Towards a theory of judicial agency in international settings: Government input and litigant success before the European Court of Justice

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Abstract

In this article we study how international courts balance between the input from government and non-governmental actors. We integrate theories of legal mobilization with theories of judicial politics in international settings, two literatures that hitherto have evolved in mutual ignorance. Our contribution is twofold: First, we study international courts' decision-making from two dimensions, government and non-governmental actors, effectively bridging two literatures. Then, we develop and empirically test a theory to understand under what political conditions international courts respond to the input from private litigants and their legal counsel.

We draw on an original dataset of parties and lawyers involved in preliminary references before the European Court of Justice, and leverage variation in both governments' involvement and the quality of parties' legal representation to assess the decision-making of the Court. We find that with the 'permission' of governments the Court considers arguments from private lawyers and finds itself in an opportunity to redo its case-law. Absent government permission, the Court more often decide cases in line with previous case-law than give sway to quality arguments. We conclude by highlighting the necessity to bring theories of legal mobilization closer to judicial politics for explaining litigant success and judicial agency in international settings.

Introduction

In this article we study how international courts balance between the input from government and non-governmental actors. We integrate theories of legal mobilization with theories of judicial politics in international settings, two literatures that hitherto have evolved in mutual ignorance. Our contribution is twofold: First, we study international courts decision-making from two dimensions, government and non-government actors, bridging two literatures. Then, we develop and empirically test a theory to understand under what political conditions international courts respond to the input from private litigants and their legal counsel.

International courts operate with a dual mandate. One the one hand, courts are delegated with the task of filling in incomplete contracts on behalf of governments (Kahler, 2000). International courts' most valuable contribution might be their ability to broker solutions that are acceptable to sovereign states, allowing them to remain in cooperation. This means that the outcome of cases is sometimes dictated by the imperatives of member states, although the legal reasoning that justifies this result is penned by the court (Carrubba, 2005). International courts are often seen as agents of member states (Carrubba and Gabel, 2017) with a particular sensitivity to the political signals they receive.

On the other hand, international courts are foras where societal actors can challenge the domestic status quo by seeking the recognition of rights at the supranational level (Burley and Mattli, 1993; Alter and Vargas, 2000; Cichowski, 2006; Conant et al., 2018). Legal mobilization before international courts is thus part of a broader strategy in which actors pick judicial venues that they believe will give them a favorable outcome. Legal-capability theories emphasize that judges have incomplete information about both the facts of the dispute and the potential legal solutions (McAtee and McGuire, 2007). As a result, courts hear arguments presented by litigants. Lawyers formulate these arguments, and the quality of the argument is often equated

with the quality of the legal team. Good lawyers can have an effect on the win-rate of their clients, but also on the legal reasoning that supports the court's conclusions. Studies of domestic courts across the world consistently show that litigants with high-quality legal counsel obtain better outcomes (Szmer, S. W. Johnson, and Sarver, 2007; Szmer, Songer, and Bowie, 2016; Nelson and Epstein, 2021; McGuire, 1995; Miller, Keith, and Holmes, 2015; Chen, Huang, and Lin, 2015).

In order to study how national courts make decisions, the latter perspective have been emphasized, focusing in legal-capability theories. In order to to study how international courts make decisions, the former perspective have been emphasized, focusing on political constraints of international courts. In this article we integrate these two theories to assess international courts' sensitivity to input from private litigants, their legal counsel and governments. We rely on a unique dataset consisting of all government submissions as well as all litigants and their lawyers in preliminary reference cases brought to the European Court of Justice (ECJ) between 1961 and 2008. We then link governments' and parties' involvement to the Court's decision to support the applicant (Carrubba, Gabel, and Hankla, 2008; Larsson and Naurin, 2016). The ECJ is the first – and arguably the most influential international court. It has served as a model for other international courts (Alter, 2014), and many of the claims pertaining to supranational legal mobilization and intergovernmental politics have their roots in studies of the European judiciary.

We find that the Court responds both to governments' endorsement of litigants' claims and resists government push-back, when there is no such endorsement. However, the effect of litigants' legal representation on outcomes is contingent on governments' support. In contrast, when the claims of the applicant are not supported by governments, the Court may resist by reverting to its previous case-law, with little to no effect of the additional assets that litigants bring to court. We conclude by highlighting the need to bring theories of legal mobilisation closer to theories of international politics

to understand the dynamics of international courts.

Literature

The preliminary reference procedure allows domestic judges to pause their proceedings to refer questions of EU law to the ECJ for interpretation. After the Court introduced its doctrines of direct effect (Van Gend en Loos, 1962) and primacy (Costa vs. ENEL, 1964), the procedure effectively became a means for litigants to challenge domestic policies by referring to EU legislation (Alter, 1998). The procedure has been central for the ECJ's role in EU legal integration. The Court's self-declared mandate to strike down government policies has earned the ECJ the reputation of the *de facto* supreme court of the EU. Authors vary widely in the role attributed to litigants and governments in this process.

