The Variable Influences and Dynamics of Judicial Integration in the Union

Damian Chalmers and Mariana Chaves

Abstract: It is often stated that the Court of Justice is a highly significant actor and a single explanatory narrative accounts for its position. A more plausible explanation is that it has grown precisely because it is less significant than claimed, and, as with other forms of EU politics, there is not a single field of judicial politics but multiple, discrete ones. All are highly confined and almost all are neither politically nor legally salient. The sole exception is litigation which enables a counter-majoritarian politics to take hold in domestic arenas. If the lack of salience of the Court in other fields raises questions about its functionality, this counter-majoritarian field raises the question as to how integration process identifies the legislative failure that justifies such intervention and sets its limits.

Key words: Court of Justice; judicial politics; preliminary rulings; single market

I. Introduction

EU judicial politics straddles a powerful paradox. If the last few years have seen a particularly rich literature (Carubba etal. 2008; Alter 2009; Jupille and Caparaso 2009; Kelemen 2011), phenomena have emerged to challenge many of its traditional assumptions. These include the introduction of different styles of court and litigation with the 2004 and 2007 enlargements (Kuhn 2004); changes in the legislative landscape with the completion of the area of freedom, security and justice and enlargement of the Court's capacity in this field

by the Lisbon Treaty (Chalmers 2005); and organisational changes within the Court leading to more judgments being decided by Chambers with fewer judges (Malecki 2011). These do not so much provide new contexts as suggest different actors coming to ask different things before a different body. More broadly, they suggest the question of variation in the judicial field should be explored and problematised much more carefully. After all, variation in the prevalence of EU judicial decision-making goes to understanding the significance of the judiciary in the integration process and the circumstances which must hold for its deployment. Variation in the style of judgment or in litigant constituencies goes to whether there is a single or several fields of EU judicial politics. Variability in judgments raises the issue of why Member States would not merely tolerate but extend the powers of the Court.

To consider this, this article carries out an analysis of all preliminary rulings between 2007 and 2009. It finds national governments have tolerated judicial politics because it has been confined to very discrete fields, and its variability has therefore not caused too many ripples. Within this aegis, four discrete fields have emerged: multinational enterprises enforcing and recalibrating transnational rules of the game; administrative actors litigating or provoking litigation to reinforce their administrative, regulatory and penal capacities; domestic industry litigating to rid itself of significant fiscal and regulatory burdens; and groups marginalised from both EU and domestic legislative processes using courts as a forum for counter-majoritarian politics. Each of these fields has its own litigant dynamics and roles it calls for from the Court. The first calls for the Court to rebalance continually competitive relationship in the single market. The second leads it into an essentially passive role where it upholds administrative authority. However, it is the third and four categories which generate most politically sensitive as they involve commercial and non-commercial actors

who have been largely marginalised by both EU and domestic legislative processes who are inviting the Court to indict these processes. Courts become here a place for a counter-politics to rectify and therefore indict legislative failure.

2. Variation and the Court of Justice

Judges are largely reactive institutions who do not control the presence of their terrain or what they are asked to do on it. Instead, the relationship between three largely independent processes is axiomatic to the constitution of EU judicial politics. The first is the grant of justiciable entitlements. In drafting a law, the framer has not merely to determine its substance but also through the grant of justiciable entitlements the degree of involvement of the judiciary and through what process it is involved (eg whether the norm is to generate individual rights invocable before domestic courts so as to allow for a preliminary reference). Secondly, litigating communities not only determine the incidence of litigation but contribute to how legal arguments are articulated and framed.[1] Factors as unpredictable as new legal aid arrangements, new legal professionals or changes in industrial organisation or within civil society can all affect who litigates. Finally, there is the process of judicial decision itself. This is not deterministic and courts are particularly insulated from political constraint by the specialisation of legal expertise, the commitment of political institutions to the rule of the law and judicial independence, and public support for a number of judicial attributes (eg procedural fairness, reliance on existing legal authority and internal consensus) which combine against political constraint (Zink etal 2009).

[1] To be sure in a preliminary reference it is the domestic court which asks the question. However, not only is there a fair chance this was drafted by the parties but the question will be subject to extensive argument by the parties before the Court.

Any general account of EU judicial politics must pay attention not only to variation in each element but also to the relationship between them as variation in each only matters insofar as it affects that relationship. The grant of legislation, for example, that will never be litigated is irrelevant to the field. This requirement allows three intersection points to be identified where these elements act on one another, and contribute to the judicial process.

Variation in the Incidence of EU Judicial Politics: The incidence of litigation, namely what is litigated and when, is determined through the grant of justiciable entitlements and litigation of those entitlements. As all accounts of judicial politics accept the substance of the litigation as an important variable, variation in the incidence of litigation is axiomatic to any explanation of EU judicial politics. Moreover, there is considerable variation in how intensely different sectors are litigated. In the first twenty five years of British membership, for example, 5 Directives accounted for over 73% of the instances in which Directives were invoked before British courts (Chalmers 2000: 179). Incidence also goes to the ideological contribution of the judiciary. If some sectors are advanced more intensively by the judiciary (eg economic liberalisation) then the ideologies embodied in these sectors will overshadow those in other sectors unable to generate such effects (Scharpf 1999; Chapter 2).

