembly*, 54(2) INT'L ORG. 185 (2000); Steven K. Holloway & Rodney Tomlinson, *The New World Order and the General Assembly: Bloc Realignment at the UN in the Post-Cold War World*, 28(2) CANADIAN J. POL. SCI. 227 (1995); Benjamin D. Meyers, *African Voting in the United Nations General Assembly*, 4(2) J. MODERN AFRICAN STUDIES 213 (1966); Soo Yeon Kim & Bruce Russett, *The New Politics of Voting Alignments in the United Nations General Assembly*, 50(4) INT'L ORG. 629 (1996).

[195] Weiss, *supra* note 22, 133. For similar conclusions, *see* Padelford, *supra* note 172, at 249 (where he observes that though some judges reason arguments in similar ways to counsels of their states or their allies, these same judges sometimes support their country's political rivals as well).

impartiality of the entire Court.[196] In Posner and de Figueiredo's research, they conclude that ICJ judges are more likely to vote for countries that are in the same economic development status as the judges' home country. However, they also report that no significant alignment can be identified between the judges on the basis of NATO membership or regional matches.[197]

With regard to whether there are voting blocs or ideology confrontations in the ICJ, the findings were split and inconclusive. While Hensley and Smith's research asserts that Communist and Western European blocs exist in the Court[198] and that the judges from Eastern Europe voted distinctively from the others,[199] Terry and Weiss's studies argue to the contrary. In their research, both Terry and Weiss conclude that no observable alignment or blocs can be found among the ICJ judges,[200] and the ICJ functioned impartially.

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[196] Either because the votes of national judges are likely to cancel each other out or because national judges are always the minority in the court. *See* Posner & de Figueiredo, *supra* note 91, at 609; Suh, *supra* note 18, at 233–34; Samore, *supra* note 54, at 210–11.

[197] Posner & de Figueiredo, *supra* note 91, at 620–22.

[198] Smith, *supra* note 83, at 220; Hensley, *Bloc Voting*, *supra* note 21, at 54–55.

[199] Hensley, *Bloc Voting*, *supra* note 21, at 54–55.

[200] Terry, *supra* note 22, at 97; Weiss, *supra* note 22, 131–33.

4. The Limitations and Flaws of the Previous Studies

Based on the literature review provided above, we can see that the prior studies' findings on the ICJ judges' bloc voting behaviors remain inconclusive and contradict one another. In addition to the inconclusive observations of the judges' collective voting behaviors, I would like to point out two additional problems that appeared in these prior studies:

(a) The judges' voting behavior was analyzed in an ahistorical manner

First, previous studies' failure to consider the time and historical background as a factor influencing the ICJ judges' voting behavior is problematic. As these earlier studies emphasized observing how interstate relationships are likely to affect the judges' voting preferences, they must also realize that international political and economic relations between states are not static variables but change rapidly in response to the shifts in the dynamic world. The earlier studies' decisions to neglect the social and political changes in history bear the problem of oversimplifying the analysis and thus create a weakness in detecting how the change of external factors correlates with the judges' changing voting behaviors.

Among all of the studies, Terry and Smith are the only two scholars that have taken time as a factor and compared the judges' voting behaviors between different time periods. However, as Terry's research is limited to examining the judges' voting patterns in two periods (between 1945-1951 and 1961-1967), the apparent weakness embedded is that Terry's study lacks comprehensiveness and its findings may no longer be accurate for describing the current practices happening in the ICJ today.

As to Smith's research, aside from the fact that his research only observes the party state judges' voting behaviors, Smith's decision to compile the data in an ahistorical manner also hinders the correctness of his data. For example, when Smith classifies countries into different political groups, he falsely classifies China as a member of the Eastern (Communist) bloc[201] and fails to notice that the Republic of China (Democratic China) was the government representing China in the first 25 years of the UN. Additionally, the first two Chinese judges that served in the ICJ – Judge Hsu Mo and Judge Wellington Koo – were also both nominated by the Nationalist government. Therefore Smith's

[201] Smith, *supra* note 83, at 221.

inaccurate categorizations, like viewing China only as a Communist state, would certainly affect the correctness of his further analysis.

The problem of assessing the voting data in an ahistorical manner also appears in the work of Posner and de Figueiredo, who did not take history and time as factors and analyzed all voting blocs across the entire Court's history. Also because of this ahistorical analysis design, Posner and de Figueiredo's study may only be able to identify voting behaviors that are noticeable throughout the ICJ's history and may not detect voting blocs that are only significant in a particular historical period. For example, because the tensions between the judges from colonial powers and those from previously colonized states mainly arise in the 1960s, it is highly possible that Posner and de Figueiredo's research would not detect confrontation between these judges since they only existed in the designated period.[202]

(b) Previous studies failed to demonstrate the actual voting clusters existing in the ICJ

Second, because of the constraints of the ICJ's institutional design and the analytical methods used, no prior study was able to observe voting agreements between "all judges"

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[202] Posner and de Figuiredo are aware of this problem as they suggest others to test some time-specific control variables such as the Cold War in future studies. Posner & de Figueiredo, *supra* note 91, at 22.

across the Court's history. In the studies that observe the voting blocs in the ICJ, most of them measure the closeness between the judges' voting patterns by calculating the rate of voting agreement between the judges. The most common formula used is to divide the number of instances that two judges cast the same vote by the number of instances that the judges have the chance to vote together.[203] The index of agreement calculated under the Rice-Beyle analysis used in Hensley and Terry's work adheres to a similar idea.[204] However, the inherent limitation of measuring the similarity between the judges' votes through voting agreement is that this analytical method can only describe the closeness between judges that have co-voting experience. In circumstances when the two judges never voted together, the voting agreement analysis method is no longer capable of describing the similarity between the voting patterns of these two judges.

In the past 70 years, 106 regular judges from 49 countries have served in the ICJ. If the rate of voting agreement between regular judges is calculated by lumping the judges by their country of origin, there should be a 49*49 matrix, or a 106*106 matrix if the judges

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[203] In the Rice-Beyle cluster analysis method, the index of agreement is calculated in a similar way. *See* Hensley, *Bloc Voting*, *supra* note 21, at 43–44.

[204] *Id.*

are paired individually. As not all judges have the chance to decide cases together, either because they serve on the bench in different time-periods or because no dispute is referred to the Court when they are together on the bench, this creates a problem in calculating the degree of agreement between these judges. This incalculable voting agreement thus turns into missing cells in the matrix and creates an obstacle for comparing the voting preferences between all Court members.

In the next chapter, this dissertation illustrates the research and analytical method we use to assess the ICJ judges' voting behaviors, and explains how this dissertation shall avoid the problems and issues that we have observed in prior studies' data compiling or analysis processes.

Chapter 3 Research Methods and Expected Results

In Chapter 2, I have pointed out that the interest of this dissertation lies in assessing the ICJ judges' voting behaviors empirically. In the first part of Chapter 3, I shall explain why this dissertation assesses the research questions with statistical analysis methods and how the data used in this research was collected and coded. The second and third parts of Chapter 3 illustrate the research methods used in this dissertation and also the expected contributions and limitations of this study.

1. Research Design and Goals

1.1 The Research Design and the Reasons for Conducting Quantitative Analyses

As reviewed in Chapter 2, the speculations and criticisms challenging the ICJ's impartiality and independence have accompanied it throughout its history. Although these accusations draw serious attention from the public, the veracity of these allegations remains contestable since they have not been empirically proven. Noticing that there is already an abundance of doctrinal analyses discussing what an ideal international adjudication body

should be like and how the Court should function[205] but only relatively few studies observing the Court's actual practices empirically, I aim to assess the performance of the ICJ judges with statistical methods to supplement the empirical research in this area. In particular, I aim to assess if the ICJ judges are politically influenced and if the judges form into voting clusters. In the following sections, I shall lay out the research plan and explain why I choose statistical analysis as the research method.

(a) Empirical studies in the research of international law

Legal hermeneutics has long been the mainstream of legal studies. Although some scholars have tried to incorporate empirical analyses into the study of law to make legal research more scientific and to improve the quality of the work,[206] it was not until the past

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[205] *See e.g.*, Lyndel V. Prott, *The Role of the Judge of the International Court of Justice*, 10 BELG. REV. INT'L L. 473 (1974).

[206] Michael Heise, *The Importance of Being Empirical*, 26 PEPP. L. REV. 807, 834 (1999); Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1357–58 (2002); Thomas S. Ulen, *A Nobel Prize in Legal Science: Theory, Empirical Work, and the Scientific Method in the Study of Law*, 2002 U. ILL. L. REV 875, 900. For arguments urging more empirical studies in legal research, *see also* Lawrence M. Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763 (1986). Epstein and King opined that much of the published empirical legal scholarship is flawed with serious violations of the rules of inference. However, instead of rejecting the use of empirical analysis, they suggest that the studies and analyses should be done more carefully and that legal publications should be peer reviewed. *See* Lee Epstein & Gary King,

two decades that the use of empirical analysis methods has become more common in legal scholarship.[207] Empirical research has blossomed especially in areas like antitrust regulations[208] and property law.[209] Although the overall popularity of empirical research

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Empirical Research and the Goals of Legal Scholarship: The Rules of Inference, 69 U. CHI. L. REV. 1, 6–10 (2002).

[207] Tracey E. George, *An Empirical Study of Empirical Legal Scholarship: The Top Law Schools*, 81 IND. L.J. 141, 141 (2006); Robert C. Ellickson, *Trends in Legal Scholarship: A Statistical Study*, 29 J. LEGAL STUD. 517 (2000); Heise, *supra* note 206, at 834. *Cf.* Epstein and King argue that scholars have been conducting research that is empirical for a long time, it is just that this research was done with less attention paid to the rule of inference and that legal academia has failed to catch up to the development of analysis methods in other disciplines. Epstein & King, *supra* note 206, at 1.

[208] *See e.g.*, Joshua D. Wright, *Overshot The Mark? A Simple Explanation of the Chicago School's Influence on Antitrust*, 5 COMPETITION POL'Y INT'L 1 (2009); James F. Blumstein, *The Application of Antitrust Doctrine to the Healthcare Industry: The Interweaving of Empirical and Normative Issues*, 31 IND. L. REV. 91 (1998); Jonathan B. Baker & Timothy F. Bresnahan, *Empirical Methods of Identifying and Measuring Market Power*, 61 ANTITRUST L.J. 3 (1992); Jonathan B. Baker & Daniel L. Rubinfeld, *Empirical Methods in Antitrust Litigation: Review and Critique*, 1(1) AM. L. ECON. REV. 386 (1999); William H. Page, *The Chicago School and the Evolution Of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency*, 75 VA. L. REV. 1221 (1989).

[209] *See e.g.,* Elizabeth Chambliss, *When do Facts Persuade? Some Thoughts on the Market for "Empirical Legal Studies,"* 71 L. & COMTEMP. PROBS. 17 (2008); Tracey E. George, *An Empirical Study of Empirical Legal Scholarship: The Top Law Schools*, 81 IND. L.J. 141 (2006); Theodore Eisenberg, *Why do Empirical Legal Scholarship?*, 41 SAN DIEGO L. REV. 1741 (2004).

in legal scholarship is increasing, its use in the area of international law is still relatively rare.[210]

The resistance to using empirical analyses to explore international legal questions may be due to the sophisticated nature of the subject[211] and the practical obstacles such as the difficulties of acquiring accountable information and data.[212] The disaggregation between studies on international relations and international law[213] is also thought to have fueled the

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[210] Susan D. Franck, *Empiricism and International Law: Insights for Investment Treaty Dispute Resolution*, 48 VA. J. INT'L L. 767 (2008); Ryan Goodman, *The Difference Law Makes: Research Design, Institutional Design, and Human Rights*, 98 AM. SOC'Y INT'L L. PROC. 198, 198 (2004); Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Concept of International Law*, 19 MICH. J. INT'L L. 345, 370 (1998) ("Social science in general has already contributed a great deal of useful theory describing and explaining the two-way causal relations between rules and behavior, but much more remains to be done in applying this work to the theory and empirical study of international law"); Guglielmo Verdirame, *"The Divided West": International Lawyers in Europe and America*, 18 Eur. J. Int'l L. 553, 561 (2007) (suggesting that most European international lawyers viewed empiricism in international legal studies with indifference or as futile).

[211] *See* Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT'L L. 69 (2004). J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 483 (2000).

[212] Michael D. Ramsey, *The Empirical Dilemma of International Law*, 41 SAN DIEGO L. REV. 1243, 1249–50 (2004);

[213] Kenneth W. Abbott, *Elements of a Joint Discipline*, 86 AM. SOC'Y INT'L L. PROC. 167, 167 (1992)

resistance, since international law scholars focus more on the normative study and are committed to theorizing "what the law might/should be"[214] while IR scholars focus more on anecdotal and positive observations to explain reality.[215] It was not until this past decade that the importance of empirical studies on international law has gradually been recognized and has started to gain greater weight in international legal scholarship.[216]

(b) Why take an empirical approach in this dissertation?

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[214] Ramsey, *supra* note 211, at 1252; Stephen D. Krasner, *International Law and International Relations: Together, Apart, Together?*, 1 CHI. J. INT'L L. 93, 98 (2000).

[215] Franck, *supra* note 210, at 775–78; Krasner, *supra* note 214, at 98. The distrust between IR and IL works both ways, *see* ANTHONY CLARK AREND, LEGAL RULES AND INTERNATIONAL SOCIETY 4 (1999) (discussing political science's distrust of international law).

[216] Goodman, *supra* note 210, at 198; Jose E. Alvarez, *Do States Socialize?*, 54 DUKE L.J. 961, 961-62 (2005) (commenting favorably on an empirical approach but suggesting a need for case studies); Harold Koh, *Internalization Through Socialization*, 54 DUKE L.J. 975, 979–80 (2005) (discussing the growth of empiricism in international law); Kingsbury, *supra* note 210, at 370; David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT'L L. 104, 152 (1990) (commenting on the necessity of having empirical study to establish historical propositions related to international dispute settlement). Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT'L L. 1 (2012); Shima Baradaran, Michael Findley, Daniel Nielson & J. C. Sharman, *Does International Law Matter?*, 97 MINN. L. REV. 743, 764-67 (2013).

Like the studies reviewed in Chapter 2, I also aim to analyze the ICJ judges' voting behavior empirically. Considering that the research goal is to identify voting blocs from the ICJ judges voting records throughout ICJ's 70 years of history and the need to assess the large quantity of data, I find statistical analysis to be the appropriate method with the power to manage and analyze this multitude of data.[217] The strengths of statistical analysis enables this research to identify blocs of judges that consistently share high agreement with one another and those that vote distinctively. Furthermore, I shall also use regression analysis to find the variables that correlate with the clustering behaviors among the judges.

1.2 Research Data

The most critical data needed for this research is the ICJ judges' voting records. In this dissertation, I coded the judges' votes over 146 contentious cases and 27 advisory opinions that the ICJ adjudicated from 1946-2015.[218] Considering that procedural and

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[217] Shaffer & Ginsburg, *supra* note 216, at 4 (explaining the power of quantitative and qualitative methods, when these methods are used, and the potential weaknesses of the analysis methods).

[218] 22 contentious cases are not incorporated in the dataset either because they are decisions over requests for provisional measures or because they are unidentifiable. In the cases that were assessed and coded, there may be individual claims in those decisions that are also excluded due to a lack of importance or other reasons. For a detailed illustration of the coding method used in this dissertation, see Chapter 3, Section 1.3.

substantive proceedings also substantially affect the rights and obligations of the parties, the judges' votes on both jurisdictional and substantive matters are also included. Nevertheless, since the decisions on provisional measures are only interim and not final,[219] there lacks merit to include the judges' votes on these matters. The judges' votes on provisional measures were thus not incorporated in the dataset.

Most of the information used in this dissertation can be acquired and extracted from public records. The most important data – the ICJ's advisory decisions and judgments on contentious cases – are all publicly available on the ICJ's website.[220] In addition to the vote counts and the decisions, the ICJ website also provides information about the judges' nationalities and the time they served on the bench. This dissertation also supplemented other information from Judge Nagendra Singh's work *The Role and Record of the*

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[219] For studies discussing the granting of provisional measures in ICJ, see *e.g.*, Bernhard Kempen & Zan He, *The Practice of the International Court of Justice on Provisional Measures: The Recent Development*, 69 HEIDELBERG J. INT'L L. 919 (2009); Hironobu Sakai, *New Developments of the Orders on Provisional Measures by the International Court of Justice*, 52 JAPANESE Y.B. INT'L L. 231 (2009).

[220] International Court of Justice, http://www.icj-cij.org/homepage/index.php (last visited Feb. 9, 2016).

International Court of Justice published in 1989[221] and the International Court of Justice Handbook published by the ICJ in 2014.[222]

(a) Coding methods

Previous studies have applied two different techniques when coding the judge's votes, which are the claim-based and the case-based coding methods. Depending on the scholars' preferences and research goals, these two coding methods can help to observe the judges' voting behaviors either from a microcosmic or macrocosmic perspective.

On average, most ICJ cases include at least three separate issues.[223] When the judges decide a case, instead of casting a single vote over the entire case, judges cast multiple votes, and each claim is decided separately.[224] That said, if a scholar wishes to observe the

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[221] SINGH, *supra* note 28.

[222] INTERNATIONAL COURT OF JUSTICE, THE INTERNATIONAL COURT OF JUSTICE HANDBOOK (5th ed. 2014), *available at* http://www.icj-cij.org/publications/en/manuel_en.pdf (last visited June 4, 2017).

[223] This may be affected by how the parties structured their claims and how the Court addresses the issues. *See infra* note 226.

[224] The design for judges to cast separate votes on each claim instead of the entire case could generate the problem which Kornhauser and Sager termed the "doctrinal paradox." The basic idea is that when judges have to decide a series of connected issues in order to determine the overall judgment, the result of the case may be influenced by whether judges vote on the overall outcome of the case or if they take separate votes on individual issues. Chilton and Tingley observed how the doctrinal paradox could also be found in the

ICJ's behavior from a macrocosmic perspective, they may want to disregard the separate claims raised in the proceeding and keep the entire case as a single outcome. In such circumstances, although the judges may have voted differently over the separate claims, the judges' votes would only be coded once for each case. Under this so-called case-based coding method, the data would be coded based upon the judges' votes over the issue that best represents the question that arose out of that case. Alternately, if a scholar aims to observe the judges' votes from a microcosmic perspective, a claim-by-claim coding method (claim-based method) would better match their goal. Under the claim-based coding method, the judges' votes on all issues/claims are coded separately and would all be recorded.

(b) The cons and pros of the case-based and claim-based coding methods

Among the two coding methods, the strengths of the claim-based coding method shine in circumstances when a case includes multiple critical issues and when a judge supports different parties on different claims. Using the data compiled with the claims-based coding

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international adjudication process. *See* Adam Chilton & Dustin Tingley, *The Doctrinal Paradox & International Law*, 34 U. PA. J. INT'L L. 67, 79, 115–18, 127 (2012) (primarily using the European Court of Human Rights as an example, however, the authors note that a similar problem can also appear in the ICJ).

method allows us to assess the question with the most comprehensive data since all votes are incorporated. Also, as it is unnecessary for us to select the issue that can best represent the issue of the case, it is therefore unnecessary for us to compare the importance of the claims and decide which should be coded and which should be discarded.

Nevertheless, the broad inclusion of all votes also presents some problems since not every issue brought before the Court shares the same importance. If the research data were coded on a claim-by-claim basis, and the votes cast on minor issues were not removed or properly adjusted, the claim-based coding method would have the shortcoming of over-representing judges' decisions on trivial matters and thus would overweight minor matters in the analysis. Consequently, the judge's genuine intentions may not be observed.[225]

The positive feature of the case-based coding method is that it ensures that the judges' votes on minor claims will not be given the same weight as the critical issues and dilute the data. Moreover, the data coded by case is also more manageable since its size is only about one-third of the data coded on claim basis.[226] However, the disadvantages of the

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[225] For this reason, Posner and de Figueiredo reject to code the votes issue-by-issue. *See* Posner & de Figueiredo, *supra* note 91, at 611 n.15.

[226] If this dissertation codes votes on a claim basis, there are more than 5,300 votes to code. But if the data is coded on a case basis, the number of votes collected is reduced to less than 1,700.

case-based coding method appear when multiple important issues are raised in the same proceeding. Under the case-based coding method, since the judges' votes would only be coded once per case, when the case includes more than one issue, some of the judges' votes would thus have to be discarded. Because there lacks an objective guideline on how to evaluate the importance of each issue and how to select the claim that can best represent the case, the process of selecting the "most critical issue of each case" may be highly subjective and even arbitrary. The persuasiveness of the analysis may also thus be undermined.

In the earlier research, Samore, Suh, and Hensley coded their dataset with the claim-based method; the datasets later used in Weiss, Smith, and Posner and de Figueiredo's studies were all coded with the case-based method. Although the scholars provide little explanation as to why they changed from the earlier claim-based method to the case-based method,[227] in my speculation, a possible reason for the case-based coding to be more popular is that datasets coded with such a method are smaller and do not require as much coding effort.

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[227] Posner and de Figueiredo are the only ones that briefly explain why they preferred case-based coding over claim-based coding, see *supra* note 225.

(c) The coding method used in this dissertation

The main consideration for coding the ICJ judges' votes through the claim-based coding method is that this coding method could strengthen the comprehensiveness of this project. In the coding spreadsheet, the judges are lumped by their country of origin. The judges' votes are coded as in favor of the applicant if the judge agrees or concurs with the applicant's argument,[228] and are also coded as voting for the applicant if the judge voted against the counterclaim or defense raised by the respondent. The rest of the votes are coded as in favor of the respondent. I understand the drawback of using the claim-based coding method is that the dataset would include votes on claims that share less importance. To ease the problem of incorporating votes on inessential issues into the dataset and thus diluting the analysis, I excluded the votes on some minor issues from the analysis.[229] Moreover, due to certain coding constraints and considerations, the judges' votes were discarded in the following three circumstances:

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[228] This includes circumstances when judges only partly agree with the applicant's argument or request but the overall decision on the claim still favors the applicant.

[229] *See* Chapter 3, section 1.3.

1.3 Types of Votes that are Excluded from the Data

(a) Unidentifiable votes in pre-1978 decisions

After 1978, the ICJ case report provides the majority opinion of the Court and the concurring and dissenting opinions delivered by judges, the vote tally for each issue, and the names of judges that voted for and against the decision.[230] These materials are extremely helpful during the coding process as they provide information about whom the judges' have voted for in the decision. However, before 1978, the Court decisions (including both advisory opinions and contentious cases) only include the overall vote tally and do not publish the names of the judges that voted for and against the decision.[231] This creates some difficulties in identifying whom the judges voted for in that decision.

In order to code the judges' votes cast in pre-1978 cases, I read through the judges' concurring and dissenting opinions and declarations to examine if the judges voted for the

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[230] This was the result of the 1978 amendment. The current Rule of the Court requires the judgments to include the names of the judges constituting the majority. *See* Article 95(1), Rules of Court (1978), International Court of Justice, *available at* http://www.icj-cij.org/documents/index.php?p1=4&p2=3& [hereinafter ICJ Rules of Court].

[231] SHABTAI ROSENNE, PROCEDURE IN THE INTERNATIONAL COURT: A COMMENTARY ON THE 1978 RULES OF THE INTERNATIONAL COURT OF JUSTICE 91 (1983).

applicant or the respondent. Nevertheless, the pre-1978 Rule of the Court did not compel judges to attach an opinion to their votes and the judges could dissent or concur without providing any reasoning.[232] In circumstances when the allocation of the judges' votes were not provided in the case report, and the judges did not attach an opinion to their decisions, the unidentifiable votes were left out of the analysis.[233]

(b) Votes on territorial (maritime) delimitation issues

In addition to the unidentifiable votes illustrated above, difficulties also arose when I coded the judges' votes on territorial and maritime boundary demarcation cases. In territorial and maritime delimitation disputes, the Court was asked to decide the ownership of a particular territory or to determine the boundary line between the parties. In the former scenario, the judges' votes can be coded by observing whom they ruled the territory belonged to; but in the boundary demarcation scenario, coding the judges' votes is challenging and sometimes unachievable.

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[232] *See* Article 95(2), ICJ Rules of Court.

[233] Hensley, Posner and de Figueiredo faced similar problems and they also excluded the votes on these issues from their data. *See* Hensley, *Bloc Voting*, *supra* note 21, at 43 n.3; Posner & de Figueiredo, *supra* note 91, at 611.

In boundary demarcation cases, the parties would each propose a demarcation line and persuade the Court to adopt their proposal. However, due to the arbitral nature of territorial demarcation cases, the Court has discretion over how the boundary line should be drawn and is not bound by the solutions proposed by the parties. As Brian Sumner observes, the ICJ often draws the delimitation line in ways that mitigate the interests of both sides but not in favor of either party.[234] Eventually, this became an obstacle for me in coding the judges' votes since the decision does not appear to be in favor of either party.[235]

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[234] Brian Taylor Sumner, *Territorial Disputes at the International Court of Justice*, 53 DUKE L.J. 1779, 1806–07 (2004) ("When the court lacks guidance from treaties, uti possidetis, or effective control, it is most likely to proceed in equity *infra legem* and halve the difference between the litigants' positions. The court … prefers prescribing an equitable solution over entertaining justifications based on geography, economics, culture, history, elitism, or ideology.") *See also generally* NUGZAR DUNDUA, DELIMITATION OF MARITIME BOUNDARIES BETWEEN ADJACENT STATES (2007) (observing how equitable resolution was pursued in various maritime boundary demarcation cases).

[235] Indeed, it is possible to determine the winner of the case by comparing which party was given a bigger portion of the disputed territory. Nevertheless, for two reasons, I reject such a proposition. First, it is difficult to calculate and to compare the size of the delimited territory. Second, to most states, regardless of the size, losing any portion of territory is intolerable. Thus, it is inadequate to determine the outcome of the case via comparing the portion of territory given to the parties.

However, noticing that territorial delimitation disputes are now the most common type of case referred to the ICJ,[236] it would be a significant deficit to exclude votes on demarcation cases whenever there is vagueness barring us from identifying the judges' votes.[237] To remedy the situation and to incorporate as many votes in the dataset as possible, I ameliorate the coding process using the following methods.

First, as this dissertation aims to observe the proximity between the judges' voting patterns and the voting agreements between the judges, what I need to know is if the judges cast their votes in the same way or differently, rather than whom the judges voted for. Thus, in territorial demarcation cases, if an unidentifiable claim is decided unanimously, for coding purposes, the judges' votes are all coded as voting for the applicant.[238] Second, in

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[236] *See* Table 1 in Chapter 1.

[237] At the preliminary stage of the analysis, we exclude votes on territorial cases whenever we do not feel comfortable and confident in identifying which party the judges voted for and thus, a number of claims in territorial demarcation cases were excluded from the analysis. The author would like to thank the dissertation committee members for pointing out this problem during the proposal defense and thus for making this revision possible.

[238] For the same reason, these votes can also be coded as all voting for the defendant. The coding preference of voting in favor of the applicant or the respondent does not affect the analysis results. It should also be noted that the data this dissertation uses to analyze the voting preferences of the national judges has

non-unanimous cases, if there are judges from the two parties, and these two judges voted contrarily, I code the judges' votes that are consistent with the votes of the judge from the applicant state as voting for the applicant; similarly, the votes that are same as the defendant judge's votes are coded as voting for the defendant.

Even with this amelioration, there are still instances where the judges' votes are unidentifiable. Most of these happen in situations where the party state judges voted the same way, but the claim was not decided unanimously. Since I find no adequate way to adjust and code these votes, the votes on these claims are excluded from our analysis.

(c) Procedural and Administrative Matters

The last type of vote that is not incorporated in the dataset are the judges' votes on procedural and managerial issues. As previously mentioned, not all claims brought before the ICJ share the same importance and some only contain the Court's political statements or are decisions on procedural or administrative matters that do not affect the rights and obligations of the party. The second finding of the *Corfu Channel* case is a classic example of this type of decision where the Court rules that it "[r]eserves for further consideration

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not be adjusted with this technique since in that particular research, it is critical to know who the judges actually voted for.

the assessment of the amount of compensation and regulates the procedure on this subject by an Order dated this day."[239] A similar example of this can be found in the sixteenth finding of the *Nicaragua* case where the Court recalls both parties to "resolve the dispute in peaceful means in accordance with the international law."[240] In these decisions, the Court does not determine any substantive matter but merely reiterates the general concept of international law and illustrates its decision over the procedural arrangement.

As the ICJ's statements and decisions over administrative and procedural matters do not affect the rights and obligations of the parties, it is impractical to code the votes on these decisions as either for the applicant or the respondent. Also, since these issues are mostly of no importance, excluding the judges' votes on these matters would also help to avoid the problem which Posner and de Figueiredo referred to as "overweighing trivial issues at the expense of important issues."[241] Due to the above considerations, I exclude the judges' votes on decisions over pure procedural and administrative matters and the Court's general statements from our dataset.

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[239] Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 39 (April 9th).

[240] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment. 1986 I.C.J. 14, 139 (June 27).

[241] Posner & de Figueiredo, *supra* note 91, at 611.

2. Analytical Methods

To assess the ICJ judges' bloc voting behaviors, most of the previous studies use the Rice-Beyle bloc analysis method to calculate the index of agreement between the judges and then approximate the judges' voting blocs by creating pseudo blocs.[242] However, instead of using the Rice-Belye method for this dissertation, the proximity between judges' voting patterns are measured using the "relative distance" calculated through the Euclidean distance method.[243] The reasons and benefits for replacing the Rice-Beyle analysis method with the Euclidean distance method shall be illustrated as follows:

2.1 The Limits of the Rice-Beyle Analysis Method

In Hensley and Weiss's studies, they both calculated the voting agreements between the judges' votes to examine the similarity between the judges' thoughts.[244] However, the

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[242] Posner and de Figueiredo are the exception. For an explanation of the Rice-Beyle analysis method, see Hensley, *Bloc Voting*, *supra* note 21, at 43–44; Weiss, *supra* note 22.

[243] I am indebted to my advisor Professor Ethan Michelson for his enormous help in developing the research methods and providing programming tools to help calculate the data material.

[244] Hensley uses the Rice-Beyle analysis method which requires further adjustment after acquiring the degree of agreement between the judges while Weiss simply uses the degree of agreement to measure the closeness between the judges' voting patterns. *See* Hensley, *Bloc Voting*, *supra* note 21; Weiss, *supra* note 22, at 128–31.

weakness of this analytical method is that it can only measure the similarity between judges that have voted together and is thus unable to compare the judges' voting patterns across the Court's history. With the help of the following fictitious example, I shall illustrate the limited power of the Rice-Beyle method in assessing the voting relationship between the judges and show why I replaced it with the Euclidean distance method.

Case 1, composed of five issues, is presided over by Judge X and Judge Y. Judge X votes for the Respondent on all claims while Judge Y votes for the Applicant on claims 1, 2, and 3, and supports the Respondent on claims 4 and 5. If the similarity between Judge X and Judge Y's decisions is evaluated through voting agreement, the agreement between these two judges would be forty since they voted the same way two times out of five, *i.e.*, 40 percent of the time.[245]

In the next election, Judge Z is elected and replaces Judge X in the court. In the next case brought before the court, Case 2, which also consists of five issues, Judge Y votes for the Applicant on all claims and Judge Z supports the Applicant on the first issue and votes

[245] If it is preferred to describe the closeness between the two judges by the dissimilarity between them, the analysis result can also be described as a disagreement between the two judges of 60 (signaling disagreeing 60 percent of the time).

for the Respondent on all other matters. The distribution of Judges X, Y, and Z's votes and the voting agreement matrix between the judges can be presented as Tables 3-1 and 3-2 below:

Table 3-1 Distribution of Judges' Votes (example)

		Judge X	Judge Y	Judge Z
Case 1	Claim1	R	A	n/a
	Claim 2	R	A	n/a
	Claim 3	R	A	n/a
	Claim 4	R	R	n/a
	Claim 5	R	R	n/a
Case 2	Claim1	n/a	A	A
	Claim 2	n/a	A	R
	Claim 3	n/a	A	R
	Claim 4	n/a	A	R
	Claim 5	n/a	A	R

Table 3-2 Voting Agreement Matrix (example)

	Judge X	Judge Y	Judge Z
Judge X	-	40	n/a
Judge Y	40	-	20
Judge Z	n/a	20	-

Since Judge X and Judge Z never voted together, the closeness between their voting patterns cannot be assessed through calculating the voting agreements between them. Consequently, research using voting agreement to measure the proximity between the judges can only report the voting distance between Judges X and Y, and between Judges Y and Z. Meanwhile, the voting distance between Judges X and Z will remain unobservable. As shown in

Table 3-2, the incalculable voting agreement between Judge X and Judge Z becomes missing cells in the matrix.

The technique of calculating voting agreements between judges demonstrated above is similar to the Rice-Beyle analysis method used in Hensley's research and is also akin to the equation Weiss used to assesses if the judges aligned with the Soviet or the American judges. As illustrated, the inherent limitation of this analytical method is that it can only measure the closeness between judges that have voted together before. To avoid having

missing cells in the analysis matrix, the researcher would either have to reduce the number of observed subjects or bear with the problem of having missing cells in the matrix. In Hensley's case, he chose the former option and reduced the number of judges observed in his research from 48 to 14.[246]

If this dissertation also used the Rice-Beyle analysis method to compare the proximity between the ICJ judges' voting behaviors across the ICJ's history, there would be a significant amount of missing cells in the matrix since a large number of ICJ judges never had the chance to decide a case together. Consequently, this project will either have to bear the consequences of having missing cells or limit the observation to smaller groups of judges that have decided a case together.

Recognizing the limited power of the Rice-Beyle analysis method and that it is incapable of demonstrating the interactions between all judges,[247] this analytical method does not fit the needs of this dissertation. Hence, instead of comparing the voting cohesion between each pair of judges through calculating the voting agreements between them, this

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[246] Hensley, *Bloc Voting*, *supra* note 21, at 43.

[247] See Chapter 3, Section 3(b) for a discussion explaining why Posner & de Figueiredo's analysis method does not suffice as bloc voting analysis.

dissertation describes the closeness between the judges' voting behavior by the relative distance (the Euclidean distance) with respect to the votes of the P5 state judges.

2.2 A Better Analytical Method: the Euclidean Distance Method

(a) Measuring the similarity/dissimilarity between the voting patterns by relative distance

Let us turn back to the previous hypothetical cases. Since Judge Y has voted with both Judge X and Judge Z before, Judge Y can serve as a comparison benchmark when comparing the similarity and dissimilarity between Judge X and Judge Z's voting behaviors. Firstly, while Judges X and Y agree with each other 40 percent of the time and Judge Y agrees with Judge Z 20 percent of the time, this can also be described as Judge X agrees with Judge Y 20 percentage points more than Judge Z did with Judge Y. If this observation is further translated into the notion of distance, the proximity between the judges can also be described as Judge X voted more closely with Judge Y than Judge Z did by 20 percentage points. In this way, the relative distance measuring method would allow this dissertation to compare the voting patterns between judges that have never voted together if an adequate comparison benchmark could be found.

Although the Euclidean distance method is commonly used by social scientists to examine states' voting behaviors in the UN General Assembly or even the U.S. Supreme

Court judges' voting preferences, no prior study assessing the ICJ judges' voting behaviors has deployed this technique before. Consequently, measuring the proximity between the judges' voting patterns by relative distance carries novelty.

The closest method used before to evaluate ICJ judges' voting behavior appears in Edith Weiss's research in which she uses the votes of judges from the United States and the Soviet Union as the benchmark to see if the other judges aligned themselves with judges from these two superpowers during the Cold War. Nevertheless, since Weiss's research only focuses on observing if judges aligned themselves with the two superpowers, it remains to measure the similarity and dissimilarity between judges' voting patterns by calculating the voting agreement between them. The clear difference can be drawn between analysis methods used in Weiss's project and those used this dissertation.

In addition, as this dissertation aims to examine if judges from countries that share political, economic, or cultural similarity are keen to vote closely with each other, the judges are lumped together by their country of origin. Thus, instead of showing the voting distance between individual judges, the voting matrix demonstrates the voting distance between the judges from certain countries.

(b) Creating the comparison benchmark

In order to compare the voting patterns between judges that have never voted together through relative distance, we need a third judge or a group of judges that have voted with all of the observed subjects to serve as the comparison benchmark. Since I aim to observe the co-voting of all judges across the ICJ's history, the ideal comparison benchmark for this dissertation would be a judge or a group of judges that have served on the bench throughout the Court's history and have voted with every other ICJ judge. Alternatively, since the judges are lumped by their country of origin, a country or a group of countries that constantly have judges serving on the bench would also meet our need. Despite the fact that no judges have ever served on the bench throughout the ICJ's history, luckily, the five Permanent Members of the UN Security Council that constantly have judges serving on the bench provide the comparison benchmark needed for the analysis.[248]

[248] China was the only exception. China did not have a judge on the ICJ bench between 1965 and 1985. Except for this period, all P5 countries have had a national sitting on the ICJ bench across the Court's history. Due to this limit, in the second time period when there were no Chinese judges serving in the court, the comparison benchmark is comprised of the votes of the judges from the other P4 countries.

As it is agreed that guaranteeing the powerful countries to have a national serving on the ICJ bench is a controversial political arrangement,[249] the decision to use the votes of the P5 judges as the comparison benchmark does not imply that this dissertation supports such an arrangement nor that the votes of the P5 judges carry more importance than the others. The only reason to use the P5 judges' votes as the comparison benchmark is that the consistent appearance of these judges matches the needs of this research. By having the votes of these five judges' forming the comparison baseline, it also ensures that the comparison benchmark could continue to function when a few P5 judges are absent from the case either because of the judges' sickness or other reasons.

Although some non-P5 countries like Poland and Japan have also had judges serving on the bench for extended periods,[250] since the mixture of judges from the P5 countries

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[249] KOLB, ELGAR COMPANION, *supra* note 33, at 105; Ogbodo, *supra* note *54*, at 106–08; Jacob Katz Cogan, *Representation and Power in International Organization: The Operational Constitution and its Critics*, 103 AM. J. INT'L L. 209, 229–30 (2009); *Reforming the United Nations: What About the International Court of Justice?*, 5(1) CHINESE J. INT'L L. 39, Part III (2006); Robinson, *supra* note 50, at 278–80.

[250] Poland has Judge Bohdan Winiarski serving on the bench from 1946-1967 and Judge Manfred Lachs from 1967-1993; the three ICJ judges from Japan include: Judge Kotaro Tanaka (1961-1970), Judge Shigeru Oda (1976-2003), and Judge Hisashi Owada (2003-present).

already enables the benchmark to include judges from East and West, from developing and developed countries, and from almost all the main geographical regions, I find no pressing need to add the Polish and Japanese judges as part of the comparison benchmark. The only regret here is that I am unable to incorporate an African or Muslin country that consistently has judges serving in the Court into our comparison parameter.

