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The Influence of International Judicial Governance Institutions on Judicial Independence

The Politics of International Law

Thesis MIRD

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Chapter 1: Introduction

In 2011, the Southern Africa Development Community (SADC) tribunal was suspended and then amended by the SADC assembly after it had ruled against Zimbabwe in a case concerning land appropriations by the Zimbabwean government (Cowell 2013; Nathan 2013). Many observers said that this brought in jeopardy the judicial independence of the court, but the large focus of the analysis has been on the member states of the SADC, especially the active lobbying of Zimbabwean ministers (Cowell 2013). What this example shows is that it is often assumed when researching judicial independence, that it is the contracting states that affect this.[1] This is not necessarily the case. As can be seen in figure 1, there is only an indirect link between the contracting parties and the court, and that this link is mitigated through a direct link between the contracting parties and the International Judicial Governance Institution (injugovin) of a court. In the injugovin all contracting parties are represented and injugovins are linked directly to the court (Blokker 2016). These institutions are related to all governance functions that are executed within the court or tribunal, such as electing the judges or adopting the budget of the court (Blokker 2016). Examples include the Assembly of State Parties for the International Criminal Court or the United Nations General Assembly for the International Court of Justice. As these institutions have not been researched into great detail, this thesis will raise the question:

Does the institutional design of international judicial governance institutions influence the independent functioning of international courts and tribunals, and if so, to what extent?

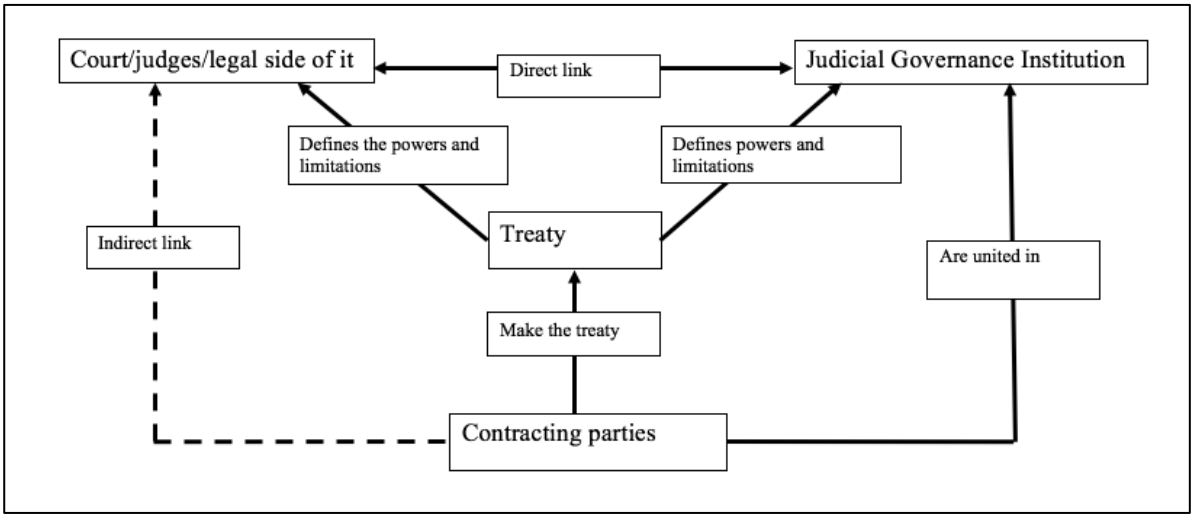


Figure 1: General Set-up of an International Court or Tribunal

[1] See for example the analyses of Cowell (2013) and Nathan (2013) on the Southern Africa Development Community Tribunal.

Current research focusses, to a large extent, only on the undue influence that contracting states might have on the court and making this question academically relevant as, it introduces a new way of looking at judicial independence (Ginsburg 2015; Posner and Yoo 2005; Zimmermann 2014). However, the independence of courts also matters in real life. As can be seen from the SADC tribunal ruling or the institutional set-up of the European Court of Justice, international courts and tribunals have come to play a larger role in international politics, as many of them now have compulsory jurisdiction or can hear complaints brought by individuals (Posner and Yoo 2005; Voeten 2011). As a result, international courts and tribunals can now adjudicate all conflicts that fall within its jurisdiction, being able to directly influence policies of its member states (Larsson and Naurin 2016; Posner and Yoo 2005). It has been observed that some courts have been amended after a court or tribunal has ruled against one of its member states, while in other cases the court has remained unchanged (Blokker 2016). This means that something in the political parts of those courts need to differ, in order for this result to come about as it is only the political bodies of international courts and tribunals that can amend the court or tribunal as a whole or a specific part of it, making it more in line with their preferences (Ginsburg 2015; Panke 2017).

This thesis will proceed as follows. Chapter two will give an overview of important literature. The first section of this chapter will provide a link between international courts and tribunals and international relations. It will show that international courts and tribunals are a special sort of international organizations, and that the ease of cooperation and the way these organizations work can differ depending on the theoretical perspective taken (Barnett and Finnemore 1999; Cohn 2012; Rittberger et al. 2012). Institutionalism sees organizations as a method of facilitating cooperation, realism sees organizations as a way for the strongest state to remain in control and constructivism asserts that even though it is states that make the organization happen, it is hard to control them afterwards something the other two see as a necessity for the organization to remain in place (Barnett and Finnemore 1999; Cohn 2012; Rittberger et al. 2012). The second section of chapter two will then place this thesis in the debate on judicial independence and introduces two conflicting theories. On the one hand, separation of power theory holds that courts and tribunals are only as independent as to the extent that the judgement falls within the win set of preferences of those actors that can make changes to the court (Garoupa, Gomez-Pomar, and Grembi 2013; Larsson and Naurin 2016). The attitudinal model, on the other hand, holds that there are so many actors that play a role in changing the court at the international level that this enables judges to vote according to

their own preferences without regard to the preferences of those actors that can change the court (Kantorowicz and Garoupa 2016; Larsson and Naurin 2016).

Chapter three will then introduce the theoretical framework and the hypotheses. Following to a large extent separation of power theory, this thesis will ascertain whether a different institutional design of injugovins influences the independence of the court. The hypotheses focus on how easy it is to change the statute of a court, how easy it is to withhold the budget of a court and the number of votes that is necessary to elect the judges of the court. Here, the assumption is that the easier it is to make changes or to withhold the budget and the lower the number of votes that is necessary to elect a judge, the more dependent the court will be (Garoupa et al. 2013; Ginsburg 2015; Ingadóttir 2011). The next chapter will introduce the research design and the methodology. This thesis will use a comparative case study of the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ) in order to compare differences in the institutional design of their respective injugovins (Halperin and Heath 2012). The two courts will be compared on their respective levels of judicial independence using three variables: economic alignment, political alignment and voting in favour of the home state (Feld and Voigt 2003; Posner and De Figueiredo 2004). These indicators will be compared using a two-sample t-test for the two alignment variables and the Lambda test for the voting in favour of home state variable. The latter test is used, because the vote in favour of home state variable is a categorical variable, making the t-test not suitable, as you need to be able to calculate a mean of the sample for the t-test to yield results (Argyrous 2011).

Chapter five contains a comparison of the injugovins of the PCIJ and the ICJ as well as a brief description of the two courts themselves. The PCIJ has the Assembly of the League of Nations and the Council of the League of Nations as its injugovins and those organs are responsible for setting the budget of the PCIJ, electing the judges and changing the statute if this is deemed necessary (Assembly of the League of Nations 1920). All decisions need to be taken with unanimity, except the election of the judges, for which a simple majority suffices (Assembly of the League of Nations 1920; The Covenant of the League of Nations 1920; Fachiri 1925). The ICJ has the United Nations General Assembly and the United Nations Security Council as its injugovins. The Security Council only plays a role in electing the judges, with the General Assembly being responsible for setting the budget of the ICJ and amending the statute if deemed necessary (*Statute of the International Court of Justice* 1945). Important decisions need to be taken with a two-thirds majority, while for electing the judges a simple majority suffices (*Charter of the United Nations* 1945). The main difference

between the injugovins of both courts is therefore the number of votes necessary to get something done, while the main similarity is the powers given to the injugovins.

The comparison of the injugovins of the PCIJ and the ICJ is followed by the operationalization of the data and the actual analysis of the data. The data is operationalized in order to see which court, based on the voting patterns in the two courts, is more independent. Based on voting in favour for the home state the ICJ seems to be more independent. The data on economic alignment and political alignment does not yield any conclusive results and the two courts seem to be equally independent based on this variable. The analysis will then link the differences in institutional design of the injugovins to the data on the independence of the court. This gives some mixed results at best. Based on the easiness of changing the statute the PCIJ is deemed to be more independent, while the ICJ seems to be more independent based on the fact that it is more difficult to withhold the budget (Ingadóttir 2011; Larsson and Naurin 2016; United Nations 2003). Support is found for neither prediction, leading to a rejection of both hypotheses. When looking at the way judges are elected, it is expected that the ICJ judges are slightly more independent as there is a larger number of actual votes necessary to get them elected and some weak support is found for this. The last two chapters will then point out the limitations of this thesis, possible avenues for future research and conclude this thesis.

