Instrument of Power or Weapon of the Weak? Litigation and Party Capability Before the European Court of Justice

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Abstract

International courts (ICs) are increasingly expanding opportunities for private litigation. Do more resourceful businesses disproportionately benefit from these international legal opportunities compared to individuals - consistent with research on litigation before national courts? To answer, we analyze litigation before the first IC to procure access to private litigants: The European Court of Justice (ECJ). Leveraging the first dataset of all parties and their lawyers involved in cases referred to the ECJ from national courts, we find that although businesses consistently boast better legal counsel and capacity to litigate, individuals are surprisingly more likely to win their cases and to attract greater issue attention inside and outside the courtroom. Drawing on the outreach and writings of ECJ judges, we theorize that this counterintuitive outcome is due to judicial entrepreneurs refracting the influence of party capability: Leveling the odds for the

"have nots" enables ICs with contested authority to legitimate judicial policymaking as democracy-enhancing and to cultivate domestic compliance constituencies. Party capability is not destiny before ICs.

1 Introduction

Of all the transformations accompanying the "judicialization of politics," expanding access to international justice for private litigants could prove amongst the most profound (Hirschl 2009, Stone Sweet and Brunell 2013, Alter et al. 2019). Gone are the days when litigation before international courts (ICs) was the exclusive prerogative of national states. Since 1945, seventeen "new-style" ICs (Alter, 2012; Alter, 2014) have been established granting access to individuals and businesses via direct actions or referrals from national courts. Of these, twelve can even adjudicate disputes exclusively comprised of private parties (see Figure 1). This transformation opens international "legal opportunities" for rights claiming and judicial policymaking (Vanhala 2012). In international regimes that tend to lack avenues for direct democratic participation, ICs can become a key forum for private actors to raise claims and to shape the policy agenda. In turn, ICs can harness private litigation to demonstrate their relevance and legitimize expansive judicial policymaking (Stone Sweet and Brunell, 1998; Cichowski, 2007; Stone Sweet, 2010).

Despite these potentially transformative effects, we know surprisingly little about which private actors have benefited the most from expanding opportunities to litigate before ICs, and why. Research on litigation before national courts has consistently shown that litigants' resources and legal representation – what is usually termed "party capability" – condition their ability to bring cases to court and influence judicial outcomes (Galanter, 1974; McGuire, 1995; Songer, Sheehan, and Haire, 1999; Haire, Lindquist, and Hartley, 1999; Szmer, Johnson, and Sarver, 2007; Nelson and Epstein,

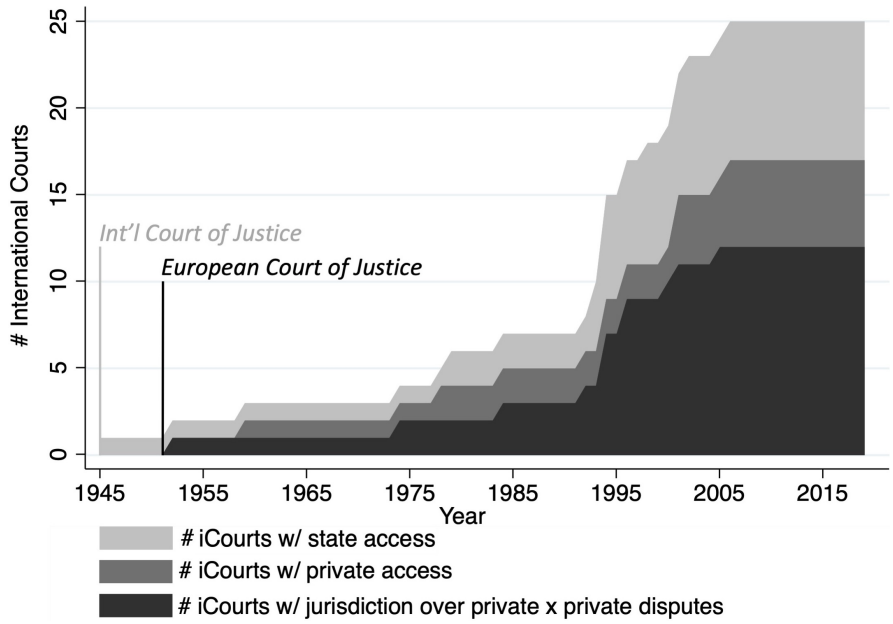

Figure 1: Number of international courts with private access, 1945-2019

2021). Greater financial resources empower privileged private parties to pursue costly litigation, while quality legal counsel enable them to trade information – facts, legal arguments, and interpretive frames – for favorable court rulings. Does party capability similarly condition litigation and judicial policymaking before ICs? While an affirmative answer might seem obvious, this paper unearths novel evidence that the opposite may be true and proposes a revisionist theory to make sense of this puzzling finding.

In contrast to the near-ubiquitous findings of party capability research before domestic courts, we posit that party capability is not destiny before ICs: It neither determines who win cases nor who can better catalyze issue attention or set the policy agenda. We argue that the reason for this counterintuitive outcome lies in how the "have nots" – especially individuals – can serve as vehicles for ICs to address legitimacy challenges that are more acute at the international level compared to more institutionally-entrenched domestic courts. Individuals may lack businesses' financial resources and ca-

pacity to trade information through quality legal counsel, but they can deal in legitimacy: Their claims can serve as vehicles for ICs to justify judicial policymaking as a means to alleviate the democratic deficits plaguing international politics. By demonstrating their responsiveness to individual claiming and focusing attention on the human face of lawmaking, ICs can preempt state backlashes to their authority (Voeten 2019) and cultivate allies in legal academia capable of amplifying their rulings. International judges are not automatons bound to the information and resources that litigants bring. By "leveling the odds" for weaker private parties (Miller, Keith, and Holmes, 2015), ICs can justify their policy activism and cultivate the attention of key domestic "compliance constituencies" (Alter, 2014).

To elaborate and evaluate this argument, we focus on the first IC to provide access to private parties and that has long been hailed as a uniquely successful international judicial policymaker: The European Court of Justice (ECJ). Private parties can raise claims before the ECJ when their dispute is referred to Luxembourg by a national court under Article 267 of the Treaty on the Functioning of the European Union (TFEU). Since the 1960s, a growing stream of these referrals have fueled the ECJ's rise as "the most effective supranational judicial body in the history of the world" (Stone Sweet, 2004, p. 1). In turn, a vigorous debate arose over whether the ECJ acts as a "people's court" benefiting individual claimants (Cichowski, 2004; Cichowski, 2007; Stone Sweet, 2010) or as a tool empowering already-powerful business interests (Conant, 2002; Börzel, 2006; Hoevenaars, 2018). In the absence of comprehensive party capability data, these opposing camps have struck an ambivalent truce: "It is difficult to respond to normative questions about whether European legal mobilization [before the ECJ] is a positive or negative development for democracy and rights" (Conant et al., 2018, p. 1378).