The first step of the calculation process is to acquire the voting agreement between the observed judges and the judges from the P5 countries. Following that, this dissertation uses the Euclidean distance equation to calculate the relative distances between the judges from the two observed countries. The "Euclidean distance" equation employed is:

$$d(p,q) = \left\{\sum_{i=1}^{n}(q_i - p_i)^2\right\}^{\frac{1}{2}} = \sqrt{\sum_{i=1}^{n}(q_i - p_i)^2}$$

$$=\sqrt{(q_1 - p_1)^2 + (q_2 - p_2)^2 + \cdots (q_n - p_n)^2}$$

In the equation, p and q each represent the two countries that the judges are from, and p_i and q_i represent the voting distances between the judges from p and q and those from the P5 countries. For example, p_1 and q_1 indicates the voting agreement between the observed judges and the judges from the United States; p_2 and q_2 indicates the voting agreement

between the observed judges and the judges from France; similarly, p_3~ p_5 and q_3~q_5 represent the voting agreement between the observed judges and the judges from China, Russia, and the United Kingdom.

Let me illustrate with the examples of India and Pakistan. Although India and Pakistan both had regular judges serving in the ICJ between 1946 and 1966, the judges from these two countries never had the chance to hear the same case. Because of that, the proximity between the voting behaviors of the judges from the two countries cannot be measured through calculating the voting agreement between them. Nonetheless, with the help of the Euclidean distance method and the above equation, I am still able to compare the voting distances between the judges from these two countries through relative distance. Here are the Indian and Pakistani judges' levels of agreement with the P5 judges:

	India	Pakistan
China	66.67%	90.91%
France	33.33%	77.78%
Russia (USSR)	66.67%	63.63%
United Kingdom	66.67%	66.67%
United States	100%	100%

Following the above equation, the Euclidean distance between the judges from India and Pakistan is calculated as the square root of the sum of the squared distance between the two countries: $(587.58+1975.8+9.24+0+0)^{\wedge 1/2} = 50.72$.

Of course, this method must be used with caution especially regarding the time periods that the judges served on the Court, as it may be inadequate to use this method to compare a judge that served in the Court in the 1940-1950s with a judge that served in the Court in the 1990s-2000. Accordingly, as illustrated below, this dissertation divides the data into three time periods.

(c) Hierarchical cluster analysis and regression analysis

In addition to using relative distance to describe the proximity between the judges' voting patterns, I also use the hierarchical cluster analysis method to visualize the research findings.[251] In particular, I use 'Complete Linkage Clustering' (farthest neighbor

[251] *See generally,* RUI XU & DON WUNSCH, CLUSTERING (2009) (see chapter 3 for a discussion of hierarchical cluster analysis); William Revelle, *Hierarchical Cluster Analysis and the Internal Structure of Tests*, 14 MULTIVARIATE BEHAVIORAL RESEARCH 57 (1979).

clustering[252]) to visualize the clusters in dendrograms so that the voting blocs formed among the judges can be better observed. Lastly, using the matrices acquired through calculating the Euclidean distance between the judges' voting agreements, I further assess the possible variables contributing to the formation of the voting blocs in the Court through regression analysis.

(d) Dividing the timeline into three periods

In the literature review section, I have stressed that time and history are the two critical factors that should be taken into consideration when assessing the judges' voting behaviors. Accordingly, for purposes of analysis, I divide the Court's history into three periods and shall assess the judges' voting behaviors in each time-period separately. The three divided timelines are (1) 1946–1966, (2) 1967–1984, and (3) 1985–2015. In addition to the benefit of allowing us to observe how the judges' voting behaviors changed through time, there are three additional reasons to divide the analysis into the three suggested time periods:

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[252] For equations and introduction of the difference between different Agglomerative hierarchical clustering, see XU & WUNSCH, *supra* note 251, at 32–37; BRIAN S. EVERITT, SABINE LANDAU & MORVEN LEESE, CLUSTER ANALYSIS 57–67 (4th edn. 2001).

First, the first two periods combined (1946–1984) roughly correspond to the phase of the Cold War, and the third period represents a post-Cold War era. Hence, by comparing the judges voting patterns in the first two and the third period, we are able to observe if and how the change in the judges' voting behaviors correspond to the end of Cold War. Moreover, by dividing 1946–1984 into two periods, we are able to observe if and how the change in the judges' voting behaviors correspond to the exacerbating Cold War between the East and the West.

Second, while the ratio of judges from Asia and Africa has increased between 1965 and 1970, dividing the Cold War phase into two periods allows us to observe how the changes in the Court's composition affects the formation of voting clusters in the Court. Dividing 1946–1984 into two periods also enables this research to examine how the pre-existing voting bloc(s) respond to such changes.

Third, the division of time periods is also a result of the practical concern that the Chinese judges are absent from the Court between 1967 and 1984. After Judge Wellington Koo, nominated by the Nationalist China, retired from the Court in 1967, due to the representation problem between the Communist and Nationalist China, no Chinese judge was elected between 1967 and 1984. Consequently, when calculating the voting distances

between the judges with the above-mentioned Euclidean distance, the votes of Chinese judges were only incorporated in the first and third periods (1946–1966 and 1985–2015). In the second period (1967–1984), the comparison benchmark is only comprised of the votes of judges from the United States, United Kingdom, France, and the Soviet Union (Russia).

(e) Dividing the analysis by types of disputes

In addition to observing the judges' voting patterns from an overall perspective, I am also interested in assessing the voting clusters that only appear in certain kinds of disputes. Hence, in this dissertation, I shall conduct separate cluster and regression analyses based upon the categorization presented in Chapter 1 and shall compare and identify the differences between the voting clusters identified in different clusters. Moreover, I shall examine if the judges show unique voting patterns when adjudicating specific types of cases.

3. Expected Contribution and Research Limits

This dissertation aims to add to the literature in four ways. The first contribution is to establish an empirical analysis of ICJ judges' voting behaviors across the Court's history. By this, I aim to clarify the previous studies' contradicting conclusions regarding if voting

blocs exist in the ICJ. As a side project, I shall also keep track of national judges' preferences in supporting their home countries and appointers.

Second, with the help of the relative distance measuring method, this dissertation hopes to document and compare the voting agreements between all judges. As no prior studies have provided any analysis like this, I hope the introduction of this new analysis method will strengthen the studies of the ICJ judges' voting behaviors and reveal new findings.

Third, with the help of regression analysis, this dissertation aims to examine the long-speculated question of whether judges from countries sharing a similarity in political ideological, economic development, and other social connections form into voting blocs. In this part, the analysis shall particularly address if the judges' voting patterns correspond with the interests or the political or social alignment and connections between the judges' home countries. I shall also compare the clusters identified in this study with those identified in the analysis of the UN General Assembly's voting records.

Fourth and last, for practical implications, I hope that this comprehensive analysis of the judges' voting behaviors will help the IR and IL scholars to understand the actual performance of the ICJ better. Based on the findings, perhaps scholars may replenish the

broader study on how external factors may influence judges' behaviors and develop theories explaining the relationship between the judges serving in international tribunals and their home countries.[253] From a more practical perspective, I hope that the findings of this dissertation can assist states in having a better understanding of the ICJ's actual performance and may help them to determine if the ICJ is their ideal dispute settlement forum.

A comparison of this dissertation project and previous studies regarding research inquiry, research methodology, comprehensiveness, and the dataset used for analysis is provided in Table 3-3 on page 121.

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[253] Recent studies propose that new institutional arrangements in courts like the European Court of Justice and the WTO Dispute Settlement Body may better secure the international court's independence and impartiality than traditional courts like the ICJ. *See* Born, *supra* note 103, 758–59 (arguing that the second generation of international courts (*e.g.* the WTO DSB, arbitral tribunals under investment treaties), with relatively dependent adjudicators and more enforceable decisions, are more effective than the first generation courts (e.g. ICJ, ITLOS)); Robert O. Keohane, Andrew Moravcsik & Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT'L ORG. 457, 458-59 (2000) (suggesting "low independence, access, and embeddedness as the ideal type of interstate dispute resolution and high independence, access, and embeddedness as the ideal type of transnational dispute resolution.")

Lastly, before moving to the chapters reporting the results of this study, I would like to provide the disclaimer that this dissertation does not attempt to report or find the mechanism(s) influencing the judges' voting behaviors. Although I shall later report on and demonstrate some of the ICJ judges' partial and biased voting behaviors through cluster and regression analysis, the analytical methods used in this dissertation are incapable of identifying the mechanism(s) causing such behaviors. Hence, when reading the analysis results, one should bear in mind that this research only reports the phenomenon of bias and partiality but not the cause of such phenomenon.

Table 3-3 Typologies of Previous Scholarship on ICJ Judge Bias/Bloc Voting

	Scope of Inquiry	Unit of Analysis for Disputes	Unit of Analysis for Advisory Opinions	Subject of Inquiry	Object of Comparison	Comprehensiveness of Inquiry	Treatment of Countries
William Samore	decisions of judges from or appointed by plaintiff or defendant country	claim	claim	judges' support for their country of origin or the countries that appointed them	petitioner/respondent	a subset of all cases (including contentious cases and advisory opinions) years: (PCIJ: 1922-1946, 28 cases; ICJ: 1946-1955, 14 cases)	as identifiable countries
Il Suh	decisions of judges from or appointed by plaintiff or defendant country	claim	claim	judges' support for their home countries or the countries that appointed them	petitioner/respondent	a subset of cases that national judges participated in (including contentious cases and advisory opinions) years: (PCIJ: 1922-1946, 29 cases; ICJ: 1948-1955, 25 cases)	as identifiable countries
Thomas Hensley	decisions of judges from or appointed by plaintiff or defendant country	claim	claim	judges' support for their home countries or the countries that appointed them	other judges	a subset of contentious cases and advisory opinions years: 1946-1964 (decisions on 54 claims)	as identifiable countries

Thomas Hensley	decisions of judges who have voted together (in more than 17 decisions)	claim	claim	the level of agreement between judges deciding on the same cases	other judges	a subset of non-unanimous contentious cases and advisory opinions years: 1946-1972	as identifiable countries
Adam Smith	decisions of judges from or appointed by plaintiff or defendant county	case	n/a	judges' support for their home countries or the countries that appointed them	petitioner/respondent	a subset of contentious cases years: 1946-2000	as identifiable countries
Edith Weiss	decisions of judges who have voted together	case	n/a	1. the level of agreement between judges 2. judges' agreement with U.S. and USSR judges	majority/minority opinion	subset of all contentious cases years: 1946-1985	as identifiable countries
Eric Posner & Miguel de Figueiredo	decisions of all judges	case	n/a	judges' support for types of countries	petitioner/respondent	subset of contentious cases years: 1949-2004	as abstract country types
Kai-Chih Chang	decisions of judges from countries other than plaintiff and defendant (non-party judges)	claim	claim	1. the level of agreement between judges serving in the same period 2. identify the variables influencing judges' voting behavior 3. national judges' voting preference	other judges	a subset of all contentious cases and advisory opinions years: 1947-2015	as identifiable countries

Chapter 4 The Voting Preferences of National Judges

Chapters 4 and 5 report the major findings of this dissertation. Chapter 4 starts with reporting the average proportion of votes that the prevailing party receives in cases, with the purpose to examine if ICJ decisions are mostly made with a high degree of unanimity or with a divided bench. The second part of Chapter 4 reports on the party state judges' voting preferences and examines if national judges continue to show distinctive voting patterns and remain keen to vote in favor of the appointers.

1. Are ICJ Decisions Generally Made with a High Degree of Unanimity?

In comparison with other political decision-making bodies, scholars have reported that judicial decisions are generally made facing less disagreement from within the bench.[254] A high degree of unanimity is said to be one of the unique features that judicial decision-making carries.[255] Hence, in the first step of analysis, I aim to observe if a high degree of unanimity can also be found in ICJ's decision-making or if the Court faces a high

[254] Peter Willetts, *Cluster-Bloc Analysis and Statistical Inference*, 66 AM. POL. SCI. REV. 569, 576 (1972).

[255] *Id.*

volume of disagreements, similar to institutions such as the UN General Assembly or the US Congress.

As shown in Table 4-1, this dissertation reports that most of the ICJ decisions were decided with the prevailing party receiving a high proportion of support from the bench.[256] Among the 346 claims observed, 62 percent of the claims were decided unanimously or with no more than one judge dissenting. Cumulatively, more than 83 percent of the claims were decided with fewer than four judges dissenting.[257] Since on average the decisions made under the contentious proceedings were supported by 89% of the bench (meaning with less than two judge dissenting), the analysis shows that the typical feature of judicial decision-making is reflected in the ICJ's voting records.

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[256] *See supra* note 254. It should be noted that the votes of judges from party states (including both regular and *ad hoc* judges) are excluded due to the fact that party state judges are known to be keen to vote in favor of their own country or their appointer. While their distinctive voting preference has already been identified, we tend to preclude them in this part so that the voting behavior of other non-party state judges can be better observed. This exclusion was out of the consideration that party state judges were already known to be keen to vote for their own country. The inclusion of party state judges would likely result in at least one dissenter in each case.

[257] This roughly correspond to 80~85% of judges supporting the prevailing party.

Table 4-1 Level of Support for the Prevailing Party in Contentious Case Claims

Percentage of judges supporting the prevailing party	50-59%	60-69%	70-74%	75-79%	80-84%	85-89%	90-100%
Percentage of claims decided under this rate of support	2% (N=6)	9% (N=31)	5% (N=18)	7% (N=24)	9% (N=31)	5% (N=19)	62% (N=216)
Average percentage of votes the prevailing party receives	89%						

As presented in Table 4-2, if we further divide the analysis by type of dispute, a high degree of unanimity is still reported in most of the observations across all subcategories of cases. Among all the subcategories, the cases that report high disagreement are those relating to trusteeship (decolonization) issues, and most of the dissents found therein are sourced from the *South West Africa* case.[258] Because the *South West Africa* case was

[258] Including both South West Africa (Liberia v. South Africa) and South West Africa (Ethiopia v. South Africa). The other trusteeship case brought under the contentious proceeding is the *East Timor* case

known for reflecting the legal and political conflict between the colonial power and the formerly colonized countries, this increases the possibility for judges to take the political viewpoints of their home countries into consideration and also the likelihood for disagreement to occur. But besides Trusteeship cases, we find no significant and constant disagreements between the judges. In short, the finding that no systematic disagreements are found between the ICJ judges refute the hypothesis that the radical confrontations found between countries in political realms is also replicated in the ICJ.

Table 4-2 Average Percentage of Judges Who Voted for the Prevailing Party in Contentious Proceedings (disaggregated by case type)

Case Type	Aerial Incident	Territorial/ Maritime Demarcation	Property Rights	Trusteeship	Use of Force	Diplomatic Relationship	Other
Average percentage of votes the prevailing party receives	83%	89%	90%	62%	91%	92%	88%

between Portugal and Australia. However, the *East Timor* decision was averagely supported by 93 percent of the bench.

We turn now to the analysis of advisory opinion proceedings. As shown in Table 4-3, most of the ICJ advisory opinions are also decided with high unanimity and with few dissents. Almost half of the decisions were decided with the unanimous support of the bench. Although the average rate of support that the prevailing party received in advisory opinion proceedings was about 5% lower than those reported in the contentious proceedings, on average advisory opinion decisions were still supported by 84 percent of the bench (meaning that there were about less than two out of fifteen judges dissenting).[259]

Table 4-3 Level of Support for the Majority Opinion in Advisory Opinion Claims

Percentage of votes in the majority	50-59%	60-69%	70-74%	75-79%	80-84%	85-89%	90-100%
Percentage of claims decided under this supporting rate	6% (N=5)	14% (N=11)	6% (N=5)	13% (N=10)	4% (N=3)	12% (N=9)	45% (N=35)
Average percentage of supporting votes in the majority	84%						

[259] Ideally, the bench would be composed of 15 judges. However, due to sickness or the inclusion of ad hoc judges, not all cases were decided with 15 judges on the bench. The actual number of judges on the bench varies and ranged from 11~17.

2. The National Judges' Voting Preferences

Let us now turn to observe the voting preferences of the judges from or appointed by the party states. Previous scholarship consistently reports that these judges show obvious keenness to vote in favor of those who appoint them. First, however, I would like to clarify the definitions of a few terms that are used in this section before introducing the analysis method and interpreting the findings.

In this dissertation, 'regular judges' refers to judges that are nominated by a state and elected to the ICJ through the ordinary ICJ judge election procedures. If the regular judges' home countries become disputing parties before the ICJ during their term of service, the regular judges from these disputing parties are referred to as 'regular judges from party states.' On the other hand, '*ad hoc* judges' refers to the judge(s) that are appointed by party states to join the decision-making of a particular case when the party state does not already have a national serving on the ICJ bench. The *ad hoc* judges may be a national of the party state but may also be from any other country. Lastly, the term 'national judges' refers to judges that are either nominated or appointed by the party states, hence, this term covers both 'regular judges from party states' and also '*ad hoc* judges' regardless of their national origin.

As early as 1933, through observing the voting patterns of judges serving in the Permanent Court of International Justice (PCIJ), Hersch Lauterpacht first argued that the judges serving in international adjudication institutions may be consciously or subconsciously biased in favor of their own countries.[260] H. Lauterpacht argues that even with all the institutional steps taken to avoid the *ad hoc* judges acting in the interest of their states, the judges' preference to vote in favor of their home countries/appointors is almost impossible to eliminate.[261] The separate studies of Samore, Hensley, and Smith have also reported that national judges are keen to vote in favor of their home countries and appointers. In this section, the research goals are also to assess the national judges' preferences for voting in favor of their home country or appointer and to provide updated information about the national judges' voting preferences.

Unsurprisingly, the conclusion reached in this dissertation over the ICJ national judges' voting preferences is not different from the aforementioned studies. In my study, I also find that the national judges either nominated or appointed by the party states continue

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[260] LAUTERPACHT, *supra* note 107, at 233–36.

[261] *Id.*

to showed consistent preference for voting in favor of their home country or nominator across the ICJ's history.

2.1 The National Judges' Strong Tendency to Support Their Home Countries or Appointers

The analysis starts with examining the national judges' tendency to vote in favor of their home countries or appointers. Table 4-5 shows that throughout the ICJ's history, national judges that are either nominated or appointed by party states voted for their home countries and appointers around 80 percent of the time. The tendency for regular judges from party states to vote in favor of their home countries is identical to the support *ad hoc* judges show to their appointers. With the support of this evidence, I disagree with Smith's earlier observation and argument that regular judges carry a "modicum of independence" and act more independently than the *ad hoc* judges. [262] Nothing in the evidence at hand suggests that regular judges show less support to their home country in comparison with *ad hoc* judges' preferences to vote in favor of their appointers.

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[262] Smith, *supra* note 83, at 218. Suh and Hensley also advance similar arguments, see Hensley, *National Bias*, *supra* note 17, at 577; Suh, *supra* note 18, at 230.

Table 4-4 Percentage of National Judges Voting for Their Country or Appointer

	Regular Judges from Party States			*Ad hoc* Judges		
Year	1945-1966	1967-1984	1985-2015	1945-1966	1967-1984	1985-2015
Percentage of votes supporting their home country/ appointor	79.3	93.3	73	83.6	85.8	77.8
	78.8			79.7		

Although Table 4-4 reports that the national judges, including both regular judges from party states and *ad hoc* judges, hold a strong tendency to support their home countries or appointors, this data does not illustrate whether and how the national judges act distinctively from the rest of the bench. In order to assess if national judges show greater tendency to vote in favor of their home countries and appointers, I compare the national judges' votes with those of the other judges that are not from the party states.

As Table 4-5 presents, national judges voted in favor of their home countries and appointers significantly more than the judges from non-party states. On average, national judges voted for their appointers 30 percentage points more than the average percentage of non-party state judges who voted for that country. Also, regardless of if the national judges were appointed by the applicant or by the respondent, or if they were regular or *ad hoc*

judges, they all voted in favor of their appointors significantly more than the other judges throughout the Court's history.

Table 4-5 Rate at which National Judges Voted More for their Appointer or Nominator Compared with Other Members of the ICJ

	% Point Difference Between Non-Party State Judges and …			
	Regular Judges from the Applicant States	Regular Judges from the Respondent States	*Ad hoc* Judges Appointed by Applicant States	*Ad hoc* Judges Appointed by Respondent States
1946-1964	31.7	22.7	37.2	40.5
1965-1984	22.9	53.6	40.7	0[263]
1985-2015	41.6	20.7	32.2	29.7
Overall	31.5	28.5	34	31.9

It is worth noticing that the average percentage deviation between the voting rates of national judges and other members from non-party states reported in this dissertation is

[263] There is only one case in this time period that was adjudicated with the participation of an ad hoc judge, and in that case, the *ad hoc* judge agreed 100% with the other judges.

about 8 percentage points higher than what Hensley reported in his 1968 study.[264] In other words, between 1968 (the year Hensley's study was completed) and 2015, the national judges must have supported their home countries and appointers at a even greater degree than they had previously so that the overall average deviation increased.

Meanwhile, from the fact that the national judges consistently voted for their appointers and nominators 80 percent of the time and 30 percentage points more than the other judges, their tendency to vote in favor of their appointers and nominators is apparent.[265] Nonetheless, as national judges from the applicant and respondent states both show similar tendencies to support their appointers and nominators, the votes of these national judges are likely to cancel each other out. I thus share with Suh, Samore, Posner and de Figueiredo the observation and opinion that the national judges' votes are unlikely to influence the outcome of the case.[266]

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[264] The average deviation rate reported in this research is 30 percentage points while Hensley reports an average 22 percentage point deviation. *See* Hensley, *National Bias*, *supra* note 17, at 572.

[265] Some consider this as hard evidence proving that the national judges are biased. *See id.*

[266] Posner & de Figueiredo, *supra* note 91, at 609; Suh, *supra* note 18, at 233–34; Samore, *supra* note 54, at 210–11.

2.2 Do the Parties Prefer to Appoint Their Citizens as *ad hoc* Judges?

Although nationality was long considered the major reason for *ad hoc* judges to be keen to vote in favor of their appointers,[267] I disagree with this proposition. Instead, my analysis shows not only that the party states do not have a strong preference in appointing their citizens, but neither was 'citizenship' the leading cause driving the *ad hoc* judges to vote for their home country.

Firstly, of the 139 total instances where *ad hoc* judges took part in the adjudication, in only 70 were the *ad hoc* judges selected from the party states' own citizens. As nearly half of the *ad hoc* judges were unrelated to the party state (at least not in the sense of nationality connection), this rejects the argument that parties are keen to select their own citizens as *ad hoc* judges.[268] In some more rare circumstances, states are even willing to

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[267] Smith, *supra* note 83, at 222, 'nationality… was a prime aspect of individual definition.' *See also* OLIVER J. LISSITZYN, THE INTERNATIONAL COURT OF JUSTICE: ITS ROLE IN THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY 49–50 (Lawbook Exchange, 2006) (1951).

[268] For example, in the case of Arbitral Award Made by the King of Spain on 23 December 1906 between Honduras and Nicaragua, Honduras appointed Roberto Ago from Italy as *ad hoc* judge; in the case of Obligation to Negotiate Access to the Pacific Ocean between Bolivia and Chile, Chile appointed Louise Arbour from Canada as its choice of *ad hoc* judge. For more examples, *see* All Judges *ad hoc*, International Court of Justice, http://www.icj-cij.org/en/all-judges-ad-hoc (last visited Sept. 30, 2017).

appoint their counter-party's nationals as *ad hoc* judge. One classic example is the case concerning *Certain Criminal Proceedings in France* between the Republic of Congo and France.[269] The plaintiff, the Republic of Congo, had the right to appoint an *ad hoc* judge since it had no national serving on the bench, but instead of appointing its own citizen or someone from its region, Congo appointed a national of its counterparty, Jean-Yves de Cara from France, as its *ad hoc* judge. If the nationality linkage was truly the cardinal criteria to be considered when the state selects its *ad hoc* judge, it is hardly imaginable that Congo would choose a French national as its *ad hoc* judge. Moreover, as *ad hoc* Judge Cara supported Congo as the lone dissenter in all decisions in that case, Cara's French nationality does not seem to have prevented him from voting in favor of Congo and against his own country.

In order to further rebut the assertion that nationality was the primary reason causing *ad hoc* judges to vote for their appointer, I compared the voting preferences between *ad hoc* judges with and without citizenship from one of the party states. In my hypothesis, if a nationality linkage between the judges and their home countries is the primary reason

[269] Certain Criminal Proceedings in France (Rep. Congo v. Fran.), Order, 2003 I.C.J. 102 (June 17).

causing *ad hoc* judges to be keen to vote in favor of their appointers, the *ad hoc* judges with the same nationality as one of the party states should show an even stronger tendency to vote in favor of their appointers than those without such a connection.

Table 4-6 presents the results of the disaggregated analysis of the voting preferences of the *ad hoc* judges with and without a party state's nationality. Across the Court's history, *ad hoc* judges selected from party and from non-party states both identically supported their appointers at a rate of 80 percent. There lacks an indication that *ad hoc* judges with a party state's nationality show greater support to their appointers than *ad hoc* judges selected from non-party states. In other words, the influence of nationality may have long been exaggerated and overlooked.

Table 4-6 Rate at which *ad hoc* Judges from the Party States and Those from Third Parties Voted in Favor of Their Appointers

	Ad hoc Judges with Party State Nationality			*ad hoc* Judges without Party State Nationality		
Year	1945-1966	1967-1984	1985-2015	1945-1966	1967-1984	1985-2015
% of judges voting for their appointor	73.3	100	81.5	93	75	80.3
	81			80.3		

2.3 Are National Judges Showing Less Support to Their Home Countries and Appointers?

In Smith's 2005 study, he argues that national judges are gradually showing less support to their appointers and are acting with greater independence.[270] However, in this dissertation, through observing the moving average (by 5 cases) and linear prediction over the degree that the votes of national judges deviate from the other judges, I find no evidence supporting the argument that the difference between the national judges' and other judges' voting patterns is diminishing. In Figures 4-1 to 4-4, I present the difference between the rate of support given to the parties by the national judges and by the other judges, and use the moving average and linear prediction to report the short-term and long-term deviation trend.

[270] *See* Smith, *supra* note 83, at 219, 222.

Figure 4-1 Percent difference in rate of regular judges from applicant states supporting their appointers versus other judges

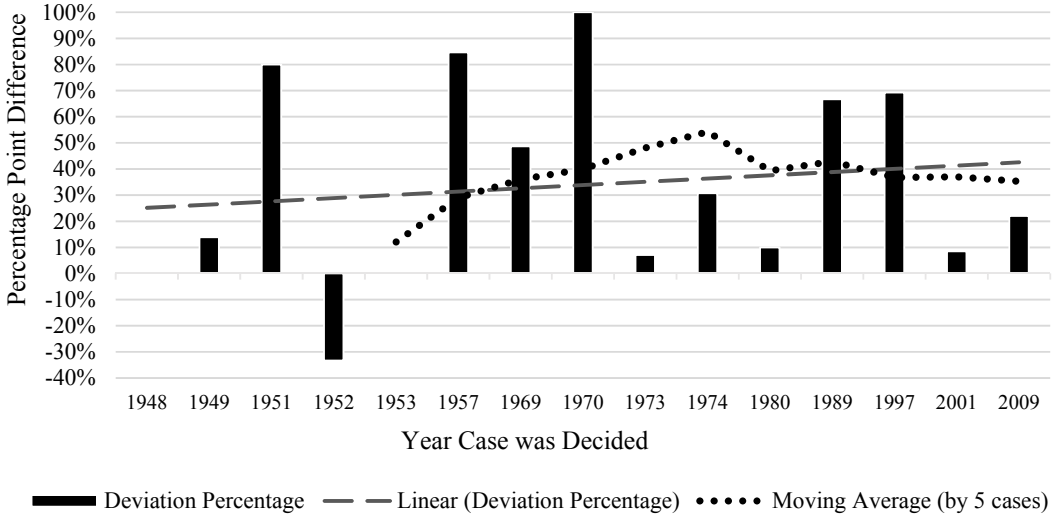


Figure 4-2 Percent difference in rate of *ad hoc* judges from applicant states supporting their appointers versus other judges

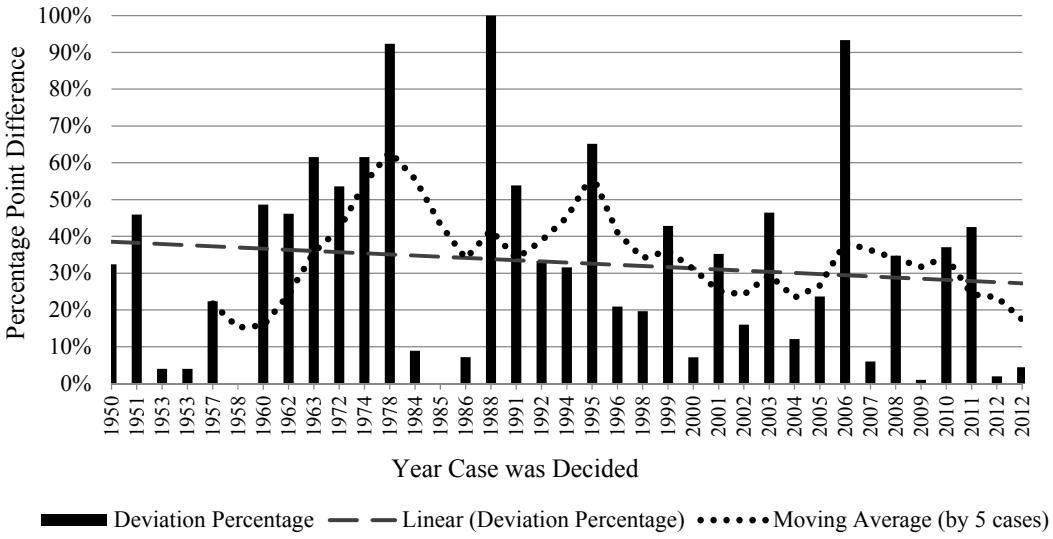


Figure 4-3 Percent difference in rate of regular judges from respondent states supporting their appointers versus other judges

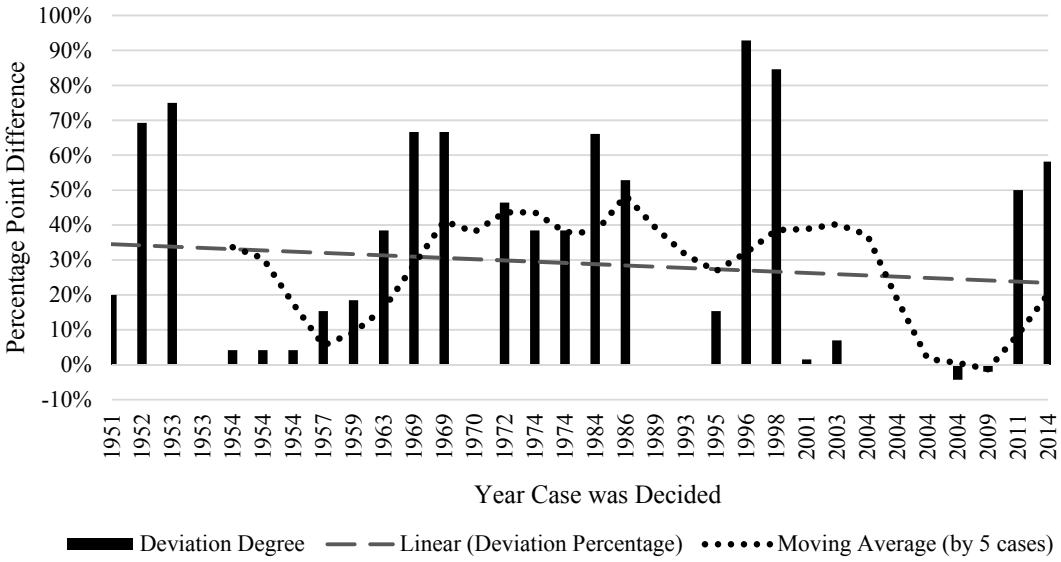
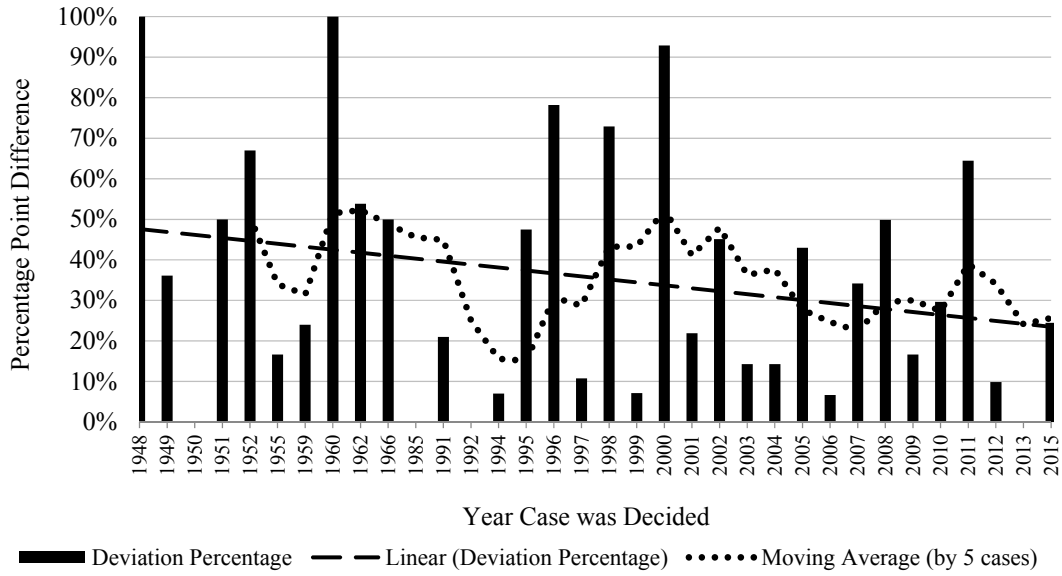


Figure 4-4 Percent difference in rate of *ad hoc* judges from respondent states supporting their appointers versus other judges



In Figures 4-2 and 4-3, the linear predictions of the degree to which national judges from the party states support their nominators or appointors more than the other judges are basically a flat horizon. This indicates that there has been little change in the keenness of *ad hoc* judges appointed by applicant states and regular judges from respondent states to vote in favor of their nominators or appointors throughout the Court's history. The linear prediction in Figure 4-1 shows a positive slope, while the linear prediction in Figure 4-4 reports a negative slope. Based on the evidence at hand, it is too crude to make any argument regarding whether national judges are gradually showing greater independence and are showing less support to their appointers.

However, echoing Judges Rosalyn Higgins and Michael Schwebel's rebuttal of the accusation that national judges are biased and keen to vote for their appointers,[271] there are indeed a few instances where the national judges voted identically to the other judges and showed no particular preference in supporting their nominator. Once in a while, national judges would even vote against their home country more than the other judges did

[271] Heiner Schulz & Rosalyn Higgins, *The Political Foundations of Decision Making by the European Court of Justice*, 99 ASIL PROCEEDING ANNUAL MEETING 132, 137–38 (2005); Schwebel, *supra* note 18, at 893 (arguing that there is still quite a number of national judges that take positions that are not congruent with those of their countries.).

(see the negative deviation in the case decided in 1952 in Figure 4-1, and the cases decided in 2004 and 2009 in Figure 4-3). Nevertheless, from an overall perspective, I am unable to concur with Smith's argument stating that judges are acting with greater independence and showing less support to their appointors and home countries. There lacks sufficient evidence to support such a proposition.

3. Conclusion

In this chapter, I reached three conclusions. Firstly, I have reported that the vast majority of the ICJ cases were decided with a high degree of unanimity and few dissents from the judges. The analysis results provide no evidence that the ICJ has become an arena for states to advance their political goals and denounce their political rivals.

In addition, through comparing the voting behaviors of the judges from or appointed by party states with the rest of the bench, the second part of this chapter reaffirms that both regular and *ad hoc* judges nominated and appointed by the parties continue to show great support to their home countries and appointors, voting for them an average of 80 percent of the time. On the one hand, this dissertation reports that the parties do not show a particular preference in selecting their own citizens as *ad hoc* judges; on the other hand, the keenness of *ad hoc* judges selected from a third country to vote in favor of their

appointors is identical to that of judges that are nationals of the party state. All *ad hoc* judges show a great degree of support for their appointor regardless of whether there is a nationality linkage between them. Lastly, I report that there is no evidence showing that national judges are gradually acting more independently and showing less support to their appointors.

Chapter 5 Voting Blocs in the ICJ

In Chapter 2, I have indicated that the previous studies' findings regarding the existence of voting blocs within the ICJ are split and inconclusive. While some report that judges from the Soviet States and the NATO States emerge into separate voting blocs, others argue that the allegations of the existence of voting blocs are false and groundless. In this chapter, with the help of the Euclidean distance analysis method, I aim to examine and report on the blocs that emerge in the ICJ and identify the features of these blocs. In addition, the analyses in this chapter shall further divide the timeframe into smaller fragments and disaggregate the cases by the type of dispute. In this way, I hope to observe the voting blocs that emerge in different periods and when the Court hears different types of cases and to assess the differences between them.

The research methods are already explained in detail in Chapter 3, and will not be repeated in this chapter. After making a few notes to refresh memories about the data and the analytical methods, I shall move directly to discussing the analysis results. This chapter is comprised of two sections. The first reports on and assesses the voting blocs identified through the cluster analyses, and the second observes the variables that correlate with the formation of the clusters.

1. Bloc Voting Analysis

1.1 Data

The data used to assess the ICJ judges' bloc voting behaviors include the judges' votes over a total of 146 contentious cases and 27 advisory opinions decided between 1946 and 2015.[272] With some exceptions,[273] the dataset is coded on a claim-basis and incorporates judges' votes on almost all claims decided by the Court. In the coding process, information about the judges' nationality, the disputing parties, the participating *ad hoc* judges, and the parties that the judges voted for in each claim are all documented. Other information such as the type of dispute and the year that the case was decided were also collected.

1.2 Analysis Processes

The transformation of the ICJ's voting record into observable voting clusters is done through a three-step process. The first step is to calculate the rate of voting agreements between the judges and the P5 state judges.[274] As I have already illustrated in Chapter 4,

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[272] The actual number of cases coded is 122 since some cases were discontinued at the request of the parties or dismissed for other reasons.

[273] Discussion of the coding methods and circumstances under which certain claims are excluded from our analysis are illustrated in Chapter 2, Sections 1.2 and 1.3.