Chapter 2: Literature Review

This chapter will aim to do two things. Firstly, it will place this thesis in the context of international relations. It will do so by showing firstly, that international courts and tribunals are not merely organizations that adjudicate but are often also viewed as political organizations. Secondly, it will place international courts and tribunals in the context of international organizations and the assumptions that international relations theories make about them. This will show that even though states try to control international organizations, this might be different for international courts and tribunals as states also want them to be independent (Posner and Yoo 2005). This leads to the second part of this chapter, which will place this thesis within the debate on whether or not international courts and tribunals can be truly independent. Borrowing from literature on national supreme courts it will introduce separation of power theory and the attitudinal model and pose some critical remarks on those two theories.

International Relations and International Law

Why does this thesis fall into the realm of political science and international law and not just in the realm of the latter? It is mainly because of two aspects. Firstly, international courts and tribunals are not always seen as judicial bodies. Posner and De Figuieredo (2004) have shown that for example the ICJ is a highly political organization and the Southern African Development Cooperation Tribunal was dismantled after its member states felt that it was interfering in the internal affairs of one of the member states (Cowell 2013; Nathan 2013; Posner and De Figueiredo 2004). Furthermore, several African states are currently debating whether or not they want to leave the International Criminal Court, as they see it as highly political and an institution that is only created as a new way to control Africa (Associated Press in Addis Ababa 2017). So even though international courts and tribunals are meant to adjudicate conflicts using only international law and states say they want them to be independent, it seems to be that international politics also play a role.

Secondly, international courts and tribunals are not much different from ordinary intergovernmental organizations. In the basis, they are set up by nation states who give their consent to be bound and give the organization a specific task or set of tasks, which is to adjudicate conflicts between state parties to the court or tribunal is this case (J. Klabbers 2013). This is for a large part in line with what institutionalism tells us about intergovernmental organizations. Institutionalism holds that states cooperate because they become interdependent because of interaction with each other (Keohane and Nye 2001; Rittberger et al. 2012). This interdependence creates both international law and the need for someone to oversee these laws, which lowers transactions costs for trade between states (Lipson 1984). Institutionalism holds that international organizations are the best way to do this, as states can make them in any way that benefits them. Furthermore, international organizations are controlled by the states and functions according to principal-agent theory, where the agent (e.g. the international organization) executes those things delegated to it by the principal (e.g. the member states) (Rittberger et al. 2012). In this way states can create a multitude of different sorts of international organizations, one of which can be an international court of tribunal.

Neo-realism on the other hand states that international cooperation is difficult to achieve at all, because the anarchical structure of the international system dictates a maximization of power which makes cooperation very difficult (Cohn 2012; Mearsheimer 1994). The only way the cooperation in an international organization can come about is when

there is one state powerful enough and willing to deal with the lower relative gains in order to gain the absolute gains. This is an avenue often pursued by hegemonic stability theory, which links international organizations to the rise and fall of major hegemonic state (McKeown 1983; Rittberger et al. 2012; Stein 1984). Here, the strongest state will have the most benefits from the international system, for example because the voting system favors this state. But something that also can happen is the rise of a new set of institutions when a new hegemon takes on this role, as it is also a way of the hegemon to control the system (McKeown 1983). The ICJ could be an example of this, as it was created during a period in time of which it was said that a new hegemon, the United States, was rising to power and willing to use this power to create a stable system[2].

Both neo-funtionalism and neo-realism hold that, when states create an organization they will always remain in control over the organization. Barnett and Finnemore (1999) following a more constructivist argument hold that this is not necessarily true. They hold that, even though states make the organizations in a way that benefits them, the outcome of the process does not necessarily do so (Barnett and Finnemore 1999). When interacting in an organization, processes are being made and people with certain ideas about how to reach the end goal interact with each other. This can lead to a specific dynamic within the organization that can produce different outcomes than expected, but also make the organization less susceptible to orders coming from the member states of the organization that are supposed to set the course (Barnett and Finnemore 1999). For an international court this could for example mean that the court becomes more independent than was expected and rules in ways that was not foreseen by the members and would indicate that the court is operating independently from the member states, something that should not be possible according to the other two theories.

The question that therefore rises is: can international courts and tribunals be independent or will they always be controlled by states? Clearly this question is not only a judicial one, but also a political one as it is the wish of states to control the organizations as the theories above here state. On the other hand, states do want international courts to be independent as this will mean that if they are dragged before the court they know they will be judged based on law and not on politics (Posner and Yoo 2005). This sets this thesis at the crossroad of both international law and international relations. The next section will focus more on the question whether or not international courts and tribunals can be independent

[2] See for a discussion whether the US was ever a true hegemon McKeown (1983) or Stein (1984)

and if so to what extent. It will introduce the debate between the two major theories that deal with this question: separation of power theory and the attitudinal model.

The debate on Judicial Independence

As the international judiciary is such a recent phenomenon, many works have borrowed from domestic literature on supreme or constitutional courts and applied this to the international judiciary (Garoupa et al2013). One of the main theories that has been borrowed from the domestic domain is separation of power theory (SOP). This theory holds that judges will take into account the preferences of those actors that can either amend the court or the law that the court is observing or that can provide them with jobs after their term ends (Garoupa et al 2013; Larsson and Naurin 2016). The vote of certain or most judges, will therefore be in line with those that have elected them or those actors that can change the whole institution of the court. SOP theory therefore holds that courts have more or less discretion in making their decision based on the number of actors necessary to make a change and the importance of the issue. This gives the most discretion to those courts that need a unanimous decision for anything to change and a decision that is not seen as going against the vital interest of important actors. (Larsson and Naurin 2016).

SOP has been heavily criticized by proponents of a second theory, the attitudinal model. This theory departs from the same assumption as SOP, that judges try to come to a verdict that will not be overridden by the legislative, but in their view this leads to different outcomes (Larsson and Naurin 2016). Their criticism towards SOP lies in two aspects. Firstly, that SOP assumes that the actors that can perform an legislative override will be easily able to coordinate this and, secondly, that the court has perfect information and knows what the other actors' preferences are and can act accordingly (Larsson and Naurin 2016). The attitudinal model holds that judges, especially those in international courts, have almost unlimited discretion, because it is very hard for all the actors to coordinate an legislative override and the court will have a lot of trouble getting the information it needs to act strategically and without information there is no possibility for strategic action (Larsson and Naurin 2016). Judges of the court will therefore take into consideration their own preferences and only use those preferences to come to a judgement (Kantorowicz and Garoupa 2016).

Both of these theories are situated at the extreme end of a scale, but both theories also have some truth in them. This thesis will, therefore, hold that neither of these theories has full explanatory power when it comes to international judicial independence. Under SOP theory,

judges would be expected to take decisions that lie within a certain win-set and this could be determined by looking at the preferences of the political actors involved (Garoupa et al. 2013; Larsson and Naurin 2016). However, judges would need full information for this, making it virtually impossible for this to be a realistic outcome (Larsson and Naurin 2016). SOP theory is nevertheless right in assuming that courts and tribunals have a certain dependence on their political counterpart, as many of them need the injugovin to agree on the budget and provide the money (Blokker 2016). This will limit the discretion of the court to a certain extent and this thesis will hold that this limit differs based on the institutional design of the injugovin.

The attitudinal model goes to the other extreme in assuming that judges have unlimited discretion in making their decisions, as there are too many veto powers to overcome the decision (Garoupa et al. 2013; Larsson and Naurin 2016). This is also not realistic, as otherwise the SADC would not have been able to amend its tribunal after it ruled against Zimbabwe (Cowell 2013; Nathan 2013). Nevertheless, there are many checks and balances in place that are supposed to assure the independence of the courts' judges (Posner and Yoo 2005). Here, everything is done in order to make sure the judges can make their decisions independent of any undue influence (Larsson and Naurin 2016; Posner and Yoo 2005; Zimmermann 2014). However, the court as an institution cannot be seen separate from its judges, as without the judges the entire institution would not function (Voeten 2011). This paper will, therefore, hold that especially the dependence of the whole institution, depends on the institutional design, that is all formal rules and procedures and institutional set-up, of the injugovin of that specific court.

Chapter 3: Theoretical Framework and Hypotheses

This will lead the thesis to focus on a specific part of the court, namely the injugovin. The injugovin becomes the most important political actor of the court, as all state parties are present in this organ and this is the arena that takes all decision that keep the court functioning, such as electing judges and adopting the budget (Blokker 2016). However, as figure 1 shows, there is an assumed connection between the court itself and the contracting states and this is the relation that is often studied. This connection is, however, only indirect as it is mitigated by either the treaty, which the contracting states have made and sometimes also can amend, or through the injugovin, in which all decisions are taken after the treaty comes into force (Blokker 2016; Österdahl 2011). An example of this, is the budget of the International Court of Justice, which is not determined by a special conference of the contracting states, but within its injugovin, the United Nations General Assembly.