Scholars inspired by functionalist theories have argued that legal integration has taken place through an interaction between litigants and the Court by which the Court has fed an ever increasing demand from litigants that find their claims supported against member states (Haas, 1958; Burley and Mattli, 1993; Stone Sweet and Brunell, 1998). Governments, in their account, have been either ignorant of (Burley and Mattli, 1993) or unable to counter (Scharpf, 1988) this dynamic. Alter (1998) offers a slightly different account, arguing that while governments have primarily bargained over case outcomes, the Court has enjoyed a large discretion in crafting the legal arguments that have later sustained its top-down integrationist pursuit.

The approach stands in contrast to the emphasis on the Court's political constraints forwarded by intergovernmental (Garrett, 1995) and comparative (Pollack, 1997) scholars. These studies tend to understand the ECJ as an agent of member states with clear political constraints. Governments are not formally part of preliminary reference cases, but have the possibility to submit their views to the Court through "observations". Drawing on theo-

ries of domestic judicial politics, scholars have repeatedly demonstrated the ECJ's sensitivity to the majority of governments that submit observations, arguing that the Court adapts to political signals out of fear of being curbed (Carrubba, Gabel, and Hankla, 2012; Larsson and Naurin, 2016; Castro-Montero et al., 2018). The role of private litigants has been entirely absent in these studies, despite their explicit comparative approach. They focus furthermore on specific elements of the Court's political constraints rather than the conditions for its agency. Some authors have gone as far as conceiving government observations as "threats of non-compliance" (Carrubba, Gabel, and Hankla, 2008). By contrast, we argue that government submissions may also constitute a mandate to act and may create windows of opportunity for the Court.

The Court also receives information from private litigants and their lawyers. How the ECJ addresses these actors remains less clear. However, by feeding courts with new cases and framing cases within EU law, private litigants and their lawyers play an incremental role, next to national judges, in the preliminary reference procedure. Without any cases to rule on, the ECJ would effectively be powerless. Lawyers may influence case outcomes at two stages in litigation: (1) They are instrumental in bringing cases to court, thus provoking a litigation. (2) Lawyers also bring arguments to bear during the proceeding and thus provides judges with information about the case and possible solutions to the case.

Pavone (2022) argues that litigants' lawyers, rather than domestic judges, have been instrumental to the activation of the preliminary reference procedure. Domestic judges – especially in lower courts – are often overworked and possess scant knowledge of EU law and legal procedures. They may, however, be willing to submit a reference to the ECJ with assistance from the litigants' lawyers. Many of the foundational cases from the first decades of the ECJ's history were brought by a subset of entrepreneurial Euro-lawyers that pro-actively sought out litigants with claims that could succeed before

the ECJ. The preliminary references were de facto "ghostwritten" by the applicant's legal team. This research showcase the importance of lawyers in provoking litigation: Without any lawyers, no court cases, and as a result, no rulings.

In terms of the second stage, there is a wast literature on lawyers influence on judicial decision-making. Regardless of this, how lawyers influence the decision-making of international courts, has to our knowledge, not been systematically investigated. This is quite surprising, in the case of the ECJ, given than the lawyers of private litigants can affect the decision-making of the Court by the same means as member states – by submitting observations. Furthermore, investigating the influence of lawyers and private litigants on the ECJ serves as an additional benchmark to evaluate the determinants of the Courts' decision-making and its independence. Extant studies researching how ECJ makes decisions have looked at when the Court rules in line with member states' uttered preferences, but paid little attention to explain what happens when the Court does the opposite.

In legal mobilization literature, lawyers are understood as someone who is filling judges' information gap (McAtee and McGuire, 2007). Lawyers provide judges with information that can help them decide the case. This may include relevant facts, sources of law, legal interpretation and arguments, and case framing (Szmer, S. W. Johnson, and Sarver, 2007; T. R. Johnson, 2001). These arguments may have a determinative effect on judicial outcomes (Schubert et al., 1992). Research have also highlighted how more experienced lawyers may provide judges with more relevant and 'better' information and that these 'experienced lawyers' are more likely to win cases compared to novices (McGuire, 1995; Haire, Lindquist, and Hartley, 1999; McAtee and McGuire, 2007; Szmer, S. W. Johnson, and Sarver, 2007; Szmer, Songer, and Bowie, 2016; Miller, Keith, and Holmes, 2015; Chen, Huang, and Lin, 2015; Nelson and Epstein, 2021). Judges are thought to be responsive to lawyers arguments, and they may even be biased towards more experienced

lawyers or lawyers they are familiar with (those who argue before the same court again and again). Nevertheless, it remains unclear how international courts respond to private litigants' legal counsel under the constraints posed by governments.