Variation in the Dynamics of Litigation: The dynamics of litigation goes to which spectrum of actors litigates before the Court. These dynamics are strongly influenced by the relationship between EU legislative and EU judicial politics. Impasses within the legislature can provide incentives for policy entrepreneurship through the courts (Weiler 1981; Caparaso and Stone Sweet 1998: 121-126) or judgments can stimulate legislative change (Cichowski 2007: 10-12). Alongside this, constituencies whose preferences are realised through EU secondary legislation might seek to protect and reinforce those advantages

through the courts. Alternately, more pluralistic legislative processes might put in place fire-controls allowing marginalised parties to litigate as a way of curbing dominant constituencies.

Variation in the Dynamics of Judicial Decision: The dynamics and incidence of litigation do not determine judicial decisions but they do frame the role asked of the judge in that they ask her to resolve a dispute in a particular manner and to grant certain entitlements. This role, in turn, generates expectations about what is judicially appropriate. In that regard, it is possible to point a number of roles. First, there is 'litigotiation' in which litigation intertwines adversarialism and negotiation with the judiciary of taking an active role in structuring a settlement between the parties (Galanter 1984). Whilst no such formal role exists for the Court of Justice this ethos is still important insofar as it suggests the idea of the judiciary preserving a balance between the parties or litigated interests or values (eg protecting the original deal, ideas of competitive balance, balance between corporate actors and labour or consumers). Secondly, there is the protection of property rights, which, within the context of EU law, relates particularly to the economic freedoms. This is the ordo-liberal vision of courts protecting an economic constitution which enables private choice and protects it from abuse by private and public power (Streit and Musler 1995). The judicial mission is rationalising regulation so that it will both secure public goods coherently whilst enabling market activity. Thirdly, there is the vision of courts as guarantors against abuse or failure by majoritarian institutions (Maduro 1998). Judicial tradition pushes towards protection of diffuse interests, civil liberties or minority groups insofar as arguments are made that representative assemblies fail to respect these. The final vision is that of welfare constitutionalism (Barber 2003, Murphy 2007). The role of courts is to contribute towards

helping government to secure collective goods. This may involve working with or redirecting other arms of government to secure their capacity to do this. However, in all cases, there is a concern about the disruptive powers of courts to subvert democracy and limit the provision of public goods.

This study considers these dynamics through analysis of all preliminary rulings by the Court of Justice in the years 2007-9. Sufficiently after the completion of the area of freedom, security and justice and the 2004 enlargements for their effects to be felt on the case law, it is also sufficiently proximate to obtain reliable socio-economic data about the dynamics of litigation. There were 549 judgments generating 8981 observations. Analysis was restricted to preliminary rulings, notwithstanding that they only make up about 48.3% of the docket (Court of Justice 2010: 82). First, they place the Court of Justice at the forefront of the decision-making process. Domestic courts seek its expertise precisely on issues where there is no consensus about the content of EU law.[2] By contrast, enforcement procedures against Member States are preceded by lengthy Commission-Member State negotiations with only a small proportion (in 2009 about 4 %) reaching judgment (European Commission 2010: 3). It is thus an arena of dispute settlement of last resort with the Commission winning 92.7% of the cases in 2005-2009 (European Court of Justice 2010: 93). Secondly, preliminary rulings for the involvement of a wider range of private parties, and therefore the possibility of tracing constituencies central to the relationship between EU legislative and judicial politics. Consequently, more salient and controversial issues are brought more frequently under this procedure. In 2007-9, of the 224 judgments cited as legally or politically significant during

[2] National courts can thus refer even where it would conflict with a prior ruling of a more senior domestic court. eg Case C-173/09 *Elchinov*, Judgment of 5 October 2010.

the period by the Court in its Annual Reports, 163 (73%) were preliminary rulings (Court of Justice 2008: 11-50; Court of Justice 2009: 11-53; Court of Justice 2010:11-53).[3]

3. The Incidence of EU Judicial Politics

The incidence of judicial politics depends on two conditions: sufficient parties in the EU legislative process wishing to grant entitlements justiciable before domestic courts, and a threshold of litigants who see sufficient value in litigating these through the preliminary reference procedure. The circumstances when both these conditions will be met will be rare.

*H1. Judicial politics is confined to very narrow fields of European integration***.**

The central benefit of judicial enforcement for institutional actors is securing the credibility of the legislative commitments: something which both prevents free-riding and is perceived as a precondition for policy effectiveness. However, these commitments can already be secured through the Article 258 TFEU enforcement procedure. Far more infringements are investigated under it across a wider array of arenas of EU law. 2900 measures were invested by the Commission in 2009 (EU Commission 2010: 3) as compared to 302 references made by national courts (Court of Justice 2010: 82). The grant of these entitlements to domestic courts, by contrast, do create political risks. They may both enfranchise unwanted constituencies and interpret legislative commitments in unanticipated ways. Similar incentive structures exist for private actors dominant in the legislative process. They will have no interest in the provision of entitlements sufficiently broad to allow others to undermine their interests. However, as they have no access to the enforcement procedure, all things being equal, they would be interested in entitlements which act as fire-controls to allow them to police

[3] There was also 1 Opinion. This figure does not include joined cases or where cases are cited on the same point of EU law.

legislative commitments and which also allow them to finesse or realign these entitlements as their preferences change.

Table 1

Table 1 shows that preliminary rulings are concentrated in a limited number of sectors. There were preliminary rulings in 35/49 fields of EU legislative activity. However, the number of rulings in most was minimal. In only 13 fields were there more than 15 judgments – a threshold that needs only one court for every 5.4 Member States to made a reference once per year. The situation is even more concentrated when one looks at the headings where litigation is clustered. If the economic freedoms are placed together on the grounds that these are Treaty provisions interpreted in parallel manners and represented by single provisions in other jurisdictions (eg the commerce clause in the United States) and the common customs tariff is treated as a tax, over 80% of case law was in seven fields: the economic freedoms, harmonisation of laws, taxation, freedom, security and justice, environment, agriculture and social policy.