In this way, the injugovin is much more powerful in exercising power over the court than the contracting states once the court has been formed. In this sense, this thesis will partly follow SOP theory, in that it assumes that the institutional design, that is all powers, rules and procedures, of the injugovin will influence the degree of independence that the court has (Garoupa et al. 2013; Larsson and Naurin 2016; White 2011). The main component of this are voting rules that are established within an injugovin. These voting rules determine how many votes each member of the injugvin has, how many votes are necessary to adopt something and how many votes need to be cast in order for the result to be valid (White 2011). For example in the International Criminal Court, important changes require a two thirds majority of votes within the Assembly of State Parties, while the same changes in the European Court of Justice require a unanimous decision and ratification of the member of the European Council, while in addition the European Parliament also needs to agree on the matter.

Hypotheses

As said before, there are two parts that need to be looked at when assessing judicial independence: the independence of the court as an institution and the independence of individual judges. This section will discuss firstly the independence of the court as a whole, which has largely to do with the budget of the court, and secondly the independence of individual judges, which for a large part depends on how they get elected. But before turning to the discussion of how the injugovin can have an influence on judicial independence, it is important to first define what is meant by judicial independence.

Judicial independence is most broadly defined as the absence of undue influence over the court by other actors (Crawford and McIntyre 2012; Kahn Zemans, n.d.; Posner and Yoo 2005; Voeten 2011; Zimmermann 2014). This broad definition seems to be the only form of a definition that can gain broad support in the literature, as does the answer to the question whether to not judicial independence is wanted or applicable to the international level (Crawford and McIntyre 2012; Voeten 2011; Zimmermann 2014). As this thesis wants to research judicial independce at the international level, it has to assume that some form of judicial independence is applicable to the international level, especially since it is referred to in the founding treaty of many international courts and tribunals (Bertodano 2002). However, as this is a very broad definition, judicial independence is not something that can be measured directly. Furthermore, as the focus is on the relation between the judicial

independence of the court and the injugovin, it is important to find a way to measure something different than the de jure independence of the treaty. It has therefore been decided to focus on the de facto independence, that is whether a judge or the court as a whole can have an opinion that goes against the interest of the member states without being disciplined.

Judicial independence of the court

As Posner and Yoo have found in their influential article on judicial independence, states do value the independence of international courts and tribunals to a large extent, but also want these institutions to be predictable. This means that they will often try to pick those judges that will vote in their favour or have the same ideology (Garoupa et al. 2013; Posner and Yoo 2005). With the older forms of arbitration, which usually took place in the form of ad hoc courts, this was quite easy as these usually consisted of a judge from each party to the conflict and a third judge, picked by the two states together. However, this is more difficult for the more recent and often permanent courts and tribunals such as the PCIJ and the ICJ. These organizations often have larger membership, but only a limited number of judges meaning that not all states have their own judge on the bench the entire time. States might therefore look to other options to keep the courts in check.

The most rigorous way to do this, is through amending the statute of the court. This would be the same as a legislative override under separation of power theory and the impact of this is therefore dependent on how easy it is to change the statute (Garoupa et al. 2013; Larsson and Naurin 2016). As states want to control the courts and tribunals but also want to guarantee their independence at the same time, they will not make it easy to change the statute but their might be differences between courts (Posner and Yoo 2005). It is of course easiest to change something when only a simple majority of 50% + 1 vote needs to be reached, while it becomes more difficult to change the statute when for example unanimity is required. When it becomes harder to change the statute, as with a legislative override, the more independent the court will be (Garoupa et al. 2013; Larsson and Naurin 2016). The first hypothesis of this thesis is therefore:

H1: The easier it is for an injugovin to change the statute of a court or tribunal, the less independent this court or tribunal will be.

Another option to control a court or tribunal is through the budget. As for all intergovernmental organizations, the courts and tribunals depend on their functioning on a

budget that is adopted or changed by their injugovin. Depending on this budget, the court can execute all of its functions, but a lower budget will make it harder for the court to execute all its functions (Ingadóttir 2011). This means that setting the budget of the court can influence the independent functioning of the court.

How is this budget adopted? Often this happens through voting in the injugovin. Here, each state has a certain number of votes depending on the rules and procedures of the injugovin, and a certain number of votes is required to get something adopted (Österdahl 2011; Panke 2017). It follows from this that the more votes necessary to adopt the budget, the easier it is for states to control the court through the budget as states often do not prefer large budgets for institutions that do not do what states want them to do (Ginsburg 2015; Ingadóttir 2011). The second hypothesis of this thesis will therefore be:

H2: The easier it is for the injugovin to withhold budget from the court or tribunal, the less independence the court has in its decisions.

Judicial independence of individual judges.

Garoupa et al. (2013) write, in their assessement of the Spanish supreme court, on how individual judges become more or less independent. Besides the human desire of judges to keep their job, Garoupa et al. (2013) point at the number of players necessary to appoint a judge. As is the case in Spain, the two largest parties can usually pick the judges they want, without having to make compromises with other actors. This gives them loyal judges, that ideologically are very close to them, something that can be seen when reviewing the voting results in the Spanish Supreme Court (Garoupa et al.2013). This could indicate, as Garoupa et al. (2013) point out in their conclusion, that if parties need to compromise in order to get judges elected, they would elect more independent candidates as otherwise no one would be elected. The final hypothesis of this thesis will therefore hold:

H3: The larger the amount of votes necessary to get a judge elected, the more independent this judge will be.

Chapter 4: Research Design and Methodology

This thesis will use a case comparison between the injugovin of the Permanent Court for International Justice (PCIJ), the Assembly and the injugovin of the International Court of Justice (ICJ), the United Nations General Assembly (UNGA) to assess the influence of their injugovin on the judicial independence of the court (Rittberger et al. 2012). The first being a

predecessor to the latter, studying these cases will show whether or not the institutional design of the injugovin has an impact on the judicial independence of the court. Both injugovins have remained largely the same, as all states are party to both of them, but differ mainly on the institutional design, most importantly the voting rules that are applied (Rittberger et al. 2012). The case study can therefore assess in which respects the institutional design of the injugovin has changed in detail and then see if these changes have had an impact on the judicial independence of the court (Halperin and Heath 2012; Posner and Yoo 2005). In order to do this, this study will rely on different sources to assess both the functioning of the court as the functioning of the injugovin.

Most importantly will be the treaties of both courts and the rules and procedures of their injugovins in order to find out if and how the institutional design of them has changed in detail, as the broad changes are already mentioned (Österdahl 2011). In order to let the courts be as similar as possible, only cases taken up by the courts between 1923-1933 and 1945-1955 will be taken into account in order to prevent confounding factors such as the Second World War and decolonization to impact the results. Lastly, literature itself will be used where there has been made an assessment of the judicial independence of both courts to cover a wide variety of angles and get an as complete picture as possible. All this together should be allowing for a close case comparison between the two courts and to see whether the institutional design of the injugovin made an impact on the judicial independence of the court.

Methodology

Now it is clear that the research design will be a comparative one, a method of comparison needs to be selected. What is going to be compared are two independent samples of court cases coming from two related, though separate courts (International Court of Justice 2017). They are going to be compared on judicial independence. Judicial independence is going to be measured through looking at how closely the state of a judge is aligned to one of the states that is part of the proceedings. As this cannot be measured directly, two proxies will be used. Firstly, the GDP per capita will be used as a measure for economic alignment using data collected by The Maddison Project (2013). Previous research done into the ICJ has shown that economic alignment has a likelihood of predicting voting behavior in international courts and tribunals and that GDP per capita is a good indicator for this

alignment (Feld and Voigt 2003; Posner and De Figueiredo 2004). Economic alignment is calculated using a measure for closeness that is set out in formula one:

$$\textbf{Formula 1}: Closeness = |\ln jcgdp - \ln dcgdp| - |\ln jcgdp - \ln pcgdp|$$

In this formula, jcgdp is the GDP per capita for the home state of the judge, dcgdp is the GDP per capita of the defendant state and pcgdp is the GDP per capita for the applicant state (Posner and De Figueiredo 2004). This means that, for example, if the GDP per capita of the state of a judge is 5000, that of the applicant is 3000 and that of the respondent is 5500, this formula will give a score of -0.42, indicating that the home state of the judge is economically more closely aligned to the respondent than to the applicant. This will be the case for all negative outcomes on the closeness variable, while all positive outcomes will indicate that the home state of a judge is economically more closely aligned with the applicant. Then, this outcome is compared to the actual vote the judge has cast to assess whether or not the judge has voted in line with what could be expected based on economic alignment of his home country. This is done for the entire bench, enabling the researcher to give a predictability score to a certain bench, which can take a score between 0% and 100%. The mean of this is then calculated, which gives a predictability score for the overall sample of each of the two courts.

The second proxy that will be used is political alignment. This is measured using the polity IV index, which indicates the level of democracy each state has at a certain point in time on a scale from -10 (most autocratic) to 10 (most democratic) (Center for Systemic Peace 2016). Political alignment has also proven to be able to influence the decision making of judges, based on their dependency for re-election or to get a job after they leave the court (Garoupa et al. 2013). Level of democracy has been proven to be a good indicator for political alignment, as more democratic states often favor more democratic states and vice versa (Feld and Voigt 2003; Posner and De Figueiredo 2004). The predictability of a bench based on political alignment is calculated in the same manner as for economic alignment, only using a different formula to calculate closeness. The calculation for closeness on political alignment is given in formula two:

$$\textbf{Formula 2}: Closeness\ 2 = |(jdem - d1dem)| - |(jdem - pdem)|$$

In this formula, jdem is the democracy score of the home state of the judge, d1dem is the democracy score of the respondent and pdem is the democracy score of the applicant (Posner and De Figueiredo 2004). As with the measure for economic alignment, a positive score

indicates closer alignment to the applicant and a negative score indicates closer alignment to the respondent.