What is more clear, however, is that the ECJ tend to favor private individuals, rather than private companies in preliminary reference cases (Hermansen, Pavone, and Boulaziz, 2022). The ECJ has sought out this as a legitimizing strategy, and uses this strategy to prove its own relevance to citizens of the EU (ibid). In line with this, our former research have shown that party capability is not "desitiny" before ICs. However, lawyers and non-governmental actors may still have a bearing on the decision-making, but it remains unclear under what political conditions. Lawyers may also be used as an additional benchmark to assess the extent to which the Court follows member states' lead on cases. This may not only tell us something about the importance of these actors before the Court, but ultimately also how the Court acts vis-à-vis these different actors.

Theory

Extant literature claims that the Court responds to member states' preferences in its rulings (Carrubba, Gabel, and Hankla, 2008; Larsson and Naurin, 2016). This means that when governments favor the applicant, the Court is more likely to grant the applicant a favorable ruling, and vice versa. However, where Carrubba, Gabel, and Hankla (2008) view member states observations as a "threat of non-compliance", we posit that these observations also constitute a mandate to act and may create a widow of opportunity for the Court to redo its case-law. Yet, the Court does not blindly follow member states preferences when issuing rulings. In some situations, the ECJ may instead revert to earlier case-law to defend its position.

The Court face two different political contexts: (1) Where a majority of

governments support the applicant and the Court is mandated to act, and (2) where a majority of member states do not support the applicant, where the Court may resist or follow member states' lead. We seek to explain how the Court issues decisions in these two political contexts and where there is room for input from non-governmental actors. We further emphasize that the Court does not blindly follow governments' uttered preferences. The Court may resist. This becomes the most apparent when the Court does the opposite of what governments signal in their submissions to the Court. Additionally, the Court may (1) rely on previous case-law in its rulings, or (2) produce new case-law or redo its case-law. In the event that the political conditions are unfavorable for the applicant, we expect that the Court relies on previous case-law. The Court may use this strategy both when ruling in line with governments' uttered preferences, but also when it resists. In the event that political conditions are favorable we expect the Court to expand its case-law. When the Court expands its case-law, we assume that previous rulings are less relevant for solving the case in question, suggesting that the Court does something new. It is, when the Court does something new, that we expect the Court to consider input from lawyers.

When the Court is mandated to act: member states support the applicant

Instead of viewing member states' preferences as a "threat of no-compliance" (Carrubba, Gabel, and Hankla, 2008), we posit that member states' uttered preferences may also constitute a mandate to act. When a majority of member states support the applicant, the Court may view this as a window of opportunity to expand or redo its case-law. If the Court decides to redo or expand its case-law, it relies less on previous decisions to feed its current decision. In order to take advantage of this window of opportunity, the Court relies, instead, on lawyers. Therefore, in situations when the political conditions are favorable, the Court is more open to the input from private litigants

and their legal counsel. The Court may view the signals it receives from governments as political, but may instead view the information it receives from lawyers as sources of innovation. The lawyers may provide the necessary legal arguments needed to pen a ruling expanding the Courts' case-law. The Court needs the lawyers in this window of opportunity because it faces two obstacles, (1) the Court is time constrained and (2) the Court needs innovative arguments to push for new case-law. Lawyers may solve both of these problems for the Court. We assume, in line with extant research, that private litigants with better legal counsel will have a larger bearing on the case, as the quality of legal counsel is often equated with obtaining a favorable ruling (e.g. Nelson and Epstein, 2021).

Hypothesis 1 *Parties' legal capability has a bearing on the outcome of cases when governments support the applicant.*

When the Court resists: member states do not support the applicant

We expect that in cases where a majority of member states' do not support the applicant, the Court will rule in favor of the defendant, responding to member states uttered preferences, in line with extant research (Carrubba, Gabel, and Hankla, 2008; Larsson and Naurin, 2016). However, the Court might resist following governments' uttered preferences. These situations arise when a majority of governments support the defendant, but the Court supports the applicant. In these instances we expect that the Court reverts to earlier case-law to feed its judgments. This means that the Court uses previous cases that are similar in nature in which the applicant won to grant the applicant a win when the political context is unfavorable. The Court knows that member states cannot oppose its decision if it was previously accepted in a different case. Therefore, the Court face little to no opposition from governments in these instances. We expect that in these cases, litigants

legal team play little to no role, as the Court already has its argument: The previously related case that was argued.