This concentration is, moreover, not new. Brunell, Stone Sweet and Harlow found an almost identical pattern in their work on preliminary rulings up to 2006, both in terms of the clustering and the sectors in which it took place (Brunell etal 2008). The only significant difference is the emergence of the area of freedom, security and justice as a significant field of litigation, a development subsequent but in keeping with their research. EU judicial politics cannot be seen, therefore, as generalised phenomenon which parallels broader developments in the integration process. There was no surge of litigation after 1992 or the

Financial Services Action Programme, for example. It must rather be seen as something which the legislature will need strong reasons to generate entitlements and with its own particular dynamics.

H2 The preconditions for judicial politics will usually only exist where the legal norms in question are understood as 'thickly evaluative'.

These risks entail that the EU legislature will only generate entitlements when domestic courts offers clear advantages over other institutional avenues. Relying on the work of James Penner (Penner 2003), this essay suggests this will be the case when the legislature understands a legal norm as 'thickly evaluative in nature. Penner notes that legislation typically provides only median range ethical commitments in which values are articulated at a certain generality. It is silent over more fundamental and more detailed commitments precisely because there is such deep disagreement. These silences allow mutual respect and solidarity to be maintained. In the case of much regulatory law, this ambiguity can be easily retained as an ends/means distinction exists. Median-range ethical commitments are set out as goals at the beginning of the legislation but their implementation is through a series of processes which rely on non-legal expertise (eg best available technology in environmental law). Reliance on such expertise means that the only question is whether these processes are the most effective at realising the goals in question. This is different where the legislation uses thickly evaluative concepts. These are highly value-laden concepts whose evaluative elements cannot be understood in any strong way separately from the factual contexts in which they arise. They express a 'union of fact and value' (Williams 1985: 130 quoted in Penner 2003: 83). An example is discrimination. It is impossible to explain why offering an advantage to one party over another is egregious without placing it in a context. The

normative richness of the concept depends upon its being played out through a wide range of settings. However, it dissolves the ambiguity which facilitated the consensus between the parties.

Courts have a powerful comparative institutional advantage on three accounts. First, they receive information later than the legislature and are therefore able to give a greater depth of evaluative resonance to commitments set out by the legislature (Rogers 2001). Secondly, judicial training and legal reasoning is well suited to this form of thick evaluation insofar as it is based on an application to norms to factual situations and consideration of the wider implications of this. Thirdly, as they only decide the issue for a particular dispute, the ambiguity is only resolved in relation to that dispute. It continues in other fields where there may still be deep disagreement.

This hypothesis can be measured against the instruments deployed in litigation and the sectors of litigation.

On their face, Directives should not generate many justiciable entitlements. The circumstances in which they can be invoked in domestic courts are more constrained than Regulations (Chalmers etal 2010: 285-293). There are fewer Directives. At the end of 2009, according to Eur-lex, there were 7717 Regulations in force and 1918 Directives.[4] Finally, Directives are deployed precisely because of the salience and uncertainty of their content. There are thus higher political risks to judicial adventurism. However, the median range consensus, namely the acknowledgment that it is too problematic and too complex to

[4] Notwithstanding their high concentration in certain fields, Regulations are prevalent across most fields of EU law. On 1 February 2011, in the fields of free movement of persons/social policy and freedom, security and justice, for example, there are 148 and 89 Regulations and 88 and 25 Directives respectively.

resolve too much, which leads Member States to agree Directives and Treaty provisions is the same median range consensus as that which generates thickly evaluative legal norms. With the latter, the legislature recognises that it can only put the concept in play and delegates to courts development of its detailed meaning.

Table 2

However, Directives account for 58% of the secondary legislation invoked in references whilst Regulations account for only 33%. A Directive is 6.7 times more likely to be referred than a Regulation. Similarly, Treaty provisions account for 30% of all the cases in which a legal provision is invoked in a preliminary ruling, notwithstanding that, with the one exception of Article 63 TFEU the provision on free movement of capital, all directly effective provisions date back to the original Treaty of Rome.

The litigated sectors reinforce this. The sectors most explicitly concerned with the allocation of values are amongst the most heavily litigated. These include social policy, environment, the area of freedom, security and justice and the economic freedoms. Of the remaining sectors, two are notably for the high proportion of Directives in the sector. In the case of taxation, therefore, 29 Regulations are, in force, and 80 Directives. Similar proportions exist for the approximation of laws, where one finds 221 Regulations and 815 Directives, in force. Moreover, whilst taxation appears less explicitly value driven than some of the other sectors, in a market economy the circumstances when to extract money from an individual are thickly evaluative. The only heavily litigated sector falling outside this explanation is

agriculture. However, it is marked by its volume of legislation, 4060 Regulations and 685 Directives according to Eur-lex. A very small proportion is litigated before the Court of Justice, 45 decisions in three years: something not out of kilter with other 'Regulation heavy' sectors such as Regional Policy (144 Regulations and 6 Directives) which appear only as minimally litigated (3 decisions).

4. The Dynamics of Litigation

The thickly evaluative nature of justiciable entitlements generate not a single field but multiple and discrete fields of EU judicial politics. For such qualities cannot be identified strongly with a single litigating constituency. Instead, they are general in nature and lead to dispersal of entitlements across a wide variety of societal and economic groups and sectors.