For cases in which multiple states are on either side of the case, a slightly different procedure is followed, as otherwise no definitive GDP or level of democracy score could be awarded in these cases. This has been dealt with by using the average of these variables for all parties on either side of the case. In order to determine this for advisory opinions, those states involved favoring the majority opinion in the court were deemed the applicant and those states favoring another outcome were deemed the respondent. Then, were data was available, the average of all parties involved was used to come to a GDP per capita or democracy score for this group of states. Sometimes, when data was unavailable for a certain year, but it was clear from previous or later years that not entering a score could significantly alter the average, the score in the year closest to that of the judgement was used. This was only done for GDP, as the democracy score of a state can change more rapidly and another year could therefore not be used as an estimate. Using both proxies for political alignment is therefore necessary to get the best possible idea of dependency of the court, as for cases involving more than two states there is a chance that the data for either of the variables is different from the situation as it was. The advantage of using cases with more than two parties involved, is that this gives a good view as to how often, if not all the time, judges vote the same as the position taken by their home state. As there are more parties involved, there is a higher chance of multiple parties having a judge on the bench, resulting in more data points.

Both measures of alignment lead to an average which is measured on a scale level (a score between 0% and 100%) and the goal is to compare the averages of the independent samples. The best test to compare those means is therefore the two-sample t-test. The t-test compares the means of two different samples and calculates a test value (Argyrous 2011; Elliot and Woodward 2007). If this test value is higher than the critical value[3] at a certain level of significance for a specific number of degrees of freedom, the means of the two samples are statistically different (Argyrous 2011). For this thesis, a level of significance of p = 0.05 will be used for a test to be significant. The t-test for the equality of two means is expressed in formula three:

$$\boldsymbol{Formula\ 3}: t = \frac{\overline{X_{\mathrm{X}}} - \overline{X_{\mathrm{Y}}}}{\sigma_{\overline{X}-\overline{Y}}}$$

[3] The critical values for a t-test are bell shaped, which means that any negative signs for the t-value results in the t-test needing to be lower than the negative critical value (Argyrous 2011).

In this formula, $\bar{X}$ is the sample mean of either sample X or sample Y (Argyrous 2011). $\sigma_{\bar{X}-\bar{Y}}$ is expressed in formula four:

$$\textbf{Formula 4}: \sigma_{\bar{X}-\bar{Y}} = \sqrt{\frac{(n_{\mathrm{X}}-1)s_{\mathrm{X}}^2 + (n_{\mathrm{Y}}-1)s_{\mathrm{Y}}^2}{n_{\mathrm{X}}+n_{\mathrm{Y}}-2}} \sqrt{\frac{n_{\mathrm{X}}+n_{\mathrm{Y}}}{n_{\mathrm{X}}n_{\mathrm{Y}}}}$$

In this formula, *n* is the number of cases in each sample and *s* is the standard deviation of the sample (Argyrous 2011). In order to perform a t-test it is ideal if the standard deviation of both samples is roughly equal and if both samples approximate normality as this makes this test the most robust. A slight deviation from this should not be a problem, but when the deviation is large, the test results might be less robust (Argyrous 2011; Elliot and Woodward 2007).

For one variable, that of judges voting in favor of their home state, the t-test is not a good measure, as both variables are categorical and neither is at the ordinal or scale level. The judge either belongs to the PCIJ or the ICJ, while there are only two options on the favorhomestate variable: vote in favor or do not vote in favor of the home state. In order to assess whether there is a difference between the two courts on this variable, it is necessary to perform a different test. As both of the variables are nominal, the only possible test is the Lambda test (Argyrous 2011)A. This test uses crosstabulations, predictions and error reduction to calculate the strength of the relationship between two variables. In this case, a strong relationship will mean that that one of either courts is more independent than the other one, as it is possible to predict what a judge will do based on the court he is a member of (Argyrous 2011; Elliot and Woodward 2007). The formula of Lambda is expressed in formula 5:

$$\textbf{Formula 5}: \lambda = \frac{E_1 - E_2}{E_1}$$

In this formula, E_1 is the amount of errors you would get basing your guessing only on the category (favor home state/do not favor home state) and E_2 is the amount of errors you get when you know from which court the judge is (Argyrous 2011). The down side of using this test is that if the result is 0, this does not need to mean that there is no relationship (Argyrous 2011). The assessment of the favorhomestate variable will therefore be based on both the crosstabulation and the Lambda test.

Chapter 5: Institutional Design

This chapter will provide a description of the injugovins of both courts. These are the Assembly of the League of Nations (Assembly) and the Council of the League of Nations (Council) for the PCIJ and the United Nations General Assembly (UNGA) and the United Nations Security Council (UNSC) for the ICJ. This chapter will highlight the institutional design of all injugovins and compare the injugovins for the PCIJ and ICJ on their powers, rules and procedures. Before doing so, it will give a short introduction of each court, including its composition, relation to the injugovins and most important rules.

Institutional Design of the Injugovins

PCIJ

The statute of the PCIJ was adopted by the Assembly of the League of Nations on 13 December 1920 and the statute entered into force on 1 September 1921 (International Court of Justice 2017). The PCIJ had no formal relationship with the League of Nations Covenant, but the League was allowed to refer certain matters to the court (Rosenne 2006). Between 1921 and 1931 the court consisted of eleven judges and four deputy-judges and as of the changes in 1931 the court consisted of fifteen judges (Rosenne 2006). During a case a total of eleven judges needed to be present and nine judges were necessary to take a decision. The judges have a nine year term and are eligible for reelection (Assembly of the League of Nations 1920; Fachiri 1925; Rosenne 2006). Article 31 PCIJ statute provided for the institution of ad hoc judges when one or both of the states to a case did not have a judge being of its own nationality. By virtue of article 36 PCIJ statute, the court had jurisdiction over all cases that the parties referred to it and all matters that were referred to it by treaties and convention in force. The court ceased to function in 1940 and it had dealt with 29 contentious cases and 27 advisory opinions since 1922. The PCIJ was official dissolved in 1946 after all judges had resigned (International Court of Justice 2017).

The two injugovins of the PCIJ are the Assembly of the League of Nations and the Council of the League of nations. The Assembly was comprised of all members of all members of the League of Nations and every member state had one vote in this organ (The Covenant of the League of Nations 1920). The decisions needed to be taken by unanimous decision of all states present and voting, giving each member state a de facto veto power. In

practice, states sometimes abstained from voting when they could not fully agree with a resolution, to prevent a full deadlock in the League (Singer 1959). The Council, on the other hand, was comprised of only eight members. Four of these seats were permanently reserved for the representatives of the Principled Allies and Associated Powers and the representatives for the other seats were to be selected by the Assembly (The Covenant of the League of Nations 1920). Here, also, all decisions required unanimity, except those requiring the appointment of persons for which an absolute majority of votes sufficed (Rules of Procedure of the Council of the League of Nations 1920). The two injugovins shared their powers vis-à-vis the PCIJ and had two official and one unofficial power: setting the budget, electing judges and changing the statute of the PCIJ.

The first power, setting the budget was a two-step procedure. First, the council deliberated on a draft budget, composed by the secretariat and a special committee for budgetary matters (Singer 1959). This budget was based on the previous budget and estimates for the next budget period, which in the case of the League of nations was a year (Singer 1959). The council gave itself the power to propose the draft budget to the Assembly and to actually let this be the budget in case the Assembly did not get around voting on the budget when the new year started (Singer 1959)S. Once the Council adopted the draft budget, it was sent to the Assembly for final approval (The Covenant of the League of Nations 1920). In both organs, a unanimous decision was required for the budget to be adopted, but it often happened that a state abstained from voting in order to prevent the League, and thus the PCIJ, from having any funds available over the next year (Singer 1959). For the PCIJ, the budget needed to cover the salaries of the judges, costs for the secretariat, costs for research and all other costs required to keep the PCIJ up and running (Assembly of the League of Nations 1920).

The second power the two organs share is that to elect the judges of the PCIJ. For a judge to be elected, it was required that this person was first selected by one of the regional groups represented in the Permanent Court of Arbitration that were members of the League of Nations. Of these people, the secretariat then prepared a list that was used for voting on the judges in both organs. During the ballot, a judge needed an absolute majority of votes in both organs, which would vote separately of each other (Assembly of the League of Nations 1920). This meant, for example, that during the first election of PCIJ judges, in order to be elected, a judge needed 22 of the 42 votes in the Assembly and five out of eight votes in the Council (Fachiri 1925). Only those judge that gained an absolute majority in both organs were elected. Any seats that remained unfilled, would then go for a second round of voting

and, if necessary even more rounds could follow (Assembly of the League of Nations 1920; Fachiri 1925). However, if either of the organs perceived a deadlock, it could ask for a special committee to be elected. This committee was comprised of three members of the Assembly and three members of the Council that would together select one candidate to be recommended to both organs (Assembly of the League of Nations 1920). This could be a person that was already on the list prepared by the secretariat, which would require a majority of the committee to agree, or a person that was not on the list, in which case this person needed to be recommended unanimously. Following this procedure, first the positions of the judges were filled and then the positions of the deputy-judges were filled (Fachiri 1925).