[274] In this research, all judges are lumped together and identified by the countries that they are from.

the judges from and appointed by party states show unique voting patterns and are keen to support their home countries and appointers. Therefore, the national judges' votes are excluded from the analysis to avoid the dataset being influenced by their unique votes.[275]

[275] The inclusion of national judges' votes in the dataset has two major drawbacks. Firstly, including the votes of national judges would greatly increase the number of judges observed since the votes of all *ad hoc* judges additionally selected would also be included. However, as most of the *ad hoc* judges only appear in the court once, including them in the analysis would diluted our observations of the voting behaviors of the regular judges. Moreover, as the national judges are already known to be keen to vote for their home country and appointer, the inclusion of these votes may also have a negative impact on the observation of the other judges' clustering behavior. In this dissertation, I have run the analyses with datasets both including and excluding the votes of national judges. But just as I have speculated, in the analysis using the dataset that includes the national judges' votes, many significant findings that can be observed when using the dataset without the votes of national judges disappear. For instance, when conducting the analysis with the dataset excluding the votes of national judges, the analysis reports that the judges from countries with NATO membership voted closely with each other at a significant level. However, if the same analysis is done using the dataset that includes the votes of national judges, the significance of the NATO match disappears. When I look into the cases for a possible explanation of this difference, it seems that this difference stems from the fact that a number of *ad hoc* judges were selected from the NATO States and they voted very differently from the other NATO permanent judges that serve in the Court. In addition to reducing the significance of the NATO matches, the significance of the many other findings is also affected. As I believe that the analysis using the data without the votes of national judges best demonstrates the significance and contribution of our findings, the analyses of this chapter were all done using the dataset that excludes the votes of national judges. Nonetheless, as the P5 countries were sometimes the party states, a drawback of using the dataset excluding the votes of national judges is that this reduces the

In the second step, the voting agreements between the judges and the P5 state judges were transformed and described as the relative voting distance using the Euclidean distance method introduced in Chapter 3, and I use hierarchical cluster analysis to visualize the clusters and observe the emergence of voting blocs in the Court. The results of the cluster analysis shall be presented in dendrograms.

The transformation of actual voting agreements into relative distance does not distort the data. The scatterplots in Figure 5-1 show that after the conversion, the relative voting distance still highly correlates with the actual voting agreements between the judges. In other words, the fact that high voting agreements between judges are now presented as close voting distances between the judges' voting patterns indicates that the data has not been distorted in the transformation process. Negative correlations between the actual voting agreements and the relative voting distances were reported in both analyses of the Contentious Cases and Advisory Opinions.

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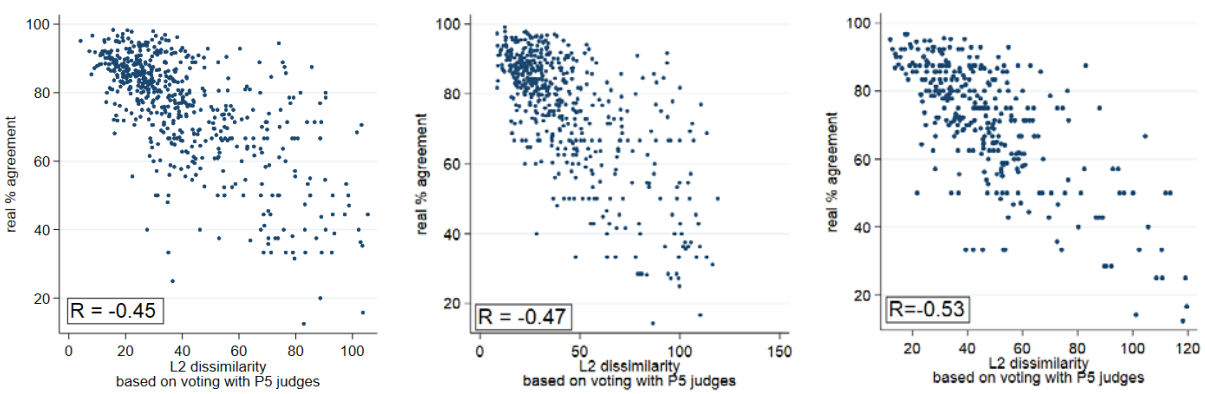
number of countries serving as comparison benchmark (this mostly occurs when I assess cases involving a specific type of dispute in the disaggregated time-period.) But for the sake of best demonstrating the significance and contribution of our findings, I stay with the decision to assess the research question with the dataset that excludes the votes of national judges.

Figure 5-1 Scatterplots Depicting Degree of Consistency between L2 (Relative Voting Distance) and Actual Voting Agreement

A. Combined Cases B. Contentious Cases C. Advisory Opinions



In the third step, I conducted a regression of the relative voting distances between the judges with the purpose of testing the variables that correlate with the clustering behavior of the ICJ judges. Just as Alker and Russult have shown in their classic study of voting groups in the UN General Assembly that different voting clusters emerge when the organization deals with various subject issues,[276] I am also interested in learning if topic-specific clusters arise in the ICJ and if different clusters emerge in different time-periods. Hence, I disaggregated the data and observed the cohesion formed among judges in

[276] HAYWARD R. ALKER, JR. & BRUCE M. RUSSET, WORLD POLITICS IN THE GENERAL ASSEMBLY 193–200 (1965), the three major issue dimensions or "super-issues" identified have been characterized as "Cold War," "colonial self-determination," and "supranationalism" issues.

different time periods and when the Court adjudicates over different types of cases. The subsets of analyses assessed include (1) an analysis of all contentious cases, (2) an analysis of all advisory opinions, and (3) analyses of the six types of disputes brought under the contentious proceedings.[277] In addition, time was also added as a parameter, and all of the analyses mentioned above were assessed with the ICJ's history divided into three periods.

In total, the analyses produced 36 dendrogram graphs showing the voting clusters formed under different parameter settings. As I do not wish to overwhelm the readers with dozens of charts and figures, only the graphs that carry noticeable features will be presented and discussed. The entire collection of dendrogram graphs is provided in the Appendix for the reader's reference.[278]

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[277] In Chapter 1, the cases were divided into seven categories. However, as the last category "other" is composed of cases not belonging to the six other categories and does not carries its own features, we do not conduct a cluster analysis of cases under this category.

[278] It should be noted that when the analyses were broken down into specific time periods and types of cases, the number of cases that fall within the scope of analysis also decreased. In some disaggregated analyses, there may be only one case (or even none) that satisfies the condition set forth in the designated category.

2. The Voting Blocs in the ICJ

2.1 Overall Observation: A Soviet Bloc in Advisory Opinion Proceedings

In studies of UN General Assembly voting behavior, Hovet, Alker and Russett, and Holloway have pointed out that the Soviet (Warsaw Pact) bloc was the most cohesive bloc in the UN.[279] However, looking through the dendrograms reflecting the emergence of blocs within the ICJ, I only find a Soviet bloc noticeable in the advisory opinions proceedings between 1946 and 2015. As shown in Figure 5-2, the judges from the three Communist States – namely the Soviet Union (marked as Russia), Poland, and Yugoslavia – formed into a compact cluster (the clusters are preliminarily separated with the black dotted line), and have voted quite distantly from most of the judges from NATO countries.

Although the analyses only report and identify one voting cluster formed by the judges from the (former) Soviet States, this finding nevertheless challenges the conclusion reached by some scholars that denies the existence of Soviet and NATO blocs in the ICJ.[280] In

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[279] THOMAS HOVET, AFRICA IN THE UNITED NATION (1963); ALKER & RUSSET, *supra* note 276, 166, 169; Bruce Russet, *Discovering Voting Groups in the United Nation*, 60 AM. POL. SCI. REV. 327, 338–39 (1966); Steven Holloway, *Forty Years of United Nation General Assembly Voting*, 23(2) CANADIAN J. POL. SCI. 279 (1990)

[280] Weiss, *supra* note 22, at 130.

addition, the finding here that reports the Polish judges vote closely with the other Communist state judges in advisory proceedings also challenges the traditional observation that the Polish judges vote distinctly from the other Communist judges.[281]

Exciting as it may be to identify a Communist bloc in the ICJ, the significance of this finding should not be overstated. The influence of the Soviet bloc is inherently limited by its size. As the Communist bloc only consists of three judges (the number of judges that Eastern European states were given during the earlier periods of ICJ), the *actual* influence and power of this Communist bloc in the ICJ should not be overemphasized since this group is unlikely to be impactful enough to alter the outcome of cases without the help of others. Just as the Soviet States were often doomed as a political minority in voting situations in the United Nations,[282] the Communist bloc also only shares limited influence in the ICJ.

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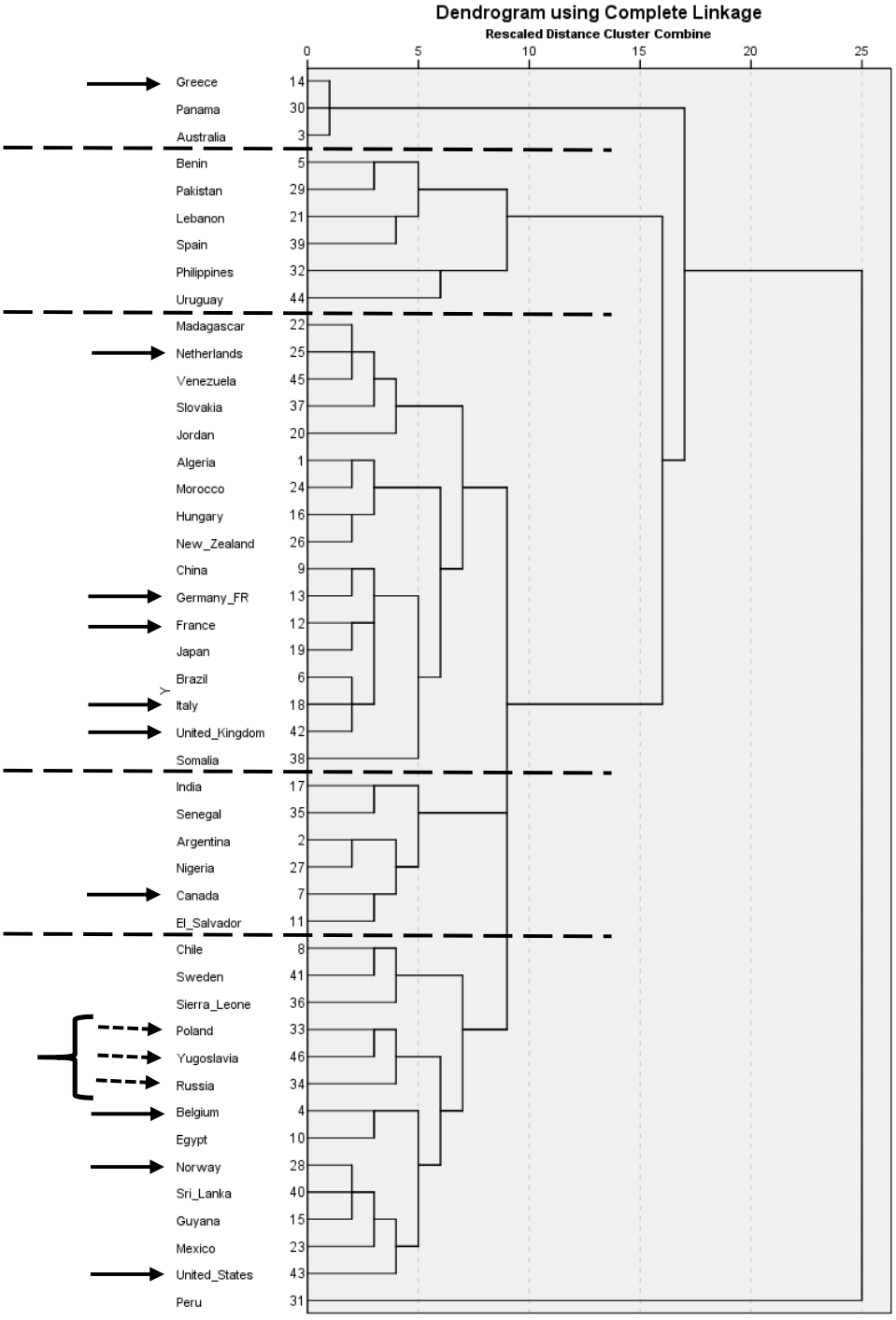
[281] Weiss argues that the Soviet judge and the Polish judge do not vote together much more frequently than the U.S. and Polish judge. *See id.* at 131. However, in some later periods of the ICJ, the Polish judge does vote distantly from the Soviet judges.

[282] EDWARD MCWHINNEY, THE INTERNATIONAL COURT OF JUSTICE AND THE WESTERN TRADITION OF INTERNATIONAL LAW 38, 56 (1987).

Figure 5-2 Cluster Analysis of Advisory Opinions (1946–2015)



NATO States; Communist States

Aside from the identification of a Communist bloc in the advisory opinion proceedings, our analysis across the Court's history only acquired limited information about the existence of meaningful clusters. Looking through the dendrograms that report the judges' clustering behavior in contentious cases, I find no clear indication that the judges from the same geographical region, with the same cultural background, or from countries that adhere to similar political ideology form into clusters. Most of the clusters identified consist of judges from countries with various differences and do not match with any pre-existing caucusing voting groups. Up to this point, as Weiss and McWhinney have argued,[283] there seems to be little evidence suggesting that political ideology or regional alignment have a significant influence on the ICJ judges' decision-making and voting patterns.

2.2 Disaggregated Analysis: The Voting Blocs that Emerge in Different Periods of History

While the analysis of all cases across the Court's history only reports one obvious voting bloc (at least in my perspective), I further disaggregate the analysis by breaking

[283] Weiss, *supra* note 22, at 129–31; MCWHINNEY, *supra* note 282, at 56.

down the timeline into shorter time-periods to see if other voting blocs emerge and if the already identified Communist bloc remains detectable in all subsets of cases. Here, the ICJ's history is divided into three periods. The first time-period covers cases from 1946 to 1966, the second time-period covers cases from 1967 to 1984, and the third time-period covers cases from 1985 to 2015.

(a) The Communist bloc in the Court

The Soviet bloc continues to remain noticeable in the disaggregated analyses. The three instances where the Soviet bloc is identified include: (1) advisory opinion proceedings between 1946 and 1966, (2) advisory opinion proceedings between 1985 and 2015, and (3) contentious case proceedings between 1985 and 2015. The dendrograms that show these analysis results are provided as Figures 5-3 to 5-5.

In the first period, the Communist bloc only appears in the advisory opinion proceedings and not in the analysis of contentious cases. However, the Communist bloc soon disappears in the second period in both sets of analyses as the number of seats distributed to the Eastern European states is reduced to accommodate more judges from the African and Asian regions and as the Polish judges start to vote differently than those

from the U.S.S.R. The Communist bloc does not revive and become noticeable again until the third period, after China (PRC) joins the group.

The finding showing the Chinese judges joining the Communist bloc in the third period is worth noticing. In the first time-period, the Chinese ICJ judges nominated by the Nationalist regime (the Republic of China currently located in Taiwan) voted closely with the judges from the NATO countries and remained distant from the Communist judges (*infra* Figure 5-3 is an example).[284] In the third period, however, the Chinese judges nominated by the Communist regime (the Peoples' Republic of China) became close companions with the judges from Russia (*infra* Figure 5-5 is an example). The cohesion between the Russian and Chinese judges also shares great similarity with the two countries' cooperation in the United Nations and other international organizations.[285]

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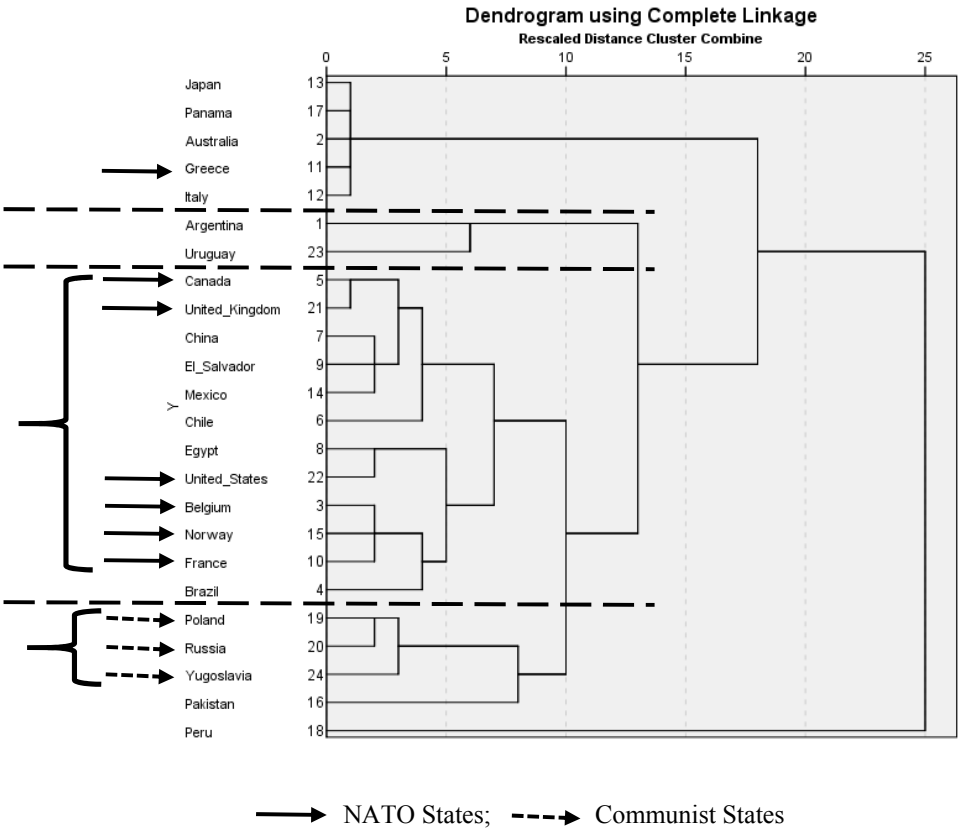
[284] G. Terry reports that Judge Hsu Mo voted closely with the judges from the U.K., Belgium, the U.S., France, Norway, and El Salvador (mostly NATO countries).

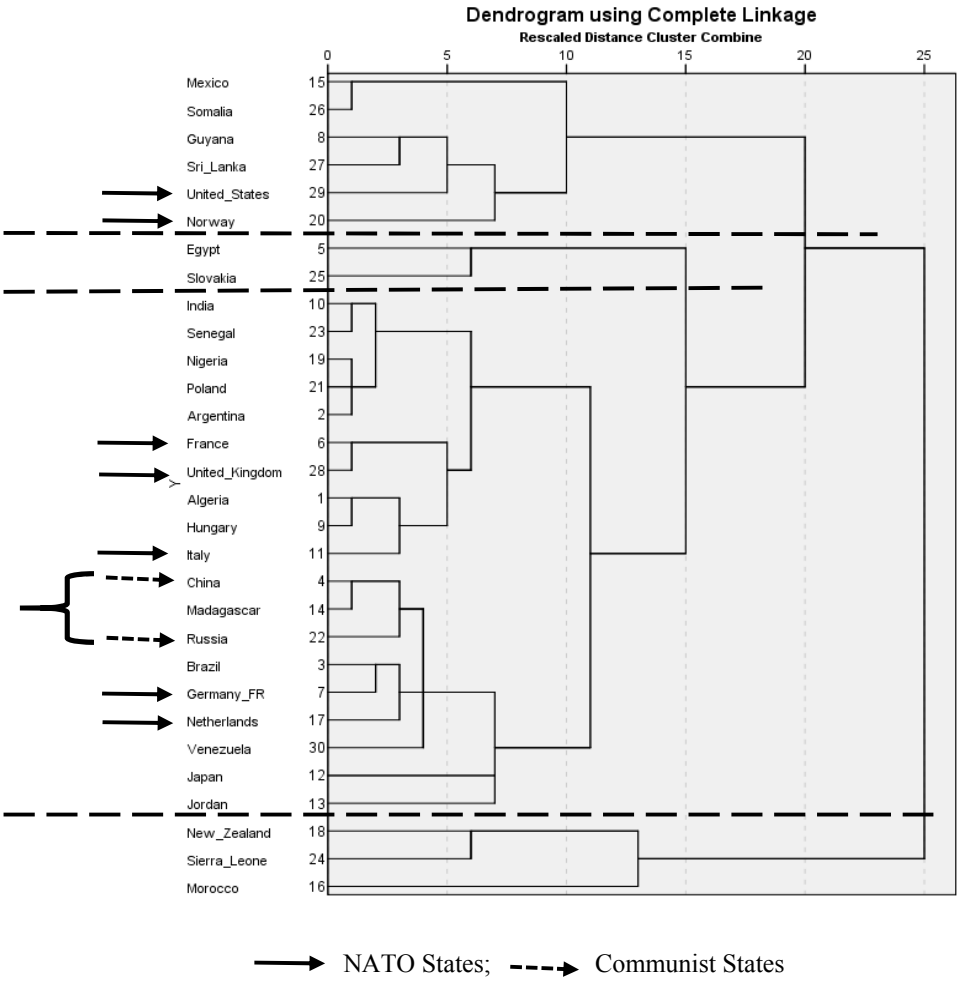
[285] Peter Ferdinand, *Rising powers at the UN: an analysis of the voting behaviour of brics in the General Assembly*, 35(3) THIRD WORLD QUARTERLY 376, 382 (2014) (see especially Table 3 for the index agreement between Russia and China in the UNGA). *See also* Andrew Kuchins, *Russia and China: The Ambivalent Embrace*, 106 CURRENT HISTORY 321, 324–25 (2007); H. BELOPOLSKY, RUSSIA AND THE CHALLENGERS: RUSSIAN ALIGNMENT WITH CHINA, IRAN AND IRAQ IN THE UNIPOLAR ERA 65–96 (2009) (noting the alignments between Russia and China in the UN over various issues).

Figure 5-3: Cluster Analysis of Advisory Opinions (1946–1966)



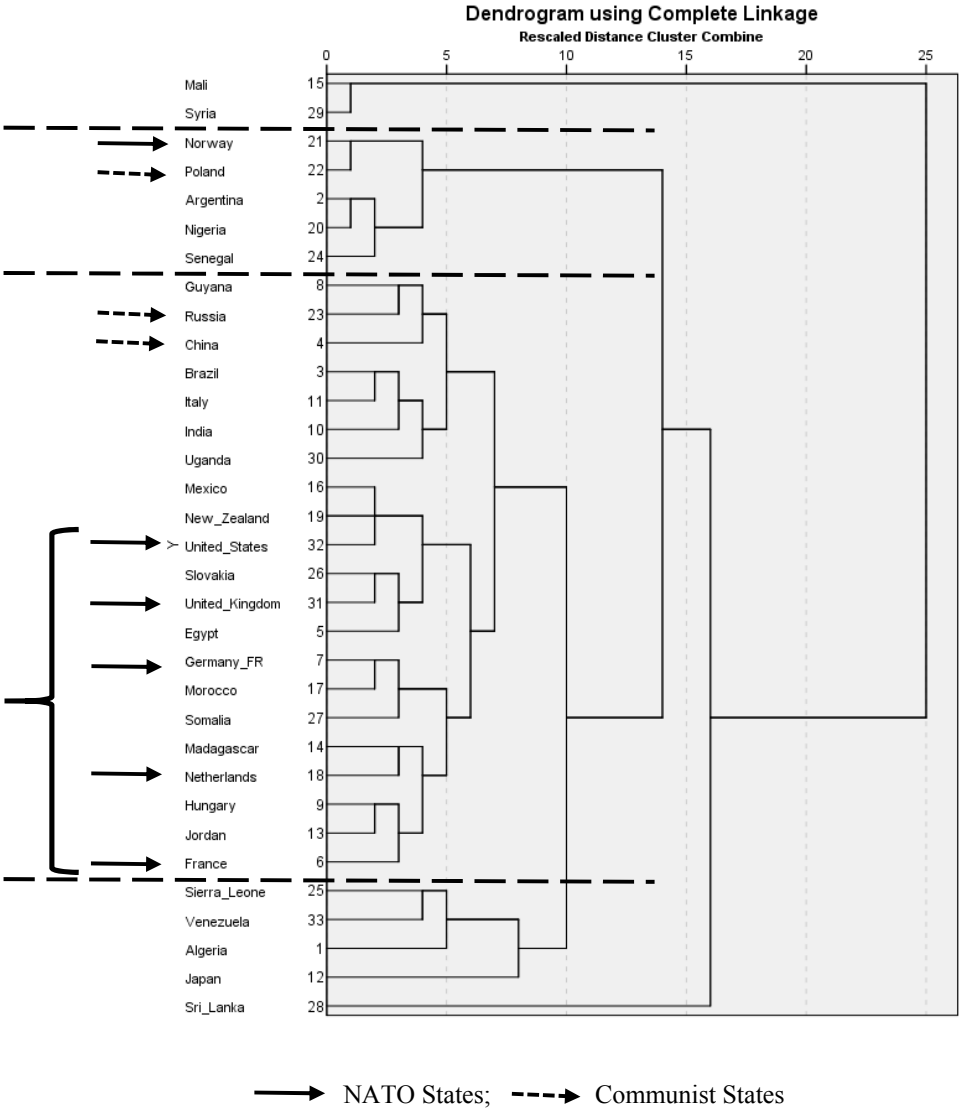
NATO States; Communist States

Figure 5-4 Cluster Analysis of Advisory Opinions (1985–2015)



NATO States; Communist States

Figure 5-5 Cluster Analysis of Contentious Cases (1985–2015)



NATO States; Communist States

(b) The NATO bloc

Besides the Communist bloc, a cluster formed by the NATO/Western democracy judges is also identified in the disaggregated analysis. The NATO bloc is especially observable in the advisory opinion and contentious proceedings in the first period (see *infra*

supra Figure 5-3 and *infra* Figure 5-6). Also, a vague image of the NATO bloc also appears in the analysis results of contentious proceedings in the second and third periods (*infra* Figures 5-7 and 5-8).

In contrast to the compact cluster formed among the Communist judges, the NATO cluster is formed in a much looser manner. Moreover, the judges from the Central or South America States are also found to vote closely with those from the NATO States.

Figure 5-6 Cluster Analysis of Contentious Cases (1946–1966)

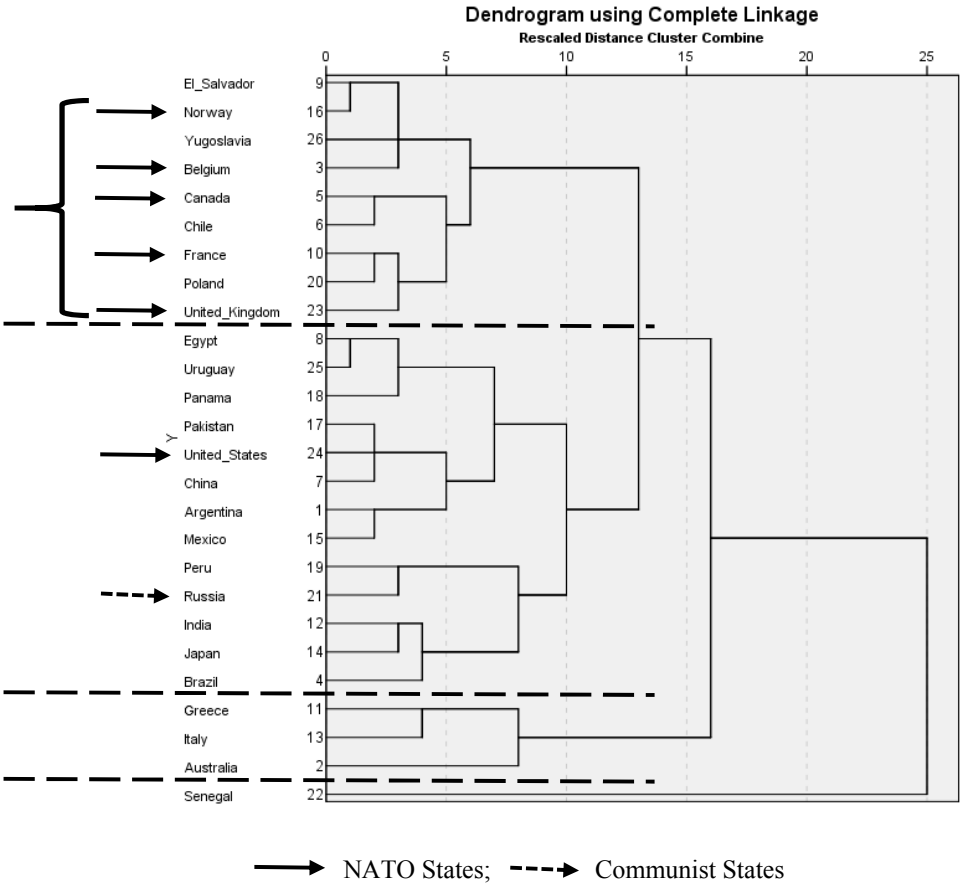
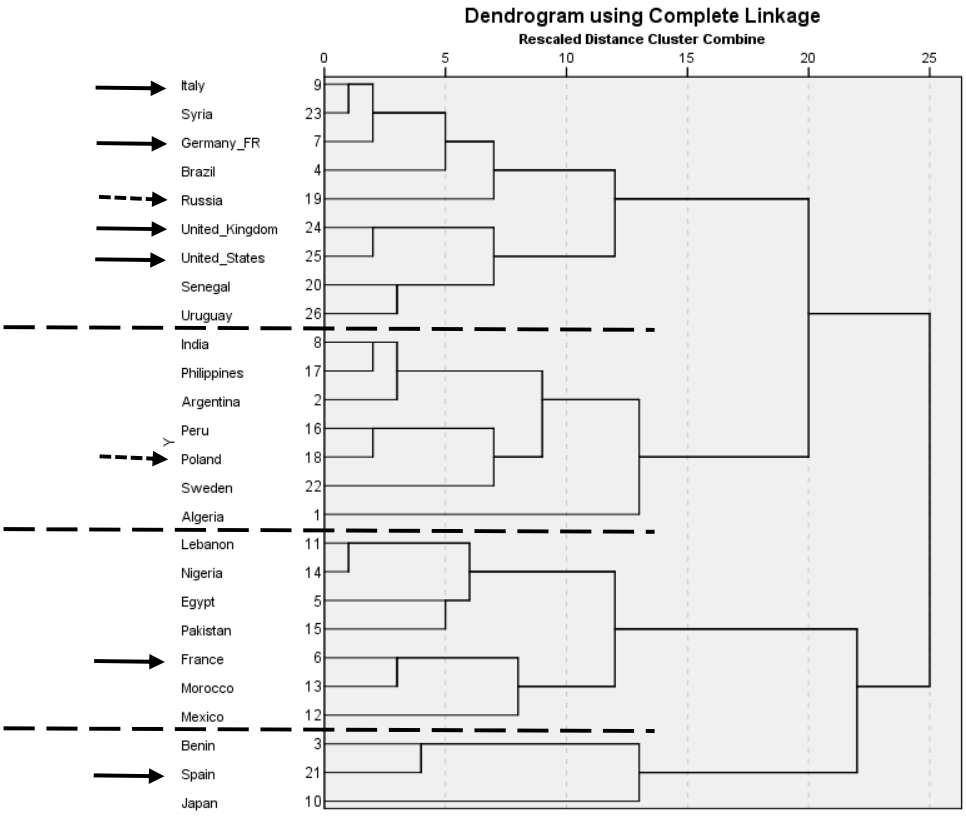
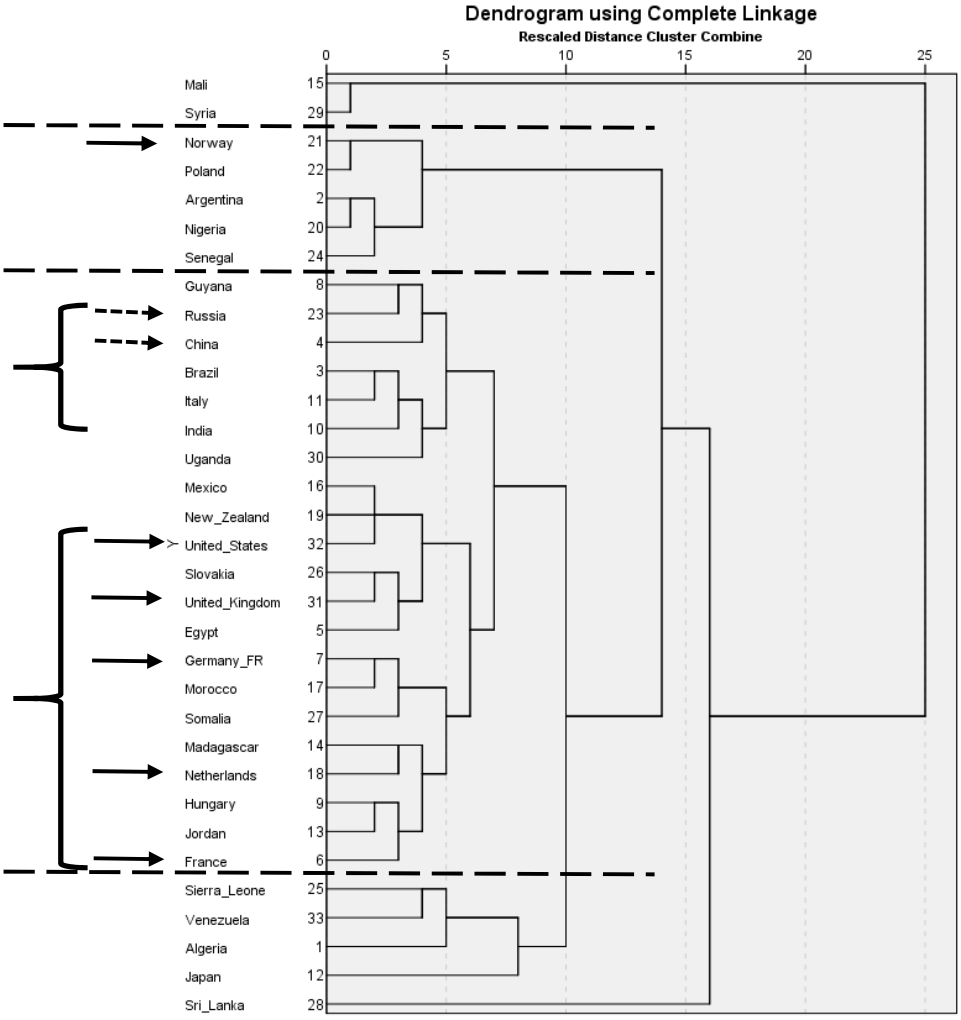


Figure 5-7 Cluster Analysis of Contentious Cases (1967–1984)



NATO States; Communist States

Figure 5-8 Cluster Analysis of Contentious Cases (1985–2015)



NATO States; Communist States

With regard to the size of the voting bloc, in most time-periods, the NATO bloc consists of more than five judges and is larger than the Communist bloc. The NATO bloc's power is especially observable in the analysis of contentious cases in the first period (*supra* Figure 5-6) where the Western democracies and the states from the American regions cluster together, forming a dominating group in the Court. Even after the reduction of some of the seats held by these countries after the 1960s, these two regions together still hold more than a third of the seats on the bench.[286] Given its size, the NATO bloc is evidently more influential than the others, and their collective power should not be underestimated. As the size of the voting bloc is interconnected with how the seats in the ICJ are distributed, this somewhat explains why the African and Asian countries have constantly called to have more seats distributed to their region. As already discussed in Chapter 2, even today, the

[286] Just to refresh the memory, the modern composition of the Court consists of "three judges from the Americas, one always being from the USA, the two others normally from Latin America, occasionally with a Canadian; three Africans, always including one from a North African Arab State; three Asians, always including one from the PRC and another from an Arab State; four from western Europe, always one each from France and the United Kingdom; and two from eastern Europe, one always from the USSR/Russia." See KOLB, *supra* note 35, at 114.

NATO and the American States together still hold more seats in the ICJ than the others and may have continued their influence over the decision-making of the ICJ.

Although the Communist and NATO blocs are both identified in the ICJ, these two blocs do not always co-appear. In contrast to the Communist bloc that appears in advisory opinion proceedings of the first period and disappears in the second period but is later revived in the third period, the NATO bloc remains visible almost throughout the Court's history (but sometimes formed loosely). However, throughout the Court's history, except in the advisory opinion proceeding of the first time-period, where relatively clear disagreements can be found between the Communist and NATO bloc judges and which may be inferred as a reflection of Cold War confrontation in the ICJ, there is no other evidence suggesting that there are systematic clashes between these two groups of judges.

(c) Are there other voting blocs in the ICJ?

In addition to the Cold War confrontation between the East and West, there are also rumors that there may be a North-South confrontation,[287] anti-colonialist and anti-western

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[287] LOUIS HENKIN, HOW NATIONS BEHAVE 187 (2D ED. 1979); MILTON. KATZ, THE RELEVANCE OF INTERNATIONAL ADJUDICATION 103–44 (1968). The ICJ was also thought to be biased against weaker states, *see* NATALIE KLEIN, DISPUTE SETTLEMENT IN THE UN CONVENTION ON THE LAW OF THE SEA 54–55

movements,[288] and even anti-U.S. groups[289] in the ICJ. Although political scientists such as Hovet, Russet, and Holloway have also identified some of these voting blocs in the UN General Assembly,[290] the analyses in this dissertation report no finding of any of these blocs. Instead, the analyses report two voting blocs formed by the P5 states and the BRIC countries in the third period.

In the first two periods, the judges from the United States, the Soviet Union, and those from the other Western European states vote distantly from each other. However, in the third period, the P5 state judges start to vote coherently. Unlike Peter Ferdinand's observation regarding the UN General Assembly's voting record that reports high

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(2005); John E. Noyes, *The International Tribunal for the Law of the Sea*, 32 CORNELL INT'L L.J. 109, 115 n.33 (1998).

[288] Gordon, *supra* note 126, at 397–98; Weiss, *supra* note 22, at 123–33; MCWHINNEY, *supra* note 126, at 64–65, 79.

[289] Keith Highet, *Evidence, the Court, and the Nicaragua Case*, 81 AM. J. INT'L L. 1, 53 (1987); Thomas M. Franck, *Icy Day at the ICJ*, 79 AM. J. INT'L L. 379, 380–82 (1985); THOMAS FRANCK, JUDGING THE WORLD COURT 35–38 (1986); W. MICHAEL REISMAN, *Termination of the United States Declaration Under Article 36(2) of the Statute of the International Court*, *in* THE UNITED STATES AND THE COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE 71 (ANTHONY CLARK AREND, ED., 1986).

[290] *See supra* note 279.

disagreement between the P5 countries,[291] the judges from these traditional political rivalries seem to embrace similar legal opinions between 1985 and 2015 as the disagreements between them reduced. The only exception to this observation is that the U.S. judges voted differently from the other four P5 judges in the advisory opinion proceedings during the third period.