H3 EU judicial politics is not a single field of judicial politics with a dominant dynamic but rather multiple fields

Table 3

Across almost any prism of analysis, it is impossible to find the dominance of one particular constituency or one style of dispute. Commercial actors make up only 37% of litigants. There is a spread between transnational enterprises and domestic firms, large firms and smaller firms (less than 1,000 employees), the service, agricultural and industrial sectors. The different stages of the production process are also all well represented. In terms of the style

of dispute there is also a fairly even division between disputes involving only domestic parties and those where one party is either a transnational actor or foreigner. There is also a fairly even division between disputes which are exclusively between private parties and those which involve the State or public actors. Such heterogeneity makes it impossible to point to a single dynamic pushing forward the preliminary reference process. If transnational exchange accounts have to explain the heavy incidence of wholly domestic disputes and the heavy number of disputes involving the services sector when it is subject to limited transnational exchange, neo-functionalist accounts struggle to explain the wide array of actors and types of disputes present in the litigation.

H4. EU judicial politics includes a number of discrete fields whose litigation dynamics are strongly informed by the politics of the legislative sectors giving rise to them.

If justiciable entitlements are rare they are also valuable in providing actors with an avenue both to secure their own interests and to shape future articulations of the legal norm. There are incentives for constituencies dominant in the legislative process to attempt to monopolise the grant of these for themselves or those whom they represent. Litigation should, if anything, reinforce these patterns. Insofar as only constituencies enjoying entitlements will be able to instigate litigation and these entitlements are distributed asymmetrically, it will tend to reinforce dominance within the process.

H5 A further litigation dynamic is correction against Union or national legislative failure. This will host a broader array of constituencies with constituencies not dominant in the legislative process more prevalent.

Justiciable entitlements are sometimes also created to curb legislative failure or abuse. Crafted as civil liberties in many national constitutions, these protect constituencies historically poorly served by majoritarianism (eg minorities, women, foreigners, future generations). EU law counterparts are the economic freedoms and Article 157 TFEU securing equal pay for men and women for work of equal value. These provisions secure against legislative failure at both Union and domestic levels. The economic freedoms, for example, can be deployed as much to prod the Union legislature into liberalising measures as to correct against domestic protectionism. As these provisions are provided to counteract legislative dominance one would expect them to be available to a wider array of constituencies. Furthermore, insofar as certain constituencies cannot secure their preferences through legislative action one would expect these to resort particularly to litigation, thereby accentuating the disparity between this dynamic and the first dynamic (Alter and Vargas 2000, Slagter 2009).

H6, The willingness of constituencies to seek preliminary rulings will be limited by the possibility of other available institutional substitutes to secure their preferences.

As litigation is risky, expensive and time-consuming, litigants only invest in it if they see comparative advantage in it with regard to both the status quo and other available institutional fora (eg legislative avenues, administrative or regulatory ones or private ones such as arbitration or mediation). The former condition acts as a threshold condition. Litigants will only seek preliminary rulings where they can secure significant financial or temporal advantage or desired policy change. The latter suggests its value will be inversely proportional to the ease with which other institutional substitutes are available. Parties with a wide variety of fora at their disposal are less likely to use litigation. By contrast, litigation

becomes more attractive for parties disenfranchised from other avenues Alter 2009) or marginalised within them (Slagter 2009)

H7 The generalisability of legal norms diversifies the litigating constituencies but this acts only as a second-order corrective to the other dynamics.

The generalisability of the entitlement affects how many actors can invoke it and may reflect a more pluralistic policy domain. One would expect, therefore, environmental and consumer legislation to generate more justiciable entitlements than sector specific legislation. Furthermore, insofar as legislation does not generally grant entitlements to named actors, it allows for the possibility of its use by unanticipated constituencies. The scope for this is affected by the breadth of the entitlement as it comes into contact with more actors with corollary possibilities for these to litigate (in the field of the environment and social policy see Cichowski 2007). However, this generalisability is unlikely to be a dominant dynamic. Insofar as justiciable entitlements are rare, valuable and their effects unpredictable, they will not be disseminated too broadly. Likewise, spill-overs are unintended consequences. They will be present but rarely dominant

These last four hypotheses are assessed by looking at the parties litigating in the different sectors. The parties are divided into multinational enterprises, domestic industry, the State, individuals and other groups (eg NGOs, associations and trade unions). The data involving the State is, necessarily, overweighted as, by virtue of its regulatory, fiscal and penal activities, it is the party against which litigation frequently takes place. Furthermore, there is some substitutability between the data on individuals and that on 'other groups' by virtue of considerable private litigation being sponsored by a public-interest organisation who remains, undeclared, in the background. Four patterns are observed in the litigation.

Table 4

The first pattern concerns the incidence of multinational enterprises in the litigation. Multinational enterprises litigation is concentrated in three discrete fields: the single market which comprises approximation of laws, industrial policy (harmonisation of legislation on network industries such as energy and telecommunications) and intellectual property; the fiscal field (taxation, customs union and common customs tariff); competition, freedom of capital and freedom of establishment. Within these fields, there is considerable variation but the incidence of multinationals is in all cases significant, particularly when one discounts the State as an inevitable defendant in many cases.