To advance this debate, we build the first comprehensive dataset of all parties and their lawyers involved in all cases referred to the ECJ from national courts over more than six decades. Using these data, we show that

although businesses indeed boast greater capabilities to litigate than individuals, the latter are not only more likely to win cases before the ECJ, but the ECJ and its "interlocutors" – legal academics and member state governments (Weiler, 1994) – consistently devote greater attention to cases involving individual claims. Drawing on the historical writings of ECJ judges, we theorize that individuals may serve as better legitimating vehicles for international judicial policymaking than businesses. ECJ judges not only purport to be responsive to the 'have nots' and their claims – they have backed up words with deeds to justify an expansive policy agenda along the way.

These findings imply that when it comes to litigation before "new-style" ICs, the presumed impact of party capability may have to be flipped on its head. For ICs' imperative to build and bolster their institutional legitimacy can create incentives to also serve as "weapons of the weak."

2 Private Litigants and International Courts: A Revisionist Theory

Ever since Marc Galanter penned his famous 1974 article, "Why the 'Haves' Come Out Ahead," a burgeoning literature has probed how resource inequalities shape litigation and influence decisions by national courts. These studies posit that more resourceful private parties – usually businesses – can absorb the costs of litigation and hire better counsel than less resourceful parties – usually individuals (Szmer, Songer, and Bowie, 2016, p. 89). In turn, hiring quality lawyers contributes "process expertise" – practical know-how of judicial practices and procedures amassed via repeated visits – and "substantive expertise" – specialized legal knowledge usually acquired in larger legal teams (Kritzer 1998). By mustering economic resources and hiring bigger and more experienced legal teams, the "haves" bolster their capacity to effectively convey information and persuade judges.

Evidentiary support for party capability theory is compelling and nearly

ubiquitous - particularly for courts embedded in well-entrenched national legal systems. From US immigration courts to the federal courts to the Supreme Court, businesses who can afford more experienced litigators are more likely to win judges' support than individuals (McGuire 1995; Songer et al. 1999; Haire et al. 1999; Johnson et al. 2006; Miller et al. 2015; Szmer 2016; Nelson & Epstein 2021). Cross-national studies have uncovered similar findings before courts in the Philippines (Haynie 1994), Canada (Szmer, Johnson, and Sarver, 2007), Taiwan (Chen, Huang, and Lin, 2015), Italy, France, and Germany (Pavone, 2022).

Despite these consistent findings, party capability studies face three limitations. First, their outcome of interest is usually narrowly defined as wins or losses in court. Yet law and society scholars have shown that legal claims can shape the broader policy agenda irrespective of obtaining a favorable ruling (McCann, 1994; Albiston, 1999; Vanhala, 2010), not unlike interest groups who pursue outside lobbying to raise issues in public debate (Kollman, 1998). Second, existing research tends to understate the agency of judges by conceiving them as primarily responding to litigant inputs. But judges may manipulate and counterbalance these inputs if they have the desire and discretion to pursue their own agenda – particularly in more activist high courts at the national or international level (Epp, 1999; Dotan, 1999). Finally, existing studies focus primarily on two resources that litigants bring to bear – finances and information – while neglecting other attributes of legal claims that judges may value. Particularly for fledgling courts with contested authority - such as all "new-style" international courts - individual claims may prove attractive vehicles for building legitimacy (Hermansen, 2020) and justifying an expansive policymaking agenda.

The institutional development of the first and most successful IC to court private litigants – the European Court of Justice (ECJ) – highlights these three limitations, and how taking the international legal context seriously may require flipping party capability arguments on their head. "Tucked away

in the fairyland Duchy of Luxembourg" (Stein, 1981, p. 1) and faced with national lawyers and judges initially ignoring its existence (Pavone, 2018; Pavone, 2022), the ECJ could not rely solely on handing out wins and losses - it also had to attract the attention of domestic compliance constituencies (Burley and Mattli, 1993; Weiler, 1994). Staffed with ambitious judges determined to develop the EU legal order through their rulings (Weiler, 1991; Maduro, 1998; Rasmussen, 2008; Vauchez, 2009; Phelan, 2017), the ECJ not only saw private litigants as sources of disputes but also as vehicles for judicial policymaking. And faced with vigorous and repeated domestic challenges to its legitimate authority - from constitutional courts in the 1960s and 1970s (Weiler, 1986; Alter, 2001; Davies, 2012; Kelemen and Pavone, 2019), populist parties today (Voeten, 2020; Turnbull-Dugarte and Devine, 2021), and national governments throughout (Alter, 1998; Alter, 2000; Martinsen, 2015) - the ECJ has had compelling reasons to value private litigation not solely as a source of information, but also as a means of building legitimacy.

This institution-building logic has suffused the public advocacy of ECJ judges themselves. The trailblazer of this strategy to building legitimacy in the 1960s and 1970s lay in its most influential President, Robert Lecourt (Phelan, 2017; Phelan, 2019).[1] His landmark and influential 1976 book, *L'Europe des Juges*, was an explicitly "popularizing" and justificatory manifesto directed at "national lawyers and judges who might apply European law in national litigation" and refer cases to the ECJ (Phelan, 2017, p. 944). Therein, Lecourt repeatedly legitimates an activist policy agenda as a means to level the odds for individual claimants and enhance the questionable legitimacy of EU legal order by giving it a human face:

> "The work of judges. . . [is] to discretely but peremptorily delegitimize the charge sometimes addressed at the [European Communities] that they are only preoccupied with business Europe. The

[1] Lecourt was judge at the ECJ from 1962 to 1976 and President of the Court from 1967 to 1976, a "foundational period" characterized by a number of revolutionary judgements (Phelan, 2019).

