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Lobbying versus Litigation:
Political and Legal Strategies of Interest
Representation in the European Union
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Lobbying versus Litigation: Political and Legal Strategies of Interest Representation in the European Union

ABSTRACT

Interest groups' attempts to and means of influencing European public policy are well documented. Research on EU interest politics has made considerable progress in the systematic analysis of interest groups' political strategies for seeking to influence the EU policy-making process. While some studies have focused on "access strategies" that interests use to directly participate in the EU decision-making process, others investigated "voice strategies" which attempt to influence policy-makers indirectly, through media attention and political campaigns. Private actors also deploy legal strategies in their attempts to shape public policy, bringing cases to the European Court of Justice through the preliminary reference mechanism. These actions have been well studied in the context of European judicial integration. What we know very little about, however, is what determines actors' selection of litigation versus lobbying strategies in their pursuit of policy change, although both strategies are, in principle, available to most business interest groups. This paper offers a framework to understand private actors' choice between lobbying and litigation, attempting to bridge the two strands of research and theory.

1. Introduction¹

The strategies that interest groups bring to bear in their attempts to influence public policy are well studied. The range of targets, resources and actions that they engage through lobbying has been extensively detailed in both national politics and, increasingly, at the European level (Coen 1997, Beyers 2002, Bouwen 2002 and 2004, Mahoney 2004, Eising and Kohler-Koch 2005; Mazey and Richardson 2006). Similarly, the ways in which interest groups take to the courts in order to prompt policy change and the distinctive behaviors that underpin their success before the bench have long been studied in national systems (Epp 1998, Galanter 1974) and often presented as a key part of the story of European integration (Stone Sweet and Brunell 1999, Stone Sweet and McCown 2004).

Indeed, the European Union is relatively distinctive in terms of the number of opportunities that it presents to interest groups seeking to shape policy and regulation. What has never been examined in the EU and only cursorily in other contexts is the interaction between these two choices: what underpins the decision of an interest group to pursue policy change through lobbying or litigation? Do they tend towards one over the other? Is one a dominant choice? Although it has been exhaustively established that interest groups engage in both activities and that they have been centrally involved in the on-going process of European integration through these means (Haas, 1958), next to nothing is known about the relationship between these two principle modes of interest group action.

It is, however, an important question. Interest groups are differentially able to take advantage of a variety of lobbying and litigation strategies, as will be discussed below. External events can also push them to pursue one over the other. Famously, during the period of the Luxembourg Compromise, when the dominance of unanimity-based decision-making slowed legislative output to nearly a standstill, interest groups pursued policy change through the courts to the extent that it was almost the sole vehicle of European integration at that time (Stone Sweet and Caparaso 1998: 116). The accession in May 2004 of 10 new Member States to the EU, absent any particularly effective decision-making mechanisms to accommodate this increase, is quite likely to increase legislative deadlock again. This would have the potential to push the EU into a second era in which policy-making through the ECJ dominates. This could have important consequences for the relative influence of various interest groups.

¹ The views expressed in this article are purely those of the authors and may not be regarded as stating the official position of the institutions for which the authors are working.

This paper sketches a theoretical perspective for understanding this un-studied question. It introduces the relevant literature and theory, examining the activities of interest groups engaging in lobbying and litigation as means of seeking policy change and those factors that contribute to their efficacy. On the basis of this discussion, it analyzes variables relevant to both the individual-level attributes of interest groups and to the strategic environment in which they operate that influence their choice to lobby, litigate or both. It then develops some hypotheses about which would push them to litigate or lobby and explores these propositions in the context of a series of exploratory case studies.

2. The Political Strategies of EU Interest Groups

Over the last decade, the literature on EU interest representation has made considerable progress by systematically studying the political strategies of various interests seeking to influence the policy-making process in the EU multi-level system. Two major political strategies can be distinguished at the EU level and have been characterized by the labels "access" and "voice" (Bouwen 2002; Beyers, 2004). While some studies have focused on access strategies undertaken by interests to participate directly in the EU decision-making process, other investigated the voice strategies of interests seeking to influence policy-makers indirectly through media attention and political campaigns.

2.1 Access strategies

The access strategies of private actors focus on the EU institutions that play an important role in the EU decision-making process, i.e. the European Commission, the European Parliament and the Council of Ministers. In the literature on EU interest politics, the European Commission has until recently often been identified as the most important lobbying target (Coen 1997, Mazey and Richardson, 1999:11). However, the new formal powers acquired by the European Parliament over the last fifteen years have led to the elevation of the supranational assembly's importance as a lobbying target. While it was still possible at the time of the cooperation procedure to argue that the Parliament was relatively weak, the situation has changed dramatically. Since the Treaty of Maastricht, the co-decision procedure has provided the European Parliament with real veto power in the legislative process. The rise of the Parliament's powers coincides with a relative decline of the Council of Ministers' influence. Not only has the increased use of qualified majority voting removed the veto of individual Member States in the decision-making process, the Council has also increasingly

had to share its remaining power with the European Parliament. Nevertheless, the Council remains a crucial player in the EU decision-making game.