Hypothesis 2 *Parties' legal capability has no bearing on the case when governments do not support the applicant.*

Hypothesis 3 *The Court relies on previous case-law in the event that it resists governments uttered preferences.*

Empirical strategy

In order to test our theory on how the Court responds to input from non-governmental actors, we rely on an unprecedented data set listing all parties and their lawyer's names that have submitted observations to the Court in preliminary references in the period between 1961 until 2008. However, to consider how the Court responds to private actors under different political conditions, we combine this data with information about the political context. To do this, we draw on two different coding projects in which all actors' positions have been identified. Both Carrubba, Gabel, and Hankla (2008) and Larsson and Naurin (2016) find that the direction of member states' submissions is predictive of the Court's ruling. Using their data, we test the hypothesis' outlined in the theory part. Since we are drawing on two different coding projects, we also run two identical models, each time covering two different time periods.

Our data frames list all applicants in preliminary reference procedures and our dependent variable *Win* indicates whether the Court ended up supporting the claims. We measure the quality of parties' legal representation in two different ways: The *size of legal team* lists the number of lawyers involved on each side of the litigation and substracts the defendent's legal team from the applicant's. We thus report the net number of lawyers intervening in the applicant's favor. The *Legal team experience* is constructed in the same way, but lists only the number of lawyers that have already pleaded before the ECJ in previous cases.

We have theorized that the Court finds itself in two different situations: (1) Where a majority of governments support the applicant, and (2) where a majority of governments do not support the applicant. For the purposes of the analysis we therefore split the data sets according to these scenarios. Figure 1 illustrates the bivariate relationship between the applicant's legal team and their win-rate in each of these scenarios. It signals that the Court considers the input by lawyers when the political conditions are favorable

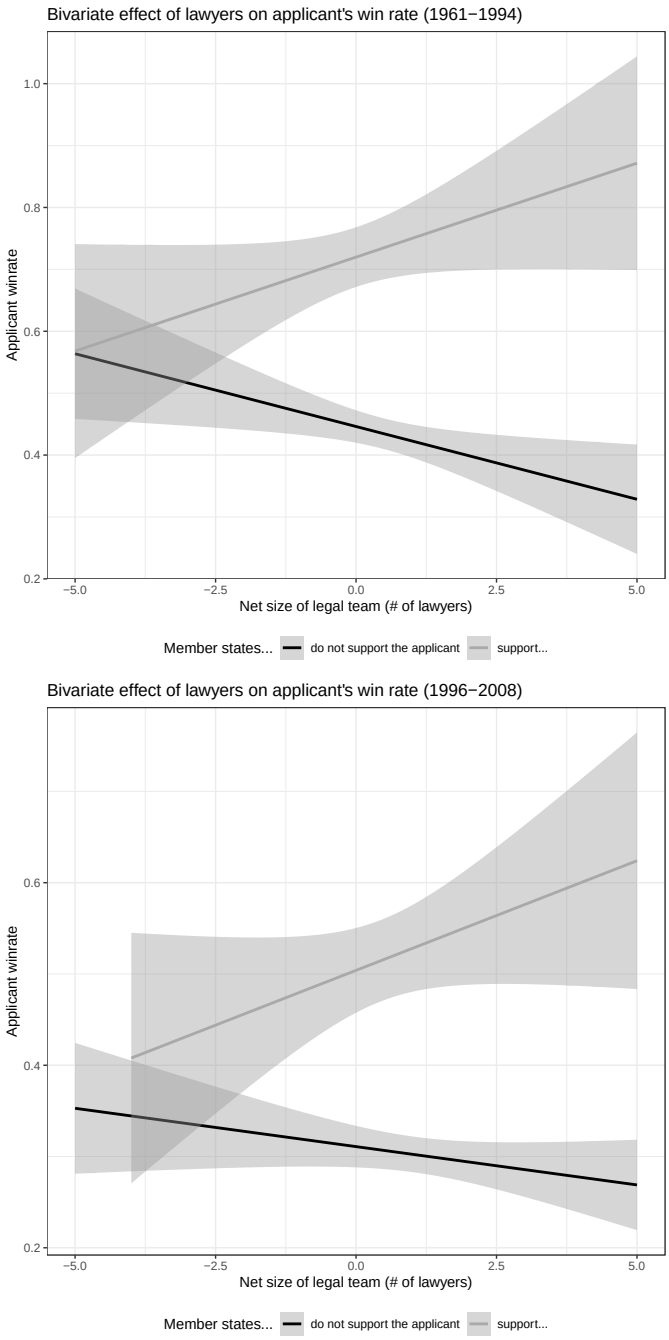

Figure 1: Applicants face two different political contexts depending on whether the majority of member states submitting their views to the Court supports the applicant. (Bivariate linear models).

(hypothesis 1).