> work of judges testifies that a social Europe also exists...
>
> Certainly, litigation of Community law is most often economically-based... but... What would be the point [of the ECJ] if she did not precisely ensure the protection of individual rights... she would fail to live up to her primary role" (Lecourt, 1976, pp. 196–197, 211–212)

Lecourt felt so strongly about the Court's pro-"have nots" agenda that he concluded his book with a call for action: If legal "commentators" across EU member states paid greater attention to the ECJ's rulings, they would help the Court build a more social and just Europe and view the European legal order in a more positive light:

> "[Our] judicial motivations finally reveals an objective of the [European] Community that is rarely observed: Its role as protector of the individual... judicial practice invites us to look beyond economic problems and to become conscious of the human objectives that they conceal. Community law would then appear in a completely new light. We would become more aware that next to a so-called technocratic Europe, or a business Europe, there also exists a Europe of consumers and shopkeepers, farmers and migratory workers, [a Europe] preoccupied with judicial protections and respect for fundamental rights, wherein the application of the law by the [ECJ] judge is dominated by their concern for protecting the weak."(ibid., pp. 308–309)

Lecourt's appeal to legal practitioners and academics meant to mobilize a key compliance constituency capable of buttressing the ECJ against domestic backlash - which in the 1960s and 1970s focused on national constitutional courts (Stein, 1981; Weiler, 1994; Davies, 2012; Rasmussen and Martinsen, 2019). The ECJ's emphasis on protecting individual claimants was designed

to disarm the constitutional concerns of national judiciaries that the EU would encroach upon individuals' fundamental rights. Over time, resistance to the ECJ's authority was increasingly mobilized by national governments under the pressures of a growing constellation of populist and Eurosceptic political parties. As charges that the EU legal order suffered from a "democratic deficit" became recurrent (Føllesdal and Hix, 2006), the "have nots" once again served as vehicles for the ECJ to cast judicial policymaking as an antidote. Consider the words of Federico Mancini, a prolific writer who served as arguably the Court's most influential judge from 1982 until his death in 1999:

> "the Court has used Article 177 [enabling national courts to refer private disputes to the ECJ]... to reduce the democratic deficit which has blighted the Community since its inception...
>
> ...[ECJ] activism was often driven by a desire to extend the jurisdiction of the Community... to make up for the set-backs which... [it] has suffered at the decision-making level at the hands of the Member States... What is said about the founding fathers' frigidity towards social issues does not apply to the Judges of the Court. If ours is not just a traders' Europe, and if it is good that this is so, it is the Judges of the Court whom we must thank.
>
> Whilst not taking the "affirmative action" route, the Court has attempted to distill as much equality as possible from the EC Treaty and secondary legislation" (Mancini, 2000, pp. 24, 100, 128)

Like Lecourt, Mancini often concluded his public writings with calls to action. Acknowledging that the Court's authority "is still challenged and [its] jurisprudence has at times been the subject of threats" because it "is sadly

lacking in democratic legitimacy" (Mancini, 2000, pp. 142, 165), Mancini called on "ordinary men and women" to defend the ECJ from court-curbing attacks:

> "Perhaps, as the Court of Justice becomes increasingly visible... and as more and more people become aware of its ability to impinge positively on their lives, the politicians of Europe will realize that a further emasculation of the Court does not necessarily provide a vote-winning platform in elections or referenda... Perhaps... they will do well to look closely at the Court's case law and remember how many of Europe's citizens have benefited directly as a result of the Court's rulings...
>
> As long as the Court goes on handing down judgements that enable ordinary men and women to savor the fruits of integration, it will continue to demonstrate its usefulness. And the Member States, whose systems of government are... founded on the principles of democracy, will surely hesitate before embarking on an incisive whittling down of its powers" (Mancini and Keeling, 1995, pp. 24, 100, 128)

The public writings and outreach campaigns of ECJ judges suggest a theoretical insight worth elaborating and taking seriously: That individuals and the "have nots" are powerful legitimating and attention-attracting vehicles for ICs seeking to bolster their contested legitimacy and authority. Unlike national judiciaries embedded in constitutional states with multiple avenues for democratic participation, international courts are usually embedded in international regimes with limited direct avenues for individuals to exercise their "voice" (Hirschman 1970). By creating a space where individual claiming is valued, safeguarded, and spotlighted, international courts can justify expansive judicial policymaking as a means to assuage the democratic deficit

plaguing international politics. Second, unlike entrenched domestic judiciaries where individual claiming is taken-for granted and constitutionally protected, ICs have historically been viewed as fora for states and multinational corporations to resolve their disputes. By flipping this presumption and tipping the scales in individuals' favor, "new-style" ICs can attract the attention and support of otherwise-skeptical compliance constituencies, such as legal scholars, capable of amplifying their rulings in national legal orders.

In other words, party capability may not be destiny before "new-style" ICs - and the "have nots" may come out ahead in international adjudication - because this outcomes serves the institution-building incentives of ICs. We need not presume that ICs are more enlightened, progressive, or justice-seeking than national courts. Rather, heeding individual claimants enables ICs to instrumentally tackle two pressing challenges - building legitimacy and attracting attention - that face all international institutions with fledgling and contested authority. Neither does this outcome hinge on resource inequalities evaporating once litigants appear before ICs. Quite the contrary, we presume that unequal party capabilities continue to condition private access to ICs. Yet for those individuals who *do* manage to bring their claims before an IC, they may, at that point, be more likely to win judges' support and to shape the policy agenda than their more resourceful corporate counterparts.

In sum, we derive three hypotheses to be empirically assessed using novel data on private litigation before the ECJ:

Hypothesis 1 *Businesses have greater capacity to litigate and benefit from higher quality legal representation before the ECJ compared to individuals.*

Hypothesis 2 *Despite their resource disadvantage, individuals are more likely to win disputes before the ECJ than businesses.*

Hypothesis 3 *Cases before the ECJ that are raised by individuals will attract more issue attention than cases raised by businesses.*

3 Case Selection, Original Data, and Models

To evaluate whether the "have nots" can come out ahead in private litigation before ICs, we focus on the critical case of the ECJ, for three reasons.

First, the ECJ is a historically and substantively important forum for international judicial policymaking. As the first IC to procure access to private litigants, the ECJ has been a much-hailed and emulated model of "new-style" international adjudication (Alter, 2012; Alter, 2014). If ICs stand any chance of leveling the odds for individual claimants, we would expect to find supportive evidence in Luxembourg: The ECJ is both an "influential" and a "critical" case for our theory (Seawright and Gerring, 2008; Gerring and Cojocaru, 2016, pp. 404–405).

Second, as we've shown, our theory and hypotheses build upon the justificatory rhetoric and outreach efforts of ECJ judges themselves. By bringing comprehensive empirical data to bear on their assertion that weaker private parties are favored in Luxembourg, we can assess whether European judges have backed up words with deeds.