The statute of the PCIJ does not provide for any guidelines or formal rules to change it. However, in 1929, the Assembly took it upon itself to call for a special meeting in which it discussed and evaluated the statute of the PCIJ (Rosenne 2006). It adopted a resolution to make certain amendments to the statute and in doing so decided to follow the same procedure as was necessary to change the Covenant of the League of Nations. The resolution initiating the changes needed to be adopted by unanimity and afterwards also needed ratification by all members of the PCIJ. The resolution calling for changes of the PCIJ was adopted in 1929, but it took until 1936 before all members had ratified the changes and they came into power (Rosenne 2006).

ICJ

The ICJ came into being at the end of World War Two as one of the principal organs of the United Nations. It held its first session in 1946 and the first case was submitted in 1947 (International Court of Justice 2017). The ICJ consists of fifteen judges, a minimum of eleven judges need to be present during the sitting and a total of nine judges constitutes a quorum (*Statute of the International Court of Justice* 1945). The judges have a term of nine years, with the exception of judges elected in the first election. Five of these judges had a term of three years and five others had a term of six years and the names of these judges were determined by lot (*Statute of the International Court of Justice* 1945). As with the PCIJ, the statute of the ICJ provides for ad hoc judges to be added to the bench when one or both parties to a case do not have a judge of its own nationality on the bench (*Statute of the International Court of Justice* 1945). Only states can be parties in cases before the court and states can either decide whether to accept the jurisdiction of the court on a case by case basis or to declare that they recognize the compulsory jurisdiction of the court. This declaration can

be made unconditionally or conditionally (*Statute of the International Court of Justice* 1945). The ICJ deals with both contentious cases brought to it by states or special treaty provisions and with advisory opinions brought before it by the UNGA or the UNSC. The court is still in function and there are currently fifteen cases pending before the court (International Court of Justice 2017).

The ICJ, like the PCIJ, has two injugovins: The United Nations General Assembly and the United Nations Security Council. The UNGA is comprised of all members of the United Nations and followed the principle of one state one vote (*Charter of the United Nations* 1945). Decisions on important questions are taken by a two-thirds majority of the members present and voting, while all other decisions are taken by a simple majority decisions. Other questions can be made to require a two-thirds majority, if a majority of the members present and voting wishes so (*Charter of the United Nations* 1945). The UNSC, in the period between 1945 and 1955 was comprised of 11 members (United Nations 2017). The United States, The Republic of China, France, the Union of the Soviet Socialist Republics and the United Kingdom of Great Britain and Northern Ireland are the permanent members of the UNSC and those members have a veto on all matters that are not procedural in nature (*Charter of the United Nations* 1945). The other six members were chosen by the UNGA, had a two-year term and were not eligible for immediate re-election. On all questions, each member of the UNSC has one vote and a requirement of 7 affirmative votes was necessary for any resolution to pass (*Charter of the United Nations* 1945). Most of the powers the injugovins have vis-à-vis the court are reserved for the UNGA: they have the power to set the budget and to approve any possible amendments to the Statute of the ICJ. The UNGA and UNSC share the power to elect the judges to the ICJ.

The budget of the ICJ is determined by the UNGA. They have full budgetary power and are responsible for considering and approving the budget of the UN of which the ICJ is an organ (*Charter of the United Nations* 1945; United Nations 2003). In order for the budget to be approved, two-thirds of the members present and voting need to cast an affirmative vote (*Charter of the United Nations* 1945). The budget is based on the budget of the previous budget period, which is two years, and on estimates of the following years. If there is no budget adopted, there will be no further activities until the UNGA grants the money to a certain project (United Nations 2003).

Changes to the Statute of the ICJ need to follow the same rules and procedures as those that are laid out for changes to the Charter of the UN (*Statute of the International Court of Justice* 1945). This means that any changes to the Statute of the ICJ need to be first

approved in the UNGA with a two-thirds majority of the members of the UNGA. Then, the changes need to be ratified by two-thirds of the members of the United Nations, including all permanent members of the UNSC. Any change will come into effect for every member of the UN, and hence the ICJ, once it has been approved by the UNGA and received the required number of ratifications (*Charter of the United Nations* 1945).

The judges are elected by the UNGA and the UNSC simultaneously, but in separate elections. The UNGA and the UNSC elect candidates of a list of nominees provided by the Secretary-General. The candidates are nominated by the regional groups as they are in the Permanent Court of Arbitration and only nominated candidates are eligible for a position as judge in the ICJ during the election (*Statute of the International Court of Justice* 1945). Every candidate obtaining a majority of votes in the UNGA and the UNSC will be considered elected and the permanent members of the UNSC will not have a veto in the matter (*Charter of the United Nations* 1945; *Statute of the International Court of Justice* 1945). If after three rounds of voting there remain seats unfilled, a conference consisting of three members of the UNGA and three members of the UNSC will be appointed to select a name for the vacant seat by absolute majority vote. This conference can include a name that was not on the list of candidates only by unanimous vote (*Statute of the International Court of Justice* 1945). The name put up for election by the conference will then be put to vote in the UNGA and UNSC and needs an absolute majority in order to be elected in both organs. For judges elected in 1945 this would mean, if all members were present and voting, that a candidate to be elected needed 25 out of 51 votes in the UNGA and 6 out of 11 votes in the UNSC (United Nations 2011).

Comparison of the Injugovins

The above gives a description of institutional design of the injugovins of both courts. Together, the courts have four injugovins, divided equally among the two courts. This section will provide the most important similarities and differences between these injugovins. For the purpose of this research, the comparison will only take place between courts and not within courts as it is the focus of this paper to differentiate between the institutional design of injugovins for each court and not the separate injugovins for each court as well. For a short overview, see table 1.

Both courts have two injugovins and they are structured in the same way. For each court, there is one injugovin with universal membership and one with more limited

membership (*Charter of the United Nations* 1945). While for the PCIJ the two injugovins work together on both setting the budget and electing the judges of the court, the UNSC is only involved in electing judges leaving all other powers vis-à-vis the court in the hands of the UNGA. Changing the statute of the court is in both cases handled by the injugovin that has universal membership.

The largest differences between the two courts seem to appear in voting rules and veto players. Where the rules for electing judges are exactly the same in both courts, an absolute majority of votes in both injugovins, are the voting rules and veto players in all other cases quite different (*Statute of the International Court of Justice* 1945; Assembly of the League of Nations 1920). For setting the budget, or taking any other decision, unanimity is required in the Assembly and the Council, while in the UNGA a two-thirds majority of votes will suffice to set the budget. Changes in the charter require in both cases that there is a vote and a ratification, but for the PCIJ a change only takes effect when there is unanimity and ratification by all members, while for the ICJ there is a two-thirds majority vote necessary in the UNGA and two-thirds of the members of the UN, including the permanent members of the UNSC need to ratify before the changes take effect (*Charter of the United Nations* 1945; Rosenne 2006). Lastly, the ICJ was embedded in the UN structure while the PCIJ was a stand-alone organization. Even though the budget was set by the League of Nations and it elected the judges of the PCIJ, once this was done there was no formal connection that remained between the two (International Court of Justice 2017). The ICJ on the other hand is embedded in the Charter of the UN and is formally recognized as one of the six primary organs. It will therefore always have to deal with the UN and have a constant link to the organization (*Charter of the United Nations* 1945; International Court of Justice 2017)h.

From all of the above, it seems to be that at the level of the entire court, especially when it comes to the budget the ICJ is the more independent court. There are more states necessary to be a veto player that can block the budget than in for the PCIJ, where one vote against the budget in either of the two injugovins can withhold the budget. For changes to the court, it seems that the PCIJ is likely to be the more independent court, as it is much harder to change the statute of the PCIJ than it is to change the statute of the ICJ, as for the former unanimity is required, something that is not required in the latter. Lastly, it will likely be hard to say anything about the independence of individual judges. In both sets of injugovins the judges are elected in the same manner, with the only difference that there is a necessity of more absolute votes in the ICJ, which could indicate that judges in this court would tend to be more independent than those in the PCIJ, where a lower number of absolute votes is required.

In order to see which court is more or less independent, the next chapter will analyze the voting behavior and the predictability thereof on various variables and contain the actual analysis.

Table 1: Comparison of the institutional design of injugovins

	PCIJ	**ICJ**
Composition	Assembly: universal membership Council: selected membership	UNGA: universal membership UNSC: selected membership
Powers	Budget, election, change	Budget, election, change
Voting rules (regular)	Unanimity	Two/thirds majority
Voting Rules (judges)	Absolute majority in both injugovins	Absolute majority in both injugovins
Other	Separate organization	Part of the UN framework
Veto Players	Budget: all members Election: 50% of members in either injugovin Change: all members	Budget: one-third + 1 of the members of the UNGA Election: 50% of members in either injugovin Change:one-third + 1 of the members of the UN + Permanent members of the UNSC

Chapter 6: Operationalization and Analysis

This chapter will lay out the data gathered on voting behavior within both courts. It will provide an overview of how judges voted on contentious cases and advisory opinions that came before both courts and how independent this voting seems to have been. These voting patterns will then be compared between courts to see if any differences are observable. The last section will give an analysis based on the hypotheses of section two to review whether or not changes in the institutional design in the injugovin of a court lead to differences in the independence of those courts.