In the third period, the judges from BRIC countries also clustered together in both the contentious case (*supra* Figure 5-8) and the advisory opinion proceedings (*infra* Figure 5-9, but without India).[292] The identification of the BRIC voting bloc in the ICJ nevertheless echoes Peter Ferdinand's study in which he concludes that there is "a high and now growing degree of cohesion among (the) BRICS" in the UN General Assembly.[293] It also hints that the intensification of the cooperation between the countries on economic,

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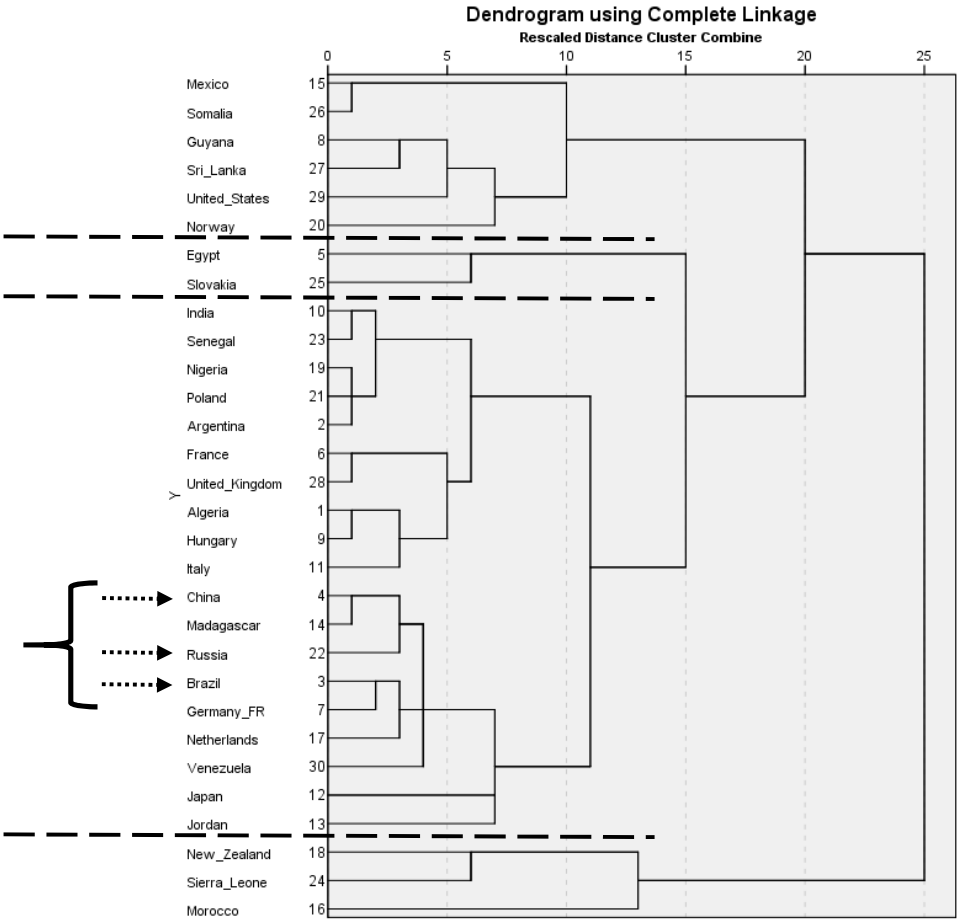
[291] Ferdinand, *supra* note 285, at 382.

[292] Note that South Africa is not represented in the ICJ. Hence, this dissertation is unable to observe the voting patterns of the judges from South Africa.

[293] *Id.* at 376. However, the study of Hooijmaaijers and Keukeleire later challenges Ferdinand's conclusion stating that there are no BRIC, *see* Bas Hooijmaaijers and Stephan Keukeleire, *Voting Cohesion of the BRICS Countries in the UN General Assembly, 2006.2014: A BRICS Too Far?*, 22 GLOBAL GOVERNANCE 389, 403 (2016).

political, and diplomatic issues may also have stimulated the judges from these countries to vote closely with each other.

Figure 5-9 Cluster Analysis of Advisory Opinions (1985–2015)



⋯⋯▶ BRIC States

2.3 Voting Clusters in the Subsets of Cases

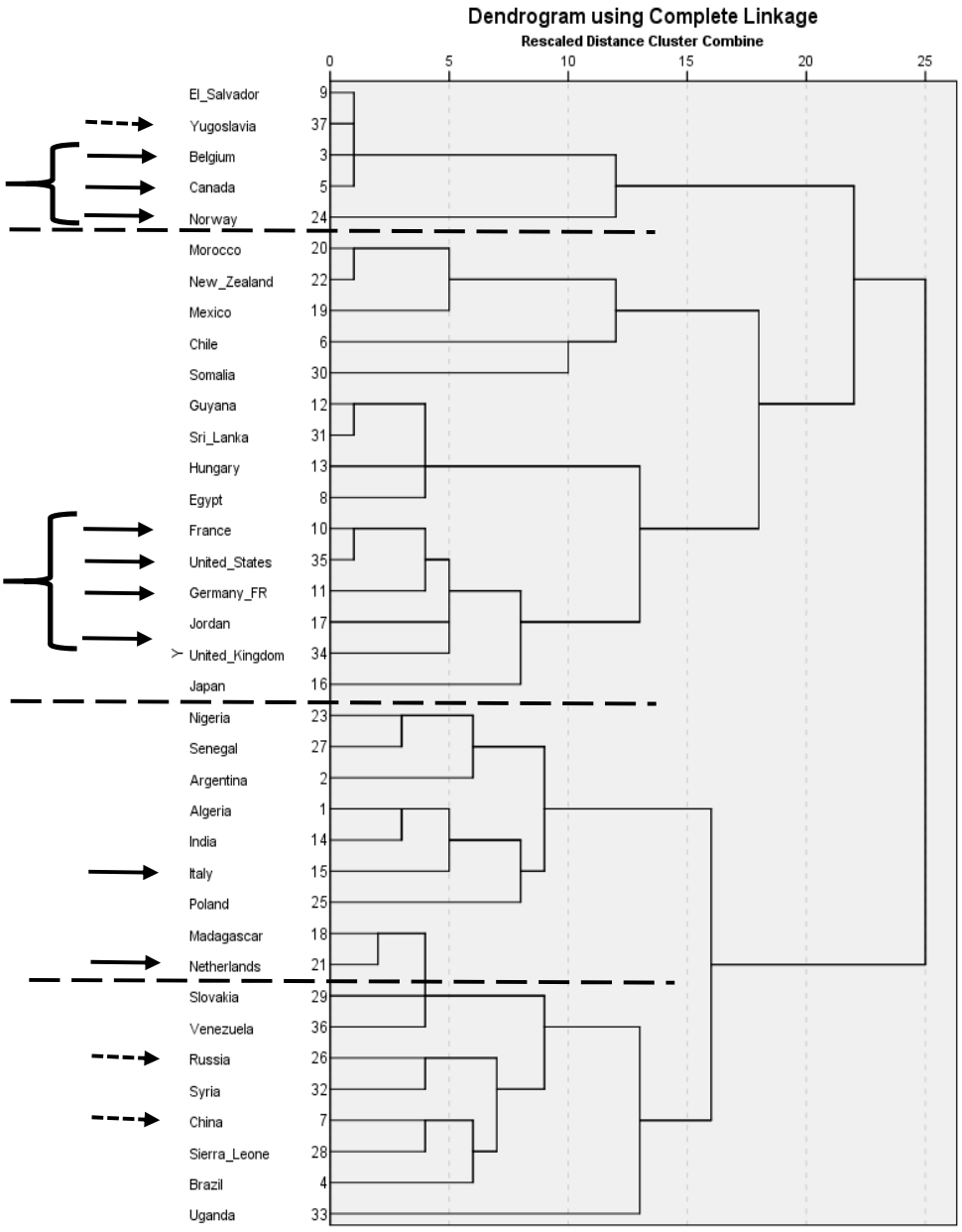
To observe if the judges' bloc voting behaviors are more active when the Court adjudicates over certain type(s) of disputes, I divide the contentious cases into six sub-

categories with the categorization method used in Ginsburg and McAdams' research.[294] In this part, I shall examine the clusters that emerge in these subsets of cases.

In the analyses of the subsets of cases, I am only able to identify voting blocs in cases relating to use of force disputes and trusteeship matters. The three types of clusters identified include the NATO bloc (*infra* Figures 5-10 and 5-11), and two other blocs formed by former colonial powers and formerly colonized states (reflecting the anti-colonial movement), respectively (*infra* Figure 5-12). The clusters found in the other subsets of cases seem to be formed quite randomly, and I summarize the findings in Table 5-1 below.

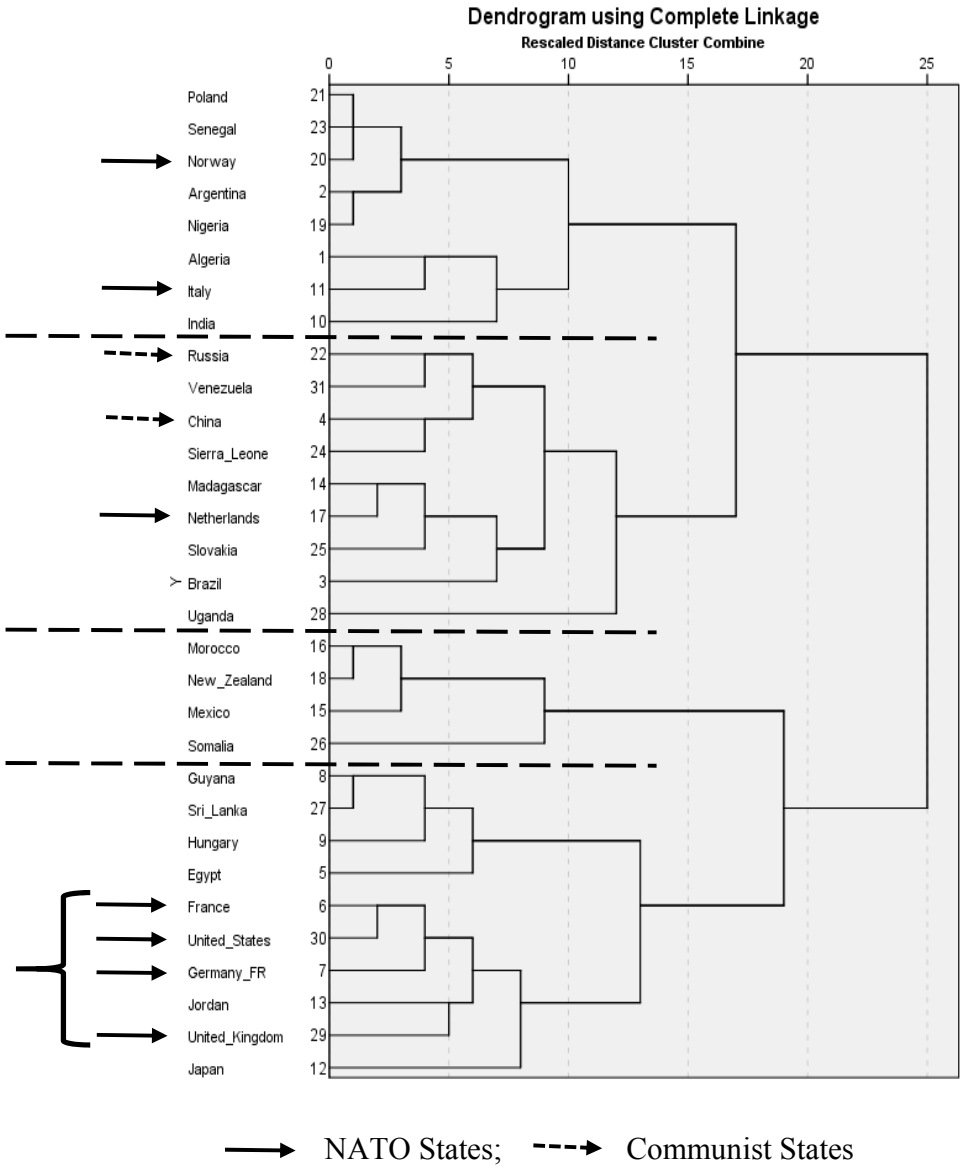
[294] Introduced earlier in Chapter 1, *see supra* note 72 (note 72 in Chapter 1).

Figure 5-10 Cluster Analysis of Use of Force Cases (1946–2015)



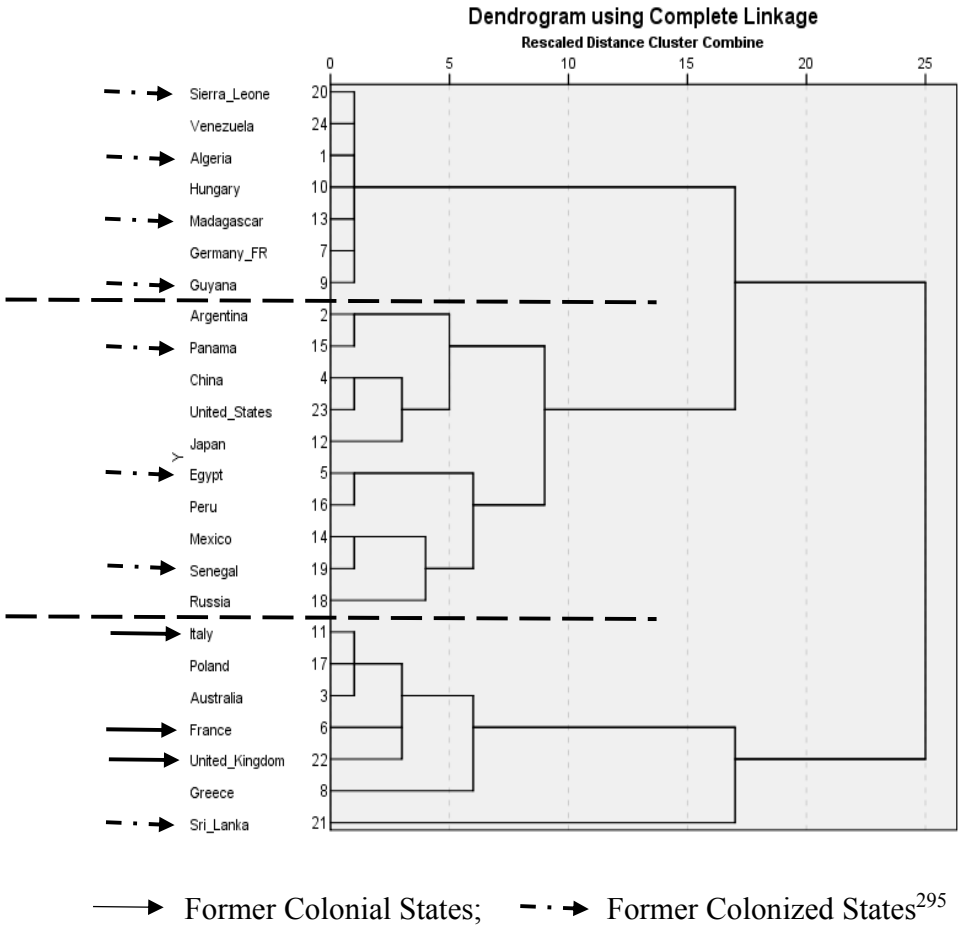
NATO States; Communist States

Figure 5-11 Cluster Analysis of Use of Force Cases (1985–2015)



NATO States; Communist States

Figure 5-12 Cluster Analysis of Trusteeship Cases (1946–2015)



→ Former Colonial States; - · → Former Colonized States[295]

[295] The status of "colonized state" here is determined by whether the state gained its independence after the end of World War II.

Table 5-1 Results of the Analyses of the Subsets of Cases

Results	Subset of Cases
Clusters Identified	1. Use of Force (T, III) 2. Trusteeship (T, I)
No Cluster	1. Property Rights (T, I, III) 2. Territorial Demarcation (T, I, II, III) 3. Diplomatic Relations (T, I, III) 4. Aerial Incidents (T, III)
Excluded due to single/no case in the subset	1. Trusteeship (II, III) 2. Diplomatic Relations (II) 3. Use of Force (I, II) 4. Property Rights (II) 5. Aerial Incidents (I, II)
Note: 'T,' 'I,' 'II,' and 'III' in the parentheses represent four time-periods. 'T' represents 1946-2015; 'I' represents 1946-1966; 'II' represents 1967-1984; 'III' represents 1985-2015.	

2.4 The NAM Bloc in the ICJ

Since the Third World countries adhere to the Policy of Non-Alignment (also known as the Non-Alignment Movement, NAM) in the United Nations,[296] I am interested in

[296] Another noticeable group or cohesion in the international organizations is the Group of 77 (G77). Although the G77 and the NAM bloc are frequently discussed together and are even said to have later emerged, the mandate and the origin of these two group are still entirely different. *See* Carol Geldart &

learning if the judges from these countries also form a NAM bloc and vote distinctly from the superpowers. As the NAM group has a sizeable number of judges in the Court, it would be interesting to learn if and how the Court is influenced (or not affected) by the judges from countries of the NAM group.

Although the NAM bloc is often characterized as a group independent of the superpowers, this is a false description of this group's features.[297] As Peter Lyon accurately describes, non-alignment does not mean isolationism or neutrality in the sense of strict military and diplomatic equidistance between the superpowers.[298] The essence of this policy is to allow states to decide issues on their merits without being influenced by external pressure and domination.[299] As Fidel Castro declared in the Havana Declaration

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Peter Lyon, *The Group of 77: A Perspective View*, 57(1) INT'L AFF. 79, 79–81 (1981); Peter Lyon, *Non-Alignment at the Summits: From Belgrade 1961 to Havana 1979—A Perspective View*, 41(1) INDIAN J. POL. SCI.132, 150 (1980).

[297] Holloway & Tomlinson, *supra* note 194, at 231–33; Voeten, *supra* note 194, at 199–201. The NAM77 bloc emerged in the 1970s, as this bloc was not reported in the studies of UN General Assembly voting during the 1960s, *see e.g.* Lijphart, *supra* note 168.

[298] Lyon, *supra* note 296, at 149.

[299] Surander Singh, *NAM in the Contemporary World Order: An Analysis*, 70(4) INDIAN J. POL. SCI. 1213, 1214 (2009).

of 1979: "[T]he quintessence of the nonalinement policy, in accordance with its original principles and fundamental nature, is the struggle against imperialism, colonialism, neocolonialism, apartheid, … , as well as the struggle against the policies of big powers or blocs."[300] In other words, the NAM group may be a bloc independent of both Communist and NATO blocs.

The NAM bloc is a cohesion of countries with differences and consists of a mixture of countries from the Afro-Asia bloc, the Muslim bloc, the Latin American bloc, and countries with different economic development statuses.[301] Although the loose and flexible criteria for membership and the lack of development agenda were said to be problems limiting the development of this group,[302] these are also the greatest features of the NAM group. Because of the NAM bloc's decentralized organization, each country is independent in developing and deciding its policy based upon the merits of the issue.[303]

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[300] *Speech by Cuban President Fidel Castro to the 34th UN General Assembly: Meets Officials at UN: Departs for Home*, available at http://lanic.utexas.edu/project/castro/db/1979/19791012.html (last visited July 12, 2017).

[301] Holloway & Tomlinson, *supra* note 194, at 231–33; Voeten, *supra* note 194, at 199–201.

[302] Singh, *supra* note 299, 1223.

[303] *Id.* at 1214–15, 1223.

The non-alignment policy also reduces the risk that the decision-making of the group will be dominated by the cohesive will of certain parties.

In this dissertation, the analyses report no cluster formed by judges from the NAM group. Nevertheless, this result of "non-clustering" may, in fact, suggest that the judges from the NAM bloc countries adhere to the non-alignment policy in the ICJ. The finding that the judges from the NAM group randomly cluster with the judges from the NATO and Communist blocs is also similar to political scientists' observations of the NAM group's voting behavior in the UN General Assembly.[304] As the NAM group has the largest number of judges in the ICJ, the non-alignment movement of these judges prevents the Court from being dominated by the superpowers or a particular group of judges. The lack of a strong mandate among the NAM group also enables the NAM bloc judges to decide cases more liberally and without political pressure. The existence of NAM blocs within the ICJ may have helped to make the ICJ's decision-making less politicized.

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[304] In Erik Voeten's analysis, the NAM group's votes are scattered between the East and West group and they joined different groups depending on the issue at stake. *See* Voeten, *supra* note 194, at 203–05.

3. The Regression Analysis

3.1 Research Design

Despite the efforts in visualizing the clusters to make the identification of voting blocs easier, the visual identification only enables us to detect three voting blocs. Hence, in the second part of this chapter, I use regression analysis to help to test if political/military alliances are significant variables that associate with the proximity between the judges' voting patterns, even net of other possible confounding factors. The use of regression analysis not only enhances the accuracy of the observation but may also help us to compare the degree of correlation between different variables.

In this section, I develop a set of regression models to examine if the voting distances between the judges correlate to the characteristics shared between the judges' home countries, such as political and military alignments, religion, level of democracy, geographical location, and economic development. The two political and military alignments examined are NATO membership and the Communist (Warsaw Pact) bloc. For religion, I examine if the judges from Christian countries (also reflecting the majority of

Western Civilization) voted more closely with each other.[305] The level of democracy is evaluated by the democracy score provided by the Polity III dataset compiled by the Center for Systematic Peace which evaluates a country's democracy scores with a set of criteria.[306] The regional variables tested here are Latin America, Middle East (also representing the Muslim community), and Africa matches to see if the judges from the same geographical

[305] Information regarding the major religious practices in each country is derived from the World Facts and Figure, the original website no longer functions but an archived webpage is preserved. *See Religion Statistics by Country*, World Facts and Figures.com, *accessible at* https://archive.is/WLcQr (last visited June 13, 2017).

[306] The Center for Systematic Peace compiled a Polity III dataset providing countries' year by year democracy scores calculated in accordance with a set of criteria including: (1) Competitiveness of Executive Recruitment; (2) Openness of Executive Recruitment; (3) Constraint on Chief Executive; and (4) Competitiveness of Political Participation. The scores ranged from 10 (most democratic) to -10 (least democratic), with an additional three standardized authority codes (-66, -77, -88) each indicating the countries in interruption periods (e.g. country under foreign occupation), interregnum periods (e.g., there is a collapse of central political authority), and transition periods (e.g., when new governments are planned). For further detail, see CENTER FOR SYSTEMATIC PEACE, POLITY IV PROJECT: DATASET USERS' MANUAL v2016 13–20, *available at* http://www.systemicpeace.org/inscr/p4manualv2016.pdf (last visited June 4, 2017). The democracy scores used in this dissertation derive from the polity2 column of the dataset. The democracy scores of a country within a specific time period is calculated by averaging the country's democracy scores within that period. For the purpose of this analysis I rescaled the democracy scores from 0 (least democratic) to 2 (most democratic). The Polity IV Project's website and database can be accessed at http://www.systemicpeace.org/inscrdata.html (last visited June 4, 2017).

region vote more closely with each other. Although the best option to evaluate economic development should be Gross Domestic Product (GDP) per capita, there is no available dataset that provides all states' GDP covering the ICJ's entire history.[307] Alternatively, I use OECD membership as indication of economic development. Lastly, in order to examine if the judges that frequently hear cases together share higher agreement with each other, the opportunity match is set to examine if the number of co-voting experiences correlates with the voting distance between the judges.[308] The results of the regression analyses are presented in Tables 5-2 and 5-3.

[307] The best dataset I can find is that compiled by the World Bank. However, the data for the GNP of countries in the World Bank database is also incomplete.

[308] The 'opportunity match' only applies to the observation of 'Disagreement' since this column observes the actual voting agreement between the judges where not every judge has the chance to vote with one another. Since 'L2' measures the distance between judges that never voted together before, voting opportunity is no longer a variable.

Table 5-2 OLS Regression Models of Bilateral Disagreement: Contentious Cases

	1946-2015		1946-1966		1967-1984		1985-2015	
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
VARIABLES	L2	disagreement	L2	disagreement	L2	disagreement	L2	disagreement
natomatch	-25.059***	-18.489***	-33.555***	-19.923*	-19.295#	-21.039#	4.021	0.140
	(4.101)	(3.943)	(9.649)	(9.201)	(10.758)	(11.177)	(4.719)	(4.618)
christianmatch	1.300	2.425	-5.106	1.611	3.713	10.230**	-13.333***	-4.073#
	(1.702)	(1.697)	(3.414)	(3.343)	(2.974)	(3.347)	(2.291)	(2.238)
oecdmatch	15.408***	10.048**	11.003#	3.673	0.956	3.056	-4.712	-0.874
	(3.152)	(3.182)	(6.404)	(6.839)	(5.271)	(5.799)	(3.496)	(3.404)
communistmatch	-18.760**	-6.810	-9.939	-8.443	-32.912	-27.824	-6.206	-8.546
	(6.770)	(6.155)	(16.399)	(13.922)	(23.395)	(24.343)	(6.606)	(6.867)
latinmatch	-12.025**	-0.910	-12.204*	-6.026	-7.918	-9.076	7.222	1.900
	(4.113)	(4.167)	(5.899)	(6.149)	(7.753)	(12.231)	(6.785)	(7.562)
africamatch	0.188	1.746	-	-	-0.414	11.177	-1.204	0.042
	(5.741)	(6.468)			(13.552)	(14.031)	(5.402)	(6.853)
middleeastmatch	2.932	-3.488	-	-	7.302	10.353	13.984*	-10.318
	(6.781)	(8.641)			(9.667)	(16.971)	(6.578)	(9.023)
opportunity		-0.065***		-0.531**		0.485		-0.007
		(0.015)		(0.189)		(0.301)		(0.017)
democmatch	4.942*	2.770	-1.886	-9.671*	-35.938*	-32.788#	10.287*	0.792
	(2.070)	(2.357)	(4.683)	(4.549)	(16.633)	(17.013)	(4.311)	(4.932)
Constant	49.666***	24.043***	63.940***	37.793***	54.427***	17.463***	35.739***	18.716***
	(1.135)	(1.357)	(2.473)	(3.356)	(1.792)	(3.328)	(1.200)	(1.656)
Observations	1,128	624	325	246	300	238	496	362
R-squared	0.057	0.077	0.070	0.080	0.037	0.077	0.118	0.021
Number of proceedings	108		25		13		70	
Number of Claims	322		38		24		260	

p≤.10, * p≤.05, ** p≤.01, *** p≤.001, two-tailed tests. Standard errors in parentheses. L2 refers to Euclidean distance between two countries with respect to voting consistency vis-à-vis P5 judges (or P4 when China is excluded between 1966 and 1984). "Disagreement" refers to actual percentage disagreement between countries that voted together

Table 5-3 OLS Regression Models of Bilateral Disagreement: Advisory Opinions

	1946-2015		1946-1966		1967-1984		1985-2015	
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
VARIABLES	L2	disagreement	L2	disagreement	L2	disagreement	L2	disagreement
natomatch	-18.016**	-11.045*	-66.004***	5.948	6.705	-3.225	-4.980	-3.947
	(5.782)	(5.661)	(15.517)	(13.989)	(20.036)	(15.380)	(6.172)	(5.235)
christianmatch	10.162***	9.128***	6.343	13.042**	1.374	6.309	-11.988***	-2.712
	(2.513)	(2.429)	(6.216)	(5.122)	(5.824)	(4.741)	(3.260)	(2.707)
oecdmatch	-1.220	1.260	19.056#	-14.348	-15.359	2.137	6.484	3.887
	(4.459)	(4.581)	(10.340)	(10.031)	(9.886)	(8.442)	(4.653)	(3.853)
communistmatch	-20.154*	-8.321	-64.591*	-22.394	-19.557	0.818	-7.149	-14.281#
	(9.548)	(8.265)	(26.272)	(19.193)	(43.588)	(32.408)	(8.639)	(7.395)
latinmatch	7.895	-0.245	3.586	-7.643	22.369	-26.566	12.663	-11.381
	(5.825)	(6.227)	(9.466)	(8.888)	(18.338)	(18.784)	(8.943)	(9.932)
africamatch	10.011	7.254	-	-	-1.825	-5.520	10.101	19.955#
	(9.551)	(11.537)			(25.243)	(18.599)	(8.608)	(11.185)
middleeastmatch	-2.245	3.057	-	-	15.873	-20.731	32.502**	19.294
	(11.656)	(14.860)			(18.013)	(32.030)	(11.029)	(13.677)
opportunity		-0.038		-0.622*		1.525*		0.214
		(0.108)		(0.318)		(0.716)		(0.162)
democmatch	7.527**	2.157	-12.016	1.416	-31.299	-14.759	10.741#	14.940*
	(3.044)	(3.440)	(8.023)	(6.643)	(31.012)	(22.813)	(6.158)	(6.315)
constant	60.313***	19.305***	77.087***	32.009***	86.451***	19.206***	49.546***	12.972***
	(1.677)	(1.967)	(4.969)	(4.824)	(3.430)	(4.639)	(1.670)	(2.128)
Observations	1,035	543	276	209	276	221	435	291
R-squared	0.041	0.035	0.089	0.065	0.023	0.048	0.071	0.066
Number of proceedings	22		8		6		8	
Number of claims	68		21		16		31	

p≤.10, * p≤.05, ** p≤.01, *** p≤.001, two-tailed tests; Standard errors in parentheses. L2 refers to the Euclidean distance between two countries with respect to voting consistency vis-à-vis P5 judges (or P4 when China is excluded between 1966 and 1984). "Disagreement" refers to actual percentage disagreement between countries that voted together

3.2 Regression Analysis of Contentious Cases and Advisory Opinions

Tables 5-4 and 5-5 report above two sets of regression results regarding contentious cases and advisory opinions. The 'Disagreement' column reflects the changes to the actual

co-voting between the judges, whereas the 'L2' column reflects the change of relative distance between the judges computed with the Euclidean distance as introduced in Chapter 3. The number of observation (N) under the 'L2' and 'Agreement' is different because 'L2' reports the relative distance between the judges' votes even if they have never voted together while the 'Disagreement' only measures the voting distance between judges that have voted together. Accordingly, 'L2' observes more pairs of judges than 'Disagreement.' A negative coefficient in the 'L2' and 'Disagreement' columns indicates a decrease in voting distance between the two judges' when their countries share the common features; alternately, a positive coefficient indicates that when the feature of the judges' home countries matches, the distance between the two judges' votes increases (i.e., the disagreement increases). As I aim to observe the variables causing the judges to vote cohesively, I pay special attention to the variables that report a negative coefficient.

In both Tables 5-4 and 5-5, the results confirm our previous observation that NATO and Communist matches are two significant factors correlating to the reduce of the voting distance between the judges. Moreover, the Communist match is the only variable that reports a (significant) negative coefficient throughout the Court's history and in every divided period in both contentious cases and advisory opinion proceedings. Although the

NATO match also constantly reports a negative coefficient, the scale of its correlation with the judges' voting distances seems to be diminishing. The significant negative coefficient of the NATO match starts to weaken after the first period and almost disappears in the last period. Unlike the consistent negative coefficient reported among the Communist match, the NATO match is no longer a significant variable that correlates to shortening the voting distance between the judges after the end of the Cold War. Instead, in the third period, the Christianity match seems to have replaced the NATO match and has become an influential variable that correlates with the clustering behavior of the ICJ judges. In the analysis of both contentious cases and advisory opinions in the third period, the Christianity match reports a significant negative coefficient while the influence of the NATO match turns marginal. Nonetheless, it should be noted that the members of NATO are mostly also Christian states. In other words, these two matching groups highly overlap with one another. In a separate analysis removing the Christianity variable with the other variables unchanged, in the third period, the significance of the NATO match increased.

Like Posner and Figueredo's research, the study in this dissertation is also troubled by the multicollinearity problem since the features of the predictor variables correlate with one another. For instance, many countries that are NATO members are also OECD

members, many Christianity countries are also NATO and OECD members and share a high democracy level rating. Table 5-4 below presents an example of the results when I tested the different combination of variables in the regression. In the first and second sets of analyses where the NATO and Christianity matches were set as the variable while the OECD match is excluded, both the NATO and Christianity matches report a significant negative coefficient. However, in the third set of analyses where all three matches are tested together, the NATO and Christianity matches' influences disappear while the OECD match reports a (significant) negative coefficient.

Table 5-4 OLS Regression Models of Bilateral Disagreement:

Contentious Cases (1985–2015)

	(1)	(2)	(3)	(4)	(5)	(6)
VARIABLES	L2	disagreement	L2	disagreement	L2	disagreement
natomatch	-9.210*	-3.413			4.021	0.140
	(3.738)	(3.474)			(4.719)	(4.618)
christianmatch			-14.188***	-4.330*	-13.333***	-4.073#
			(2.008)	(1.998)	(2.291)	(2.238)
oecdmatch					-4.712	-0.874
					(3.496)	(3.404)
… the other variables and results omitted.						
# p≤.10, * p≤.05, ** p≤.01, *** p≤.001, two-tailed tests; Standard errors in parentheses.						

With regard to the other variables, the 'Latin-American' match also occasionally reports negative coefficients; the democracy level match reports a significant negative coefficient in the analysis of advisory proceedings. Meanwhile, the African and the Middle East geographical matches show weak correlation with the voting distances between the judges.

3.3 Regression Analysis of Subsets of Cases

Let's now analyze the subsets of cases categorized by dispute types and by different time periods to observe the variables' influence in a smaller context. The analysis results are provided in Tables 5-5 to 5-8.

The Communist match continues to report a significant negative coefficient in almost all types of cases across the Court's history. On the other hand, due to the multicollinearity problem, the NATO match reports a less significant negative coefficient but remains noticeable. The NATO match's influence is especially observable in the overall analysis of Territorial Demarcation and Aerial Incident cases, and in Use of Force and Diplomatic Relationship disputes in all three periods. The OECD and Christianity matches also report significant negative coefficients in a wide range of cases, especially in Trustee cases. Meanwhile, regional geographical matches such as the Middle East and Latin American

matches report weak correlation with the clustering of judges but are still occasionally noticeable.

The regression results reported in Tables 5-6, 5-7, and 5-8 support the findings of the previous section where we argued that judges are likely to vote closely with those from countries that share common features with their home country. The identified influential extrajudicial factors affecting the clustering of judges include shared political ideology (Communist match), shared culture and religious practices (Christianity match, may also represent civilization), military alignment (NATO match), similar degree of economic and democracy development (OECD and democracy level matches), and shared geographical location (Latin America, Middle East, and Africa matches). Although the density of the clusters and the significance of the variables' influences vary, the clustering behavior is widely observable in almost all types of cases and every period throughout the Court's history.

Furthermore, the cohesive voting behaviors among judges from BRIC countries are also verified in the regression analysis (Table 5–9). Between 1985 and 2015, judges from

Table 5-5 OLS Regression Models of Bilateral Disagreement: Contentious Cases (1946-2015)

	Territorial Demarcation	Use of Force	Diplomatic Relationship	Aerial Incident	Trusteeship	Property Rights
VARIABLES	L2	L2	L2	L2	L2	L2
natomatch	-25.325***	-2.632	10.318*	-9.253	6.812	18.052
	(5.650)	(3.995)	(5.187)	(11.944)	(20.145)	(12.112)
christianmatch	2.147	-2.182	-7.968***	-13.900**	-0.978	6.809
	(2.346)	(1.685)	(2.192)	(5.195)	(9.074)	(5.114)
oecdmatch	17.791***	-4.155	-13.148**	17.714*	-23.221	4.450
	(4.344)	(3.586)	(4.657)	(8.709)	(17.030)	(8.992)
communistmatch	-19.550*	0.364	-7.096	-7.081	4.972	-26.291
	(9.328)	(5.028)	(6.532)	(21.346)	(28.036)	(18.389)
latinmatch	-8.715	2.986	11.222*	10.450	-22.446	41.953**
	(5.667)	(4.400)	(5.720)	(16.966)	(18.912)	(13.234)
africamatch	5.943	5.794	-1.319	-15.048	-34.873	-18.992
	(7.910)	(5.018)	(6.516)	(16.654)	(39.505)	(18.440)
middleeastmatch	2.112	4.919	18.137*	53.650**	50.351	-0.486
	(9.343)	(6.114)	(7.939)	(21.399)	(67.910)	(23.648)
democmatch	19.345***	6.028**	-4.467#	20.808**	21.030	59.833***
	(2.853)	(2.013)	(2.566)	(7.857)	(16.138)	(6.393)
Constant	64.803***	51.737***	54.329***	119.466***	129.154***	53.881***
	(1.563)	(1.053)	(1.368)	(3.217)	(5.925)	(3.354)
Observations	1,128	666	666	496	276	630
R-squared	0.071	0.031	0.058	0.047	0.023	0.162
Number of proceedings	39	30	22	7	4	6
Number of Claims	106	96	72	15	5	27

p≤.10, * p≤.05, ** p≤.01, *** p≤.001, two-tailed tests; Standard errors in parentheses. L2 refers to the Euclidean distance between two countries with respect to voting consistency vis-à-vis P5 judges (or P4 when China is excluded between 1966 and 1984).

Table 5-6 OLS Regression Models of Bilateral Disagreement: Contentious Cases (1946-1966)

	Territorial Demarcation	Use of Force	Diplomatic Relationship	Aerial Incident	Trusteeship	Property Rights
VARIABLES	L2	L2	L2	L2	L2	L2
natomatch	6.116	-41.768**	-4.587	37.641	32.527	25.143
	(15.206)	(12.990)	(8.043)	(69.519)	(53.556)	(30.541)
christianmatch	8.736	21.427*	-4.182	-4.840	16.558	22.571*
	(6.092)	(9.418)	(4.888)	(25.052)	(15.720)	(10.934)
oecdmatch	-5.335	-	-	-18.225	-13.745	-6.569
	(10.133)			(55.992)	(25.476)	(25.721)
communistmatch	-36.283	30.691	-14.455	-92.387	70.372	-41.978
	(25.746)	(22.122)	(16.556)	(108.431)	(82.180)	(32.874)
latinmatch	5.814	3.653	14.203#	-92.387	-76.708*	14.279
	(9.277)	(16.259)	(8.118)	(64.364)	(35.208)	(23.827)
africamatch	-	-	-	-	-	-
middleeastmatch	-	-	-	-	-	-
democmatch	-11.533	-7.744	-4.926	-73.041*	17.763	-41.369**
	(7.863)	(10.210)	(5.948)	(34.380)	(29.318)	(15.277)
Constant	76.090***	25.116***	39.143***	97.227***	105.942***	72.275***
	(4.869)	(7.394)	(3.497)	(17.914)	(11.323)	(8.298)
Observations	276	91	171	91	120	136
R-squared	0.027	0.171	0.039	0.088	0.061	0.105
Number of proceedings	6	3	10	1	3	2
Number of Claims	8	6	14	1	3	6

p≤.10, * p≤.05, ** p≤.01, *** p≤.001, two-tailed tests; Standard errors in parentheses. L2 refers to the Euclidean distance between two countries with respect to voting consistency vis-à-vis P5 judges (or P4 when China is excluded between 1966 and 1984).