We further control for the type of litigant making the claim in any given case. All the parties in the preliminary reference cases have been categorized according to the following: State institution, individual, company, EU institution and non-governmental organization (NGO) and "other". This is because the type of litigant can be related to certain cases and also be more or less likely to win. We have shown elsewhere that the ECJ tends to favor individual litigants (Hermansen, Pavone, and Boulaziz, 2022).

The claims that litigants make may be more or less well-founded. Claimants thus vary in the quality of their legal claims. Like the Court itself, we cannot readily know this quality. Furthermore, a rational and well-resourced litigant will hire the legal counsel they believe is appropriate to win. Thus, the litigants with the boldest claims, may also be the litigants with the best legal representation. Our research design aims to identify litigants whose claims are similarly well-anchored in EU law. We may consider that the added value of legal representation for litigants is lawyers' ability to make use of the information available about their legal opportunities. That is, we seek to compare litigants in similar informational situations. We do this by considering the set of EU-laws that the Court interprets in its judgment and the degree of uncertainty that surrounds its potential decision. The model choice and all control variables are geared for that purpose.

The models rely on a set of fixed effects reporting the number of times that each unique combination of EU laws have been interpreted before. We assume claimants thus have the same amount of case-law to inform their strategy. The models thus compare across laws, but strictly within the same informational context. Overall, our results are driven by within-iteration comparisons. The variable *Last applicant won* simply reports the lagged winning variable within these combinations of laws and further approximates the information available to litigants about the Court's most recent case-law.

Most ECJ cases directly or indirectly challenge domestic policies insofar

as the Court interprets EU law, and may – in the event of a conflict between the two – strike down national laws. However, in some instances, the Court also considers the compatibility between EU-level legislation. *Case challenges EU law* flags these instances.

We also include controls for the Court's political context. The *Government support* reports the net number of supportive submission and thus controls for any residual effect of the applicant's political support not captured by the split of the data. Last, *Commission support* indicates whether the Commission filed an observation in favor of the applicant. The Commission submits its observations simultaneously as the litigants, so its position will therefore be independent from the argument of the litigants beyond what is already present in the referral. As such, we use the Commission merely as an additional bench-mark to assess lawyers.

To avoid any bias in the estimation due to the high number of fixed effects, we run a linear probability model. In other words, the effects reported in the tables can be interpreted as absolute changes in probability and the regression coefficients are comparable across models.

Results

Previous research has shown that the ECJ's decision-making is conditional on governments' support. However, we also find that the Court does not blindly follow governments' lead. Instead, we see a Court that adapts its decision-making to its political environment by alternating between exploiting windows of opportunity (Table 1) and resisting political control (Table 2). This is the most apparent in the conditional effect of lawyers on litigants' chances of winning.

When the Court is mandated to act: member states support the applicant

When a majority of member state observations align with the applicant's claims (Table 1), an opportunity arises for the Court to consider new arguments and possibly redo its case-law. Lawyers are sources for such innovation. In these situations, we find a consistent positive effect of parties' legal representation. The size of these effects are comparable to what has previously been found for the US and Canadian Supreme Courts (Nelson and Epstein, 2021; Szmer, S. W. Johnson, and Sarver, 2007), and they are non-trivial (hypothesis 1).

The base-line model considers the effect of the size of legal teams. Hiring an additional lawyer would increase the estimated probability of success by 7 percentage points in the earlier period and 3.4 percentage points in the second. Litigants' legal teams are however regularly asymmetric. One in five proceedings involve parties for whom this asymmetry amounts to two lawyers. This inequality accounts for a 28 (13) percentage points difference in the two parties' chances of gaining satisfaction. More frequently, this asymmetry amounts to a single lawyer. Yet even in these cases, there is a 14 (7) percentage points difference in parties' chances of satisfaction merely imputable to their legal team.

In the second version of these models we compare legal teams according to their experience in litigating before the ECJ. Here, we see a difference between the two time periods. While the number of lawyers is a consistent predictor in the earlier period, it is the number of experienced lawyers that makes a difference in the second. The applicant would increase their chances of winning by 7 percentage points if they were to replace an inexperienced lawyer with someone that has been involved in a preliminary reference procedure before. The effect is similar to the legal team size in the earlier period. Figure 2 illustrates the effect of lawyers (in number and experience) on the probability of winning in the scenario where governments support the appli-