Voting behavior of judges

The dependence of the court is measured as how predictable the judges vote on certain cases. As Posner and De Figueiredo (2004) have shown, international judges do not

always vote completely independent from their home state. Their research focused solely on the ICJ and some of their variables are used to measure the predictability of courts. Three of their findings are used here: judges often favor their home state, richer states vote more often for richer states than for poorer state and vice versa and more democratic states often vote for more democratic states than for more autocratic states and vice versa (Posner and De Figueiredo 2004). This section will first give a short overview of all data used in this thesis, before turning to the specific findings mentioned above in turn. For each of them, it is calculated how predictable the whole bench, on average, seems to be and between courts it is calculated if this differs.

Description of the data

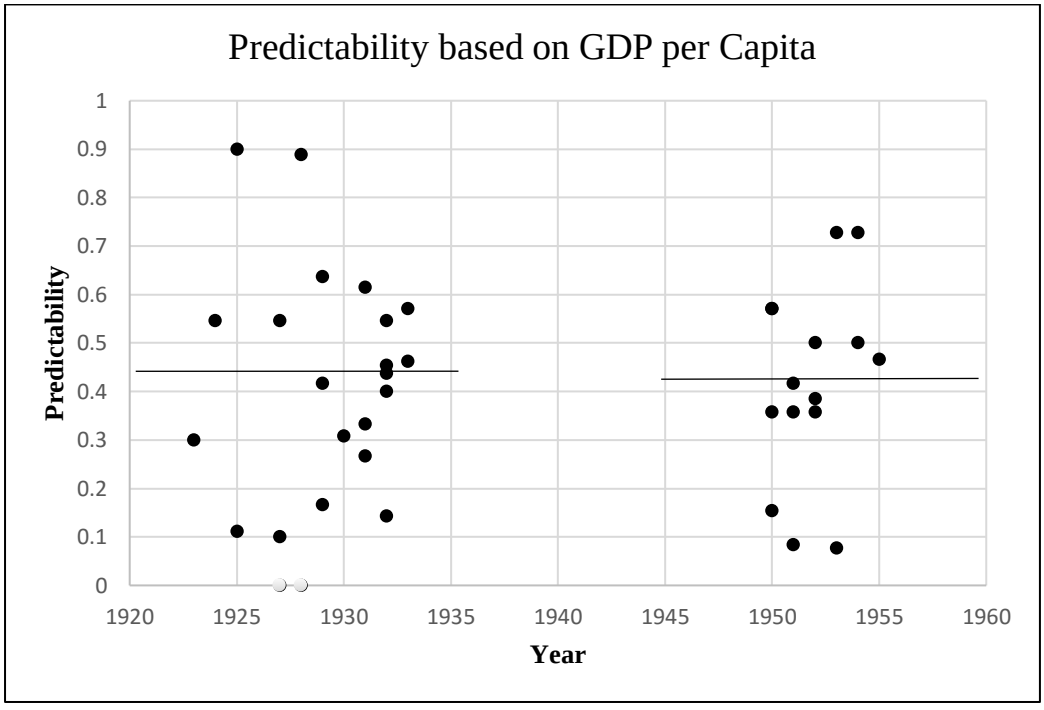
In the period between 1923-1933 and 1945-1955, the two courts gave judgements in 53 cases. Of these cases 28 were contentious cases, while 25 were advisory opinions. For the PCIJ, which is the court under investigation between 1923 and 1933, the total number of cases is 30, 14 of which were contentious cases and 16 were advisory opinions. The remainder of the cases, 23, were handled between 1945 and 1955 by the ICJ. They gave judgement in 14 contentious cases and 9 advisory opinions. Were possible, for all of these cases are logged the judges and what they voted, who the parties involved were, whether or not any dissenting opinions were given, the GDP of the parties involved and the judges, the level of democracy of the parties and the judges and if the judge came from the same state as one of the parties. The codebook of all variables can be found in Appendix A.

Rich vote for rich, poor vote for poor

The GDP per capita variable is meant to be a proxy for economic alignment. The Posner and De Figueiredo (2004) article has shown that both economic and political alignment can have an influence on how a judge votes in a certain case, with GDP per capita used as a proxy to measure this. For this reason, GDP per capita has also been chosen in this thesis. The data used in this research comes from the Madison Project, as this was the only source available that had any data on the period before 1950. The GDP per capita of states is measured in 1990 International GK$. However, even this data-set does not have all data from every year on every state, therefore not all cases can be used in this part of the analysis as some of the data is missing. When there was more than one state on the applicant or respondent side, which was often the case with advisory opinions but also sometimes in

contentious cases, an average of all data on all parties was used. In some of these instances, when data of one of the parties was missing but from later or earlier data it could be derived that this parties GDP could heavily influence the average GDP as it different substantially from the other party's GDP, the data closest to the year necessary was used to get a better approximation of the average and the distance between the judge's GDP and that of the parties involved.

With some of the data missing, the total number of cases used in this part of the analysis is 32. Of these cases, 16 were dealt with before the PCIJ and the remainder 16 were concluded before the ICJ. For all of the cases, a closeness score was determined for each of the judges using formula three. These scores are then compared to that of the vote of the judge, to see if the prediction based on GDP per capita corresponds with the vote the judge casted during the procedure. For the PCIJ this the predictability based on GDP per capita was 42.0% (standard deviation = 24.2%) while for the ICJ this was 43.7% (standard deviation = 15.8%). This means that, on average, in 42.0% or 43.7% of the votes, the judge voted something that was expected based on economic alignment with the applicant or the respondent (see graph 1; the lines represent the averages)



Graph 1: Predictability based on GDP per Capita

In order to determine whether these means differ significantly, a two-sample t-test for the equality of means is used to determine this. In order to derive the test statistics, it is first necessary to calculate the standard error following using formula four:

$$\sigma_{\overline{x}-\overline{x}} = \sqrt{\frac{(21-1)0.212^2 + (17-1)0.168^2}{21+17-2}} \sqrt{\frac{21+17}{21\times 17}} = 0.063$$

Then the t-score can be derived using formula three:

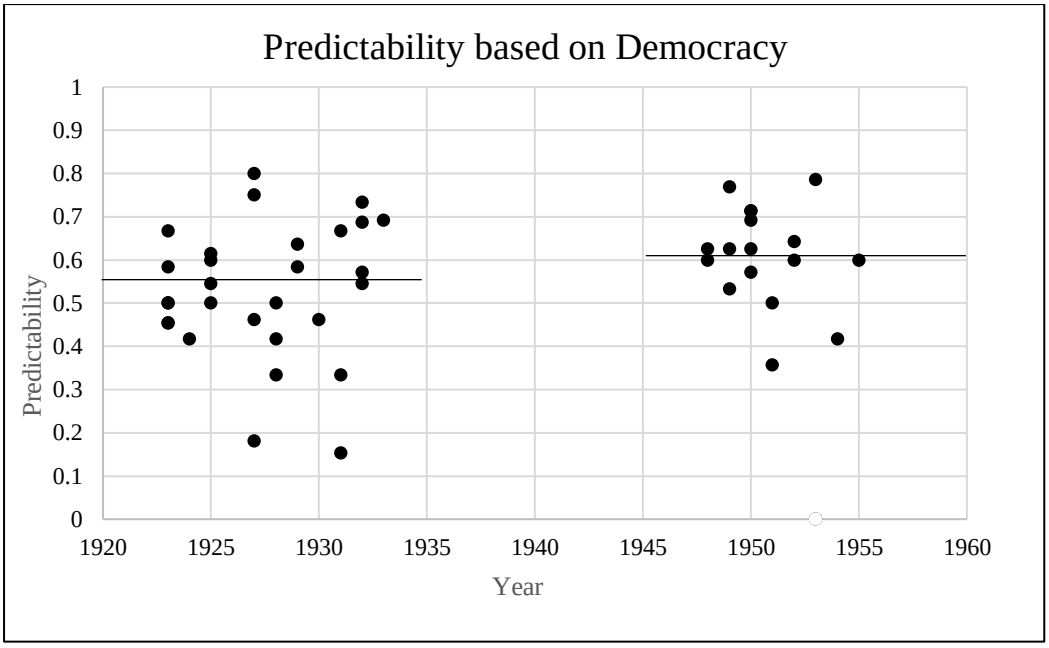
$$t = \frac{0.431 - 0.420}{0.063} = 0.174$$

With 36 degrees of freedom the t-score, to be significant at the 0.05 should be equal to or higher than 2.028 (Argyrous 2011). The t-score of 0.174 is lower than 2.042, meaning that that the test statistic is not significant at the 0.05 level. This means that there is no significant difference in the predictability of the vote of the judges based on economic alignment, indicating that both courts are equally predictable. The judges of either court, therefore, seem to be equally independent based on this indicator.