Table 5-7 OLS Regression Models of Bilateral Disagreement: Contentious Cases (1967-1984)

	Territorial Demarcation	Use of Force	Diplomatic Relationship	Aerial Incident	Trusteeship	Property Rights
VARIABLES	L2	L2	L2	L2	L2	L2
natomatch	-22.843	-7.476	-5.104	-57.143#	-	-
	(18.672)	(18.724)	(30.282)	(33.586)	-	-
christianmatch	-4.908	12.461**	8.933	-8.278	-	-
	(5.433)	(4.612)	(10.580)	(11.382)	-	-
oecdmatch	12.734	-25.271**	-35.699*	22.997	-	-
	(9.167)	(7.870)	(17.069)	(19.904)	-	-
communistmatch	-75.403#	-32.747#	28.478	65.854	-	-
	(40.590)	(17.391)	(43.981)	(49.260)	-	-
latinmatch	18.696	2.608	-40.804	-34.146	-	-
	(13.452)	(17.391)	(43.981)	(49.260)	-	-
africamatch	-1.807	-20.287	-31.871	24.242	-	-
	(23.581)	(17.064)	(43.365)	(29.349)	-	-
middleeastmatch	-9.600	-20.287	72.052#		-	-
	(40.527)	(17.064)	(43.365)		-	-
democmatch	-48.144#			-34.146	-	-
	(28.858)			(35.245)	-	-
Constant	80.311***	20.287***	31.871***	42.424***	-	-
	(3.589)	(2.320)	(5.618)	(8.472)	-	-
Observations	253	78	91	91	-	-
R-squared	0.046	0.248	0.117	0.087	-	-
Number of proceedings	9	2	1	1	0	0
Number of Claims	12	4	6	2	0	0

p≤.10, * p≤.05, ** p≤.01, *** p≤.001, two-tailed tests; Standard errors in parentheses. L2 refers to the Euclidean distance between two countries with respect to voting consistency vis-à-vis P5 judges (or P4 when China is excluded between 1966 and 1984). There are no 'Trusteeship' case in this period. There is one "Property Rights" case in this period, but the votes are unidentifiable. The Property Rights case in this period was decided unanimously. Hence, it cannot be regressed.

Table 5-8 OLS Regression Models of Bilateral Disagreement: Contentious Cases (1985-2015)

	Territorial Demarcation	Use of Force	Diplomatic Relationship	Aerial Incident	Trusteeship	Property Rights
VARIABLES	L2	L2	L2	L2	L2	L2
natomatch	1.345	-9.758*	-18.815***	-1.284	59.289	25.608
	(5.596)	(4.398)	(5.539)	(34.529)	(45.408)	(17.569)
christianmatch	-11.824***	-3.830#	-0.485	-29.256*	-59.289**	-20.479*
	(2.716)	(2.159)	(2.845)	(14.583)	(18.802)	(8.604)
oecdmatch	-8.518*	1.646	5.633	24.483	-61.008#	-3.001
	(4.146)	(3.260)	(3.835)	(27.635)	(35.475)	(12.161)
communistmatch	-14.133#	-1.556	-11.733	-16.453	-41.245	-43.411
	(7.833)	(6.157)	(8.125)	(38.019)	(44.493)	(29.534)
latinmatch	7.692	8.194	23.399*	-25.053	-1.719	-3.777
	(8.046)	(6.322)	(11.594)	(65.955)	(77.041)	(21.957)
africamatch	5.109	5.269	1.837	-88.676	-61.008	-7.646
	(6.406)	(5.043)	(8.126)	(65.286)	(76.251)	(29.643)
middleeastmatch	15.334*	12.444	-16.592*	103.605	-	39.469
	(7.800)	(7.866)	(8.155)	(65.286)		(29.643)
democmatch	9.113#	13.936***	-1.633	92.843	-1.719	-25.625
	(5.112)	(4.197)	(7.146)	(65.955)	(77.041)	(19.859)
Constant	35.849***	43.291***	30.554***	88.676***	61.008***	50.237***
	(1.423)	(1.171)	(1.576)	(7.997)	(10.932)	(5.046)
Observations	496	465	276	120	91	190
R-squared	0.109	0.059	0.081	0.097	0.152	0.078
Number of proceedings	24	25	11	5	1	4
Number of Claims	86	80	52	13	2	21

p≤.10, * p≤.05, ** p≤.01, *** p≤.001, two-tailed tests; Standard errors in parentheses. L2 refers to the Euclidean distance between two countries with respect to voting consistency vis-à-vis P5 judges.

BRIC countries voted closely with each other in both contentious and advisory opinion proceedings, as the analysis reports a significant negative coefficient. The only type of dispute in which the judges from BRIC countries did not show cohesive voting behaviors was the disputes over Property Rights. As the BRIC bloc consists of groups of judges from

Table 5-9 OLS Regression Models of Bilateral Disagreement: 1985-2015

(adding BRIC match as variable)

	Contentious Cases	Advisory Opinions	Territorial Demarcation	Use of Force	Diplomatic Relationship	Aerial Incident	Trusteeship	Property Rights
VARIABLES	L2	L2	L2	L2	L2	L2	L2	L2
bricmatch	**-17.781***	**-30.000****	**-14.310**	**-9.219**	**-1.249**	**-57.794**	**-29.954**	6.485
	(8.449)	(11.000)	(10.044)	(7.993)	(8.233)	(39.810)	(93.411)	(31.239)
natomatch	3.921	-5.143	1.264	-9.852*	-18.820***	-1.517	59.909	25.621
	(4.703)	(6.126)	(5.590)	(4.453)	(5.550)	(34.359)	(45.696)	(17.615)
christianmatch	-13.457***	-12.208***	-11.924***	-3.260	-0.502	-29.022*	-59.909**	-20.493*
	(2.283)	(3.237)	(2.714)	(2.176)	(2.853)	(14.511)	(19.003)	(8.627)
oecdmatch	-4.898	6.112	-8.668*	1.816	5.609	23.295	-61.211#	-2.908
	(3.485)	(4.620)	(4.143)	(3.328)	(3.845)	(27.510)	(35.674)	(12.201)
communistmatch	-4.553	-4.407	-12.804	-1.723	-11.549	1.546	-31.257	-45.476
	(6.630)	(8.633)	(7.881)	(6.270)	(8.230)	(39.810)	(54.510)	(31.239)
latinmatch	7.060	12.334	7.561	7.009	23.380*	-26.475	-1.302	-3.672
	(6.762)	(8.877)	(8.038)	(6.386)	(11.616)	(65.636)	(77.472)	(22.021)
africamatch	-1.482	9.552	4.885	4.399	1.802	-89.864	-61.211	-7.554
	(5.385)	(8.546)	(6.401)	(5.117)	(8.144)	(64.968)	(76.669)	(29.725)
middleeastmatch	13.698*	31.952**	15.104*	12.154	-16.629*	102.417	-	39.561
	(6.556)	(10.949)	(7.793)	(7.987)	(8.173)	(64.968)		(29.725)
democmatch	10.127*	10.448#	8.985#	-1.083	-1.652	91.422	-1.302	-25.550
	(4.297)	(6.113)	(5.108)	(2.252)	(7.160)	(65.636)	(77.472)	(19.915)
Constant	36.026***	50.096***	36.079***	44.123***	30.591***	89.864***	61.211***	50.146***
	(1.204)	(1.670)	(1.431)	(1.256)	(1.598)	(7.999)	(11.010)	(5.078)
Observations	496	435	496	465	276	120	91	190
R-squared	0.126	0.087	0.113	0.040	0.082	0.114	0.153	0.078
Number of proceedings	70	8	24	25	11	7	1	4
Number of Claims	260	31	86	86	52	15	2	21

p≤.10, * p≤.05, ** p≤.01, *** p≤.001, two-tailed tests; Standard errors in parentheses. L2 refers to the Euclidean distance between two countries with respect to voting consistency vis-à-vis P5 judges. There is only one 'Trusteeship' case in this period.

countries that are going through rapid economic growth[309] and have established political collaboration with one another, this finding again suggests how the match of wealth and political alignments between the judges' home countries are associated with the closeness between the judges' voting patterns.

4. Do the Voting Blocs Affect the Function of the ICJ?

The immediate question that follows after affirming the existence of the voting blocs is whether and how these voting blocs influence the function of the ICJ, and if the existence of voting blocs affects the states' willingness to use this forum. Although the analysis methods deployed in this research do not address these questions directly, for two reasons, I surmise that the influence of these voting blocs is insignificant.

First of all, although I have identified the voting blocs that exist in the ICJ and the variables that correlate with the voting distances between the judges, nothing in the findings suggests that the judges in different voting blocs disagree with each other

[309] The term BRIC(S) was invented by Jim O'Neill, an analysist at Goldman Sachs, as an acronym of four countries at a similar stage of advanced economic development. But later in 2010, BRIC became a formal institution where the countries held summits regularly and discussed possible political and economic cooperation between these countries.

constantly. Furthermore, as I have pointed out in Chapter 4 that the majority of ICJ decisions were made with the support of more than 80 percent of the bench, the high rate of support over the decisions also suggests that no systematic confrontation exists in the Court.[310]

The second reason to surmise that the voting blocs in the ICJ only share limited influence is that the power of these blocs is limited by their size. Throughout the ICJ's history, the NATO bloc is the largest voting bloc identified in this study.[311] However, under the unwritten decision to compose the Court with the 'equitable geographical distribution' formula, the number of judges from NATO countries is still limited and rarely exceeds five. Although there lacks a justifiable reason to distribute the seats by geographical region and allow the Western European states better representation in the Court, the equitable distribution formula nevertheless ensures that no single group acquires

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[310] 75 percent of contentious cases and 61 percent of advisory opinions are decided with more than 80 percent of the judges supporting the decision. For details, *see* Chapter 4 Section 1.

[311] The Christianity bloc may be even larger, however their influence is not as significant. Also, the NAM group also has a greater number of judges in it. But as the NAM group judges do not cluster with each other, their influence is also insignificant.

the majority of votes on the bench.[312] Accordingly, the influence of these groups is restrained.

With regard to whether the existence of voting blocs affects states' willingness to utilize the ICJ as a dispute settlement forum, the suggestive answer is also negative. First, besides some political statements, there lacks indication that states refrain from utilizing the ICJ because voting clusters exist in the Court. In Chapter 2, despite territorial demarcation being the type of case most frequently brought before the ICJ, while aerial incidents are the least frequent, voting blocs are still identified in the analyses of territorial demarcation cases, just as they appear in other types of cases. There lacks a correlation between the numbers of cases brought to the ICJ and whether voting blocs exist in the ICJ.

From a practical perspective, as the ones utilizing the forum, states should have the best knowledge and awareness about the existence of voting blocs in the Court.[313]

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[312] Except in the very early stage of the Court during which the NATO/American judges combined hold the majority of the seats. However, it should be noted that the NATO and American groups do not always agree with each other.

[313] Most parties would at least have an judge of their preference joining the adjudication. To a certain extend, these national judges may share some insights or their observations with their appointers. Of course, this is still unproven speculations.

However, if the states know about the existence of voting blocs or at least speculated about their existence but still decide to utilize this forum, it either indicates that the voting blocs have limited power, or that the states do not mind (or even prefer) to use a court composed of judges that vote in a manner reflecting the alignments between their home countries. There simply lacks indications showing that the existence of voting blocs in the ICJ has a impact on the states' willingness to utilize the Court. Following this discussion, one may perhaps rethink the debates between Eric Posner and John Yoo, and Laurence Helfer and Anne-Marie Slaughter in which they argued over the question of if a dependent or independent tribunal is more efficient (preferred) in resolving disputes.[314] However, noticing such debate is beyond the scope of dissertation, I do not comment on these matters.

[314] In the debate, Ponser and Yoo took the position that dependent courts are more effective than independent courts, and international tribunals are more effective (in helping states to resolve disputes) when they act consistently with the interests of the states that create them. Helfer and Slaughter argue otherwise. In Posner and Yoo's observation, the ICJ is categorized as a "dependent tribunal' *See* Posner & Yoo, *supra* note 127; Helfer & Slaughter, *supra* note 106.

5. Conclusion

This chapter reports three critical findings. First, through conducting cluster analyses, I have identified the existence of the NATO and Communist blocs in various periods of the ICJ. Moreover, I have also suggested that the NAM group judges adhering to the non-alignment practices may have ensured the impartialness of the Court. Second, in the regression analysis, in addition to confirming that the judges from both the NATO or Communist states are likely to vote closer with one another, I have also reported that religion (Christianity) match, geographical (Latin America, Africa) matches, level of democracy and economic development all to a certain extent correlate with the voting distance between the judges. Accordingly, the findings of this chapter challenge Weiss and McWhinney's conclusion that no alignments are formed among the ICJ judges.[315] However, because of the limited size of the voting blocs identified, I also argue that these voting blocs do not necessarily undermine the impartiality of the Court.

[315] Weiss, *supra* note 22, at 129–31; MCWHINNEY, *supra* note 282, at 38–40.

Chapter 6 Conclusions and Future Research Directions

This dissertation is about the ICJ judges' voting preferences and the clustering patterns reflected in the ICJ judges' voting behaviors. Although all judges and judicial institutions are expected to adjudicate disputes and decide cases considering nothing but the law and the fact, courts and judges are never machine-like mechanisms that can make decisions without considering or being affected by extra-legal factors. Judges' voting behavior is the result of complex processes and judges' decision-making is not only affected by the facts of the case and the applicable laws but is also affected by a variety of personal and social factors.[316] Just as Judge Schwebel vividly quoted from Milton Katz that everyone is a prisoner of their own experience,[317] every individual's personal life

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[316] *See e.g.*, Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, 26 LOY. L.A. L. REV. 993 (1993); Burt Neuborne, Of Sausage Factories and Syllogism Machines: Formalism, Realism, and Exclusionary Selection Techniques, 67 N.Y.U. L. REV. 419 (1992). The famous quote from Justice Holmes – "[t]he life of the law has not been logic; it has been experience" – vividly describes this phenomenon.

[317] Stephen M. Schwebel, *Foreign Policy and the Government Legal Adviser*, 2 GA. J. INT'L & COMP. L. 77 (1972); A similar statement was made by Edward Murrow: "Everyone is a prisoner of his own experiences.

experience, educational and social background, social status and career experience all have influence over a person's personality and values. Eventually, these influences are reflected in one's decision-making, including the judges' votes and decisions regarding cases. For those interested in evaluating the judicial institution's performances and the judges' behaviors, instead of debating whether the judges are impartial or biased, and spending valuable time deciding the standard to evaluate impartiality, the more practical mission to take on is to learn about the actual practices of the court. Only by learning from the judges' and courts' actual practices can we learn about if and perhaps how judicial decision-making is affected by any unwanted factors.

This dissertation started with the goal of portraying and assessing the ICJ judges' voting behaviors. The underlying purpose was to verify the long-debated question of whether ICJ judges cluster into voting blocs and to provide empirical evidence to show the existence of the voting blocs and observe the blocs' features. In particular, I was interested in assessing if ICJ judges form into voting blocs that are similar to the blocs that their home countries form in international organizations like the UN General Assembly or Security

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No one can eliminate prejudices - just recognize them." Edward R. Murrow, television broadcast, December 31, 1955.

Council. With surprising success, this dissertation has identified several voting blocs that emerge in different periods of ICJ's history. With the help of hierarchical cluster analysis, this dissertation is able to visualize the voting blocs and present them in dendrograms. We have made the judges' clustering patterns easier to detect and observe.

Among the blocs that I have detected, the most critical finding is perhaps the identification of two voting blocs formed by judges from NATO countries and those from Communist states. The identification of NATO and Communist blocs in the ICJ not only refutes the findings of several earlier studies which deny the existence of voting blocs in the Court but also confirms that Asian and African countries' concerns that the judges from the East and the West each show coherent voting patterns are not moot. Moreover, together with the detection of BRIC and NAM blocs, the voting blocs identified in this research share astonishing similarity with the voting blocs found in the observation of states' voting behaviors in the UN General Assembly. Since the ICJ and UN General Assembly serve entirely different purposes and one would not expect the members of these two institutions to show similar voting behaviors, instinctively, this leads us to speculate on whether there is any correlation between the emergence of clusters and extra-judicial factors, such as the political and ideological alignments between the judges' home countries.

With the help of OLS regression analysis, this dissertation showed that the emergence of voting blocs is robust to controls. In particular, I have identified some of the factors that statistically correlate with the emergence of voting blocs. Factors such as the commonality of the political ideology adopted in the judges' home countries (NATO/Communist matches), the similarity in the degree of economic or democractic developments (OECD membership/democracy score matches), and even shared religion and civilization (Christianity matches) between the countries were all found to correlate with the similarity between the judges' voting patterns. Because the regression analyses can only confirm correlations between factors and the observed subjects but cannot determine causation linkages between them, the factors that were found to show correlation may be proxies of other factors. This finding nevertheless successfully shows the likelihood that the decision-making of the ICJ is affected by extra-judicial factors.

In addition to the above-mentioned substantive findings, this dissertation's contributions also shine from a methodological perspective. First, although Euclidean distance is commonly used by social and political scientists to measure the similarity and dissimilarity between subjects' voting patterns, this dissertation is the first using it to assess the similarity and dissimilarity between the ICJ judges' voting patterns. Through

experimenting with the use of this analysis method, this dissertation introduces a new analysis method that can be use by future studies. I hope that the exchange of analysis methodology between different fields of research may stimulate the development of new research and enrich the scholarship. Furthermore, as the use of the Euclidean method allows this dissertation to overcome the obstacle in assessing the similarity and dissimilarity between the voting behaviors of judges that have no co-voting experiences, this dissertation is thus able to portray the clustering behaviors among all judges across the Court's history. The Euclidean distance measuring method also enables this dissertation to refrain from discarding a tremendous number of votes from the analysis like the earlier studies which use Rice-Beyle cluster bloc analysis and is thus able to assess the ICJ judges' voting behaviors more comprehensively than any other prior studies.

This dissertation contributes to the scholarship in many other aspects. For instance, this dissertation provides an updated report showing that the national judges (judges that are either from or appointed by the party states) continue to show a strong tendency to vote in favor of their home countries or appointors. Like the findings reported in Suh, Hensley, Samore, Smith, and Posner and de Figueiredo's studies, this dissertation also finds that this unique voting preference of national judges has not changed throughout the ICJ's history.

With regard to the analysis of the influence of nationality on *ad hoc* judges' voting behaviors, I have shown that regardless of whether the judges are nationals of the party states or if they are from third states, on average *ad hoc* judges voted for their appointors around 80 percent of the time. Meanwhile, I have also pointed out that states do not seem to care about the *ad hoc* judges' country of origin, as nearly half of them are selected from third states. In rare occasions, countries even select a national of the opposing party as their *ad hoc* judge.

Although this dissertation cannot address every question and speculation that people hold against the ICJ, it is hoped that this project has at least helped the legal community to learn things about the ICJ that have not previously been proven. It is also hoped that the use of empirical methods in this dissertation can stimulate international legal scholars to assess international legal questions with new approaches and to verify untested theories. The dataset compiled during this research can also be a valuable asset to later researchers as it can save future studies from repeating the time- and effort-consuming data collection processes.

1. Research Limits and Future Research Plans

No research is perfect, and this dissertation is no exception. There are many places in this dissertation that can be further improved and supplemented. In spite of the excitement of reaching some preliminary achievements in reporting the ICJ judges' collective voting behaviors, the findings of this dissertation only reveal the tip of the iceberg and an essential part of the ICJ and its judges' decision-making behaviors remains unknown. For example, although this dissertation finds that national judges are keen to vote in favor of their appointors and nominators, the mechanisms causing national judges to act in such a way remain unknown. It is still unclear what the qualifications are that countries look for when they select or nominate (*ad hoc*) judges. Neither do we know why some countries prefer to nominate *ad hoc* judges from a third country instead of appointing one of their nationals to serve in such a position. This is not to mention how little we know about the internal decision-making processes within the ICJ and how the judges exchange ideas before making their final decisions. There is still much that we can and need to learn about the ICJ.

With this opportunity, I would like to propose a few possible approaches that future researchers, and perhaps myself, can take to deepen the study of ICJ performance and the

judges' voting behaviors. The first approach worth trying is to focus the study on cases where "contentions truly arise." In Chapter 4, I have pointed out that most of the ICJ decisions were made with the support of nearly 90 percent of the judges and only less than 16 percent of the decisions were made with more than three judges dissenting.[318] In other words, the clusters and voting blocs identified in this dissertation are possibly the reflection of dissents that arise in that handful of cases. By narrowing the scope of analysis, we can not only differentiate between cases where voting blocs exist and where they were decided in a unanimous manner but can also identify the types of cases where disagreements arise more commonly and scenarios in which judges are more likely to disagree with each other.

Scrutinizing the features of the voting blocs identified in this dissertation is another direction worth investigating. While this dissertation uses statistical methods to identify the voting blocs and assess the clustering behaviors from a macro perspective, these identified blocs can be further assessed from a micro perspective. For example, from the quantitative analysis, we have learned that judges from the BRIC countries showed cohesive voting patterns. However, what we still do not know is the reason why these

[318] See Chapter 4, Section 1, especially Tables 4-1 to 4-4.

judges voted closely with each other. Neither do we know if these judges voted in the same way out of mere coincidence or if they acted cohesively due to other reasons. Much of these above-listed questions can only be answered by research that qualitatively studies the judgments and the judges' attached opinions. Through qualitative analyses of the judgments and judges' opinions, we may be able to observe if the judges in the same voting bloc adhere to the same teaching of international law and advance similar legal doctrines in their opinions. These analyses may also allow us to examine if judges advance cultural or geopolitical considerations in their opinion and to explore how factors like politics and cultures influence the judges' decision-making. In doing so, future studies may explore if regionalism in international law has developed coinciding with the ICJ bloc voting behavior, and address questions like whether international law with Eurocentric characteristics predominates the ICJ.

Furthermore, it is said that judges with diplomat backgrounds are keener to execute the will of their government than those selected from academia or the highest court of justice. These assertions have not been empirically tested. Future studies look into the judges' career paths and their educational backgrounds to examine the difference between voting patterns of judges selected from different training backgrounds. For those interested

in assessing how the judges' home countries' attitudes and opinions over the matter affect the judges' decision-making, they can also replicate Il Suh's analysis and observe if the judges' decision-making matches the opinions expressed by the judges' home countries over the adjudicated matters.

Although many of the above-listed research directions suggest the use of qualitative methods to scrutinize the issues relating to the ICJ, quantitative and qualitative analyses are both capable tools for evaluating the ICJ and its judges' performance and are equally recommended to be deployed. I do not prejudice one against the other.

2. An Inconvenient Truth, But What Next?

As a judicial institution, the ICJ has been viewed as a sacred institution whose reputation cannot and should not be tainted. Perhaps out of the same consideration, many scholars choose to believe that the impartiality of the judges can be ensured through the swearing of oaths and other weak institutional arrangements. In contrast with the states' speculative attitudes, scholars seem rather reluctant to challenge the presumption that the decision-making of ICJ judges is unaffected by extra-legal factors, fearing these allegations would harm the ICJ's reputation. It is not only astonishing to see how scholars are willing

to believe in these untested theories but also how these theories have remained untested for such a long period.

To those that admire and view the ICJ as a sacred symbol signaling the global community's acceptance of the rule of law notion, the findings reported in this dissertation may be a bitter truth to swallow. In this dissertation, the findings showing correlations between the judges' voting behaviors and extra-legal factors may instinctively lead states to speculate about the ICJ judges' impartiality. Consequently, states may be unwilling to utilize the ICJ for dispute settlement purposes after learning the results of this study.

But as repeatedly stated, it was never the intention of this dissertation to denounce or discredit ICJ or its reputation. Instead, what I attempted to do and have achieved in this dissertation is to report the ICJ judges' voting behaviors and the voting blocs found therein. From a practical perspective, I hope the findings of this dissertation can help states to have a better understanding of the ICJ and thus to make rational decisions about whether to utilize this institution or not. States may also have a more practical expectation of the ICJ's performance. By reporting how the ICJ judges' voting behaviors have been inconsistent with some of the existing theories, I hope the findings of this dissertation can redirect scholars to study the ICJ and to strengthen the study of the actual practices of international

courts. Instead of viewing the findings of this dissertation as a poison that weakens the legitimacy of the ICJ, I see it as an opportunity for changes to happen.

The ICJ needs changes. Many of the ICJ's institutional designs and rules set up seventy years ago are outdated. From issues like the distribution of the seats in the ICJ to matters like the adoption of the *ad hoc* judge system and the design of the Court's jurisdiction, some of the ICJ's institutional arrangements and statutory provisions are no longer popular in the modern world. However, due to the states' passive attitude over the ICJ and also the lack of empirical studies showing the problems that the ICJ faces, many proposals for revising the ICJ become superficial discussions and are discarded as meritless ideological arguments. There lack junctures to trigger the change.

Although this dissertation cannot comprehensively address every problem and challenge that the ICJ faces, I nevertheless report some critical observations of the ICJ judges' voting behaviors and states can use these findings to evaluate and reconsider the adequacy of some of the ICJ's institutional arrangements. Taking the arrangement of the *ad hoc* judge system as example, aside from reporting that national judges are keen to vote for their appointor and home country, I have also shown that the votes of two national judges are likely to cancel each other out and only possess limited influence over the

outcome of the case. If states do not benefit from having one of their nationals serving on the bench, it seems unnecessary for the ICJ to retain such arrangements. The existence of the *ad hoc* judge system seems redundant and old style as this arrangement is no longer adopted by the more recently established international adjudication institutions such as the WTO DSB. In this way, the findings reached in my dissertation may serve as persuasive evidence to advise states to revise the ICJ Statute and abolish some unnecessary arrangements.[319]

With regard to bloc voting behaviors, although the findings at hand do not allow me to argue that the existence of voting blocs implies an impartiality problem and it is also too crude to evaluate the influence of these blocs, the identification of the NATO and Communist blocs nevertheless signals the possibility that judges' voting behaviors may correlate with extra-judicial factors. Geopolitical alliances, ideological matches, and similarities in the degree of economic development between the countries are also some of the extra-judicial factors found to correlate with the judges' clustering behaviors. As the voting blocs reported in the ICJ share a strong similarity with those identified in the UN

[319] To ensure fairness between the parties, it may also be necessary to preclude the regular judge(s) from the party state(s) from participating in the adjudication of that particular dispute.

General Assembly, this information provides an opportunity for regions that are underrepresented in the ICJ to seek more equitable (if not equal) representation in the Court and may trigger a change in the ICJ.

In the most recent ICJ judge election held in November 2017, we have witnessed a groundbreaking change that has altered the traditional practices of the distribution of ICJ bench seats. As Judge Christopher Greenwood from the United Kingdom was unable to gain enough support from the General Assembly, he was eventually forced to withdraw his candidature for reelection. Consequently, the last vacancy of this election was taken by Judge Bhandari from India. For the first time in ICJ's 71 years history, the ICJ bench is composed without a UK judge on board. Although it remains uncertain if this election result signals the end of the practice of guaranteeing the superpowers a seat in the Court, as Dr. Salzburg commented: "This may indicate the will of non-Western States to challenge Western privileges enshrined in customary rules for ICJ elections."[320]

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[320] Owen Bowcott, *No British judge on world court for first time in its 71-year history*, GUARDIAN, Nov. 20, 2017, https://www.theguardian.com/law/2017/nov/20/no-british-judge-on-world-court-for-first-time-in-its-71-year-history (last visited Dec. 23, 2017).

Aside from the states' change of attitude in the most recent ICJ election, there are more that can be changed. For instance, if the states distrust the judges serving in the ICJ and have partiality concerns over their performance, instead of raising accusations against the judges, a more effective way would be to use their votes to boycott and prevent those judges from being elected and reelected. If African and Asian states are displeased about the "equitable geographical distribution" of ICJ seats, instead of complaining about unfairness, these countries can alter the situation with their superior numbers of votes. As the ultimate power to reshape and determine the use of this institution is held in the hands of states, any changes in the Court require the determination and the will of member states. What studies like this can provide is a report on the performance of the Court, to advise states how theories have been realized and to provide guidance for future revisions.

3. Final Thoughts

The ICJ needs more attention. Although the ICJ was criticized for not living up to the expectation of its founders and has not become an effective mechanism in settling interstate disputes, in the foreseeable future, the ICJ will continue to serve as the principal judicial organ of the United Nations. The Court will continue to be one of the most important international judicial institutions with the power to settle international legal disputes. The

increasing number of cases submitted to the ICJ in recent decades is a positive sign for the ICJ's future. The reviving usage of this institution may also be an opportunity for the ICJ to redeem its reputation and regain its importance.

Nonetheless, the stereotype that ICJ judges are partial and biased has already been imprinted in states' mindsets since the 70s and 80s and will not fade away easily. Although some states are now more willing to utilize the Court for dispute settlement purposes, they remain cautious and pay close attention to the Court and its judges' behaviors. In order to clarify and provide a more thorough description and report about the decision-making within the ICJ, research that studies the function and performance of the ICJ needs constant update, especially those that assess the questions empirically.

In this dissertation, I took the mission to address the questions that ICJ has faced throughout in its seventy years of history. With the help of empirical analysis methods, I have reached some preliminary success in demonstrating the clustering behavior between the ICJ judges and have identified some extra-judicial factors that correlate with the judges' voting behaviors. However, it was during the research process that I have realize how limited our knowledge about the ICJ is and how outdated were the empirical studies assessing the ICJ performance.

Aside from hoping that people would be interested in learning new findings about the ICJ and that those findings contribute to the scholarship, I hope that this study can reattract the public's attention to this seventy-year-old judicial institution. By helping states to know more about the practical function of the ICJ, I hope to assist states to better decide if the ICJ is the ideal forum to settle disputes and to motivate states to realize the goals of reforming the ICJ. Moreover, as the area of international law largely remains a virgin land to empirical study, I hope that this dissertation can stimulate scholars' interests in assessing international legal questions with empirical methods and can enrich international legal scholarship with new forms of study.

Appendix Results of the Cluster Analyses

Figure A-1: Cluster Analysis of Combined Cases (1946–2015)

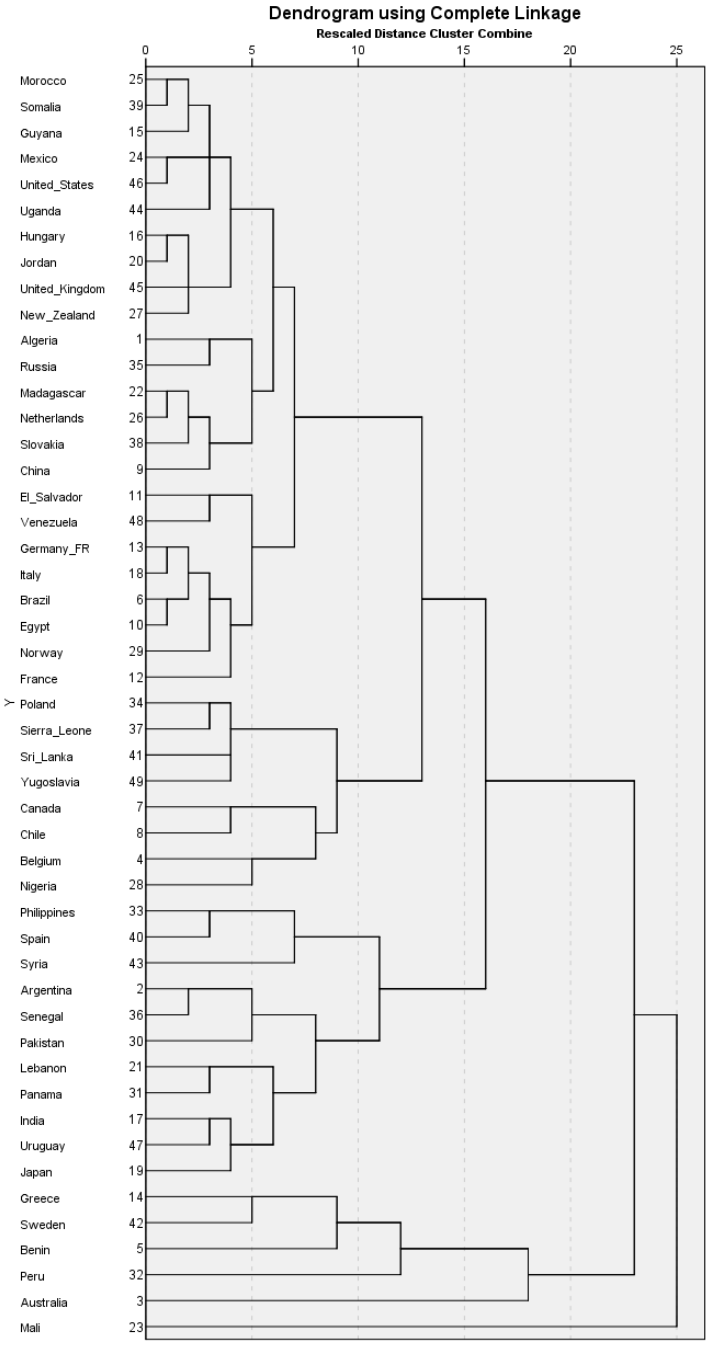


Figure A-2: Cluster Analysis of Combined Cases (1946–1966)

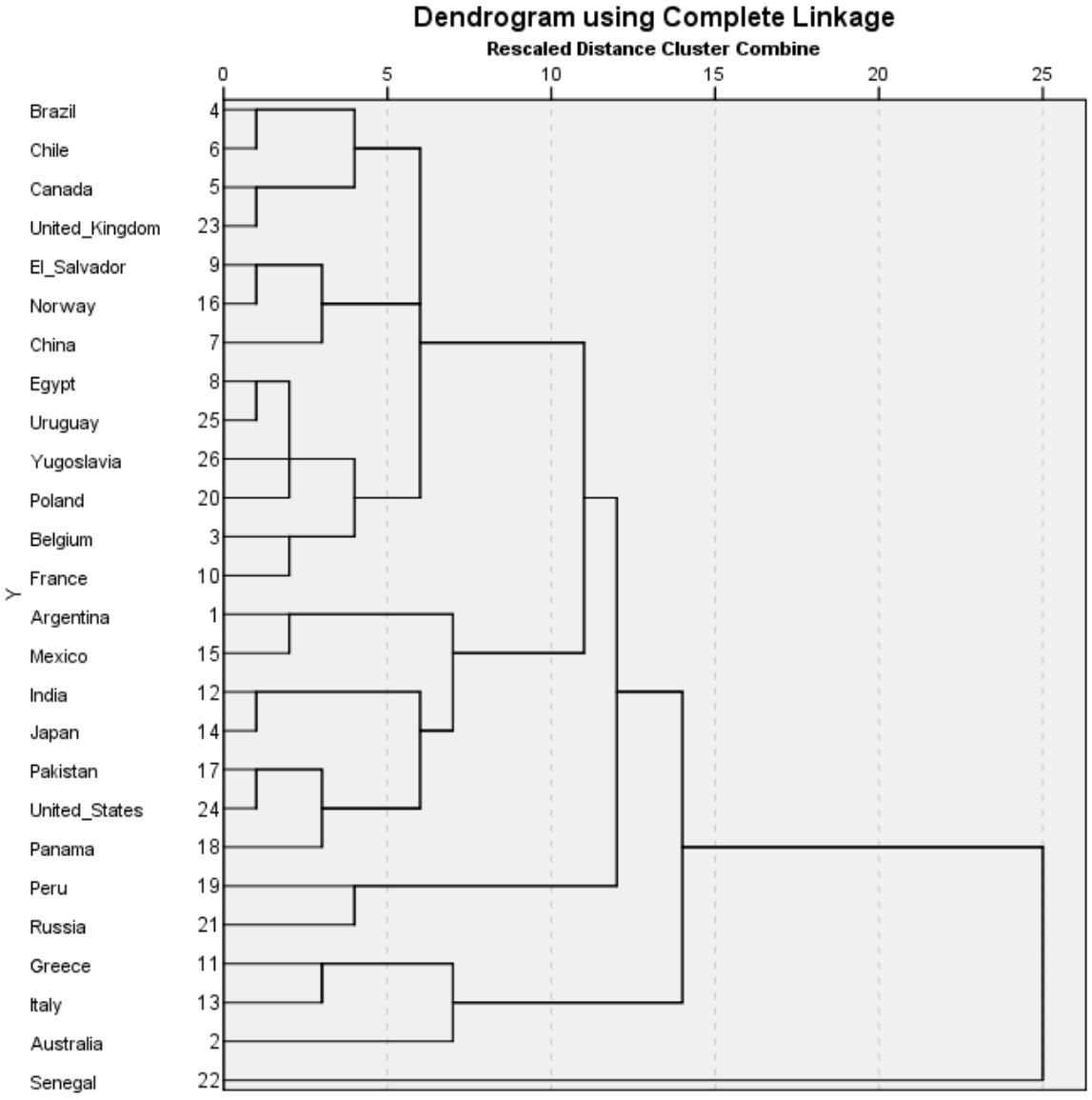


Figure A-3: Cluster Analysis of Combined Cases (1967–1985)

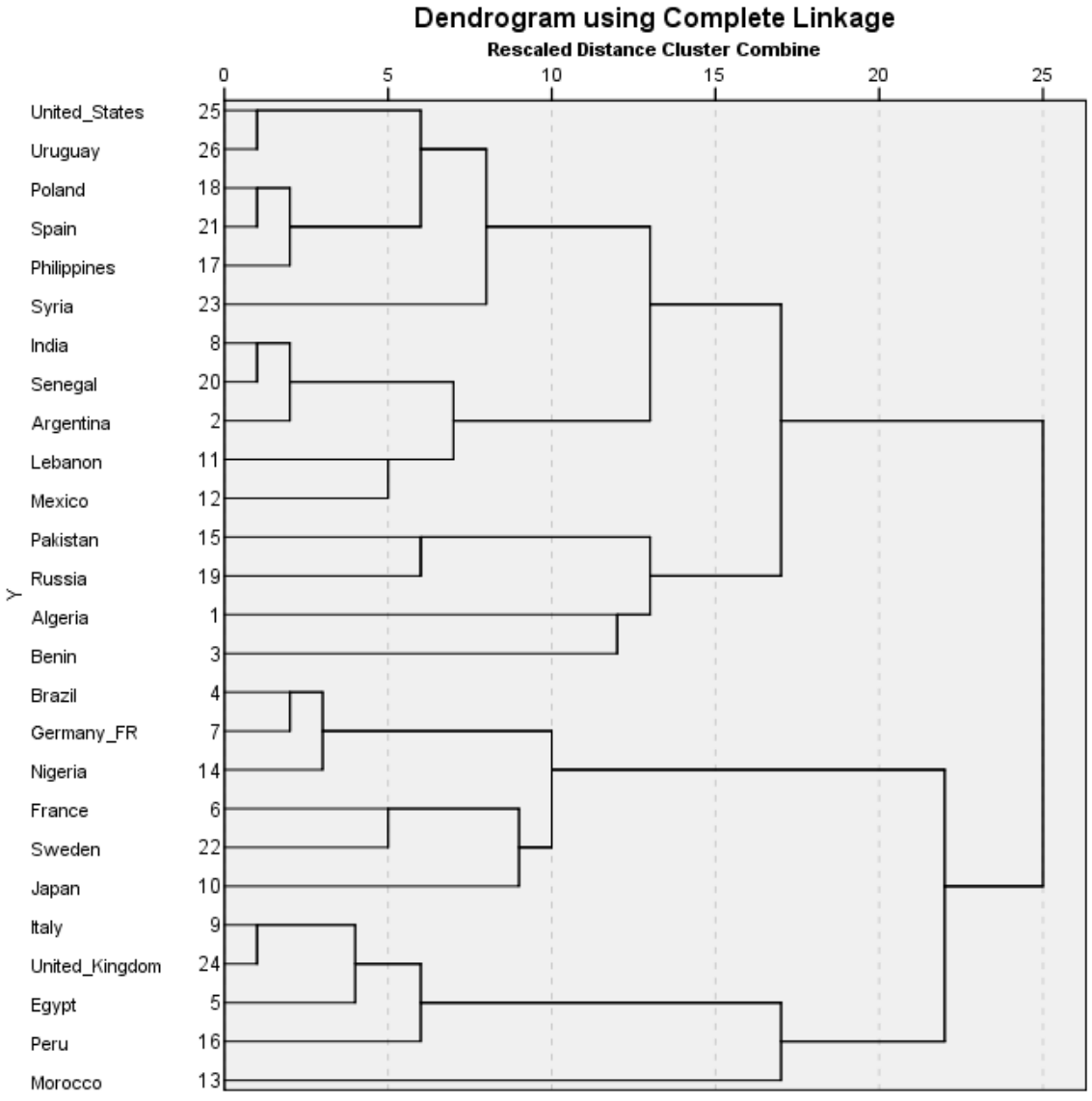


Figure A-4: Cluster Analysis of Combined Cases (1985–2015)