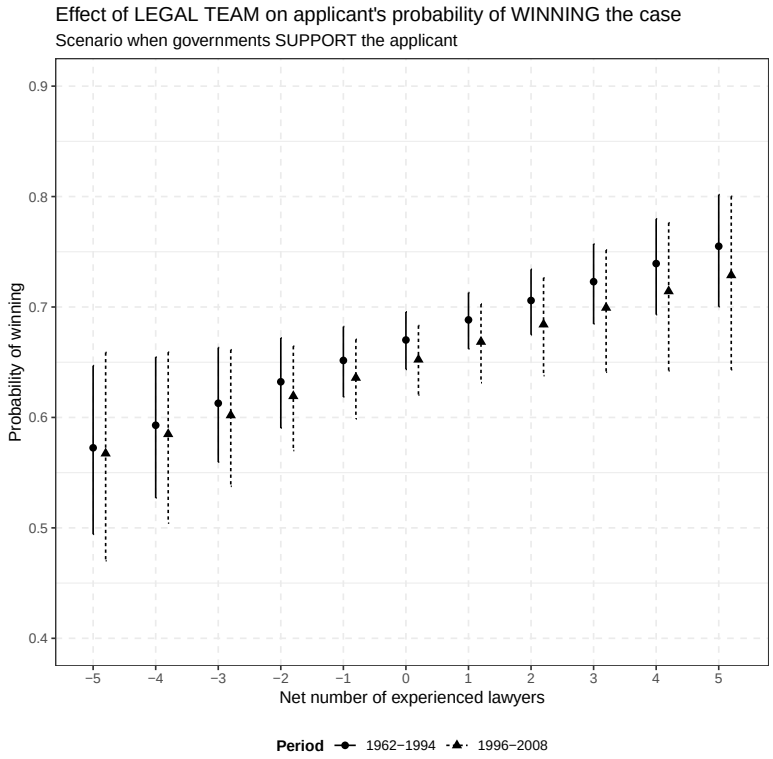

Figure 2: The effect of litigants' legal team relative to the defendant (illustration of Models 2 and 4 in Table 1).

cant. The more experienced lawyer an applicant has, the more likely it is that the applicant obtains a favorable ruling.

When the political conditions are favorable for the applicant, the Court is mandated to act. The Court's reaction in this situation, can be seen in its reliance on lawyers, but also in its relation to case-law and the type of actors it favors. First, the direction of previous decisions has no bearing on the Court's current conclusions, making the outcome less predictable, suggesting that the Court expands or redos its case-law. Second, among the private actors, we see that the Court consistently favors individual applicants compared to companies (13 and 49 percentage points, respectively). Individuals tend to bring claims that push the boundaries of EU integration, and it has

Table 1: Member states SUPPORT the applicant: Effect of legal representation on winning.

	Dependent variable:			
	Wins the case			
	OLS	*linear mixed-effects*	*OLS*	*linear mixed-effects*
	1961-1994	1996-2008	1961-1994	1996-2008
	(1)	(2)	(3)	(4)
Legal team experience (diff. lawyers)			0.021	0.079*
			(0.033)	(0.043)
Legal team size (diff. lawyers)	0.070***	0.034	0.062***	−0.008
	(0.019)	(0.032)	(0.023)	(0.038)
Governments support (net support)	0.080**	0.001	0.083***	−0.001
	(0.031)	(0.033)	(0.031)	(0.033)
Commission support	0.413***	0.414***	0.411***	0.415***
	(0.053)	(0.067)	(0.054)	(0.066)
Last applicant won (lag of y)	−0.014	−0.129	−0.018	−0.045
	(0.078)	(0.166)	(0.078)	(0.170)
Case challenges EU law	0.021	−0.289	0.012	−0.295
	(0.090)	(0.292)	(0.091)	(0.287)
Applicant is an individual (ref. company)	0.130**	0.491***	0.128**	0.490***
	(0.064)	(0.132)	(0.064)	(0.130)
... an interest group (ref. company)	−0.125	0.023	−0.121	0.004
	(0.102)	(0.152)	(0.103)	(0.150)
... public institution (ref. company)	0.169**	0.075	0.170**	0.099
	(0.071)	(0.135)	(0.071)	(0.134)
... other (ref. company)	0.143	−0.010	0.155	0.053
	(0.124)	(0.255)	(0.126)	(0.253)
Constant	0.217***	0.209**	0.214***	0.215**
	(0.077)	(0.089)	(0.077)	(0.088)
Age of case law (dummies)	yes	yes	yes	yes
Observations	293	245	293	245
R^2	0.422		0.423	
Note:				*p<0.1; **p<0.05; ***p<0.01

been argued elsewhere (Hermansen, Pavone, and Boulaziz, 2022) that these are opportunities for the Court to prove its relevance. However, these windows of opportunity are relatively rare. The majority of the member state submissions rarely support the applicant. In more than four out of five cases, there is no such support.

When the Court resists: member states do not support the applicant

When the majority of member state observations do not support the applicant, the Court is more likely to revert to status quo and act as an agent for member states. The effect of litigants' legal representation in these cases is negligible. Neither the size nor the precision of the estimates indicate a significant effect of parties legal capability (hypothesis 2).