Democracy

The second variable, the democracy score based on the Polity IV index, is the second proxy used, this time to measure political alignment. As the … article shows, this is the second form of alignment along which judges of the ICJ are known to vote. The data used are coming from the Polity IV index, with a small number of data-points coming from the comparable Polity II index. The Polity IV index measures different indicators for both autocracy and democracy and combines those in a score that gives the level of democracy for a state at a certain point in time. A score of 10 means that a state has achieve the highest level of democracy, while a score of -10 means the highest level of autocracy. Even though the Polity IV and Polity II indices provide a lot of data, data was still not available in all cases, leaving these cases out of this part of the analysis. Also, when multiple parties were part of the same case at the same side, their democracy scores were averaged to obtain the necessary data. This was only done when a score for democracy was available for a certain state at a certain point in time, as regime changes can happen very quickly, using data from other years, as was possible for the GDP per capita variable, was not possible here. When the cases on which data is missing are left out, a total of 40 cases remains, 24 of which came before the PCIJ and the remaining 16 came before the ICJ. The closeness scores are calculated using formula two. These scores are then compared to the actual vote the judge has casted during the proceedings and any matching scores are marked. Then the predictability is

calculated by taking the average percentage of predictability of the judge's vote. For the PCIJ this score was 54.4% (Standard deviation = 16%) and for the ICJ this score was 61.0% (standard deviation = 11%). This is displayed graphically in graph 2 (the lines indicate the average).



Graph 2: predictability based on Democracy

In order to determine whether these means differ significantly, a two-sample t-test for the equality of means is used to determine this. In order to derive the test statistics, it is first necessary to calculate the standard error, using formula four:

$$\sigma_{\overline{x}-\overline{x}} = \sqrt{\frac{(27-1)0.160^2 + (17-1)0.114^2}{27+17-2}} \sqrt{\frac{27+17}{27\times 17}} = 0.045$$

Then the t-score can be derived using formula three:

$$t = \frac{0.544 - 0.610}{0.045} = -1.480$$

With 42 degrees of freedom the t-score, to be significant at the 0.05 should be equal to or higher than 2.018 (Argyrous 2011). The t-score of -1.480 is lower than 2.024, meaning that that the test statistic is not significant at the 0.05 level. This means that based on the level of

democracy the ICJ and the PCIJ are both roughly equally independent, even though the means are not similar.

Favoring the home state

Of the three variables used to measure the level of independence of the court, whether or not a judge votes for his or her home state is the most direct one. In contentious cases, there are usually two of the judges on the bench that have their own state involved in the case. This is because often the ad hoc judge that states may add to the bench if there is no judge of their nationality on the bench often comes from their own state (Assembly of the League of Nations 1920; *Statute of the International Court of Justice* 1945). For advisory opinions, usually there are no ad hoc judges on the bench, with the exception of the advisory opinions before the PCIJ on the interpretation of the Greco-Bulgarian agreement of 9 December 1927 and on railway traffic between Lithuania and Poland (Permanent Court for International Justice 1928; Permanent Court for Interntional Justice 1931). Only cases or opinions in which one or more judges on the bench coincide with the parties to them will be used, as for the other cases there is no data that will give an indication as to whether or not judges vote for the state they come from. In total, there are 118 instances of which one or more judges had its home state taking part in the proceedings, 60 of which are from the PCIJ and 58 are from the ICJ. The results lead to the following crosstabulation:

Table 2: Crosstabulation of favoring home state

	PCIJ	ICJ	Total
Favor home state	48	29	77
Do not favor home state	12	29	41
Total	60	58	118

The table shows that there seems to be a difference in how often judges vote for their home state in the respective courts. It also seems clear that the majority of judges votes in favor of his home state. For the PCIJ this happens in 78% of the cases and for the ICJ in 50% of the cases. Therefore, to calculate E_1 for the Lambda formula, it is guessed that every judge would vote for his home state, resulting in 41 errors. When the court of which the judge is known, for the PCIJ 12 errors are made and for the ICJ 29 errors are made leading to a total of 41 errors for E_2. This leaves a problem, as with these data the formula for Lambda, in which E_2 is subtracted from E_1 the result of this would be 0, indicating that there is no relationship between court and judges favoring their home state. However, from the crosstabulation it

becomes clear that such a relationship is to be expected. It is therefore assumed, based on the crosstabulation, that when looking at the voting pattern of individual judges the ICJ is most likely to be more independent than the PCIJ.

Comparison of voting patterns.

This section will bring together the analysis of the institutional design of the injugovins of both courts and the analysis of the voting patterns from the previous section. It will be organized by hypothesis and for each hypothesis give what would be expected based on the institutional design and whether or not the data gathered on voting patterns support this.

Changes to the statute

The first hypothesis stated that the more difficult it is to change the statute of a court, the more independent this court will be. When looking at the institutional design of injugovins, this would mean that the PCIJ should be the more independent court as it has the most difficult path to follow for the statute to be changed (Larsson and Naurin 2016). There is no formal way of changing the statute of the PCIJ, which means that the procedure to change the statute was made up along the way. It was decided to follow the same rules as were in place to change the Covenant of the League of Nations, meaning that unanimity was required to adopt the resolution to change and that this resolution needed to be ratified by all members of the court to become the new statute (Rosenne 2006). Even though the rules and procedures that need to be followed to change the statute of the ICJ are not very easy to pass, it should be easier than for the PCIJ as there is a requirement of only a two-thirds majority in the UNGA instead of unanimity and the same goes for the ratification, with the additional requirement that all five permanent members of the UNSC need to ratify the change (*Charter of the United Nations* 1945).

The data to use in this case is the data on the bench as a whole. This means that for this hypothesis the relation between the home state of a judge and whether or not it favors this home state will not be used, as this measure is specifically designed to test at the level of the judge, not the court as a whole. The two indicators left are the GDP per capita and the level of democracy. The GDP per capita indicator does indicate that there is no clear difference between the two courts, with the predictability being approximately the same. The level of democracy indicator also does not seem to point in the direction of this hypothesis

being valid, with the variable indicating that neither of the courts can be said to be more independent based on political alignment. As there is no difference observed where there was expected to be a difference, this hypothesis needs to be rejected.

Withholding the budget

The second hypothesis states that when it is easier to withhold budget from the court, the less independent this court would be. Based on the institutional design of the injugovins, it is expected that the PCIJ will be less independent than the ICJ. It is easier for the injugovins of the PCIJ to withhold budget, as they need to adopt the budget with unanimity in two different organs (The Covenant of the League of Nations 1920; Singer 1959). Even though the council can still approve a budget for the upcoming year, it needs unanimity to do so and can later be overruled by the assembly. For the ICJ it gets harder to withhold the budget, as there is only a two-thirds majority needed to pass the budget for the next two years and it is only the UNGA that needs to approve this budget (*Charter of the United Nations* 1945; United Nations 2003). There are therefore more states necessary to block the adoption of the budget, increasing the threshold to become a veto-player.

As with the hypothesis on the statute change, this hypothesis is again about the court as a whole and therefore the relation between the home state of a judge and whether or not it favors this home state will not be used. The results are again indicate that there is no difference in independence between the court. For GDP per capita, there is no discernable difference between the two courts. Both are approximately equally independent, which would indicate that the difference in institutional design does not influence the court. On the other hand, the democracy level indicator also has the two courts not being different on level of independence. This would run counter to the hypothesis, as it is expected that the easier it is to withhold budget, the less independent the court will be. However, with the no court being more independent than the other, this hypothesis cannot be confirmed and therefore needs to be rejected.

Electing judges

The third hypothesis states that the more votes a judge needs to get elected, the more independent this judge will be. When looking at the percentage of votes that judges need, there would be no way of saying anything on this hypothesis. Both injugovins have the same rules and procedures to elect judges: they need 50% + 1 vote in either the assembly and the

council or in the UNGA and the UNSC (*Statute of the International Court of Justice* 1945; Assembly of the League of Nations 1920). When looking at the absolute number of votes, the ICJ should be slightly more independent as, at least for the Security Council, there is the need for at least one more vote than in the council of the League of Nations. Also, the UNGA has slightly more members than the Assembly of the league of nations, indicating that there, also, judges to be elected for the ICJ need a higher number of absolute votes than in the assembly (United Nations 2011).

For this hypothesis, the variable on judges favoring their home state will be used, as judges are elected on individual basis and the fact that they want to (keep) their job could mean they will favor their home state when it is party to a proceeding. When looking at the data there is a clear difference between the two, with judges that have their home state in the proceedings before the PCIJ being far more likely than those before the ICJ to favor their home state (78% vs. 50%). This seems to provide support for the hypothesis, as based on the institutional design of the injugovin it can be expected that this would be the case. However, as there is only a very small difference between the injugovins, there is a high probability that, even though it seems that this makes a large difference, this difference is in fact caused by other factors omitted in this project.

Chapter 7: Limitations

This research project knows several limitations. The first of these, is the fact that it only deals with correlation and not with causality. This thesis can only say that if something changes in one place, something also changes in another place (Halperin and Heath 2012). More specifically, this thesis can only state that when it is harder to change the statute of a court it also seems to be the case that this court is more independent. However, this thesis cannot say that the larger degree of independence is caused by the different institutional design of the injugovin. In order to establish a possible causal link between the two, it would be necessary to perform an in-depth case study of courts with different injugovins and establish that this is in fact the only difference between them and that a difference in judicial independence can therefore be only caused by this difference in institutional design of the injugovins (Halperin and Heath 2012).