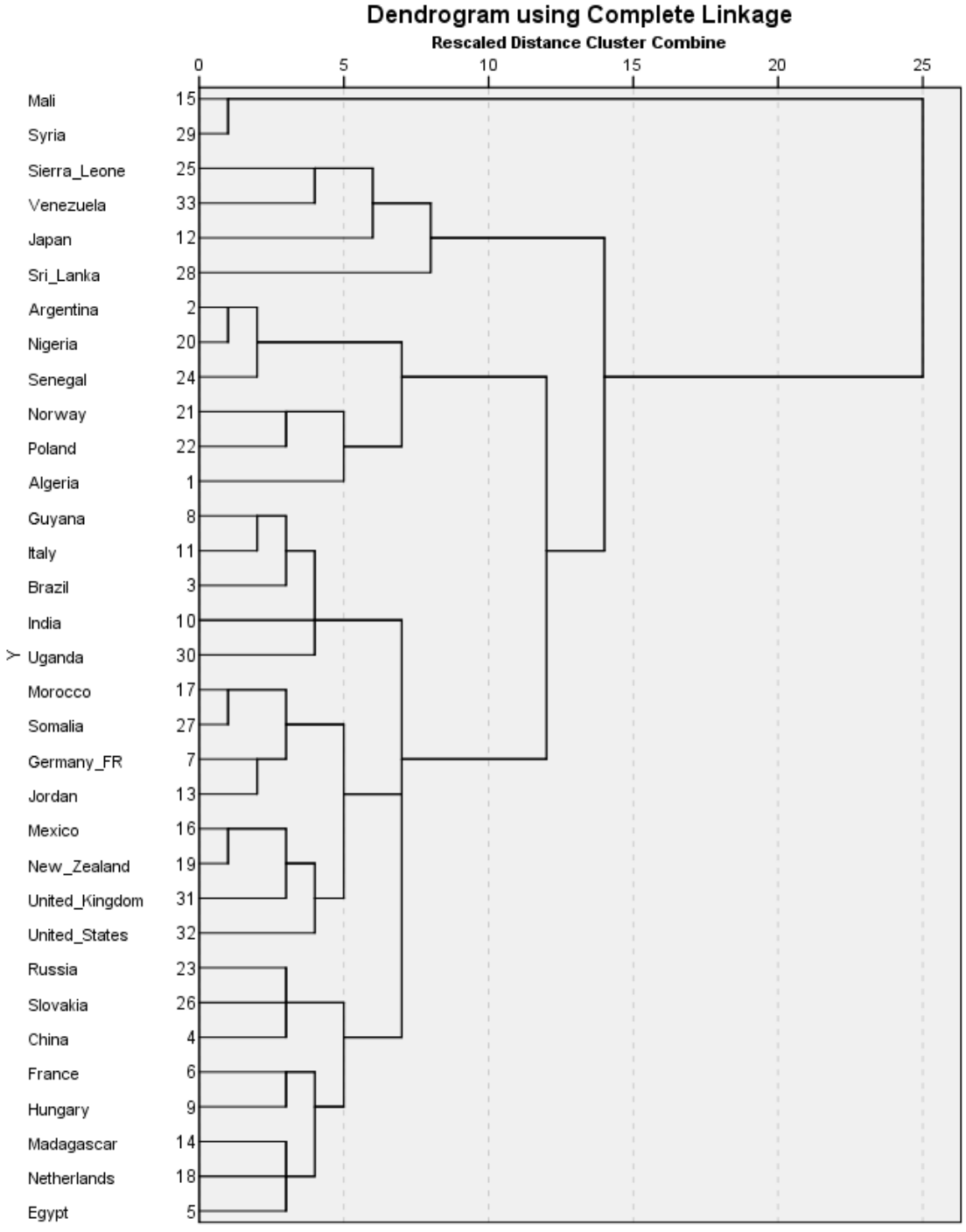


Figure A-5: Cluster Analysis of All Contentious Cases (1946–2015)

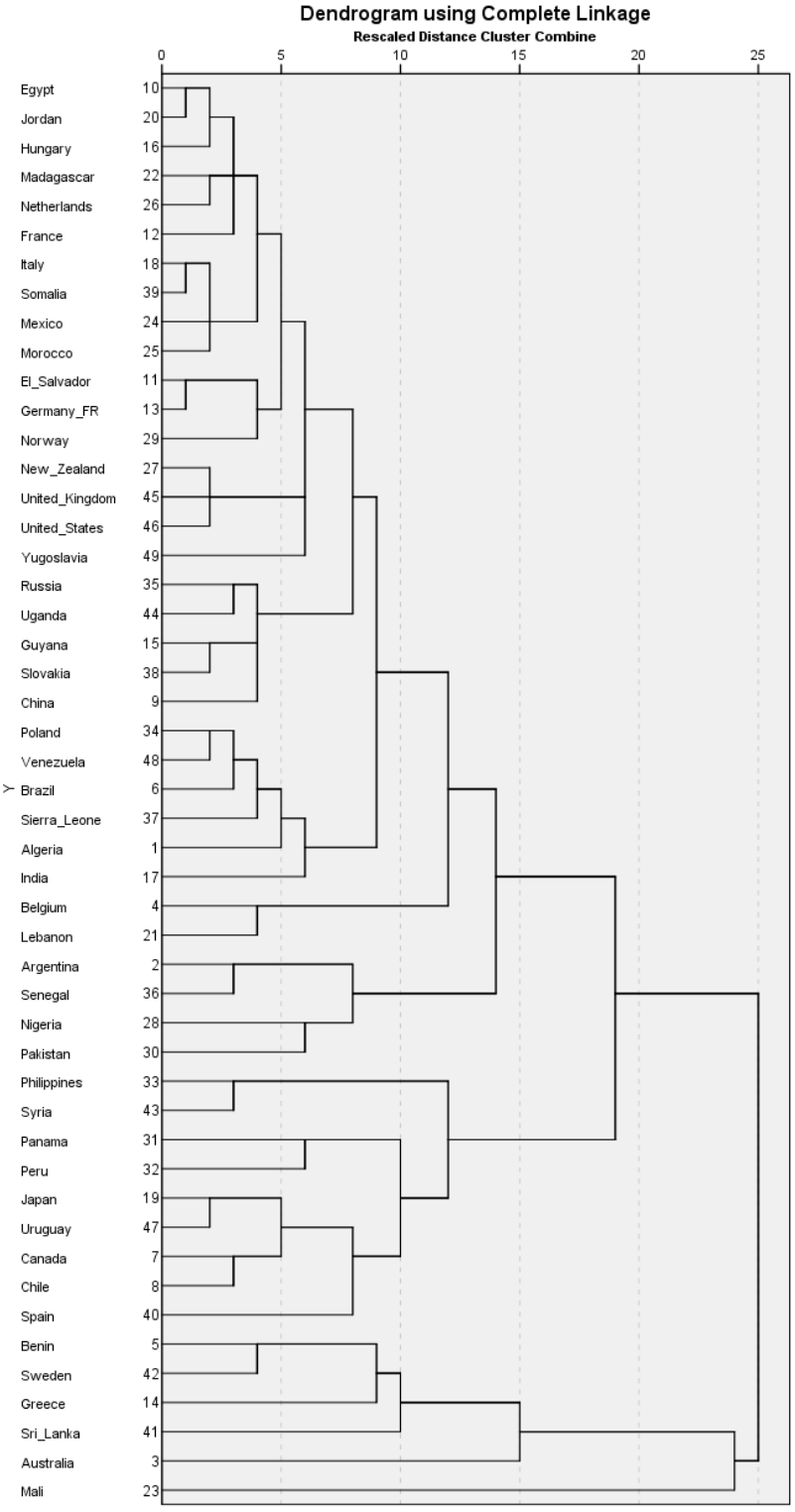


Figure A-6: Cluster Analysis of All Contentious Cases (1946–1966)

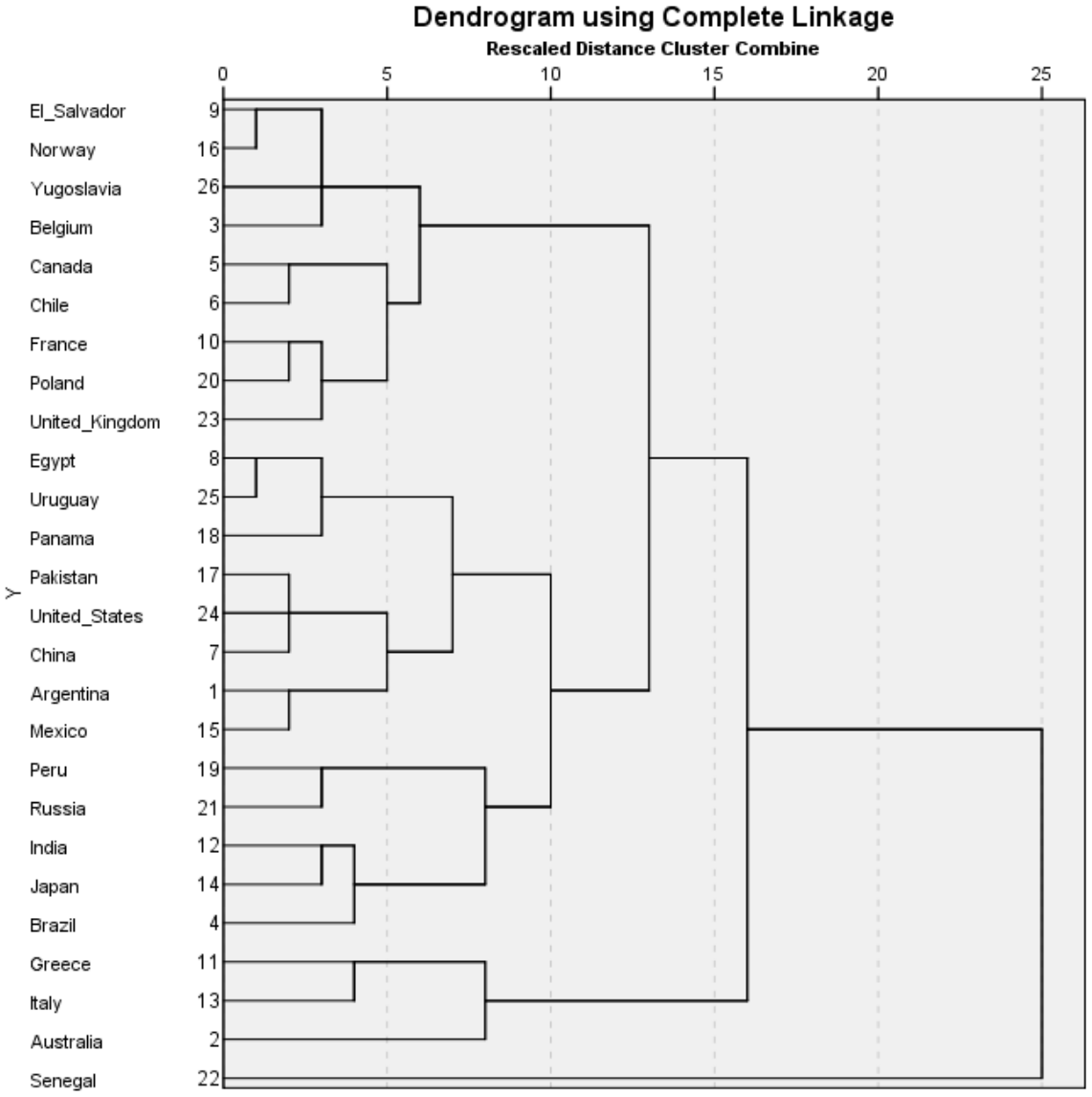


Figure A-7: Cluster Analysis of All Contentious Cases (1967–1984)

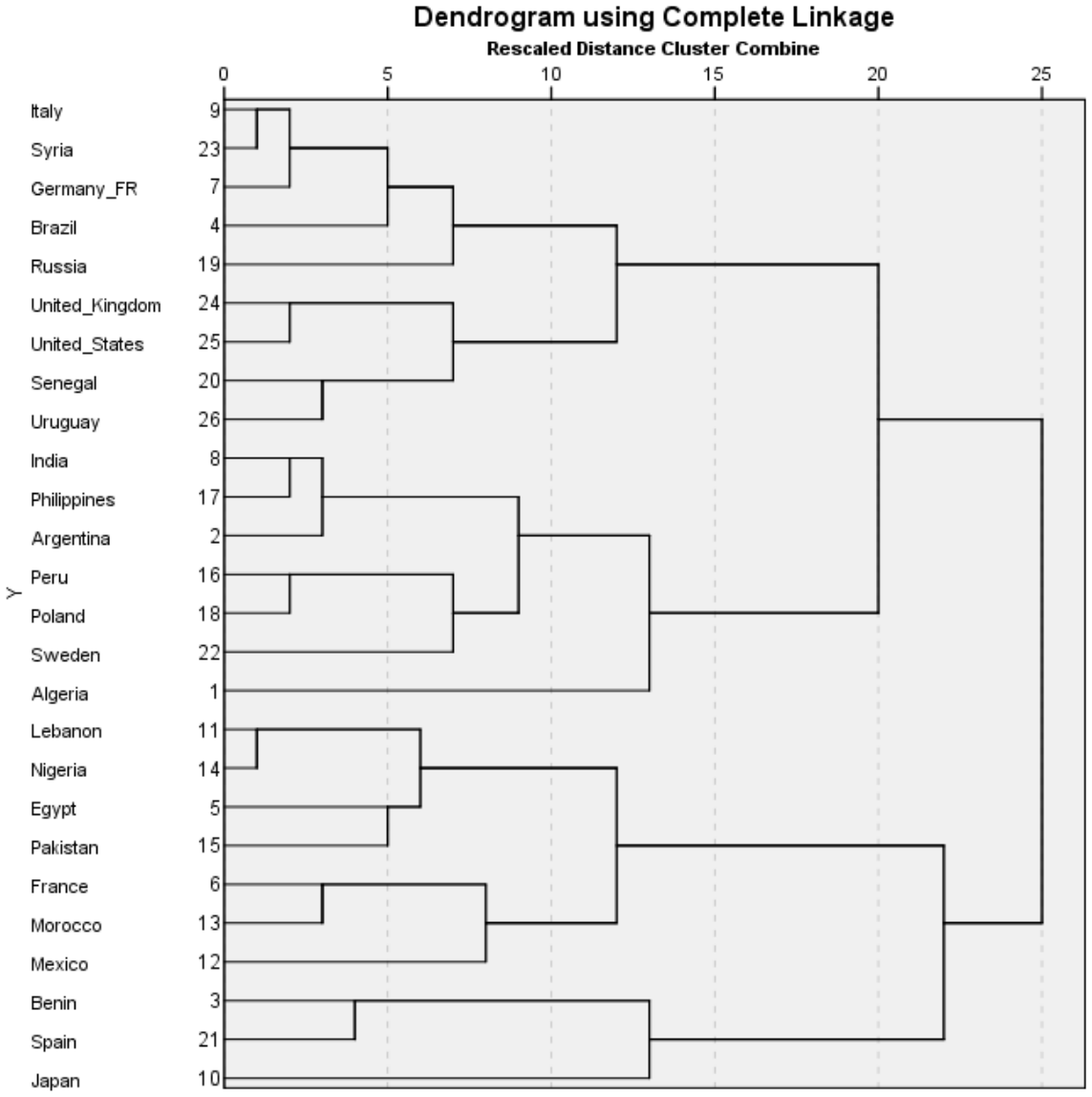


Figure A-8: Cluster Analysis of All Contentious Cases (1985–2015)

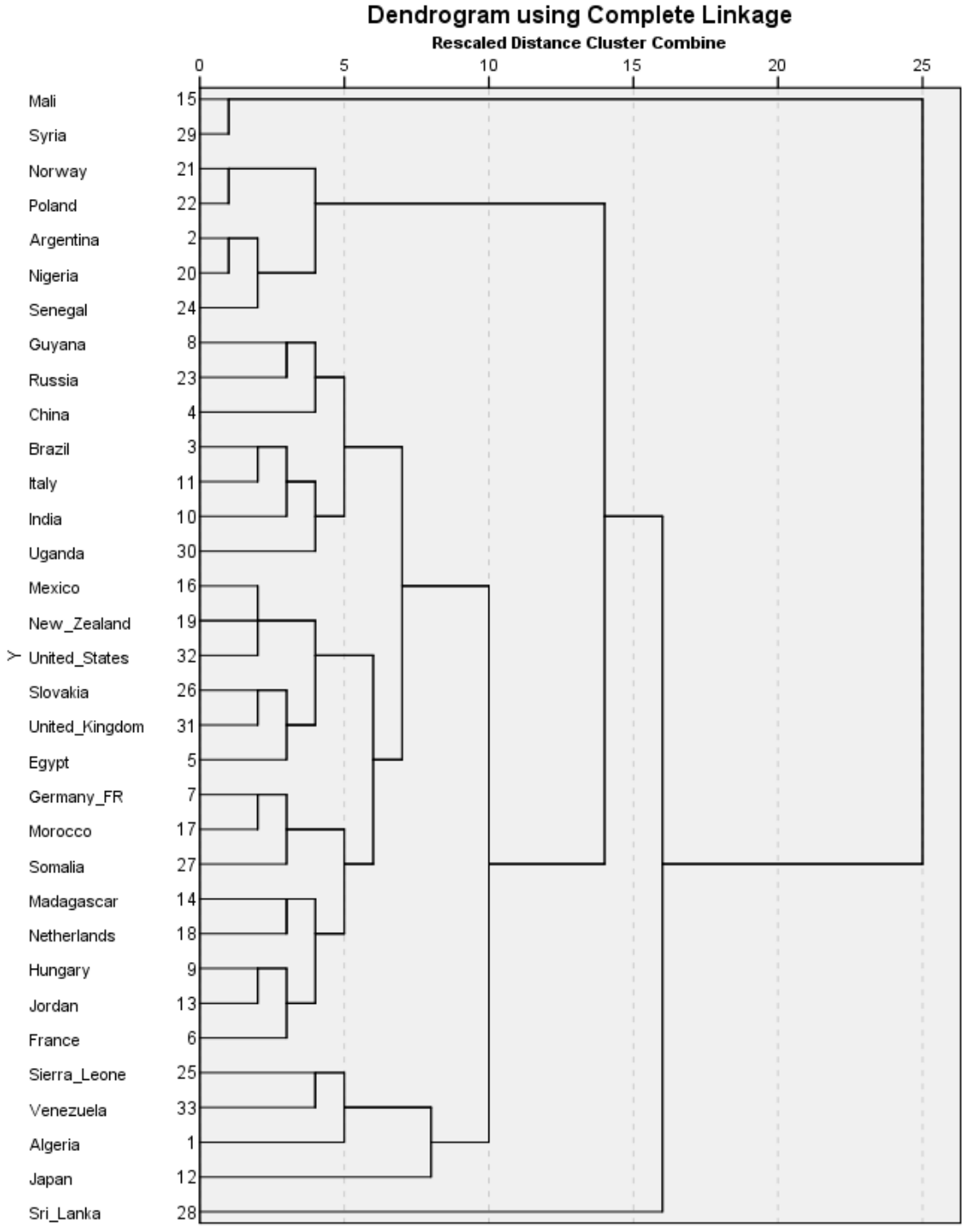


Figure A-9: Cluster Analysis of All Advisory Opinions (1946–2015)

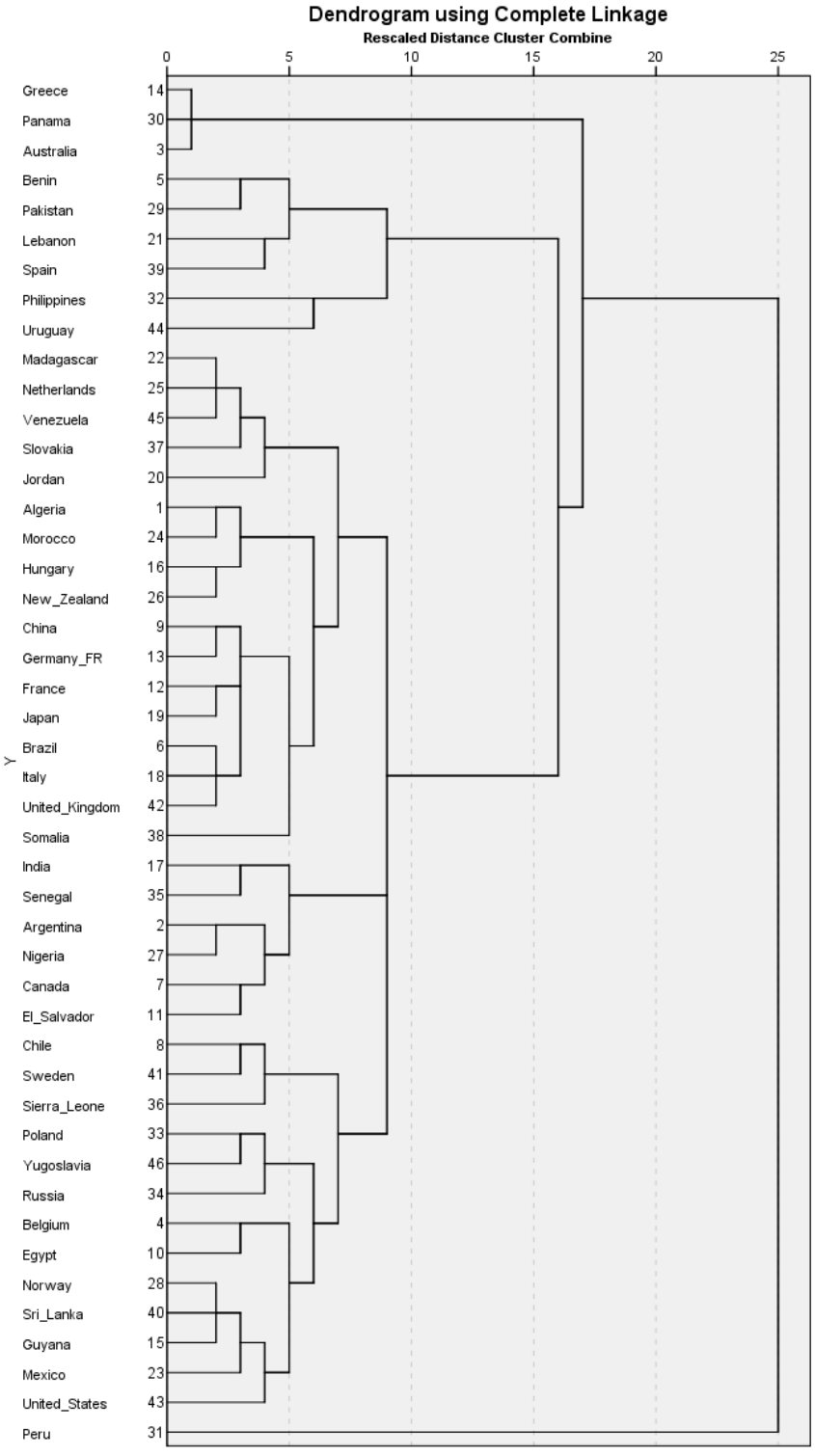


Figure A-10: Cluster Analysis of All Advisory Opinions (1946–1966)

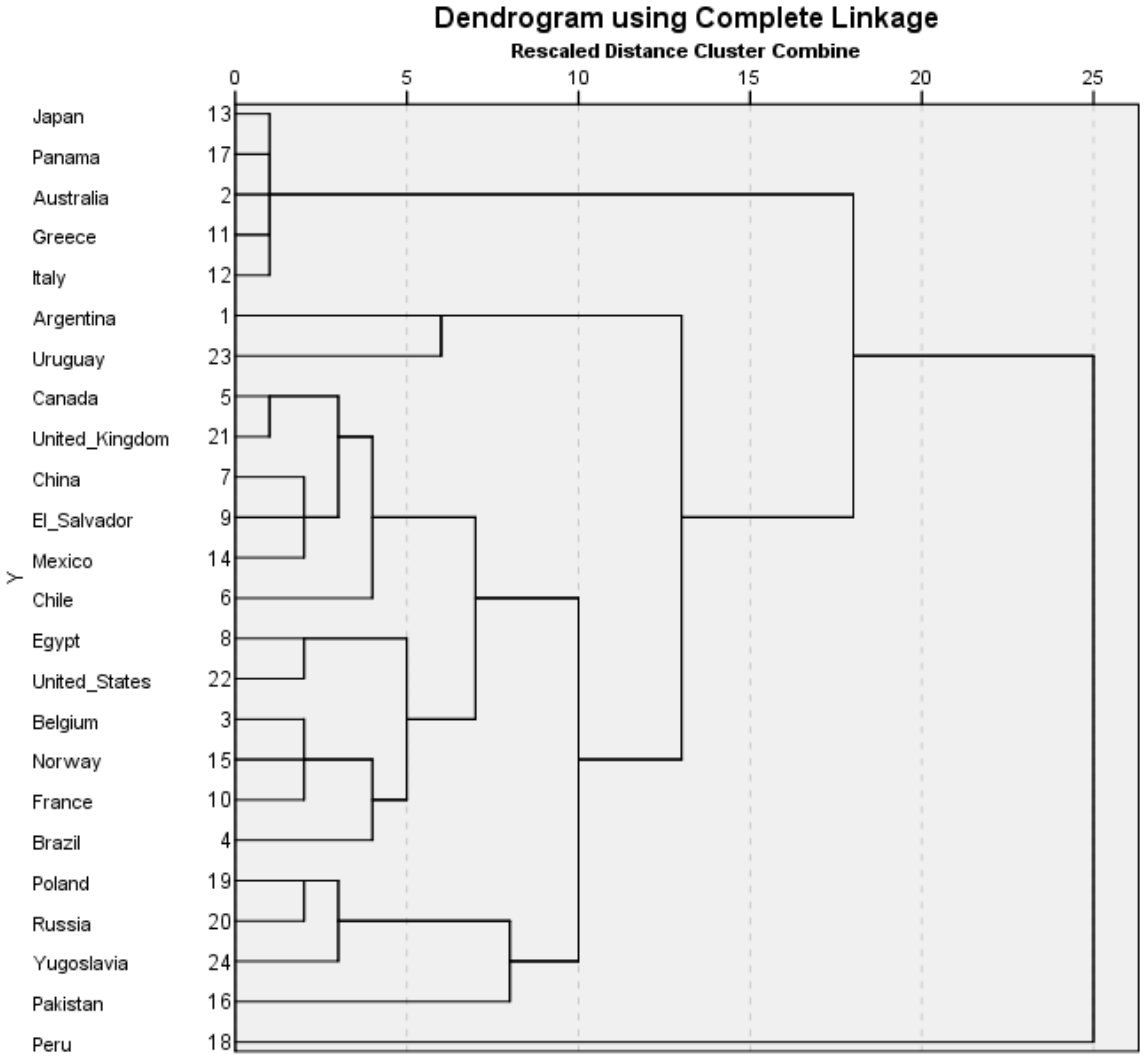


Figure A-11: Cluster Analysis of All Advisory Opinions (1967–1984)

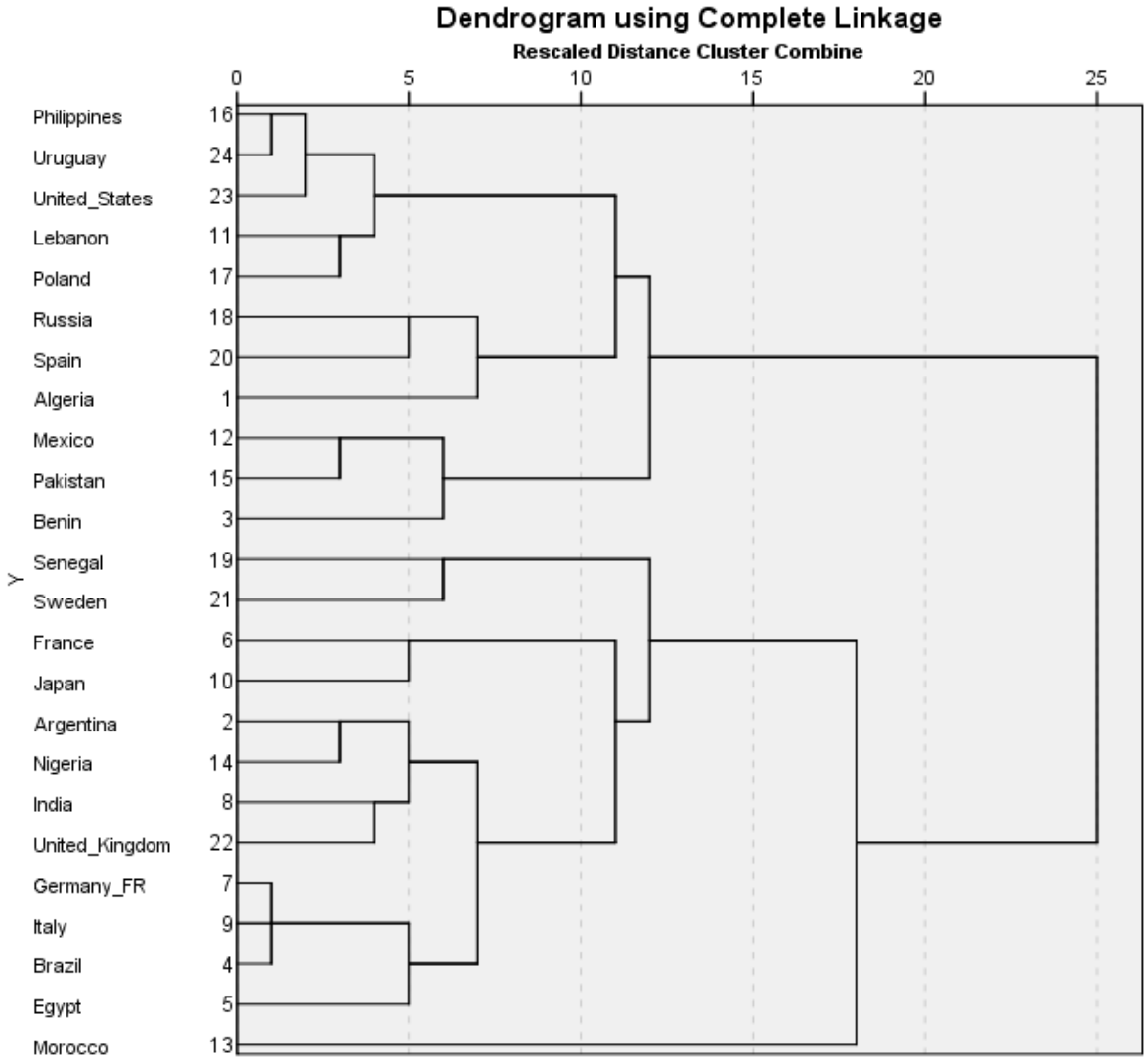


Figure A-12: Cluster Analysis of All Advisory Opinions (1985–2015)

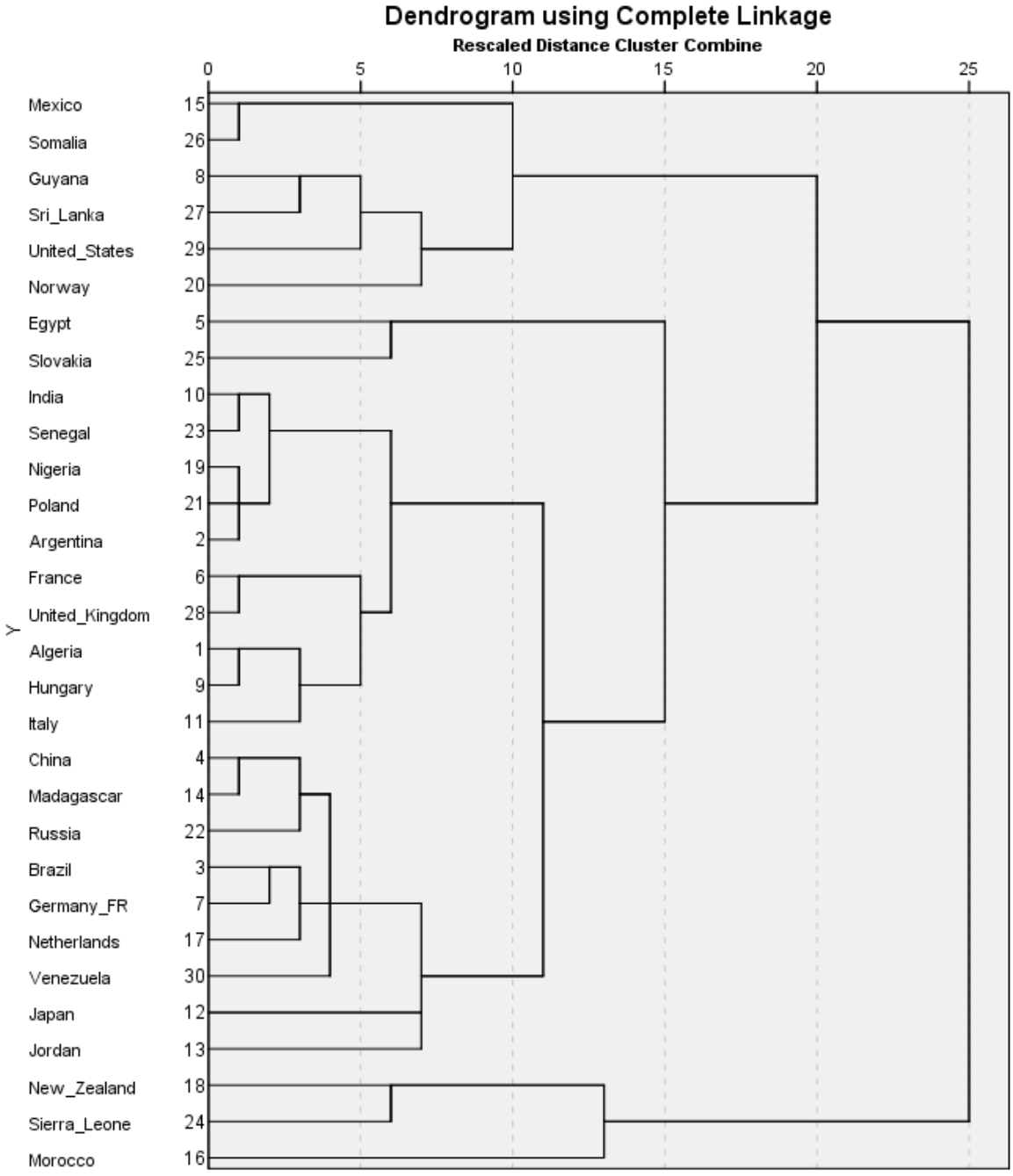


Figure A-13: Cluster Analysis of Aerial Incidents Case(s) (1946–2015)

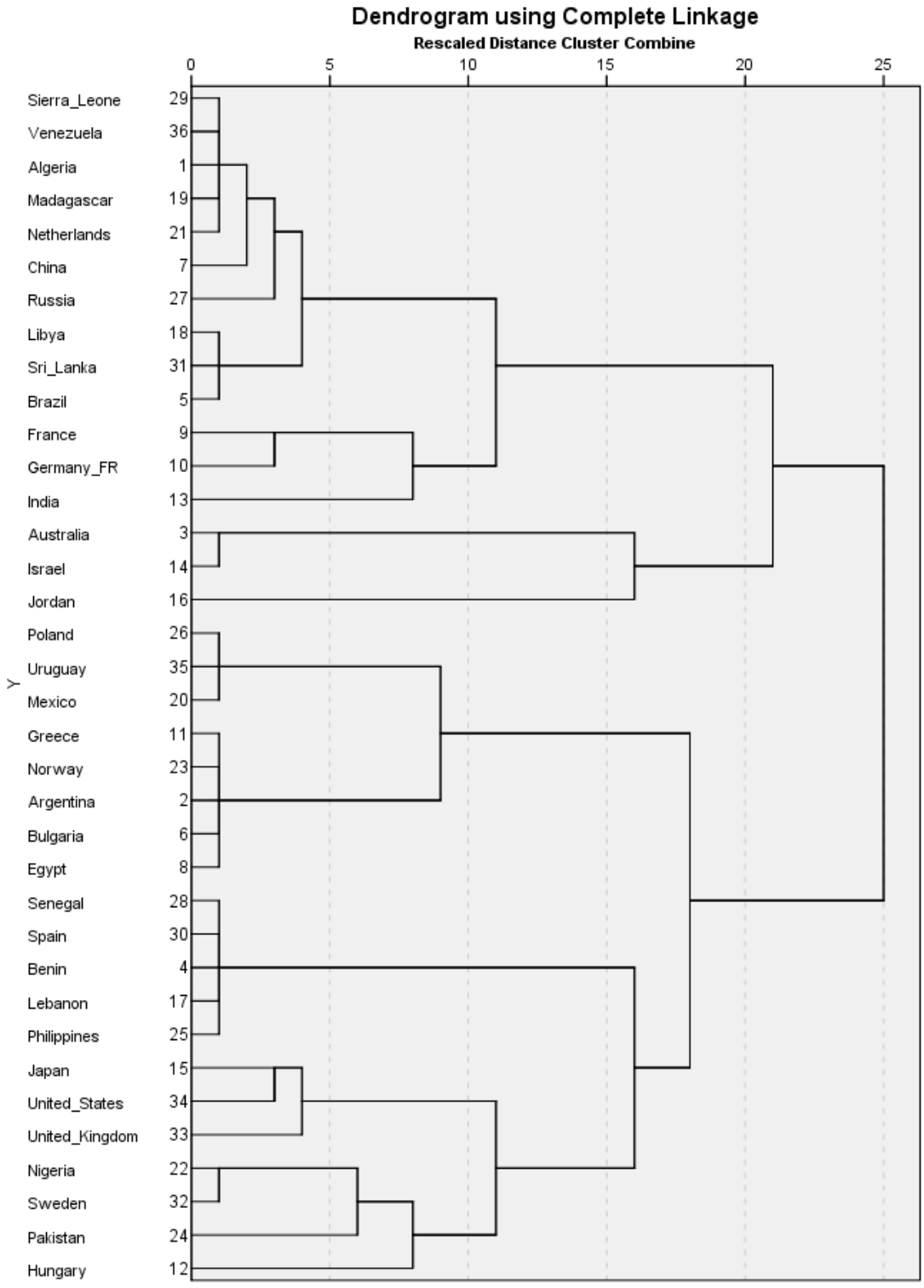


Figure A-14: Cluster Analysis of Aerial Incidents Case(s) (1946–1966)