The pattern of litigation fits the thesis of Stone Sweet, Fligstein and others of a transnational society which generates its own transnational rules of the game and systems of dispute settlement (eg Fligstein and McNichol 1998; Stone Sweet and Caparaso 1998; Fligstein 2008). This transnational society, in which multinational enterprises are dominant, is institutionalised through the single market programme. One would expect these to monitor and develop its rules through litigation. Litigation in the single market and fiscal fields is the most direct evidence of this. Their thesis is also supported by the third category of litigation. Fligstein observed that the most significant consequence of the Single Market programme was not so much a growth of inter-State trade as a sizing up and restructuring of European industry with a corresponding growth of intra-EU mergers and direct investment from one part of the EU into the other (Fligstein 2008: chapters 2 and 3). The litigation occurs at the

points of greatest friction in such a reorganisation: competition law and national restrictions on investment and setting up subsidiaries.

Their thesis is also corroborated by the evidence of the other sectors where there is no such litigation. EU commercial legislation does not necessarily generate multinational litigation. In certain highly legislated fields, agriculture and law relating to undertakings (this relates almost exclusively to public procurement) multinationals are almost completely absent. Such fields are characterised by little transnational industrial organisation (in the case of agriculture) or significant economic interpenetration (law of undertakings). Similarly, it is impossible to argue that the litigation follows any kind of functional path in which certain sectors are naturally domestic or transnational in nature. The taxation category, for example, largely concerns VAT, a tax whose incidence covers, in principle, all domestic transactions and therefore a far larger proportion of economic activity than transnational trade. The incidence of multinationals is nevertheless high –accounting for 35% of non-State parties.

However, the data also shows the limits of the transnational society thesis. In sectors whose legislative sphere is constituted by a more plural range of interests, (eg environment and consumer policy, social policy) one finds relatively low levels of multinational litigation despite its having significant effects on them, suggesting that it is less easy for them to put in play favorable entitlements there. Alongside this, even in the sectors where they are prevalent there are never sufficiently significant to control litigation dynamics (with the possible exception of intellectual property). As legal entitlements are generalisable and so rarely distinguish formally between multinational and domestic undertakings, a significant dynamic has emerged in the single market and fiscal sectors in which local industry litigates these norms domestically. Likewise with freedom of establishment and capital and EU

competition law, these provisions facilitate the single market but they also correct legislative deficits. There is, thus, a corollary broadening of litigation constituencies with individuals and non-commercial organisations more active. However, the most telling limitation is the low levels of multinational litigation. Put simply, revisiting the legislative process is not problematic for transnational constituencies. They do not challenge domestic regulations under the free movement of goods provisions in any significant way. Furthermore, notwithstanding the presence of over 1,000 pieces of legislation for approximation of laws, only eight referrals a year take place across the Union, possibly because there are more efficient systems of dispute settlement, such as arbitration and mediation, available to them.

The second pattern is where the State litigates to expand its regulator, fiscal and penal capacity The involvement of the State is high in almost all sectors. There is nevertheless some variation. In four sectors (approximation of laws, intellectual property, area of freedom, security and justice, competition) it is involved in less than 25% of the litigation. In two other sectors, free movement of goods and social policy, it constitutes less than 35% of the litigants. In all other sectors it constitutes over 40%. In large part, this is because the State is necessarily the target of EU litigation. However, such an explanation cannot account for the variation of litigation. There are some fields which are surprising low. In principal, only governmental measures can be challenged under the free movement of goods provisions. Similarly, approximation of laws legislation involves State regulatory activity as much any other field. Yet, in both these sectors, the State accounts for less than a quarter of the parties. Furthermore, a bald depiction of the State as defendant portrays it too passively. National authorities can provoke litigation by private parties by regulating or taxing at the perimeters of the

competences granted to them by EU law. The litigation in this field should be seen as a continual jockeying between parties rather than as a one-way process.

If national governments are accepted as important parties in the legislative process, one would expect them to initiate or provoke litigation to secure benefits which have enhanced their capacity. A feature of EU legislation in many of these fields is that it has extended Member State regulatory, fiscal and penal capacities. National environmental ministries were, for example, central to the inception and development of EU environmental law as the EU was central to the development of environmental law in many States (Héritier etal 1996, Anderson and Liefferink 1997:10-35). In the field of VAT, only one State, France, had such a system of taxes when it was first proposed by the Commission (Terra and Wattel 2008: 120). Likewise, EU criminal law has led to the establishment of new domestic policing facilities and forms of criminalisation (Chaves 2011: chapter 4). This pattern extends to litigation. A British study of British courts found the most powerful source of references to be where large enterprises were in an enduring relationship with domestic tax or regulatory authorities and litigation was used by both parties to push for selective advantages (Chalmers 2000) . This study suggests this to be a generalised phenomenon. The litigated fields in which the State is most highly represented are where EU law grants the State most control over private activities – be it be the extraction or grant of resources to individuals (agriculture, taxation), entry or expulsion of the territory (external relations, free movement of persons), removal of liberty (policing and judicial cooperation in criminal matters) or significant and costly regulation (environment and consumers).