Furthermore, we find that the Court is more likely to conclude in line with previous decisions when member states do not support the applicant's claim. This is not to say that the applicant has no chance of success. Regardless of the size of the member state coalition, the Court has a propensity to revert to its earlier case-law: If an applicant gained satisfaction in a previous case, the probability of this happening again is 10 (18) percentage points higher than it would otherwise have been in the subsequent case (hypothesis 3). In the appendix, we show that when the ECJ supports a claim on the same set of laws as a previous applicant, it also tends to argue for its conclusion in a similar way. That is, the overlap in citations between the current and the previous case is based on the same set of laws and is substantially higher when the Court supports the applicant in both instances. This illustrates the value of a consistent case-law as a way for the Court to tie member states to previous decisions. Earlier research has shown that the Court perceives the potential for political backlash as smaller as its case-law develops (Hermansen, 2020). In return, it tends to refer back to more of its own judgments when it faces opposition from member states (Larsson, Naurin, et al., 2017).

Table 2: Member states DO NOT SUPPORT the applicant: Effect of legal representation on winning.

	Dependent variable:			
	Wins the case			
	OLS	*linear mixed-effects*	*OLS*	*linear mixed-effects*
	1961-1994	1996-2008	1961-1994	1996-2008
	(1)	(2)	(3)	(4)
Legal team experience (diff. lawyers)			−0.005	0.012
			(0.016)	(0.016)
Legal team size (diff. lawyers)	−0.001	0.007	0.001	0.003
	(0.009)	(0.010)	(0.011)	(0.012)
Governments support (net support)	0.066***	0.041***	0.066***	0.041***
	(0.013)	(0.010)	(0.013)	(0.010)
Commission support	0.549***	0.508***	0.549***	0.506***
	(0.025)	(0.028)	(0.025)	(0.028)
Last applicant won (lag of y)	0.099***	0.179***	0.099***	0.180***
	(0.037)	(0.060)	(0.037)	(0.060)
Case challenges EU law	−0.049	0.090	−0.049	0.080
	(0.033)	(0.067)	(0.033)	(0.068)
Applicant is an individual (ref. company)	0.014	0.074**	0.014	0.075**
	(0.028)	(0.036)	(0.028)	(0.036)
... an interest group (ref. company)	0.059	0.00001	0.059	−0.002
	(0.057)	(0.056)	(0.057)	(0.056)
... public institution (ref. company)	−0.021	0.053	−0.022	0.051
	(0.039)	(0.062)	(0.039)	(0.063)
... other (ref. company)	−0.085	0.022	−0.085	0.023
	(0.063)	(0.107)	(0.063)	(0.107)
Constant	0.247***	0.140***	0.248***	0.142***
	(0.025)	(0.030)	(0.025)	(0.030)
Age of case law (dummies)	yes	yes	yes	yes
Observations	1,355	986	1,355	986
R^2	0.390		0.390	

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

In short, in the scenario where member states do not support the applicant's claims, the Court is both more likely to resist political pressure by relying on earlier judgments and less open to parties' argument. Thus, importantly, the effect of applicants' past wins is unique to the scenario where member states oppose their claims.

Conclusion

By leveraging variation in both government submissions to the ECJ and party capability we have shown that the Court acts strategically in its response to government and non-governmental actors. This stands in contrast to existing literature, which have paid little to no attention to the input from private actors and lawyers, and instead only focused on how government input predicts the direction of ECJ's rulings. We have, on the contrary, painted a different picture by showcasing how member states uttered preferences may be understood as a mandate to act and may create windows of opportunity for the Court to expand and redo its case-law. We find that when the political context is favorable, the Court finds itself in an opportunity to redo and expand its case-law. In order to do that, the Court relies on lawyers to feed its judgments. We also find that in these instances the Court does not rely on its previous rulings, suggesting that the Court views this as government endorsement of new case-law. On the other side, when the political context is not favorable, we find that the Court both acts in line with and resists governments uttered preferences. By relying on previous case-law, the Court is able to resist in instances where it does not agree with governments, without facing backlash.

We found that lawyers influence on the decision-making of the Court is limited to a favorable political context. This means that lawyers who are better at deciding which cases to take and have political insight, may have a larger say on development of EU law. Although lawyers remain an important part of the preliminary reference procedure, there has been no systematic study of their effect on ECJ's decision-making. Our research suggests that lawyers may also influence decision outcomes in international adjudication under certain political conditions.

By combining theories of legal mobilisation and theories of judicial politics in international settings, we have explored under what political conditions international courts consider the input from non-governmental actors. We have

leveraged variation in input from government and non-governmental actors to study the decision-making of international courts. With our comparative approach we have shown that the picture of intergovernmental politics is more nuanced than previous studies. Further research should highlight courts' agency when studying court-curbing mechanisms, and explore more than one determinant of courts' decision-making.