Finally, by focusing on private litigation before the ECJ, we rectify a glaring gap in existing debates on European legal mobilization. Focused primarily on state and supranational litigants before the Court, "less research focuses on individuals and companies as litigants. This is unfortunate," Conant et al. (2018, pp. 1384–1385) lament, because it "lies at the core of the normative argument about the effects of legal mobilization on democratic politics" and whether "European law can be a weapon of the weak or remains a 'hollow hope.'"

To empirically advance this normatively consequential debate, we compiled an original dataset of all parties and their legal representatives involved in the 6,919 cases referred to the ECJ (under Article 267 TFEU) from 1961 to 2016. For each case, we documented the litigants and the people (usually lawyers or teams of lawyers) that represented them. We categorized litigants according to their type (*individual*, *business*, *interest group*, *state institutions*

(public actors) and *others*). This constitutes the main explanatory variable in all our empirical analyses - focusing on comparing individual and business litigants.

3.1 Measuring and Modeling Party Capability

Our first objective is to empirically capture the well-known distinction between the "haves" and the "have-nots" that predominates party capability research, to see if inequities in capability also characterize private litigants before the ECJ (H_1). European legal mobilization research logically presumes that businesses are "comparatively [more] resourceful" than individuals (Conant et al., 2018, p. 1384), but we do not want to take this for granted.

To this end, we follow US party capability studies focusing on the quality of legal representation that private parties can muster (McGuire 1995; Wahlbeck 1997; Szmer et al. 2016; Nelson & Epstein 2021). We measure this capacity to litigate in three ways. In line with studes from domestic courts, we find that all of these measures indicate large inequalities in litigants' legal representation.

First, we consider whether litigants submitted an *observation* before the ECJ, coding this as a binary variable. When cases are referred to the ECJ by national courts, the parties to the domestic dispute are invited to submit their views in a written observation. If the Court proceeds to an oral hearing, the parties are also invited to clarify their positions through oral observations. While it may seem self-evident that making your voice heard matters, litigants without the resources to hire quality legal counsel might not recognize its importance: In fact, some 37% of the litigants in our data set did not communicate their views to ECJ judges.

We then use two indicators to proxy for the lawyers' substantive and process expertise (Kritzer 1998): larger legal teams are more likely to hold specialized knowledge of EU law through their division of labor, while more experienced litigators are more likely to dexterously navigate the ECJ's pro-

cedures. The *size of parties' legal team* (the number of lawyers representing each side of an ECJ dispute) varies substantially. While the median private litigant that ended up submitting an observation relied on a single lawyer, one in five worked with a team of two or more lawyers on their payroll. Finally, *lawyer experience* counts the number of ECJ appearances of the most experienced member of a party's legal team.

Our modeling strategy is to first run a series of regressions probing whether the quality of legal representation is unequally distributed among litigants, enabling us to assess H_1. We treat each side in a case as a litigant and thus obtain a data set with 12,142 applicants and defendants. Our dependent variable is the *quality of legal representation* that these actors mustered.

Our first model describes the probability that the party submitted an observation. Given that this is a binary dependent variable, we use a regular binomial logistic regression. When estimating the quality of the legal team, however, we rely on hurdle models. That is, we consider that the size and experience of the team is a joint probability of first submitting an observation (a binary outcome) and – conditional on this outcome – hiring a high-quality team (a count outcome) (Long, 1997). Our explanatory variables are the type of litigant (*individual*, *company*, *interest group*, *state institutions* and *others*). The models control for whether several cases where joined by the ECJ to form a single judgment (*joined case*), the role of the litigant (applicant or defendant) in the proceedings, and decade fixed effects.

3.2 Measuring and Modeling Judicial Outcomes

In a second series of models, we probe whether party capability impacts *judicial outcomes*. Building on our theory, we measure outcomes in two ways. We first consider a party's propensity to win the support of ECJ judges for their legal claims in a dispute (speaking to H_2), and we next consider a party's capacity to attract attention to their claims within and beyond the courtroom (speaking to H_3).

3.2.1 Winning the Case

To measure who wins a case before the ECJ, we rely on two existing and influential projects that coded the legal positions of litigants and the ECJ, in order to ascertain whether these positions matched. We first run a regression that includes the outcome of ECJ judgments from 1961 and 1994, relying on the codings by Carrubba, Gabel, and Hankla (2008), and we next run a second regression using a more fine-grained outcome measure that distinguishes amongst different issue areas within judgments from 1996 and 2008 (Larsson and Naurin, 2016). By measuring who wins in two different ways, across two different time periods, using two established coding schemes, our goal is to bolster confidence that our results are not time-dependent or driven by idiosyncratic measurement choices.

In our empirical analyses, we code *win* as a binary variable indicating whether the applicant received the Court's support for their legal claim(s). Descriptive statistics already suggest a surprising tendency for individual applicants to win more often than businesses: In the 1961-1994 period, for instance, 57% of individual applicants gained the ECJ's support, compared to only 42% of businesses.

Yet these descriptive statistics may be spurious. We therefore control for other elements that may contribute to an applicant's success rate in two separate logit regressions.

In particular, we address predictions derived from the party-capability literature. It could lead to two types of errors.

On the one hand, we could find that individual litigants have a higher success rate than businesses exactly because of the resource hurdles they would have to surpass. That is, it may be the case that the threshold for bringing a case to court is so high that only individuals whose cases are exceptionally well-founded reach the litigation stage. Their higher win-rate would thus be due to an adverse selection process due to the parties capabilities rather than the Court's own agenda. To hedge against this alternative explanation,

our second model includes an interaction effect where we explicitly compare individuals that claim what we label "individual rights" (social benefits, fundamental rights...) with individual litigants that claim the same rights as other businesses (often farmers, small business owners etc.).

On the one hand, we may under-estimate the effect of individuals' advantage. That is, it may be that party-capability theories are correct that better legal representation increases a litigant's chances of winning. Thus, a higher base-line probability for individuals to win cases – because the ECJ seeks to promote its own agenda – may be masked by their lack of resources. We therefore control for the net difference in the quality of legal representation between the two sides to a dispute (although, as we will show, even when taking litigants' quality of legal representation into account, this capability advantage has no impact on the likelihood of receiving a favorable ECJ ruling).