The third pattern is the challenge by domestic commercial actors of significant national regulatory and fiscal constraints. Litigation by domestic firms is particularly high in taxation, free

movement of goods and services, approximation of laws, the environment, competition, public procurement (law of undertakings) and agriculture. Agriculture and public procurement are sectors dominated by domestic industry, and with competition anti-competitive practices with predominantly domestic effects will not be be cleared by the Commission but picked up through preliminary rulings (Chalmers 2010 etal : 941-951). The more interesting litigation, thus, concerns approximation of laws, taxation, environment, free movement of goods and services. A further feature is that many domestic commercial actors are small. Formally, about a third had less than 1,000 employees but it is highly likely that, of the 54% of enterprises for whom employee numbers were unavailable, a very significant proportion were domestic small and medium size enterprises. Consequently, the litigation here is exclusively domestic and involves typically small commercial actors. It is unrealistic to see this litigation as about facilitating transnational exchange. Instead, the incidence and weight of regulatory or fiscal burden is seminal in determining for smaller firms whether it is beneficial to seek a preliminary ruling. Because of their expense and risks, small firms will only seek rulings where the costs of EU or domestic legislation are high. Dramatic shifts in the case law extending the case law do not, thus, necessarily generate increased litigation (Alter and Meunier-Aitsahalia 1994: 583-584). The relationship between legal doctrine and regulatory cost is simply too indirect for that. The relationship is rather reversed. The heterogeneity of forms of regulatory cost lead to a correspondingly diverse array of litigation, both in terms of the parties and the subject-matters of the dispute, thereby straining the legal coherence of the provisions insofar as these have to address these within a single umbrella of legal reasoning.

The fourth pattern is litigation as an expression of counter-majoritarian politics. The voice of individuals and associations is strong in fields where Treaty provisions are litigated (competition, economic freedoms, social policy (equal pay for work of equal value for men and women) and fields dominated by post-material values or civil liberties concerns (area of freedom, security and justice, social security for migrants, free movement of persons and external relations (migration rights of non EU nationals under agreements with third States; environmental and consumer law; social policy; policing and judicial cooperation in criminal matters). For the more commercially-orientated sectors (competition, freedom of establishment, services and capital) litigation by individuals and associations hovers around 20-25%. For those associated with civil liberties or post-material values, it is around 40-45% with the exception of the environment and consumers which is 30%. However, if one adds domestic undertakings to these figures on the grounds that these may be actors marginalised from EU and domestic legislative processes, the combined proportion of litigants in these fields is half or more in all sectors other than environment and consumers (41%), free movement of establishment (45%) and free movement of capital (43%). There appears to be a very strong counter-majoritarian dynamic in all these sectors concerned with rectifying legislative failure. Furthermore, with the exception of environment and consumers, the post-material or civil liberties sectors are very different from all other sectors of EU judicial politics in terms of the balance of litigants. In other sectors, non-commercial actors are absent whereas, in these sectors, they dominate the sector. The corollary is that these sectors constitute an important but possibly atypical tranche of EU judicial politics.

Ease of access to justice is central to litigation in these sectors (Conant 2006). The external relations and area of freedom, security and justice sectors, despite being huge fields, are thus

marked by quite low levels of litigation. The former concerns, *inter alia*, the migration rights of Turkish and Maghrebi nationals within EU law, but the agreements in question grant them sparse rights. With the latter, prior to the Lisbon Treaty, references could only be made by courts against decisions there was no judicial remedy, thus requiring parties to litigate fully through the domestic system before seeking a reference. The figures also support the findings by Alter and Vargas that this style of litigation is best suited to narrowly focussed policy decisions and to groups with a correspondingly narrow focus (Alter and Vargas 2000: 475-477). Higher levels of litigation by associations and individuals are, thus, present, in social policy and sectors involving migration than in the more diffuse field of environment and consumers. Similarly, with the economic freedoms, it is notable that litigation is propelled by individual traders or, occasionally, ad hoc groups of traders, focussing on a single issue than by trader or industrial associations with broader remits.

5. The Dynamics of Judicial Decision-Making

To capture the dynamics of decision-making this essay looks at the Annual Reports of the Court of Justice in which it sets out the most significant judgments it believes it has given in the last year. As indicated earlier, it set out 163 preliminary rulings during the period – 30% of the total number of preliminary rulings. If the Reports are only a measure of the Court's own assessment of the significance of the rulings, the number of judgments incorporated in them makes it unlikely judgments considered salient by other significant institutional actors will be omitted.

There are ten sectors in which the Court gave nine or more judgments that it considered significant – so an average of three or more per year. They may be divided into three clusters. First, there were two that related to single market legislation – approximation of laws (13) and intellectual property (9). Secondly, there were the economic freedoms and competition – freedom of capital (10), freedom of establishment (10), freedom of services (10), competition (10). Thirdly, there was a group which protected civil liberties, post-material values or employee rights. This was the largest group – social policy (17), free movement of persons/citizenship (13), area of freedom, security and justice (12), environment and consumers (11). Combined ruling these ten groups account for 115 of the judgments considered as significant by the Court. If one relates these figures to the four patterns of litigation outlined earlier, they make for interesting reading.

First, only two sectors in which multinational enterprises are not significantly active are not mentioned above: the fiscal field (4) and industrial policy (4).[5] It may be speculated that this litigation calls the Court to play two roles which generates salience. The first is where the Court is invariably asked to interpret a provision as to what is a suitable regulatory burden for a Member State to exert. This regulation stabilises inter-firm competition by either governing access to the market or setting the rules for firms once on the market (Fligstein and Stone Sweet 2001). Litigation involves firms seeking to redraw the balance of competition struck in the regulation. The extent of redrawing will vary with its being considerable in some cases but less so in others. As a consequence, only about one third of judgments acquire salience. The second dynamic is where the litigation concerns protection of property rights – be this intellectual property or the economic freedoms. In such

[5] With industrial policy, the proportions of litigation deemed significant was similar to those in approximation of laws.

circumstances, the litigant is asking a more dramatic thing of the Court: either to give it a monopoly over certain activities (intellectual property) or to deregulate. The response must correspondingly be more black or white. A far higher proportion of salient judgments are therefore given.