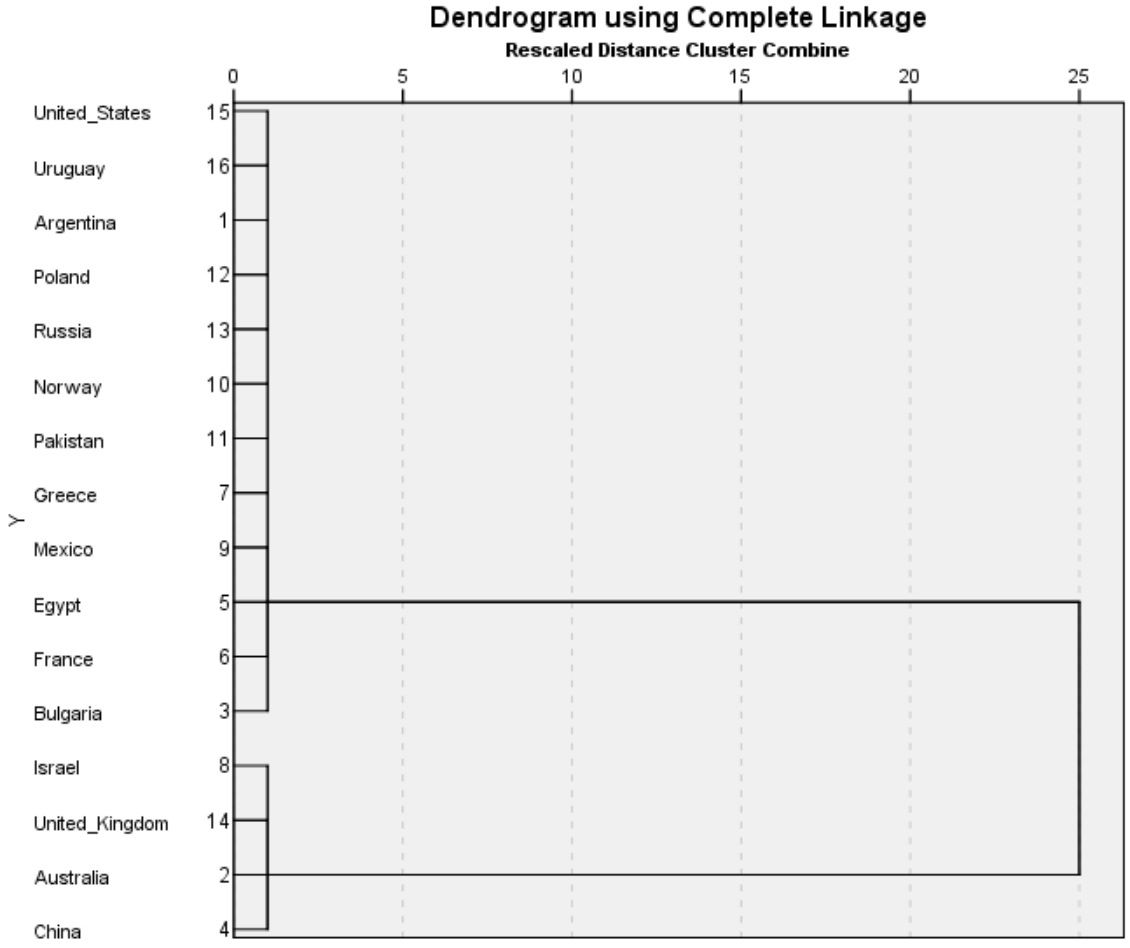


Figure A-15: Cluster Analysis of Aerial Incidents Case(s) (1967–1984)

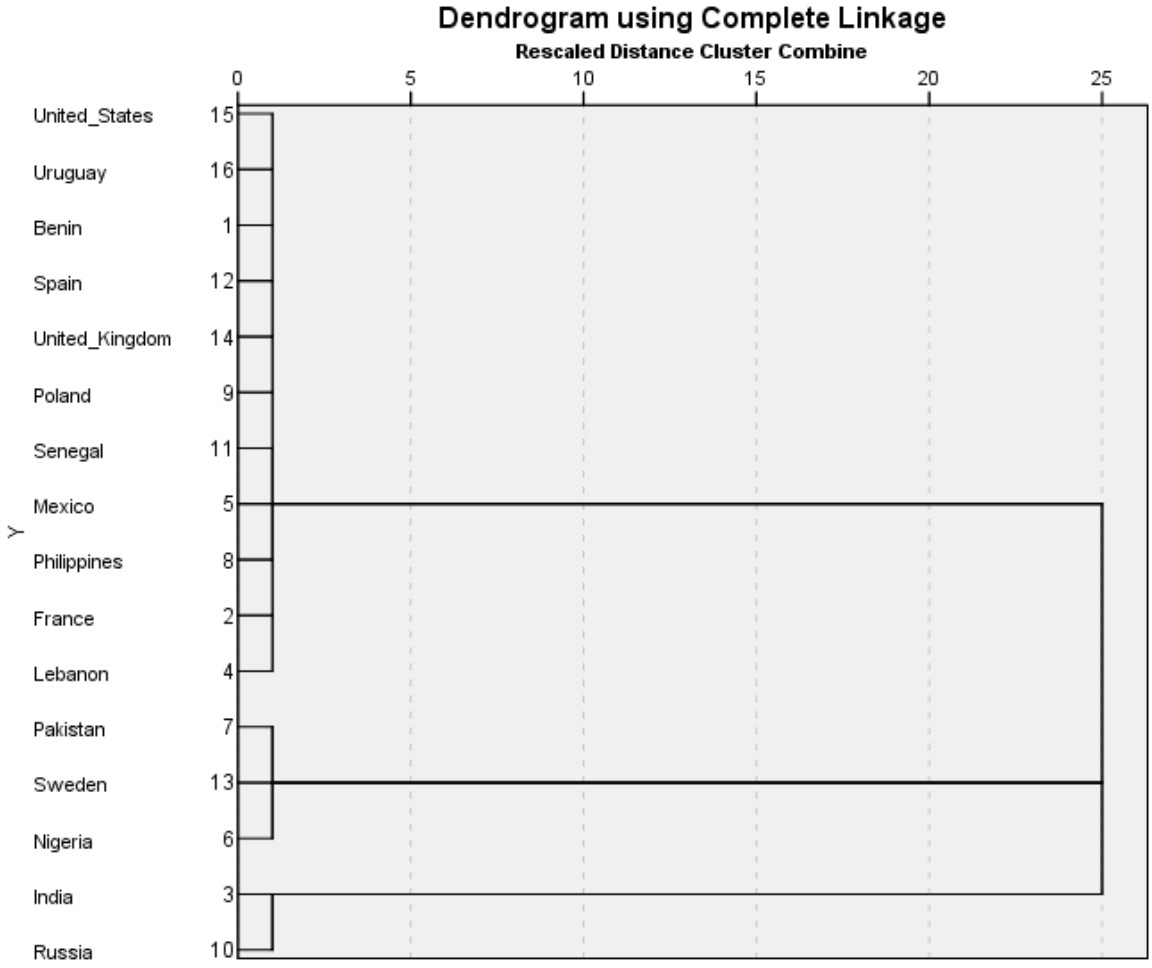


Figure A-16: Cluster Analysis of Aerial Incidents Case(s) (1985–2015)

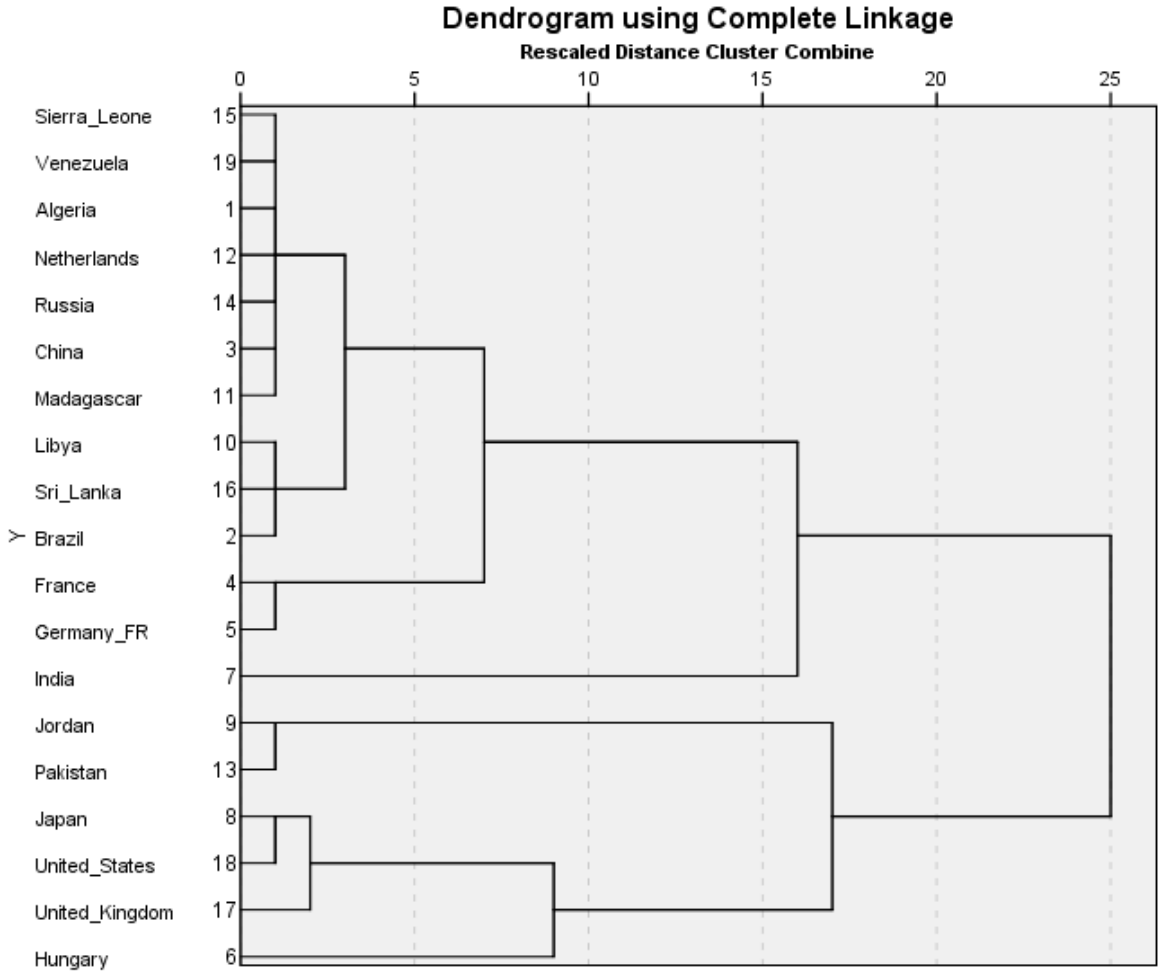


Figure A-17: Cluster Analysis of Diplomatic Relations Case(s) (1946–2015)

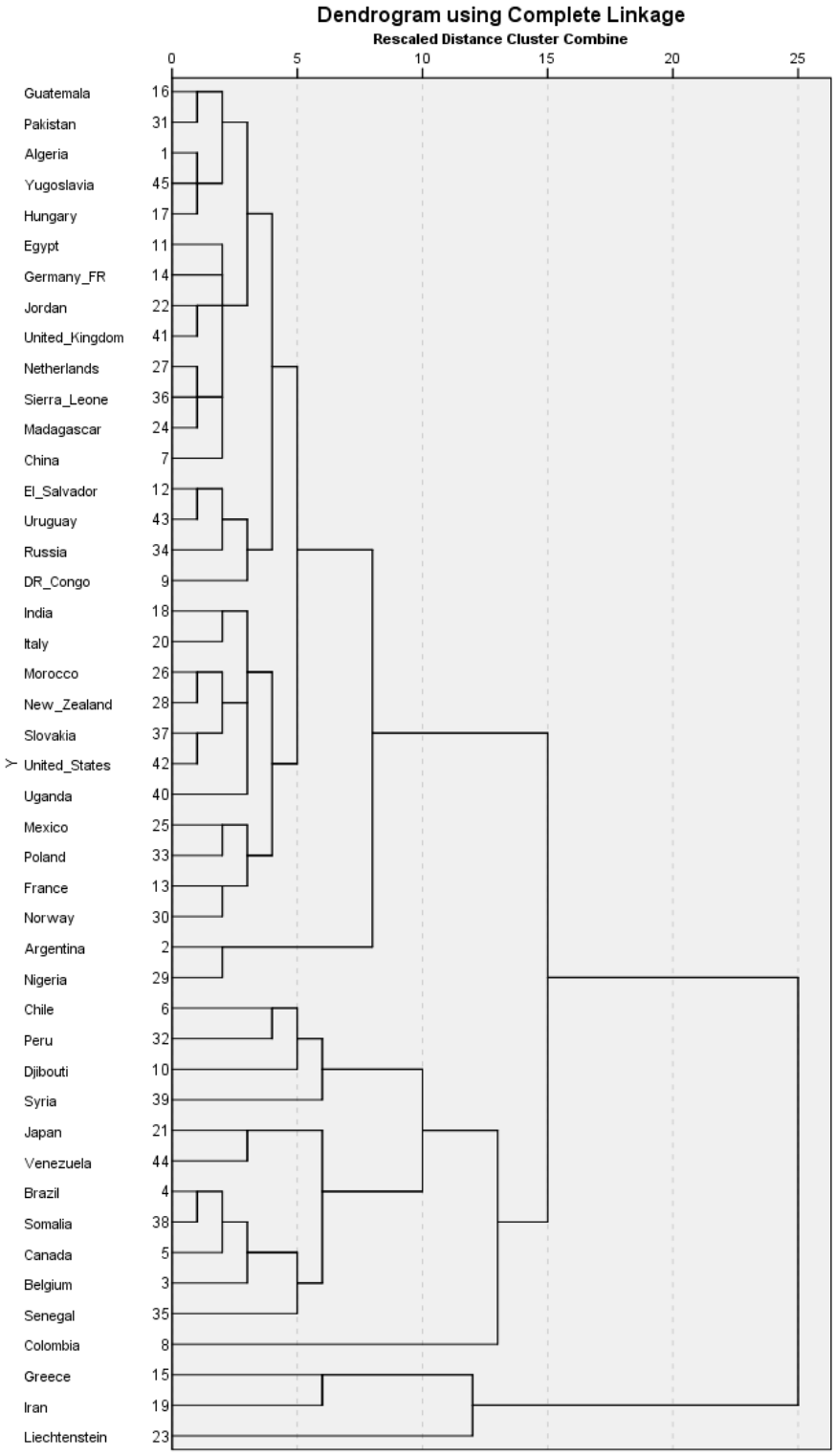


Figure A-18: Cluster Analysis of Diplomatic Relations Case(s) (1946–1966)

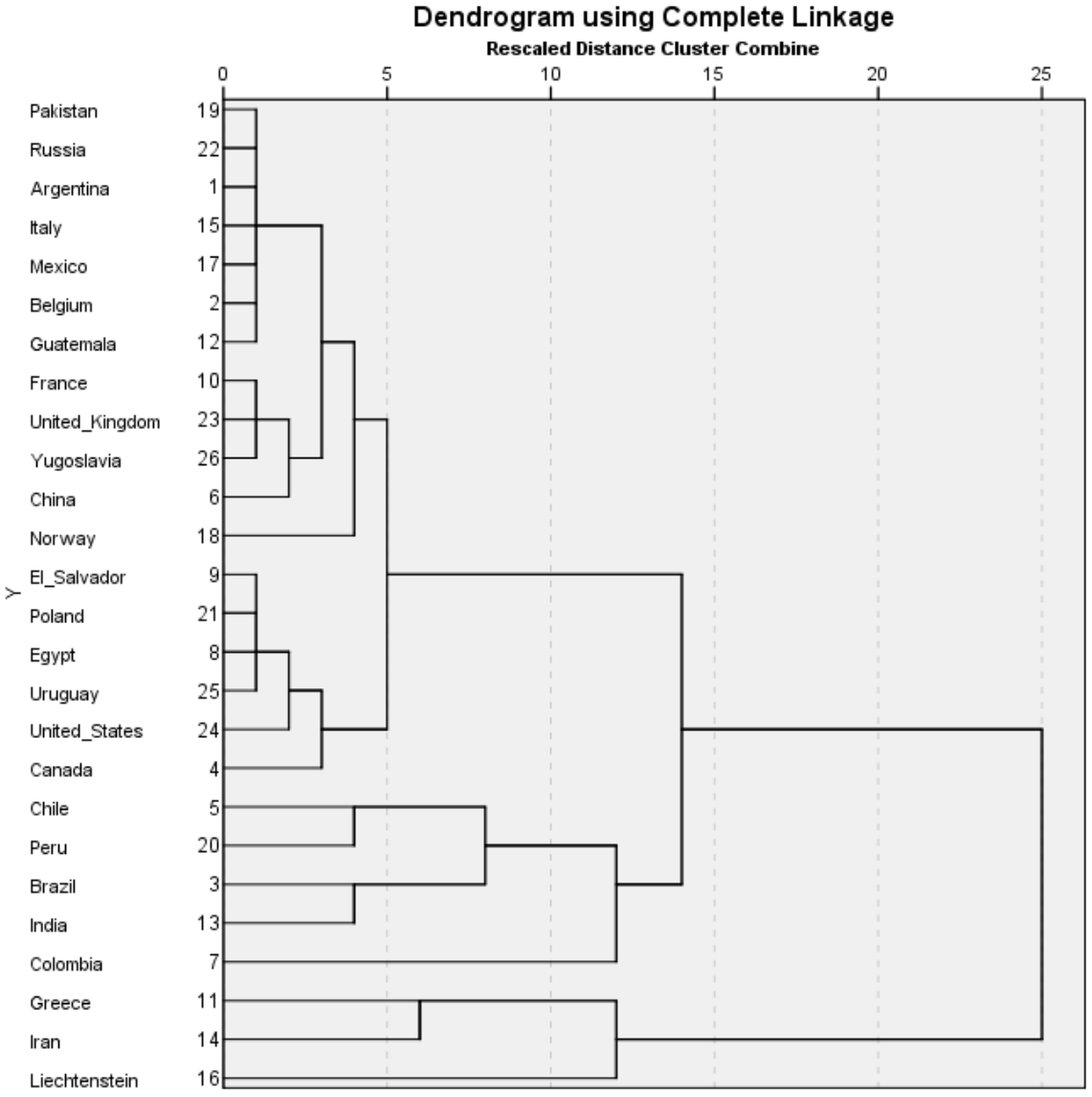


Figure A-19: Cluster Analysis of Diplomatic Relations Case(s) (1967–1984)

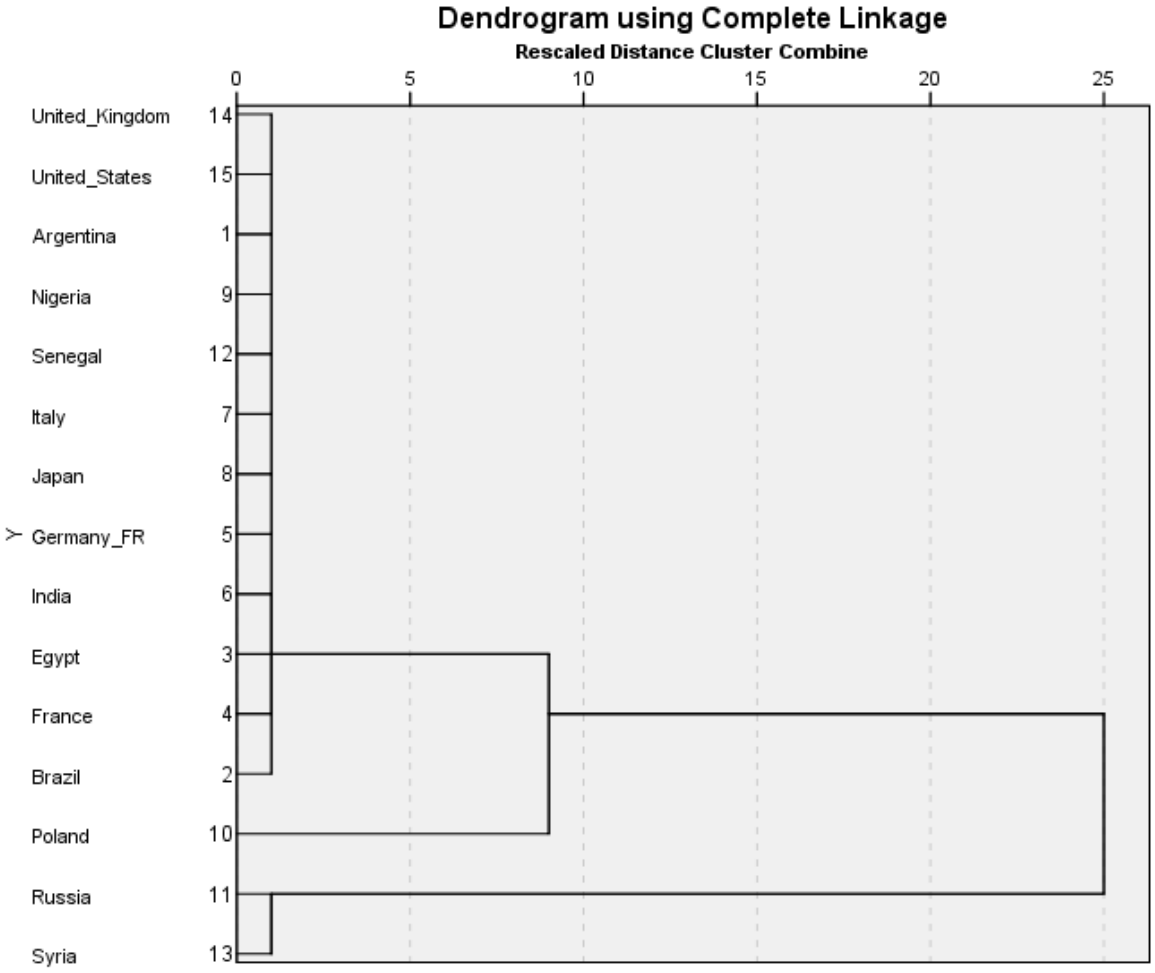


Figure A-20: Cluster Analysis of Diplomatic Relations Case(s) (1985–2015)

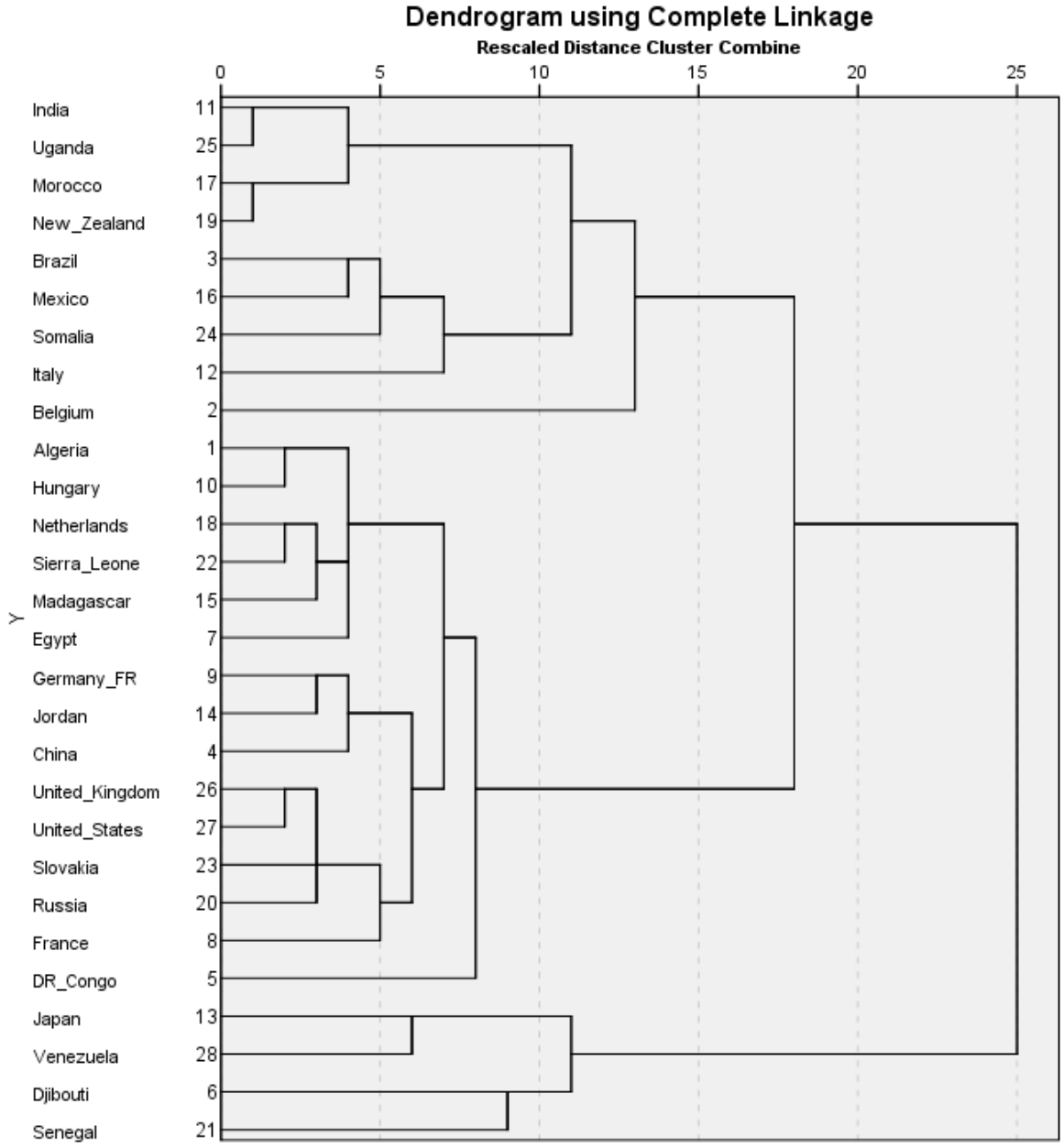


Figure A-21: Cluster Analysis of Property Rights Case(s) (1946–2015)

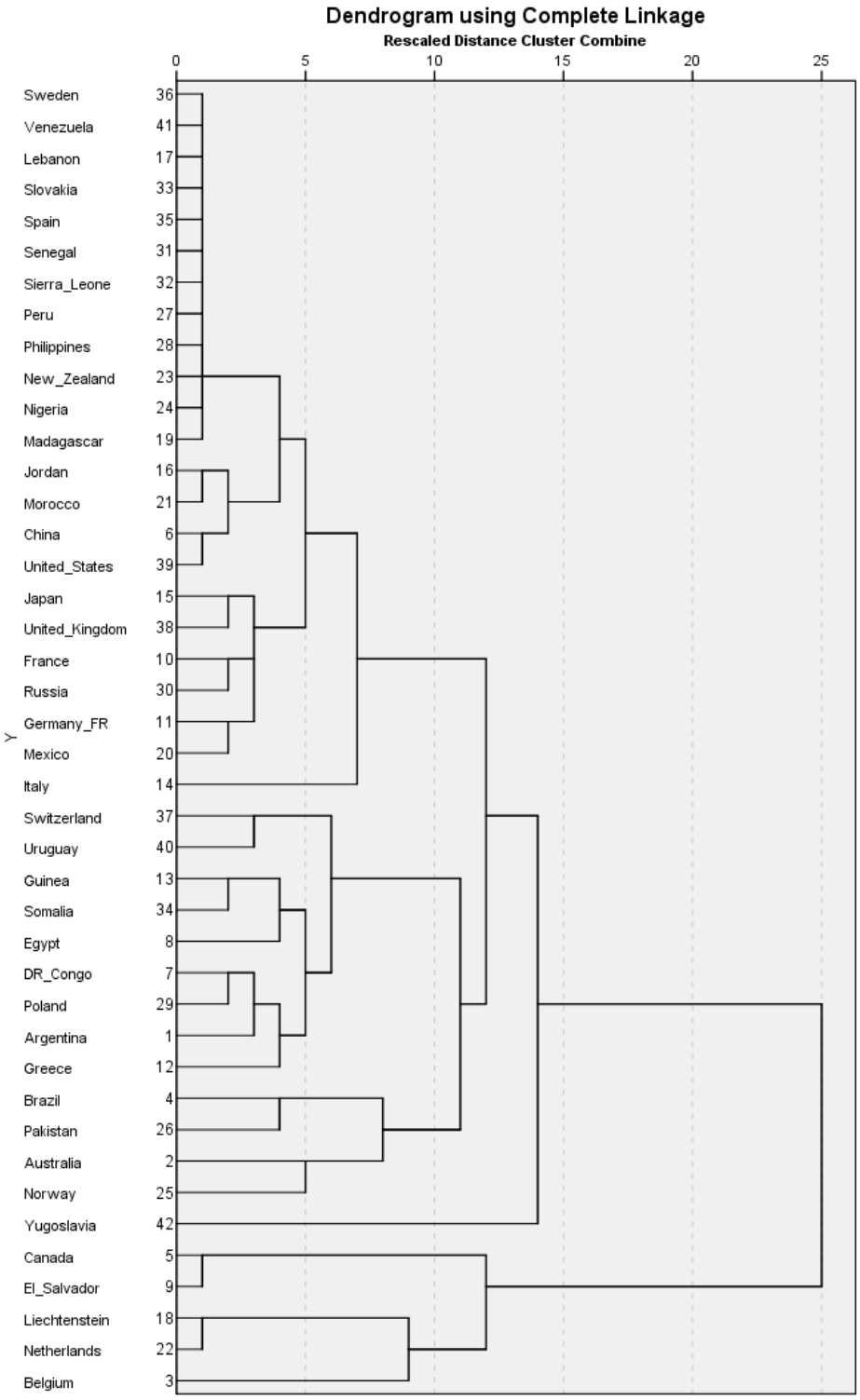


Figure A-22: Cluster Analysis of Property Rights Case(s) (1946–1966)

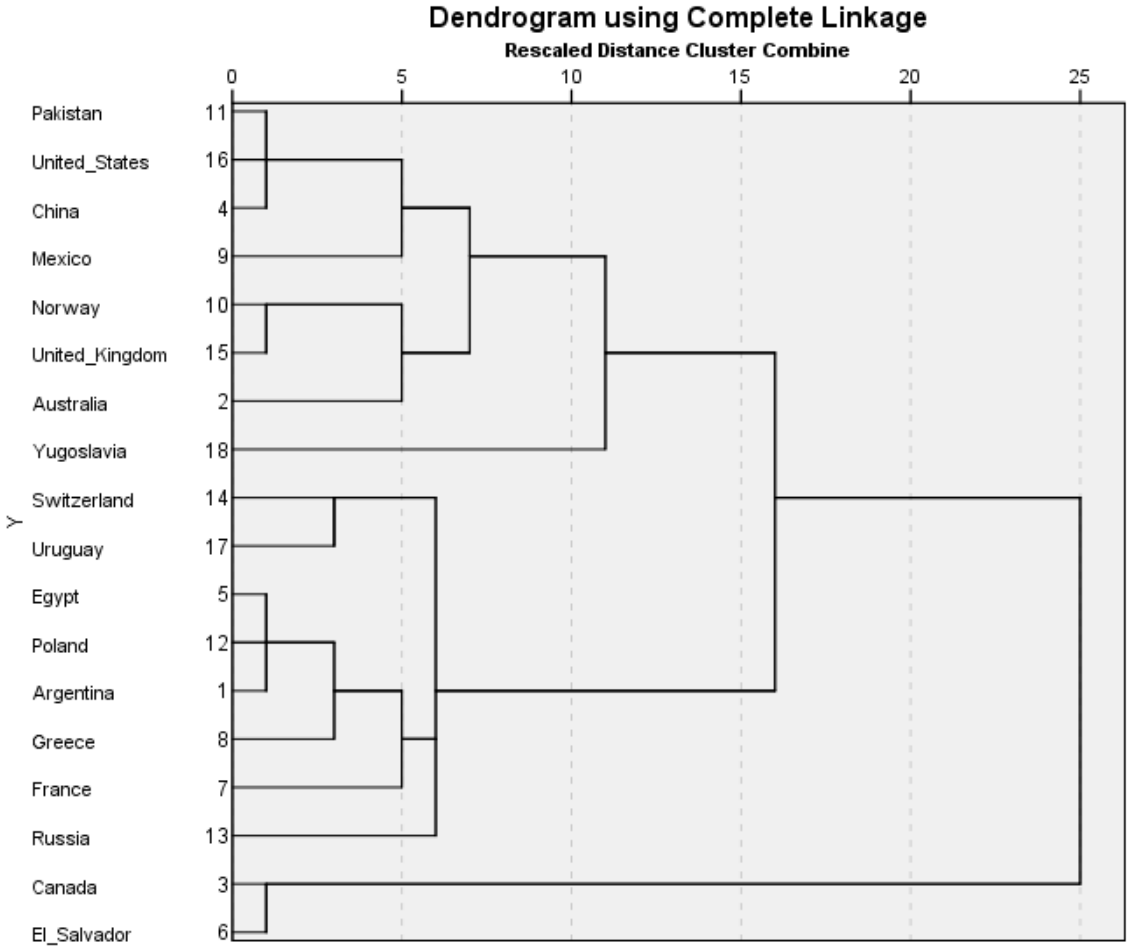


Figure A-23: Cluster Analysis of Property Rights Case(s) (1967–1984)

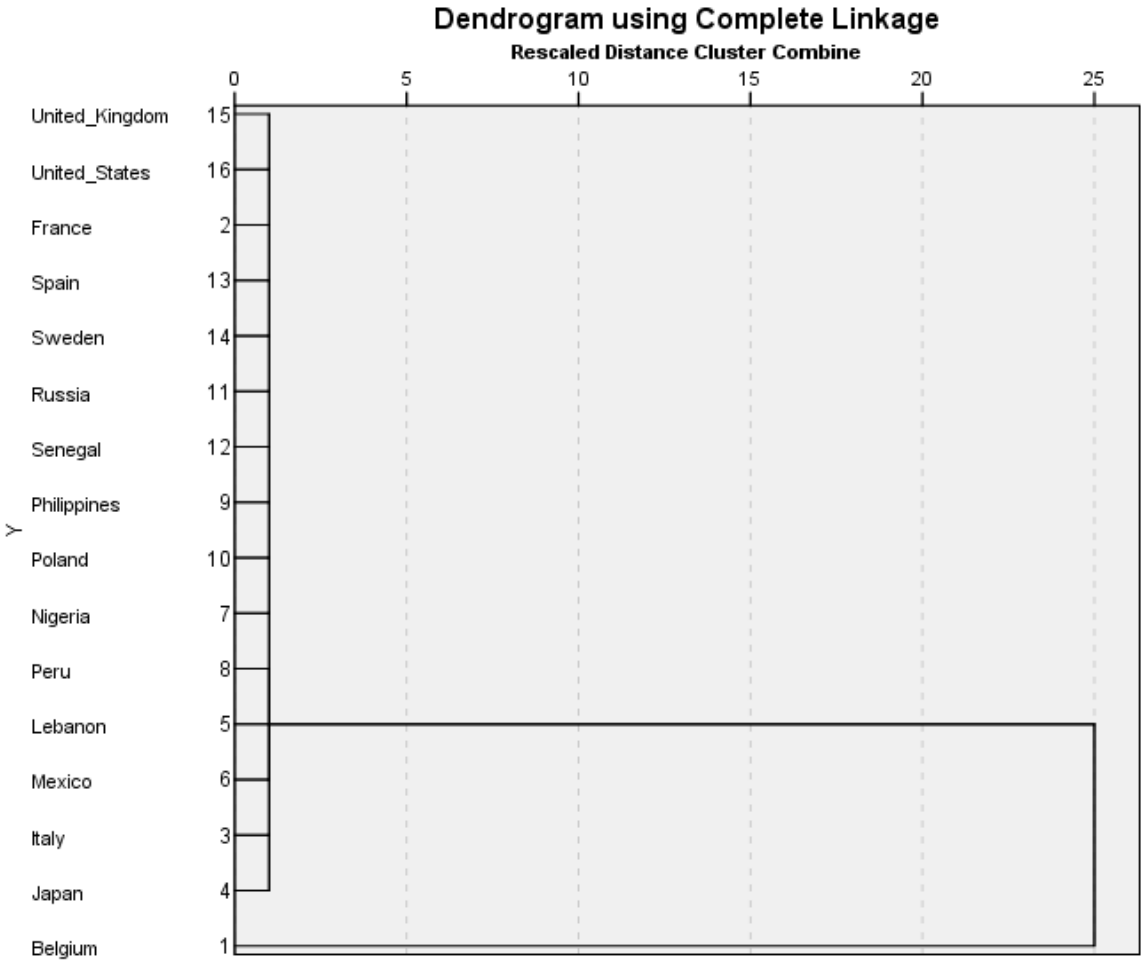
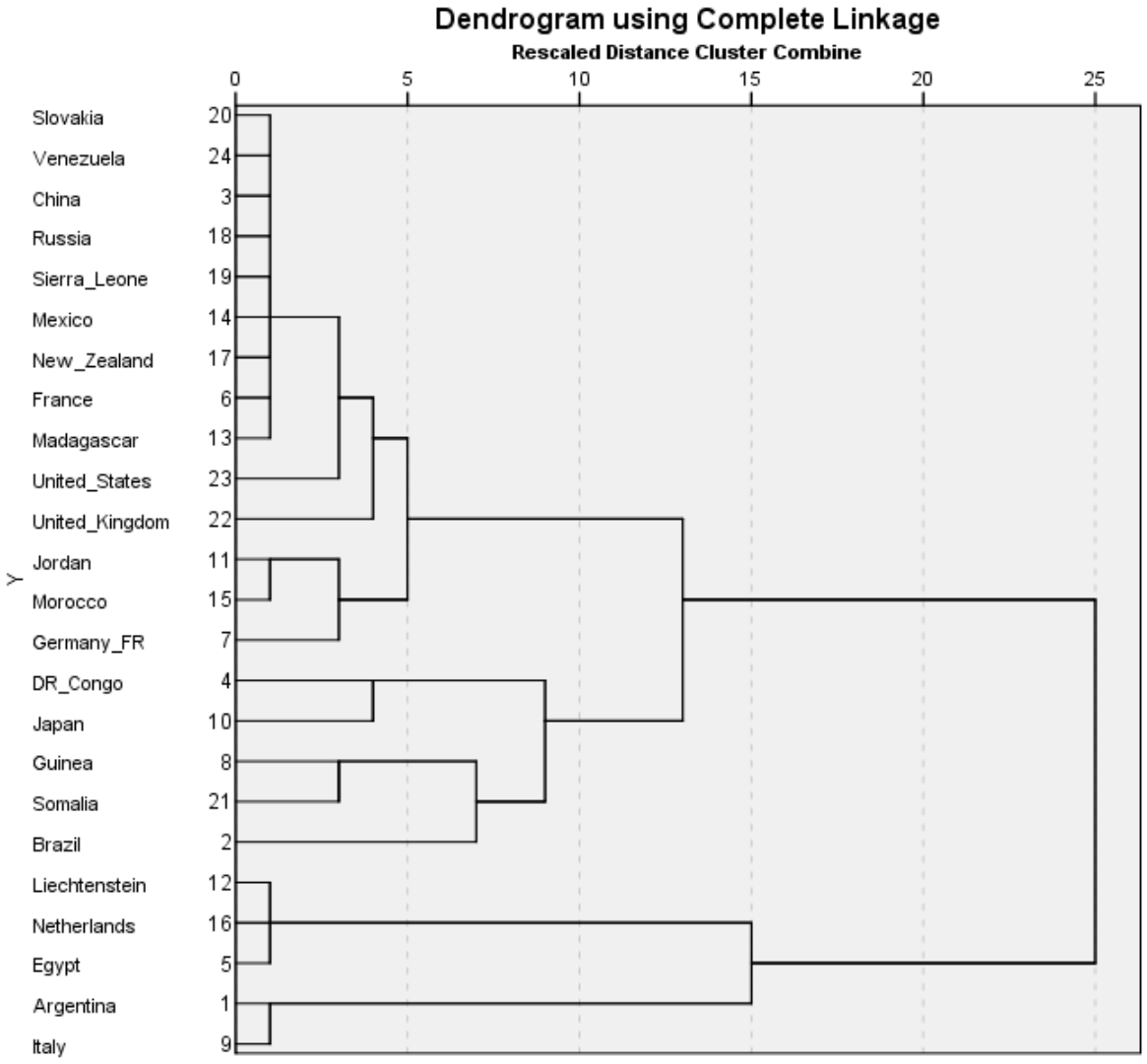