Last, our models control for other common explanation for court outcomes. First, existing studies have shown that the ECJ tends to follow the majority of the governments that submit their observations through their permanent representatives in cases referred by national courts (Castro-Montero et al., 2018; Larsson and Naurin, 2016; Carrubba, Gabel, and Hankla, 2008). Therefore, our models control for the net number of government observations in support of the applicant. Second, litigation may implicate well-established and interpreted EU laws, diminishing the uncertainty concerning how the ECJ will rule compared to cases hinging on newer EU laws (Hermansen, 2020). Applicants may thus be more likely to win in cases pertaining to legislation interpreted by the Court multiple times, and we control for this possibility. Lastly, cases referred by national courts may occasionally require the ECJ to assess the validity (rather than the interpretation) of EU laws. Since cases challenging EU laws before the ECJ may have a lower success rate – but require better legal council – we control for whether a dispute hinges on the interpretation or validity of specific EU legal acts.

3.2.2 Catalyzing Attention and Shaping the Agenda

Finally, we build on socio-legal research positing that successful litigation is not merely about winning a case, but also about attracting attention to particular legal issues in order to shape the policy agenda (McCann, 1994; Vanhala, 2010; Conant et al., 2018).

Issue attention is a multi-dimensional concept, so we rely on multiple indicators to measure it. First, we assess the attention that a case generates within the ECJ. That is, we code the *size of the chamber* that the ECJ allocates to hear the case (small (3 judges)/medium (5-7 judges)/large (grand chamber, full court)). Second, we consider the political attention the cases received by measuring the number of *member state observations* submitted in a given case. The underlying intuition is that a larger chamber size and more state observations indicate a deliberate choice by ECJ judges to spotlight the dispute and its importance, alongside the dispute's political salience beyond its state of origin (Carrubba, et al. 2008; Stone Sweet & Brunell 2012; Kelemen 2012; Carrubba & Gabel 2015; Gabel et al. 2018).

Next, we focus on the issue attention that claims can catalyze following a judgement and beyond the courtroom. In particular, scholars of European legal integration have chronicled how law professors grew into a critical compliance constituency for the ECJ by discussing and amplifying its rulings in law journals (Stein, 1981; Weiler, 1991; Vauchez, 2015; Rasmussen and Martinsen, 2019). Of particular importance are legal commentaries published in law journals founded by pro-EU academics and lawyers associations, like the *Common Market Law Review* (CMLR) (Alter, 2016, p. 12), especially given that these legal commentaries serve as sources of law in civil law countries (Merryman and Perez-Perdomo, 2007, pp. 20–27). We thus proxy for the attention that ECJ cases attract by counting the number of *annotations* that they generate in law journals generally and in the CMLR specifically. Only some cases manage to attract the attention of this crucial compliance constituency: for instance, only 10% of ECJ judgments have received anno-

tations in the CMLR.

To model and evaluate whether individual litigants are better able to catalyze issue attention (as H_3 predicts), we run poisson and logistic regressions on the chamber size that the ECJ allocates to a dispute, the number of member state observations, as well as the number of annotations in law reviews generally and the CMLR specifically.

4 Results

4.1 Party capability (H_1): Corporate litigants boast a capability advantage in ECJ litigation

In H_1, we hypothesized that individual litigants before ICs tend to benefit from lower quality legal representation than businesses – consistent with party capability studies at the domestic level. Our analysis provides strong support for the claim that inequities in party capability do not evaporate at the international level. Results are reported in Table 1 and illustrated in Figure 2.

First, business litigants are on average 1.9 times more likely to submit an observation than individual litigants involved in comparable disputes. One in four individuals did not submit an observation in their own case (a predicted submission rate of 78%), whereas only about 1 in 10 companies did not avail themselves of the opportunity to express their opinion (a submission rate of 87%). To the extent that litigants are more likely to recognize the importance of communicating their claims to the ECJ when they have quality legal counsel, this result suggests that businesses have a capability advantage.

Inequities in party capability also persist within the subset of litigants that make their voice heard by submitting an observation before the ECJ. Individual litigants' legal teams tend to be 14.1% smaller than those of businesses. Unequal party capabilities also arise when we consider parties' most

Table 1: Variation in quality of representation across parties: Companies rely on average on larger and more experienced teams than individual litigants.

	Dependent variable: Quality of legal representation		
	Submitted observation	Size of legal team	Lawyer experience
	logistic	*hurdle*	*hurdle*
Individual (ref. company)	-0.646^{***}	-0.152^{***}	-0.391^{***}
	(0.060)	(0.028)	(0.016)
Interest group (ref. company)	0.733^{***}	0.274^{***}	-0.344^{***}
	(0.151)	(0.043)	(0.030)
State institution (ref. company)	-2.156^{***}	-0.169^{***}	-0.347^{***}
	(0.055)	(0.034)	(0.020)
Other (ref. company)	-0.084	0.169^{***}	-0.060^{**}
	(0.102)	(0.044)	(0.025)
Defendant in main proceedings	-0.450^{***}	-0.092^{***}	-0.246^{***}
	(0.048)	(0.025)	(0.014)
Joined cases	0.433^{***}	0.704^{***}	0.028
	(0.081)	(0.029)	(0.022)
Constant	1.922^{***}	0.330^{***}	1.488^{***}
	(0.059)	(0.026)	(0.014)
Observations	12,286	12,286	12,286
Log Likelihood	$-6{,}505.995$	$-16{,}520.370$	$-44{,}932.190$
Akaike Inf. Crit.	13,035.990		
Note:			*p<0.1; **p<0.05; ***p<0.01