The second pattern of litigation in which the State uses EU law to assert its capacities is the dog that does not bite. Despite the significant case law generated, taxation (4) and agriculture (7) barely feature and the customs union is not worth a single mention. Even policing and judicial cooperation in criminal matters, an emerging and controversial field, generates only five mentions. The only sector generating significant mentions is environment and consumer protection (11) of which five were on consumer protection. The reason might be that the Court is pursuing a policy of welfare constitutionalism in this field where it acts to safeguard the welfare capacities of administrations. It is very rare, therefore, for a piece of EU legislation to be declared invalid by the Court following a preliminary ruling (Chalmers etal 2010: 252-256). Alongside this, the Court uses teleological reasoning to interpret particular provisions in the light of wider fiscal, regulatory or penal objectives. Stripped of the rhetoric of integration, this means broadening not narrowing their ambit. Judicial minimalism is the order of the day here, and that is why this field goes unremarked.

The central role brought in the third and fourth patterns to the Court is that of correcting legislative or administrative failure. An interest – be it transnational traders, migrants, women, ethnic minorities – has been taken insufficiently into account, and the Court is asked to intervene because, it is argued, other institutional arrangements are hog-wired in such a way as not to generate full confidence. This scepticism of other arms to government leads to arguments that the judicial power of authoritative settlement to resolve moral

controversies authoritatively through resort to legal reasoning, is strong here (Alexander and Sherwin 2001: Chapters 1-4) or that the judiciary is carrying out action which have a broader view of the public interest and therefore might be carry more public support for this (Vanberg 2001; Friedman 2003). The role asked of the Court here is to deviate from legislative preferences. This leads to a high number of salient cases. These fields account for 94/163 rulings deemed significant by the Court. Moreover, this generates its own snowball effects. The salience of these judgments has lead to these fields being the most discussed in EU law textbooks, which, in turn, leads to legal constituencies pressing for their further development and arguing that the legal doctrine requires such an approach.[6]

6. Conclusion

All this raises profound normative questions. The narrow remit of EU judicial politics renders the process vulnerable to external shocks. The creation or withdrawal of one heavily litigated field can significantly affect the nature of the Court's activities. It also raises questions about whether the Court can claim to be a generalised court on a par with domestic constitutional courts or should be seen as a specialised tribunal. Most challengingly, it raises the question of whether the Court is fit for purpose. If the Court is not frequently deployed by multinational actors because it is comparatively inefficient and if it does not really challenge the expansion of domestic regulatory, fiscal and penal capacity enabled by EU law, this begs the question as to what is left for it. The answer appears to be deregulation in largely domestic disputes and counter-majoritarian politics. To be sure,

[6] No major text book excludes the economic freedoms, EU citizenship or social policy. Most now include a chapter on the area of freedom, security and justice. The only sector on which treatment is intermittent is environment and consumer protection.

some will applaud this, painting the Court as an institutional expression of liberalism and humanitarianism. To do so, however, is not only to romanticise judicial processes but is also a counsel of despair for EU and domestic legislative processes. For counter-majoritarian politics is ultimately also anti-majoritarian politics and if there is a role for courts here it is one where they should tread warily and occasionally.

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Professor Damian Chalmers is Professor of European Union Law at the London School of Economics and Political Science. Mariana Chaves is a PhD candidate in European Union Law at the London School of Economics and Political Science.

Address for correspondence: London School of Economics and Political Science, Houghton St.