Secondly, this thesis only deals with two courts, which are chosen because their similarity makes them useful for an exploratory case study (Halperin and Heath 2012). However, this also means that only a limited amount of data is gathered as there are many

other courts and tribunals around the world today. The generalizability is therefore low, especially because the two courts fulfill a special purpose in this world: they are the only two courts that have members from all over the world and have universal jurisdiction when states recognize this (Elliot and Woodward 2007). As these two courts are therefore unique, it would be good for the generalizability of the results to be able to compare this to other courts around the world that have either limited membership (e.g. regional courts), limited jurisdiction (e.g. human rights courts), deal with another field of law (e.g. criminal law instead of public law) or any combination of the above. Finding similar results in different types of courts would increase the generalizability of the findings of this thesis, but would also make the findings more robust if it is proven to be applicable to more difficult cases.

Thirdly, the used tests also have their limits. The lambda test used for the favorhomestate variable let to a result of 0, while the crosstabulation clearly indicated that some difference was to be expected (Argyrous 2011). It is therefore difficult to establish the strength of the correlation, something that is mainly due to the kind of variable used; a categorical one. For future research it would therefore be important to find a way to either use a different variable or asses this variable in a different way in order to be able to determine the strength of the correlation.

The t-test on the other hand is limited in the sense that for a small sample in order for the results to be robust normality is very important as is equality of variance (Elliot and Woodward 2007). While normality did not seem to be an issue, there was quite some difference in variance, leading to the question of robustness for the results of the t-test. This limits this thesis in a sense that some of the results might only be an approximation of the real results which could be different. This is especially the case with the GDP per capita indicator for economic alignment, where there was quite a large difference in variance that could have possibly altered the results. For future research a different method could be used to assess the difference between the two means in order to circumvent the problem with the different variance.

Lastly, this thesis only uses a limited number of variables to establish political and economic alignment. Although previous research has proven that democracy scores and GDP per capita are a good indicator for political and economic alignment, using a multitude of variables would give a stronger indication (Feld and Voigt 2003; Halperin and Heath 2012; Posner and De Figueiredo 2004). However, during the time period under research these variables were the only two that could be used in both periods of time, but it only gives a slight indication of the two alignment variables. If future research is done in different time

periods or with different courts, things such as geography, membership to common international organizations and being and OECD country or not could also be used to make the two alignment variables more robust and take into account more factors that could influence political or economic alignment of two states.

Chapter 8: Conclusions

This thesis has looked at the institutional design of injugovins and the impact this has on the independence of international courts and tribunals. Even though there has been many research into international courts and tribunals, this has often been done from an international law perspective, while it is nowadays often argued that international courts and tribunals are more political than law institutions (Associated Press in Addis Ababa 2017; Posner and De Figueiredo 2004). It is therefore important the political scientist will also look into this aspect more often as this can broaden and strengthen this interdisciplinary field of work. This thesis has tried to do so by showing that international courts and tribunals are a special form of international organizations, certain aspects of which can be explained by using mainstream international relations theories, especially in a sense that they all agree that states try to control every organization, something they also want to do with states even though they also value their independence (Barnett and Finnemore 1999; Cohn 2012; Posner and Yoo 2005; Rittberger, Zangl, and Kruck 2012). Furthermore, this thesis has worked on a new aspect of courts that has been often overlooked in favor of member states: the international judicial governance institutions (Blokker 2016). Working under the assumption that different rules and procedures within these injugovins can impact the independent functioning of the court, this thesis has set out to conduct a comparative case study of the Permanent Court of International Justice and the International Court of Justice. As the former is the predecessor of the latter and the two courts have the same function in the world, they provide for a good case study as they have many things in common which excludes them from being able to explain differences (Halperin and Heath 2012). In order to compare the two courts, data has been collected on both the institutional design of the two courts and on the voting behavior of judges within the courts, which provides for the best measure of judicial independence. Three main variables were analyzed: the favoring of the home state of the judge in the proceedings, the closeness of the GDP per capita of the judge and either of the parties in the proceedings and the closeness of the level of democracy and the parties in the proceedings.

The findings were mixed at best. When looking at various aspects of the court and the way the injugovins can influence them, it is not all as clear cut as it might seem at a glance. Firstly, when looking at the way the budget is determined, the ICJ should be more independent than the PCIJ, but the data is unable to give any conclusive results as the means indicate that both courts should be equally independent. Secondly, when looking at the way the statute of either court is changed, the data is again unable to confirm that the prediction that the PCIJ is more independent might be true. Lastly, when looking at the independence of individual judges, it is much harder to reach any conclusion on this, as the institutional design of both injugovins are very similar to this respect, while the data seem to indicate a large difference between them.

It is therefore difficult to determine what the influence of the institutional design of injugovins is on the independence of international courts and tribunals. Future research in this direction could work with different or more courts to help collect more data from more different courts and tribunals in order to see if these findings hold up in cases where injugovins are more different. Furthermore, future research would be able to look more closely to the election procedure of judges, as this is where there is a large difference between the two courts, but no seeming explanation when looking that the institutional design of injugovins. However, there is certainly merit in using injugovins in future research as they provide for the direct link between the states that are members of the court and the court itself.

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Appendix 1: Codebook

The data-set follows the set-up of the data-set used by Posner and De Figueiredo (2004) in their study on whether the International Court of Justice is biased. The variables caseName, caseNumber and Decision1 are taken from this data-set, and, if necessary, amended or added on to, to fit the purpose of the current study. The data can be distributed at request.

This codebook will include all variables that are used for the research into the institutional design of injugovins and their impact on judicial independence. For each variable, the name of the variable in the data set is given, what this variable means in this study or the question asked to assess this variable and, if applicable, the meaning of the shorthand coding's of the variable.

caseID: Case ID

A unique number assigned to each case to keep all of them apart.

caseName: Case Name

Name of a case as assigned by the PCIJ or the ICJ.

caseNumber: Case Number

Unique label for each phase of each case and each kind of case.
C… cases are contentious cases
A… cases are advisory opinions

JudgementYear: Year of the judgement

The year in which a judgement or advisory opinion was delivered.

Applicant: Applicant in the case

Which states/states is/are the applicant (s) in this case?

In the case of an Advisory opinion: states that participated in the proceedings and share the eventual opinion of the court will be mentioned here

Respondent: Respondent in the case

Which state/states is/are the respondent(s) in this case?

In the case of an Advisory opinions: states that participated in the proceedings and disagree with the eventual opinion of the court will be mentioned here

Decision1: Judge – Vote for Applicant

Did a judge vote for the applicant?

0 = No
1 = Yes

DissentingOpinion: Dissenting Opinion

Did the judge file a separate Dissenting Opinion?

0 = No
1 = Yes

JudgeAdHoc: Ad Hoc Judge

Is the judge a permanent or Ad Hoc Judge?
0 = No
1 = Yes

HomeStateJudge: Home state of the Judge

Where does the Judge come from?

HomeStateParty: Home state of Judge party to the trial

Is one of the parties in the trial the home state of a permanent judge?

0 = No
1 = Yes

d1cgdp = GDP per capita of the defendant

The GDP per capita of the defendant state(s) in the year of the judgement

d1dem = democracy score defendant

Democracy score of the defendant state(s) according to the Polity IV index (Polity II index was used when information of the Polity IV index was unavailable)

d1match = state of the judge matches the defendant

Does the judge come from the same state as the defendant?
0=No
1=Yes

p1gdp = GDP per capita of the applicant

The GDP per capita of the applicant state(s) in the year of the judgement
p1dem = democracy score applicant

Democracy score of the applicant state(s) according to the Polity IV index (Polity II index was used when information of the Polity IV index was unavailable)

p1match = state of the judge matches the applicant

Does the judge come from the same state as the applicant?
0=No
1=Yes

jcgdp = GDP per capita of the home state of the judge

The GDP per capita of the home state of the judge in the year of the judgement

jdem = democracy score judge home state

Democracy score of the judges' state(s) according to the Polity IV index (Polity II index was used when information of the Polity IV index was unavailable)

Demdistance = closeness of a judge to the parties

|jdem-d1dem|-|jdem-p1dem|

A negative score indicates closeness to the defendant, a positive score indicates closeness to the applicant.

Matchdemexp = political alignment variable

Does a judge vote for a state that has a similar political climate?
0 = No
1 = Yes

matchdemexp2 = political alignment variable

Same as matchdemexp, but based on dissenting opinion

AVGcorrect = average of all judges that voted according to policital alignment

Score between 0 and 1 that indicates the degree of independence the judges have

matchCGDPexp = Economical alignment variable

Does a judge vote in favor of a state that is close in economic profile?
0=No
1=Yes

matchCGDPexp2 = Economical alignment variable

Same as matchCGDPexp, but based on dissenting opinion.
MatchVoteState = Vote of judge in favor of home state

Does a judge vote in favor of his home state?
0 = No
1 = Yes

MatchVoteState2 = Vote of judge in favor of home state

Does a judge vote fully in favor of his home state, based on dissenting opinion?
0 = No
1 = Yes