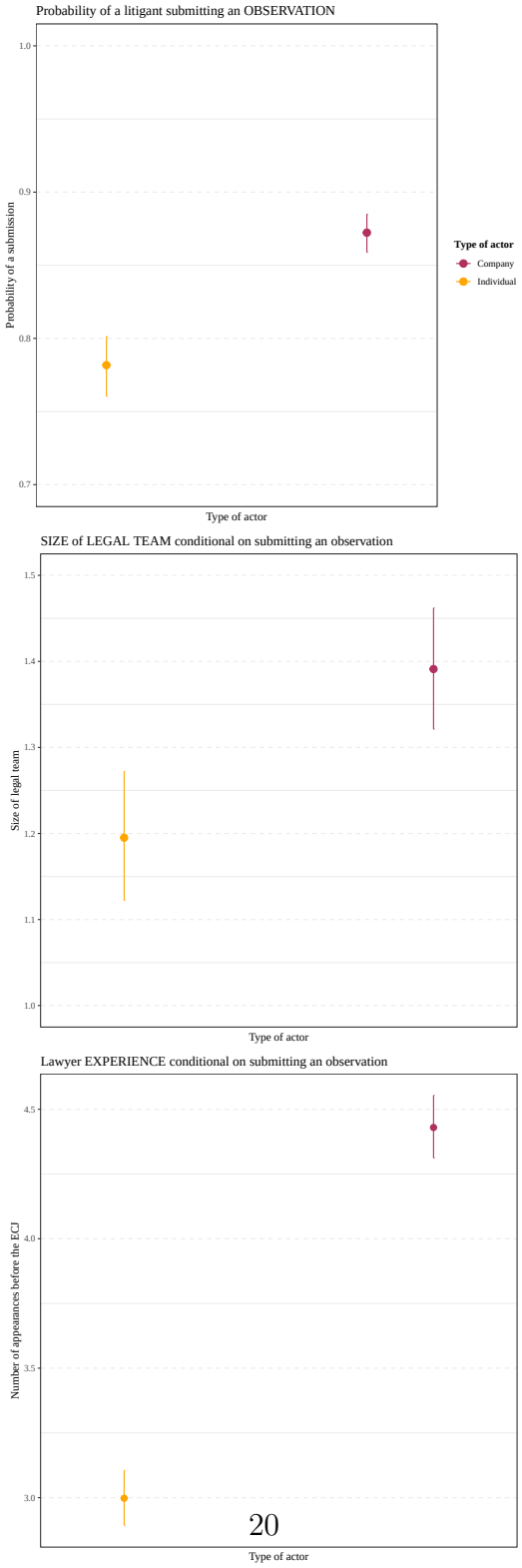

Figure 2: Businesses benefit from higher quality legal representation than individuals. These figures illustrate the case of an applicant in the 2000s.

experienced counsel, albeit to a lesser degree. Conditional on submitting an observation, individual litigants rely on lawyers with 32% less experience of litigating prior cases before the ECJ than the lawyers hired by businesses.

In sum, the same inequalities in party capability that predominate private litigation before national courts also surface in private litigation before the ECJ. This begs the question: do these inequities impact judicial outcomes in Luxembourg in the same way as they tend to impact national adjudication?

4.2 Judicial outcomes

4.2.1 Who wins? (H_2): Individual litigants are more likely to win the ECJ's support for their claims than businesses

In contrast to the tendency at the domestic level, our empirical findings suggest that litigant resources do not translate into favorable judicial outcomes before the ECJ. In fact, to the extent that party capability conditions judicial outcomes, it tends to do so in reverse: it is the disadvantaged that tend to disprotionately win the ECJ's support for their claims. Results of the relationship between party capability and the propensity to win a case are displayed in Table 2 and Figure 3.

All else equal, in the period from 1961 to 1994 individuals have a 60% higher probability of having their legal claims supported by the Court compared to businesses. This figure remains essentially the same for the 1995 to 2016 period (66%). The higher predicted win-rate is due to cases in which individuals claim "individual rights" as described by Lecourt and Mancini in the above citations rather than cases in which individuals act as businesses (visible from the interaction effects in the 2nd and 4th columns).

Starkly, the models also indicate that the quality of legal representation has no bearing on this result. In other words, even when we take into account the larger and more experienced legal teams that businesses tend to hire, this advantage in legal representation does not improve their capacity to win.

Table 2: Variation in the likelihood of winning among applicants accross types of litigants.

	Dependent variable:			
	Wins the case			
	logistic			
	1961-1994	1961-1994	1996-2008	1996-2008
Individual rights		−0.174		0.209
		(0.182)		(0.136)
Individual (ref. company)	0.473***	0.256	0.505***	0.104
	(0.116)	(0.160)	(0.102)	(0.164)
Interest group (ref. company)	0.168	0.194	0.310*	0.315*
	(0.241)	(0.242)	(0.177)	(0.178)
State institution (ref. company)	0.299*	0.295*	0.184	0.175
	(0.177)	(0.178)	(0.160)	(0.161)
Other (ref. company)	0.119	0.169	−0.084	−0.080
	(0.249)	(0.257)	(0.328)	(0.330)
Net support from MS observations	0.500***	0.500***	0.301***	0.302***
	(0.054)	(0.054)	(0.028)	(0.028)
First time an EU law is applied	−0.257**	−0.247**	−0.359***	−0.369***
	(0.113)	(0.113)	(0.110)	(0.112)
The validity of an EU law is in question	−0.650***	−0.636***	−0.587***	−0.600***
	(0.154)	(0.154)	(0.201)	(0.201)
Defendant is ... an individual (ref company)	−0.244	−0.189	0.090	0.074
	(0.174)	(0.178)	(0.176)	(0.181)
... interest group (ref. company)	0.014	−0.019	0.016	−0.062
	(0.267)	(0.270)	(0.274)	(0.275)
... state institution(ref. company)	0.036	0.005	0.379***	0.396***
	(0.141)	(0.142)	(0.114)	(0.115)
... other type of actor (ref. company)	0.211	0.144	0.149	0.072
	(0.198)	(0.201)	(0.221)	(0.223)
Difference in legal team size	0.004	0.012	−0.041	−0.047
	(0.042)	(0.042)	(0.031)	(0.031)
Difference in lawyer experience	−0.004	−0.004	0.009	0.009
	(0.007)	(0.007)	(0.007)	(0.007)
Individual * individual rights		0.509*		0.448*
		(0.260)		(0.230)
Constant	−0.003	0.023	−0.753***	−0.788***
	(0.138)	(0.139)	(0.092)	(0.096)
Observations	1,828	1,828	2,528	2,528
Log Likelihood	−1,183.369	−1,181.250	−1,533.823	−1,525.984
Akaike Inf. Crit.	2,384.738	2,394.500	3,095.646	3,083.968
Note:				*p<0.1; **p<0.05; ***p<0.01

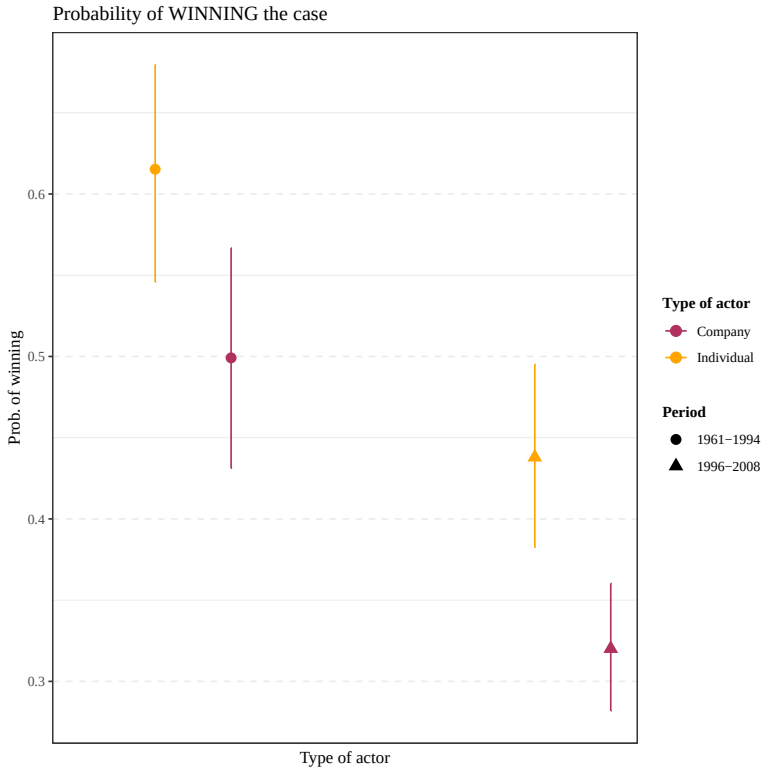

Figure 3: Probability of winning the Court's support.