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Appendix

Testing competing explanations

If the Court was merely interested in avoiding court curbing measures, we would expect to see the highest effect of lawyers when the Court is subject to little political attention. Yet, as Table 3 illustrates, we find little to no effect of lawyers when the Court is free from pressure because no government has submitted their views.

Does the positive effect of past wins reflect the Court's consistency?

In the article, we rely on a lagged version of the dependent variable to argue that the ECJ tends to conclude in a conservative direction when the applicant does not have member states' support. The lag is calculated within each unique set of laws affected by the case. However, we cannot not know if the claims of the previous applicant are similar to those of the current applicant. In this subsection we verify the credibility of this assumption.

One way in which the Court provides supportive arguments for its conclusion is by citing other legal texts. We may therefore assume that if the direction of the outcome of two cases is similar, we should also see a similar argumentation expressed through the legal texts the Court chooses to cite.

Table 4 therefore demonstrates that the overlap of citations is significantly higher between two successive cases pertaining to the same legal texts if the outcome of the two cases is similar (i.e. both applicants either won or lost).

Table 3: Effect of lawyers when no governments submitted an observation (absence of political interest/constraints).

	Dependent variable:	
	win	
	OLS	*linear mixed-effects*
	(1)	(2)
I(n_lawyers_exp - n_lawyers_exp_def)	−0.005	0.042*
	(0.023)	(0.023)
I(n_lawyers - n_lawyers_def)	0.012	−0.021
	(0.016)	(0.017)
net_support		
commobspl	0.580***	0.572***
	(0.035)	(0.040)
win_lag	0.065	0.058
	(0.053)	(0.085)
challenge	−0.050	0.089
	(0.040)	(0.067)
individual	0.007	−0.006
	(0.041)	(0.052)
ngo	0.059	−0.144
	(0.090)	(0.091)
state_institution	−0.029	−0.047
	(0.051)	(0.079)
other	−0.033	−0.205
	(0.082)	(0.241)
Constant	0.220***	0.115***
	(0.033)	(0.037)
Observations	784	526
R^2	0.412	
Adjusted R^2	0.306	
Log Likelihood		−221.536
Akaike Inf. Crit.		613.072
Bayesian Inf. Crit.		975.622
Residual Std. Error	0.415 (df = 663)	
F Statistic	3.875*** (df = 120; 663)	
Note:		*p<0.1; **p<0.05; ***p<0.01

Table 4: Overlap in citations between two successive cases

	Dependent variable:
	overlap_sum
I(win_lag == win)	0.162^{***}
	(0.030)
n_lawyers	-0.065^{***}
	(0.017)
log(n_appearances + 1)	0.036^{**}
	(0.017)
n_lawyers_def	-0.016
	(0.019)
log(n_appearances_def + 1)	-0.011
	(0.023)
n_iteration_leg	0.001^{**}
	(0.0005)
exposure	0.033^{***}
	(0.003)
n_affected	0.094^{***}
	(0.021)
date_lodged	-0.00003^{***}
	(0.00001)
Constant	1.296^{***}
	(0.053)
Observations	911
Log Likelihood	$-2{,}381.180$
Akaike Inf. Crit.	4,782.360
Note:	*p<0.1; **p<0.05; ***p<0.01

Are individuals' disproportionate win rates due to governments' support?

We have argued that individual and better-resourced litigants have a higher win rate when governments support the claims of the applicant. This is not to say that their higher win rate is due to governments' initiative.

In table 5 we show that governments are, on average, less likely to support individual litigants and better-resourced litigants. The disproportionate win-rate has to come from the ECJ.

Table 5: Effect of litigant and their lawyers on governments' support.

	Dependent variable:	
	net_support	
	OLS	*linear mixed-effects*
	1961-1994	1996-2008
net_team_size	−0.042	−0.232***
	(0.026)	(0.041)
net_team_exp	−0.078**	0.088
	(0.036)	(0.059)
individual	−0.132**	−0.513***
	(0.063)	(0.119)
ngo	−0.063	−0.187
	(0.126)	(0.207)
state_institution	0.202**	0.012
	(0.084)	(0.190)
other	0.185	0.668*
	(0.137)	(0.366)
Constant	−0.065	−0.336***
	(0.096)	(0.105)
Observations	1,828	2,521
R^2	0.117	
Adjusted R^2	0.037	
Log Likelihood		−4,499.263
Akaike Inf. Crit.		9,404.525
Bayesian Inf. Crit.		10,588.500
Residual Std. Error	1.095 (df = 1676)	
F Statistic	1.466*** (df = 151; 1676)	
Note:		*p<0.1; **p<0.05; ***p<0.01