Figure A-24: Cluster Analysis of Property Rights Case(s) (1985–2015)


Dendrogram using Complete Linkage
Rescaled Distance Cluster Combine
0
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10
15
20
25
Y
Slovakia 20
Venezuela 24
China 3
Russia 18
Sierra_Leone 19
Mexico 14
New_Zealand 17
France 6
Madagascar 13
United_States 23
United_Kingdom 22
Jordan 11
Morocco 15
Germany_FR 7
DR_Congo 4
Japan 10
Guinea 8
Somalia 21
Brazil 2
Liechtenstein 12
Netherlands 16
Egypt 5
Argentina 1
Italy 9

Figure A-25: Cluster Analysis of Territorial Demarcation Case(s) (1946–2015)

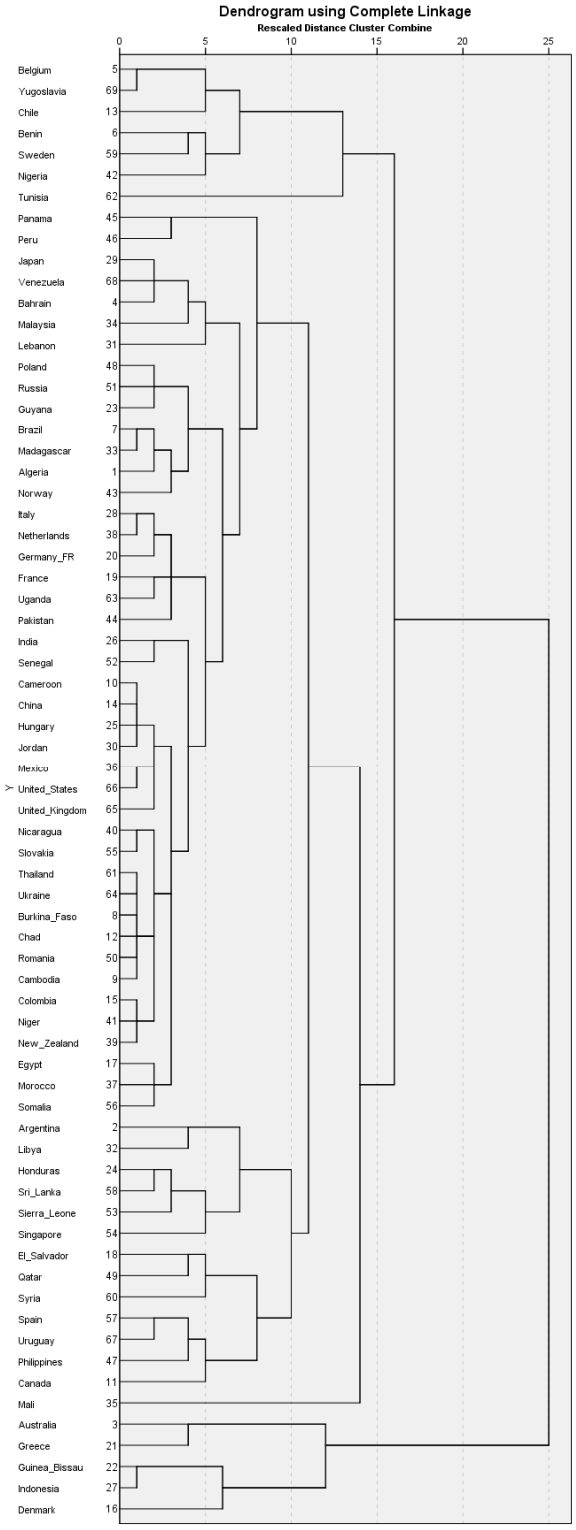

Figure A-26: Cluster Analysis of Territorial Demarcation Case(s) (1946–1966)

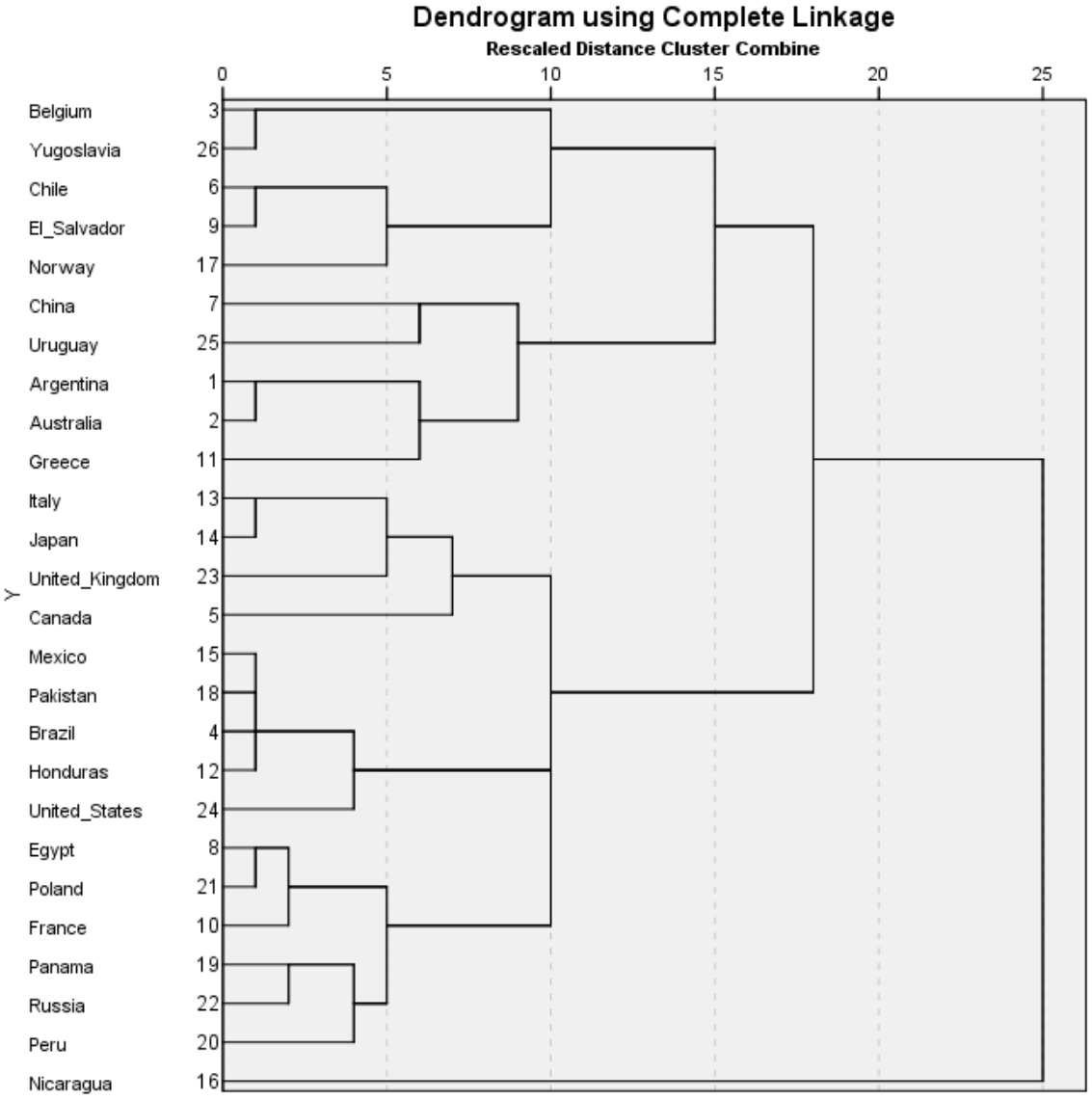

Figure A-27: Cluster Analysis of Territorial Demarcation Case(s) (1967–1984)

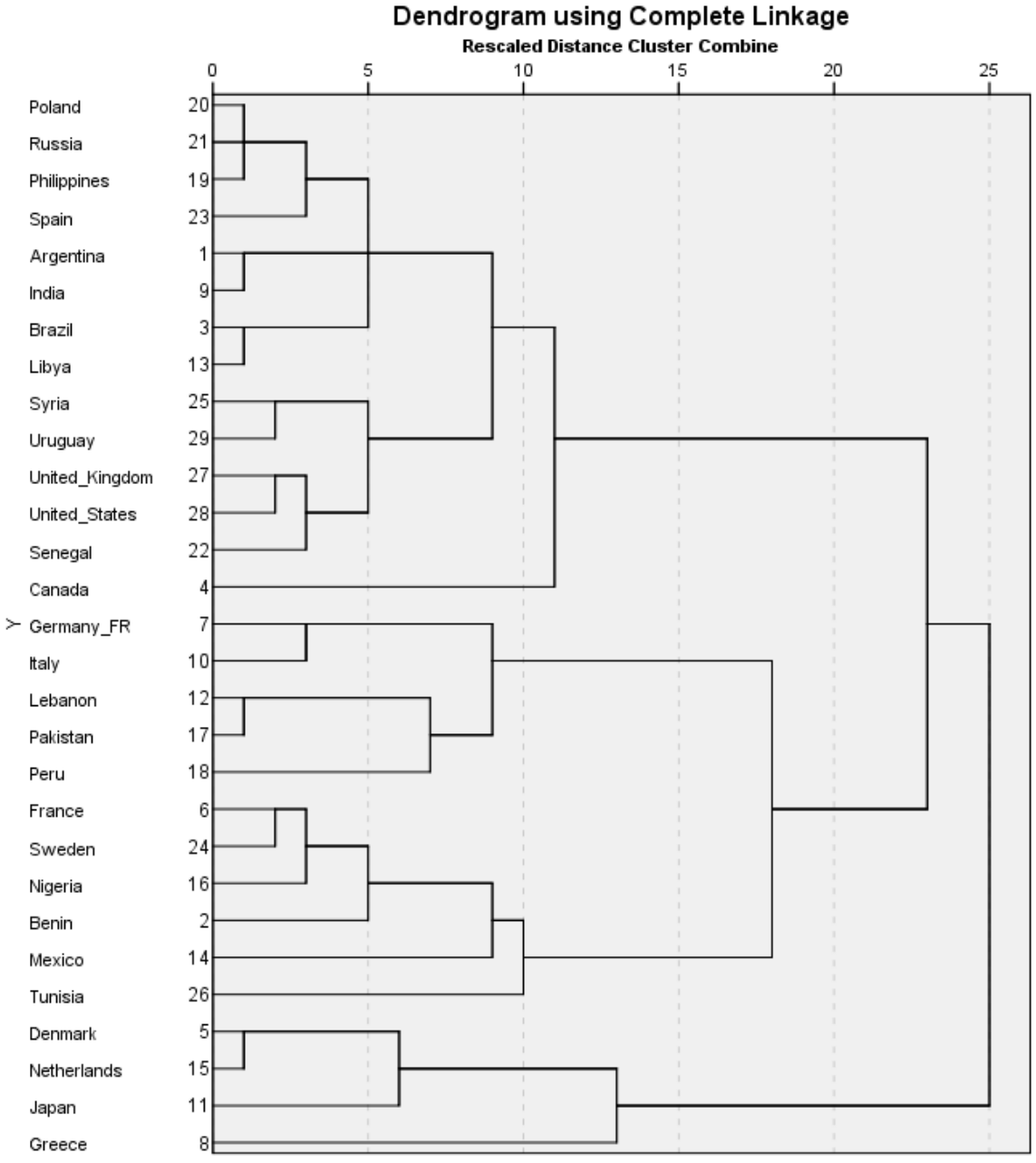

Figure A-28: Cluster Analysis of Territorial Demarcation Case(s) (1985–2015)

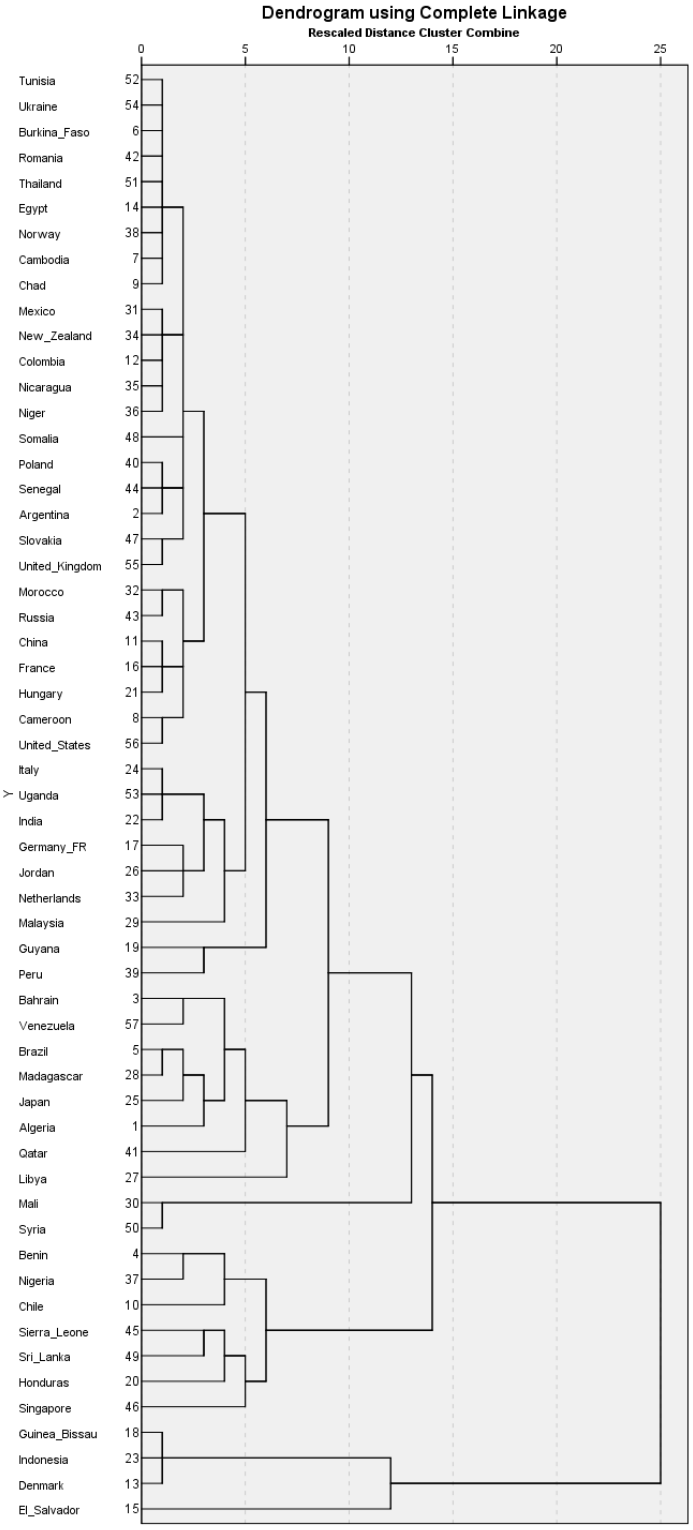

Figure A-29: Cluster Analysis of Trusteeship Case(s) (1946–2015)

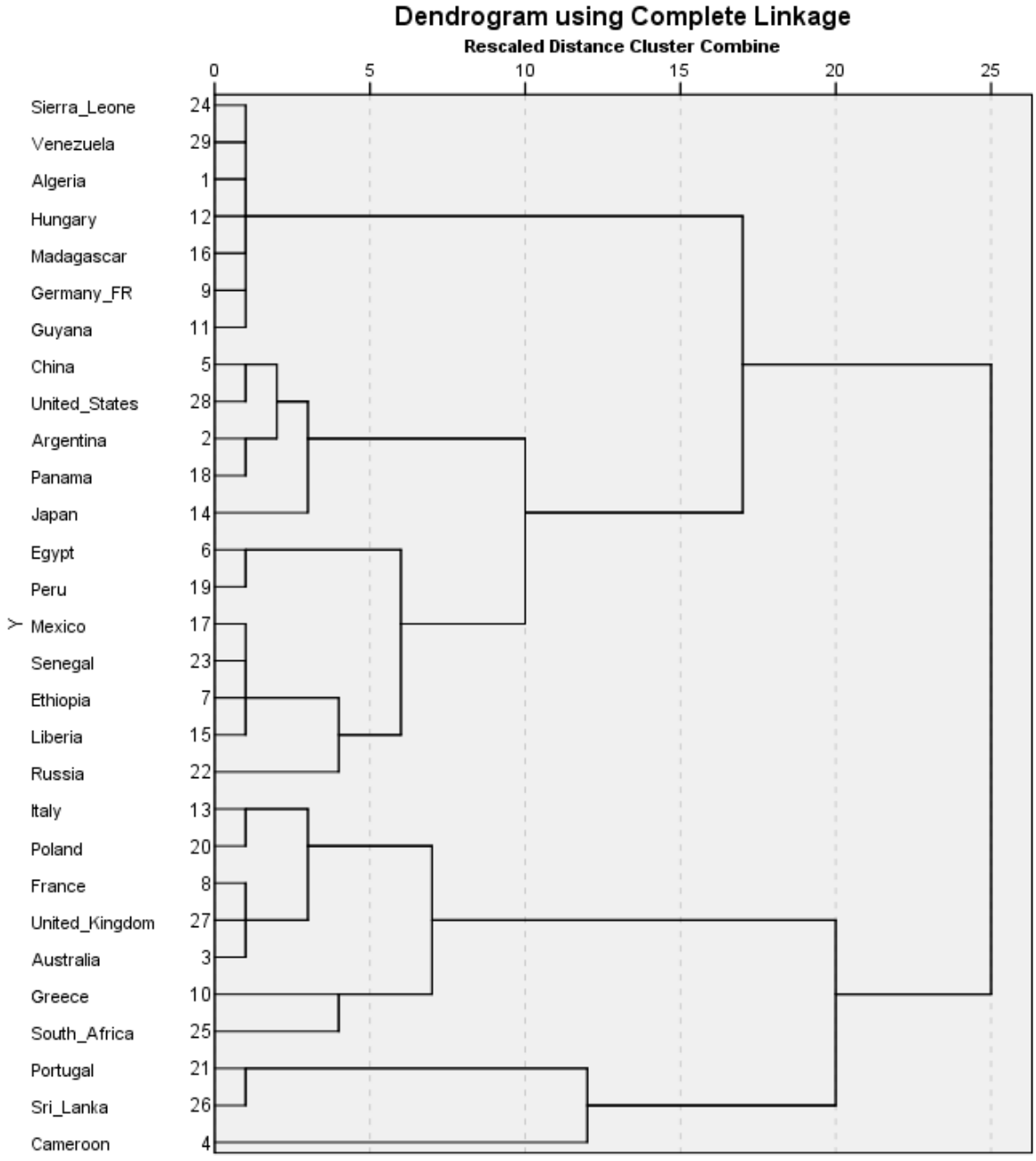

Figure A-30: Cluster Analysis of Trusteeship Case(s) (1946–1966)

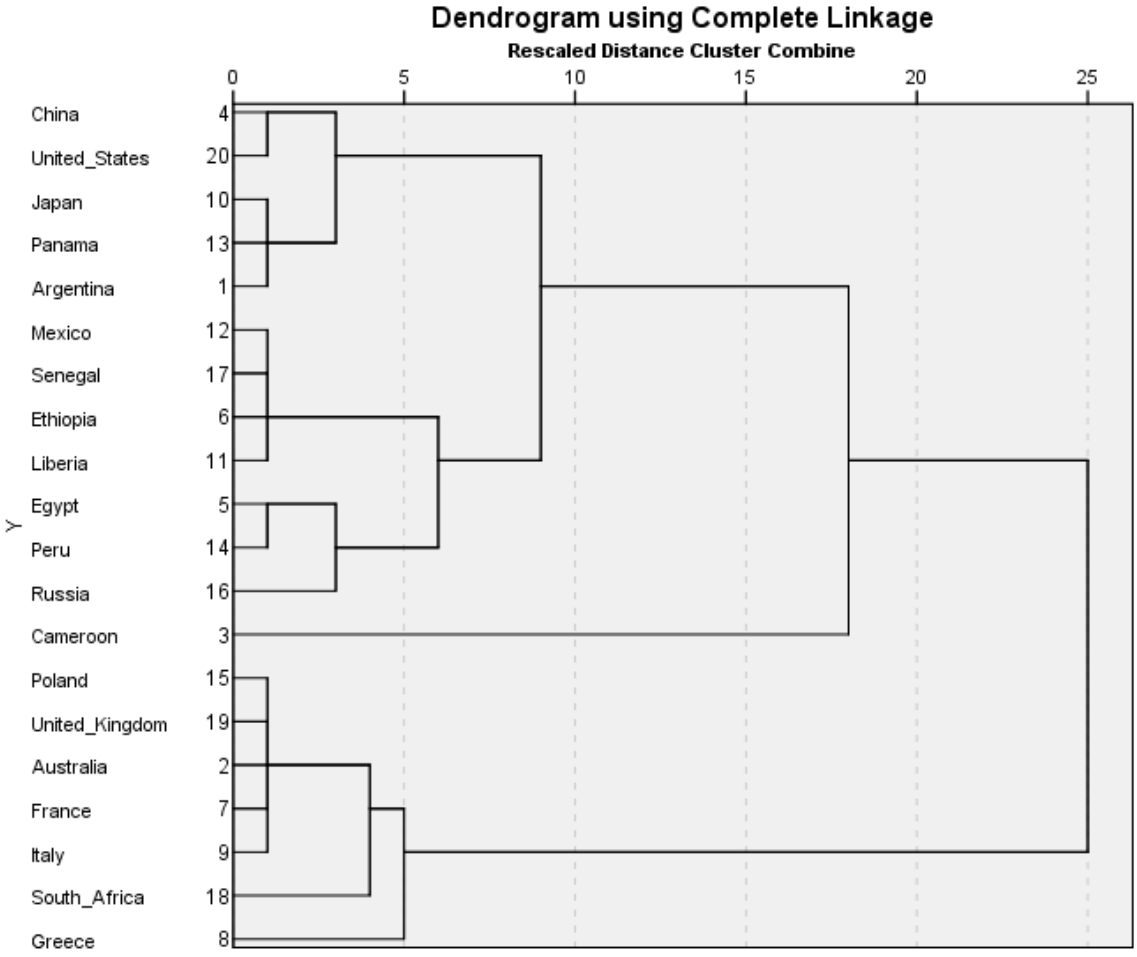

Figure A-31: Cluster Analysis of Trusteeship Case(s) (1967–1984)

N/A

Figure A-32: Cluster Analysis of Trusteeship Case(s) (1985–2015)

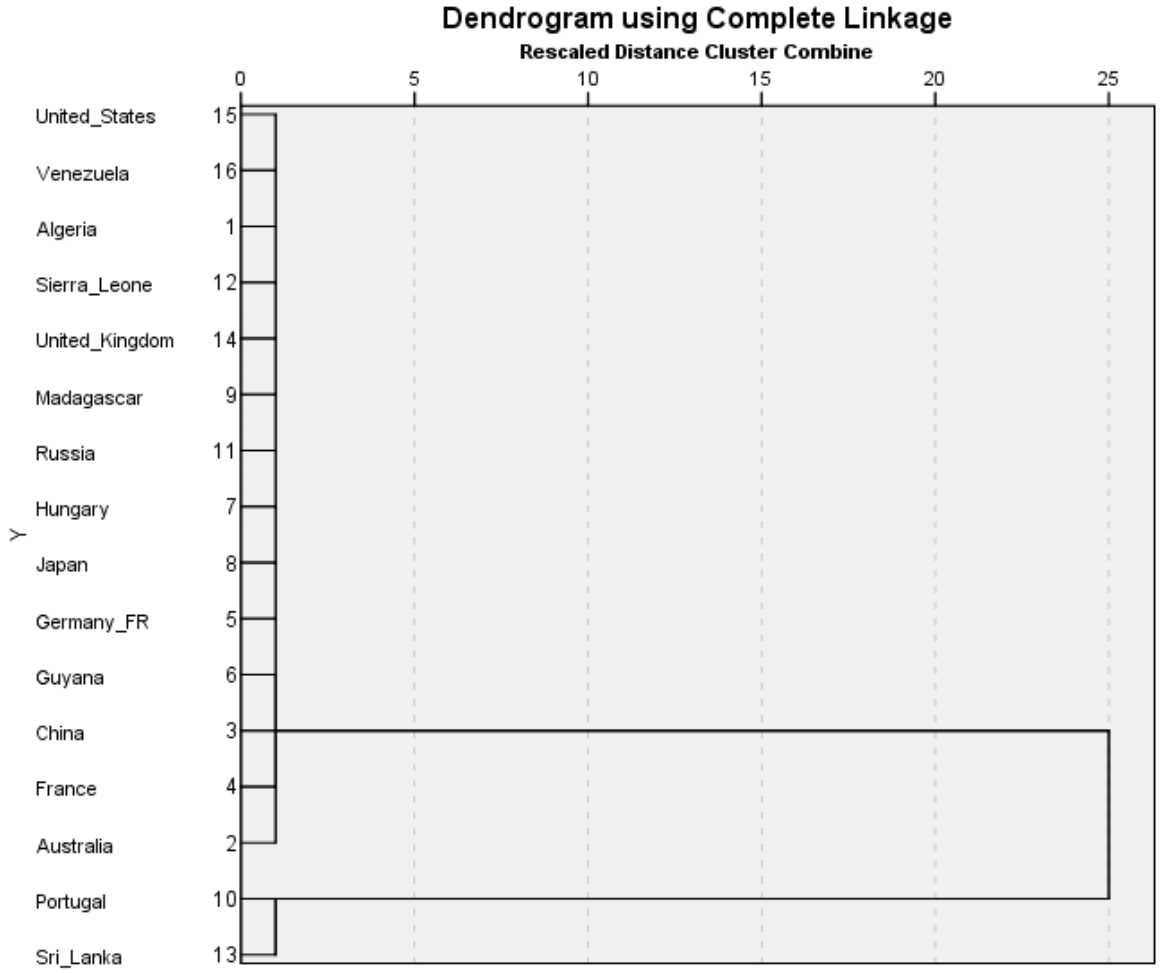

Figure A-33: Cluster Analysis of Use of Force Case(s) (1946–2015)

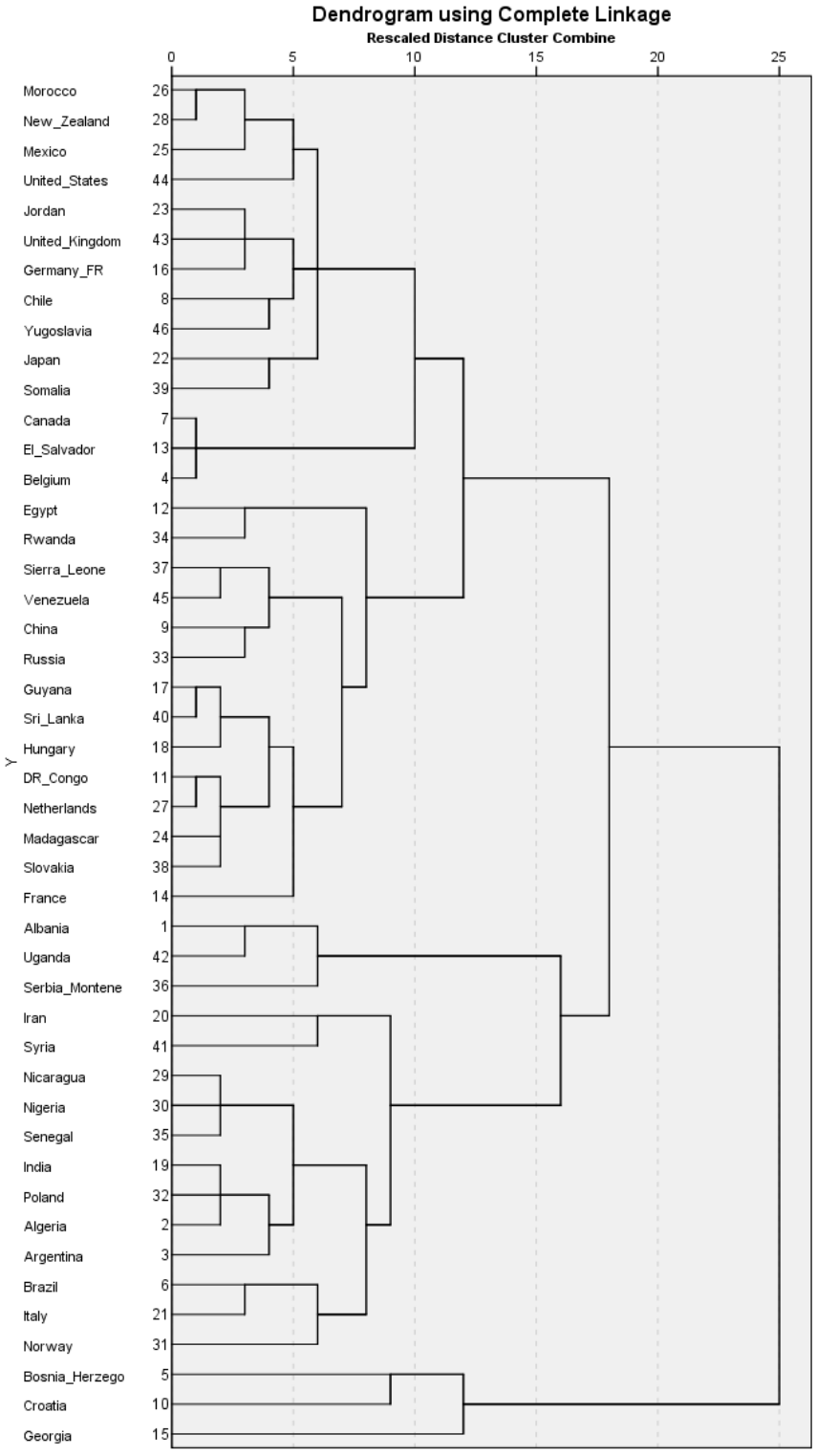

Figure A-34: Cluster Analysis of Use of Force Case(s) (1946–1966)

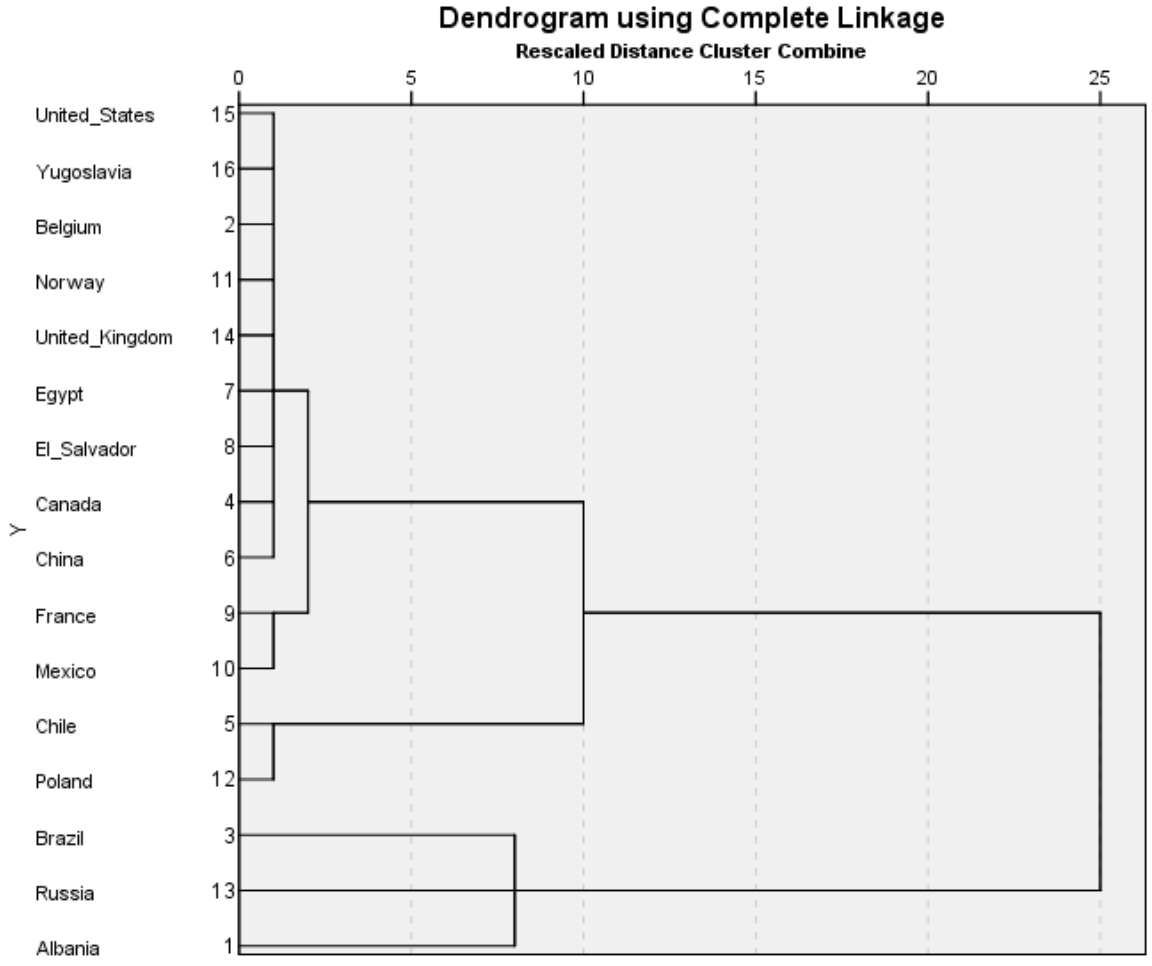

Figure A-35: Cluster Analysis of Use of Force Case(s) (1967–1984)

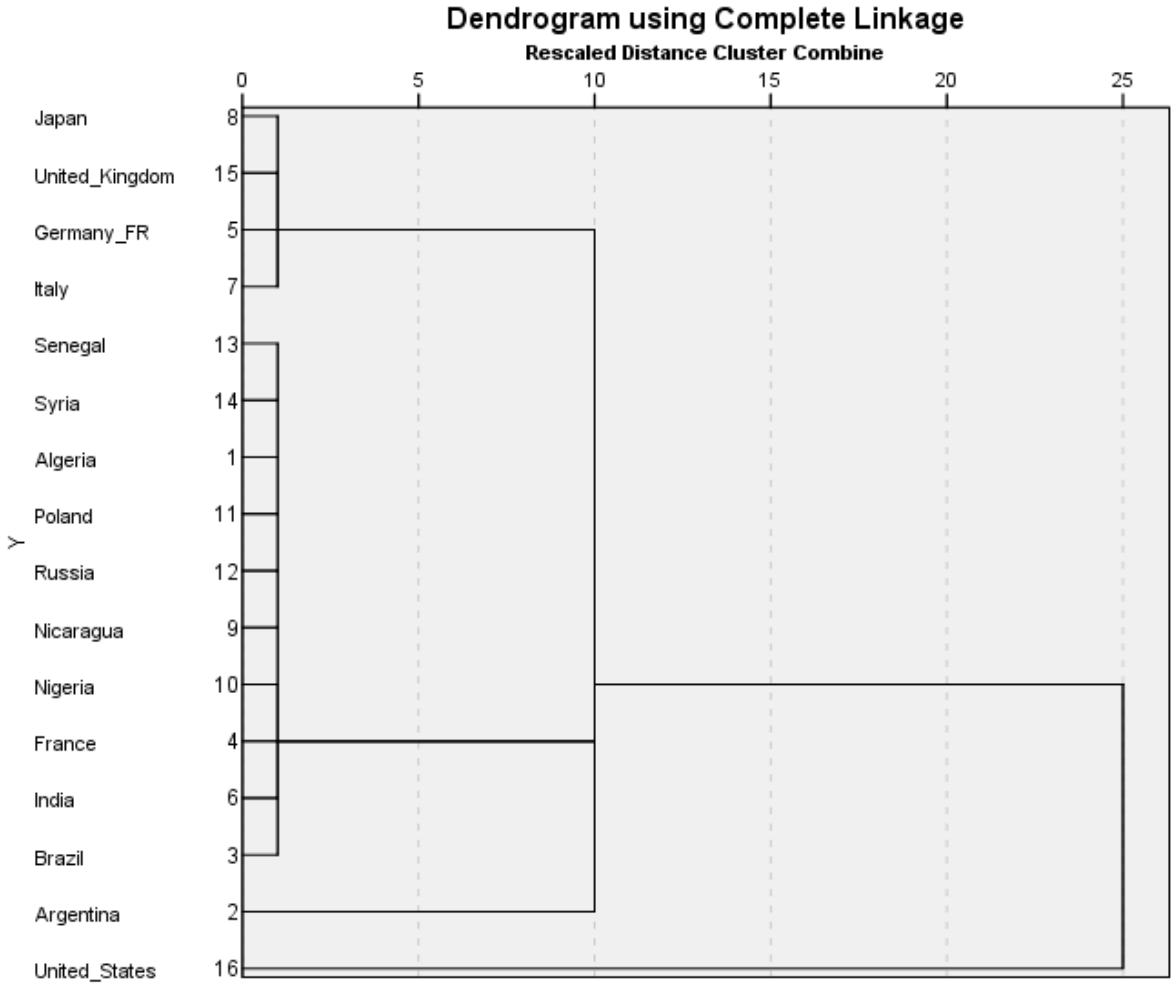

Figure A-36: Cluster Analysis of Use of Force Case(s) (1985–2015)