When it comes to our control variables, our results are consistent with previous research, bolstering confidence in our analysis (Carrubba, Gabel, and Hankla, 2008; Larsson and Naurin, 2016). For instance, our findings indicate a positive effect of member states' support for the applicant. To make up for its lower likelihood of winning a case before the ECJ, a business litigant would need to receive 1, 0, 1.7, and 0.3 additional supportive government observations across the four models in Table 2 to equalize their chances of winning vis-a-vis individuals involved comparable disputes. Lastly, we also find that applicants involved in cases where the Court interprets EU legislation for the first time or is asked to assess the validity of EU law are less likely to win the ECJ's support.

In other words, despite businesses boasting higher quality legal representation in ECJ disputes, the Court is more likely to rule in favor of individual claimants. While this result is the reverse of existing party capability studies, it is consistent with the public assertions of ECJ judges and our revisionist theory.

4.2.2 Issue attention (H_3): Individual litigants are more likely to attract attention within and beyond the ECJ

Finally, we assess how party capability conditions outcomes beyond winning a case. Specifically, we explore litigants' ability to shape the EU judicial agenda by attracting the attention of the ECJ and its domestic interlocutors. In this light, in H_3 we hypothesized that individual litigants serve as better vehicles for catalyzing issue attention in international disputes compared to corporate litigants.

First, let us consider the capacity of litigants to catalyze issue attention within the courtroom. Our results in Table 3 and Figure 4 confirm that ECJ cases involving individuals attract more attention from member state governments than cases where only companies are involved. The Court is 48% more likely to allocate a larger chamber formation to adjudicate cases involving

individual litigants compared to cases involving business litigants. Additionally, the number of member state observations filed in disputes involving individual litigants are 18% higher on average than cases only involving businesses.

While quality of legal representation has no impact on the likelihood of receiving a favorable Court decision, the ECJ does tend to allocate larger chambers in cases where more lawyers are involved. Thus for a business litigant to compensate for their lower capacity to attract the attention of ECJ judges compared to individuals, they would on average need to expend resources to hire an additional lawyer (contrariwise, the experience of the legal team is unrelated to a litigant's capacity to attract attention).

Do individual litigants also tend to attract greater issue attention beyond the courtroom? That is, do they enable the ECJ to cultivate the attention of a key compliance constituency - legal academics? Our results provide strong support for an affirmative answer. Cases involving individual litigants attract greater attention among legal scholars after the Court has rendered its judgment. This finding is not only true when it comes to legal commentary published in law reviews, but also vis-a-vis the subset of journals that tend to be supportive of European legal integration. For instance, the *Common Market Law Review* is 93% more likely to publish commentaries of cases adjudicated by the ECJ when individuals are involved compared to cases solely involving businesses.

These results suggest that ECJ adjudication disproportionately amplifies the legal claims and issues raised by individual litigants. Not only does the ECJ tend to 'level the odds' by deciding more cases in individuals' favor, but it tends to allocate a larger chamber to disputes involving individual litigants - which, in turn, helps attract the attention of member states and legal scholars.

Table 3: Variation in issue attention across cases depending on the type of litigants involved.

	Dependent variable: Political, judicial and academic attention			
	MS observations	Chamber size	Case annotations	Annotated in CMLR
	Poisson	*ordered logistic*	*Poisson*	*logistic*
individual	0.168^{***}	0.391^{***}	0.183^{***}	0.658^{***}
	(0.019)	(0.056)	(0.010)	(0.100)
ngo	0.235^{***}	0.239^{**}	0.106^{***}	0.091
	(0.033)	(0.102)	(0.016)	(0.163)
state_institution	-0.111^{***}	-0.185^{***}	-0.551^{***}	-0.211^{*}
	(0.021)	(0.063)	(0.011)	(0.109)
other	0.007	-0.182^{**}	-0.330^{***}	-0.391^{**}
	(0.032)	(0.090)	(0.017)	(0.173)
log(n_lawyers_applicant + 1)		0.524^{***}	0.258^{***}	0.643^{***}
		(0.060)	(0.011)	(0.105)
log(n_lawyers_defendant + 1)		0.332^{***}	0.205^{***}	0.352^{***}
		(0.068)	(0.011)	(0.113)
log(n_appearances_applicant + 1)		0.092^{**}	-0.052^{***}	0.103^{*}
		(0.037)	(0.007)	(0.062)
log(n_appearances_defendant + 1)		0.003	0.010	0.025
		(0.051)	(0.009)	(0.084)
log(n_iteration + 1)	-0.028^{***}	-0.053^{***}	-0.017^{***}	-0.281^{***}
	(0.007)	(0.018)	(0.004)	(0.040)
observations_prop_tot		8.334^{***}	3.619^{***}	5.709^{***}
		(0.338)	(0.036)	(0.402)
small|medium		-0.068		
		(0.110)		
medium|large		2.738^{***}		
		(0.117)		
Constant	-0.356^{***}		1.739^{***}	-3.454^{***}
	(0.098)		(0.020)	(0.207)
EU size fixed effects	Yes	No	No	No
Decade fixed effects	No	Yes	Yes	Yes
Observations	5,928	5,928	5,928	5,928