London WC2A 2AE d.chalmers@lse.ac.uk

Table1

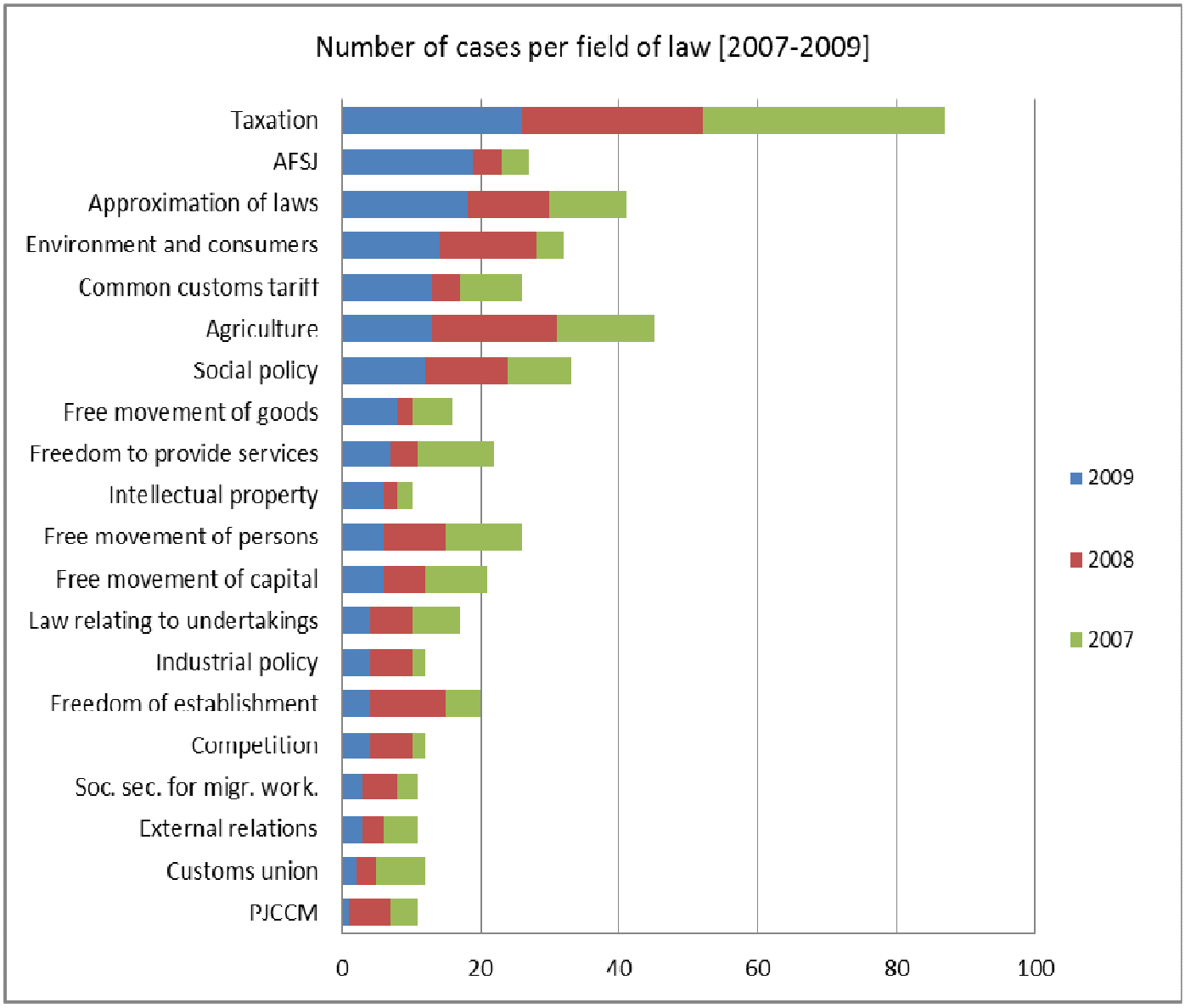

Table 2 Type of Law Invoked in Preliminary Rulings

Type of Law	2007	2008	2009	2007-2009

Public	109	94	87	290
%	62	51	47	53
Private	66	92	97	255
%	37	49	53	46
Primary	175	44	34	253
%	50	22	17	30
Secondary	173	152	167	492
%	50	78	83	70
Type of secondary Law	2007	2008	2009	2007-2009
Regulation	49	42	69	160
%	33	27	40	33
Directive	84	98	95	277
%	57	63	55	58
Decision	0	2	1	3
%	0	1	1	1
Framework Decision	2	4	1	7
%	2	3	1	2
Convention	3	3	4	10
%	2	2	2	2
Other	9	6	3	18
%	6	4	2	4

Table 3: Litigating Constituencies

Type of parties	2007	2008	2009	2007-2009
Firms	88	83	107	278
%	25	22	29	25
Multinationals	36	48	48	132
%	10	13	13	12
State	147	150	127	424
%	42	40	35	39
Individuals	62	70	66	198
%	18	19	18	18
Other	17	25	18	60
	5	7	5	5
Sector of activity (firms and multinationals)	2007	2008	2009	2007-2009
Agriculture/ fisheries	9	13	9	31
%	64	9	5	6
Industry	62	49	83	194
%	31	32	45	41
Services	63	74	83	220
%	45	49	45	46
Financial services	2	8	4	14
%	1	5	2	3
Not found	4	7	7	18
%	3	5	4	4

Industry subsectors	2007	2008	2009	2007-2009
Producers	45	33	64	142
%	38	22	47	40
Distributors	47	44	39	130
%	39	29	29	37
Retailers	20	14	22	56
%	17	9	16	16
Not found	7	7	10	24
	6	5	7	2
Size of companies (firms and multinationals)	**2007**	**2008**	**2009**	**2007-2009**
≤ 1000 employees	33	27	19	79
%	26	22	12	19
≥ 1000 employees	28	33	40	101
%	22	26	26	25
Not found	68	65	97	230
%	53	52	62	56

Table 4 Parties Litigating in Different Sectors

	Domestic Firms	Multinationals	State	Individuals	Others
Agriculture	31	6	40	10	4
%	34	7	44	11	4

Approximation of laws	27	23	18	11	5
%	32	27	21	13	6
AFSJ	15	6	7	25	3
%	27	11	13	45	5
Customs custom tariff	15	10	26	2	0
%	28	19	49	4	0
Competition	7	6	5	1	5
%	29	25	21	4	21
Customs Union	5	7	11	1	0
%	21	29	46	4	0
Environment & consumers	12	7	26	12	7
%	19	11	41	19	11
External relations	2	1	10	9	0
%	9	5	45	41	0
Free movement of capital	8	3	21	10	0
%	19	7	50	24	0
Free movement of goods	12	3	11	4	3
%	36	9	33	12	10
Free movement of persons	4	1	23	22	2
%	8	2	44	42	4
Freedom of establishment	8	5	18	6	4

%	20	12	44	15	10
Freedom to provide services	10	4	20	6	4
%	23	9	45	14	9
Industrial policy	7	6	10	1	2
%	27	23	38	4	8
Intellectual property	6	9	1	1	3
%	30	45	5	5	15
Law relating to undertakings	17	0	14	1	3
%	49	0	40	3	9
PJCCM	0	0	9	11	2
%	0	0	41	50	9
Social policy	9	5	22	28	4
%	13	7	32	41	6
Social security for migrant workers	1	0	11	10	0
%	5	0	50	45	0
Taxation	41	29	88	10	6
%	24	17	51	6	3