Note: *p<0.1; **p<0.05; ***p<0.01

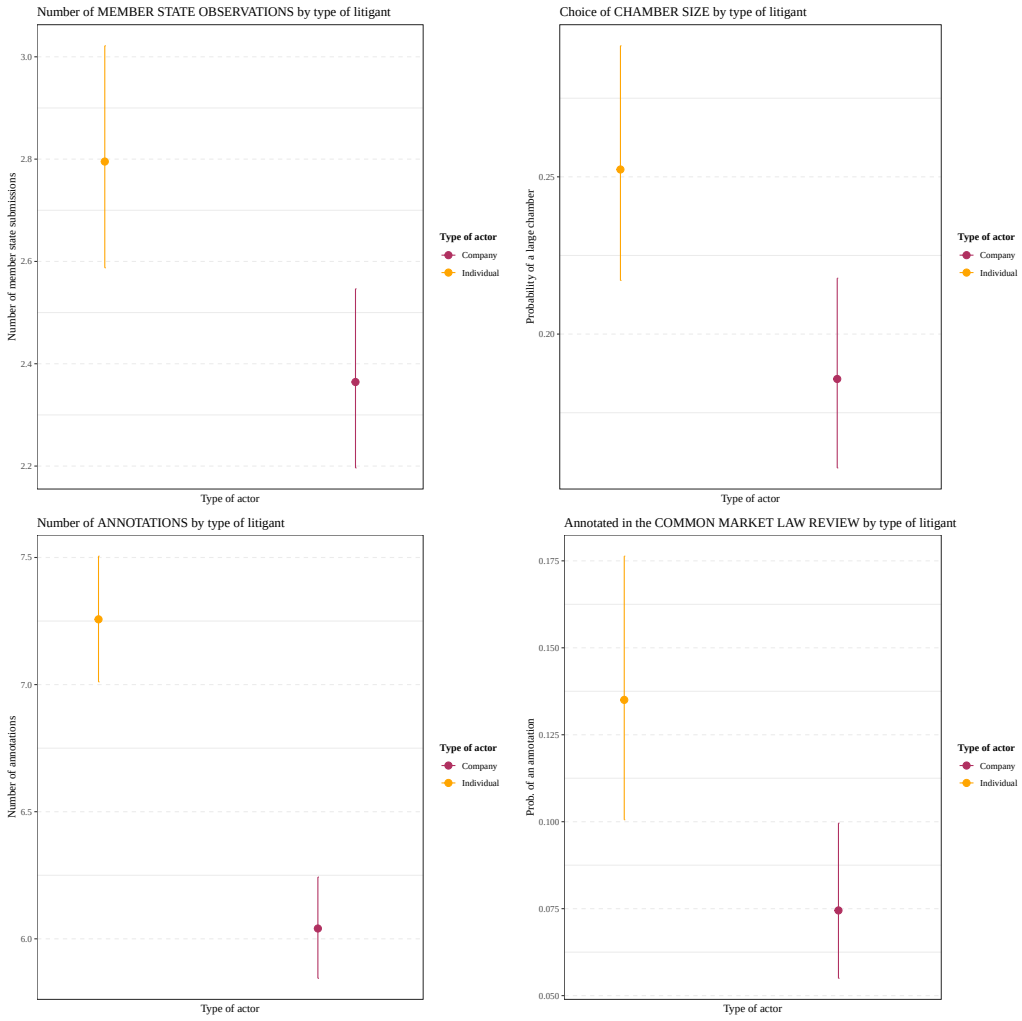

Figure 4: Individual litigants attracted greater attention from political and judicial policymakers than business litigants.

5 Conclusion: The Advantages of the Disadvantaged

That the "haves" come out ahead is arguably the most consistent finding across studies of litigation at the national level. Yet we have shown that party capability is not destiny before "new-style" ICs. Before the prototypical IC with private access - the ECJ - it is actually the "have nots" that tend to come out ahead. Not only are individual claimants more likely to win the ECJ's support than better-resourced businesses, but their claims tend to attract more attention both inside and outside the courtroom.

This is a remarkable and heartening finding, and it may appear implausible at first glance. Yet it need not rest on optimistic or herculean assumptions. We suggest that this result is consistent with judges instrumentally seeking to overcome the institutional challenges that they face. Like other international institutions, ICs face two major obstacles as policymakers: Their fledgling legitimate authority is regularly contested, and prospective compliance constituencies at the national level tend to ignore their existence or their impact. Tipping the scales in favor of the "have nots" - and publicizing these efforts as much as possible - enables new-style ICs to tackle both problems. It allows ICs to justify expansive judicial policymaking as democracy-enhancing, assuaging the critique that the international regimes in which they are embedded suffer from a "democratic deficit" (Føllesdal and Hix, 2006). And it allows ICs to cultivate the attention and support of key domestic allies - such as legal academics - who can amplify their rulings and prove their relevance. The "have nots" may be unable to trade resources and information in the courtroom as effectively as corporate litigants. But individuals can trade in legitimacy, and it is legitimacy, perhaps above all else, that is in short supply for ambitious ICs who must confront the threats of backlash, noncompliance, and court-curbing campaigns (Alter and Helfer, 2013; Cohen et al., 2018; Voeten, 2020; Pavone and Stiansen, 2021).

In other words, we see the capacity of the "have nots" to come out ahead as contingent on their capacity to serve as instruments for institution-building and legitimation. While this is a story of how judicial entrepreneurship refracts the impact of party capability, our findings also highlight opportunities that can be strategically mobilized by litigants. Amongst the three obstacles that private litigants must overcome to effectively mobilize ICs – obtaining access, winning the case, and catalyzing issue attention – only the first obstacle – access – may systematically tip the scales in favor of the "haves." For most of the seventeen new-style ICs, this access problem hinges on persuading a national court to refer a case to an international court (Alter, 2014; Pavone, 2022): it is at this stage that private litigants may need to be most proactive in mobilizing the resources necessary to compete with powerful repeat-players. Once before an IC, however, the advantages of party capability may whither away, as judges face institutional incentives to "level the odds" in favor of individual claimants (Miller, Keith, and Holmes, 2015).

Our findings also provide novel empirical support for a consequential conclusion: judicial activism is not merely a potential source of backlash, but also a means of building legitimacy (Alter and Helfer, 2013; Hermansen, 2020). In particular, ICs who deliver expansive rulings in the politically salient issue areas that tend to fuel individual claiming - social security, immigration, fundamental rights, consumer protections, etc. - may not be doing so willy-nilly, backlash be damned. Rather, ICs may be acting strategically to justify their own policy activism and to court the attention of potential allies in national legal systems. Whether the "haves" or the "have nots" come out ahead before ICs is not merely a question of amassing the most resources, the most information, and the most lawyers. It is also a question of serving as a vehicle to legitimate and amplify judicial policymaking. And at least in this respect, it is pensioners, consumers, and migratory workers who are better positioned than their corporate counterparts.

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6 Appendix