A number of systematic studies on EU interest politics have investigated the direct access of interest groups to the three main EU institutions, i.e. the Commission, the Parliament and the Council (Pappi and Henning, 1999; Beyers, 2002; Bouwen, 2004a; Eising 2004). Frequently, private interests undertake combined access strategies to the three main EU institutions in order to exert influence at the various stages of the EU legislative process. Other studies have limited their analysis to the access strategies of private interests to a specific EU institution (Kohler-Koch, 1997; Bouwen, 2004b). In that case, a single EU institution is analyzed in order to reveal its crucial access points for private interests. All these investigations focus their analysis on access instead of influence, as more traditional lobbying research tends to do because they seek to avoid the methodologically problematic enterprise of trying to measure influence (Huberts and Kleinnijenhuis, 1994). Nevertheless, it should be emphasized that access does not automatically mean influence. Political actors might gain access to the policy-making process without being able to translate this advantage into concrete policy outcomes. Moreover, as the subsequent discussion of voice will show, influence does not always require that actors have direct institutional access.

There is agreement in the literature that access strategies are related to an exchange process between private and public actors at the EU level (Levine, and White, 1961:578; Peffer and Salancik, 1978). In return for "access" to the EU agenda-setting and policy-making process, the EU institutions want certain goods from the private actors. Private interests have to provide these goods, called "access goods" (Bouwen, 2002:370). to the EU institutions in order to gain access. The EU institutions need these goods in order to fulfill or expand their role in the EU decision-making process. The access goods that can be identified have a common characteristic: information.² The direct interaction between private and public actors allows the transmission of complex technical information. However, political information is also exchanged.³ Depending on the interest group's constituency, more or less representative political information can be provided to the EU institutions. Private interests' supply of technical and/or political information and the EU institutions' demand co-determine

² In recent public choice approaches to lobbying in the European Union (Broscheid and Coen, 2003; Crombez, 2002) or to interest group politics in general (Potters and Van Winden, 1990, Baumgartner and Leech, 1996: 529-530), information increasingly plays a central role in the analysis. Starting with the assumption that interest groups are better informed on issues that affect them than policy-makers are, this literature argues that interest groups play a crucial role in the policy process by transmitting information to the relevant policy-makers.

³ Truman made already a distinction between technical knowledge and political knowledge (Truman: 1951:333-334).

the access pattern (Bouwen, 2002:372).⁴ While individual companies' superior capacity to provide technical information gives them a high degree of access to the technocratically-oriented European Commission, the ability of national and European associations to supply representative political information explains their high degree of access to the European Parliament (Bouwen, 2004a:358). As these examples show, the organizational form of interest representation (i.e. individual firms, national associations, European associations) is the crucial variable that determines the private interests' capacity to supply access goods and thereby to gain access to different EU institutions (Bouwen, 2002: 375). In addition to their organizational characteristics, the material resources interest groups have at their disposal are another important variable. The resource variable is particularly important taking the complex multi-level structure of the EU into account. Material resources determine to a large extent the extent to which interests can engage in (combined) strategies .

2.2. Voice strategies

The 'voice' strategies of private actors can be characterized as public political strategies. In contrast with the existing US literature (Gais and Walker, 1991; Kollman, 1998), these strategies have only been marginally studied in the field of EU interest politics (Reising, 1998; Imig and Tarrow, 2001). Public political strategies relate to the lobbying activities that take place in the public sphere in which the debate between societal interests and policy-makers becomes visible to the broader public. The rather technocratic conception of EU policy-making promoted by the dominant theories of European integration could provide an explanation for the scant attention paid to public political strategies in the EU literature. European integration was considered to be driven by functional spill-over and/or technocratic policy-making rather than by public debate at the EU level (Haas, 1958). It is therefore not surprising that while recent empirical research has established the importance of voice strategies in EU interest politics, it also confirmed the predominance of access vis-à-vis voice strategies (Beyers, 2004).

Voice strategies take place in the public arena. Like access strategies, they are geared towards the transmission of information to the EU institutions. However, because the information transmission occurs indirectly through public debate, there is no direct contact between private interests and EU policy-makers. The properties of debates in the public arena make the transmission of technical information rather difficult. Information that enters

⁴ For a detailed theoretical discussion and empirical analysis of the supply-and-demand scheme for information and the

the public debate must be kept short and simple. Voice strategies are, therefore, more appropriate for communicating on basic political messages than technical information. Voice strategies can be further differentiated to distinguish between information politics and protest politics (Beyers, 2004).

Information politics can be conceived as the public presentation of information at strategic decision points. Even though this strategy may reach a large public, it mainly aims at signaling policy-relevant information to targeted policy communities. A press conference organized in Brussels by the European Banking Federation can be taken as an example. This initiative is aimed at informing the policy-makers and interests that belong to the EU financial policy community rather than the public at large.

Protest politics is fundamentally different from information politics. Although it does encompass the public presentation of information, it is different from information politics because it has a more disruptive character. Demonstrations or strikes are organized in order to attract public attention and stimulate conflict. The traditional demonstrations of farmers in Brussels are a good example. These demonstrations are not only about informing civil servants about opposition to their policy proposals, they also seek to convince policy makers that the protesters enjoy support from a range of different social constituencies.

Recent empirical research shows that information politics is much more frequently used than protest politics (Beyers, 2004). This confirms earlier findings pointing at the limited use of protest politics at the EU level (Imig and Tarrow 2001; Reising, 1998). Even though interest groups are more likely to invest in information politics than in protest politics, overall access strategies remain more broadly used than voice strategies

3. The Legal Strategies of EU Interest Groups

Another means of effecting policy change that is well documented in EU politics is litigation. Seeking to have a court rule on the unconstitutionality or otherwise improper nature of legislative provisions in order to change policy is a long-standing tactic of interest groups seeking to stimulate policy change. In the EU, pro-integrative rulings of the European Court of Justice, institutionalized as precedent (McCown 2004) have underpinned profound changes in EU law, including the 'constitutionalization' of the treaties (Weiler 1999), trade liberalization (Stone Sweet and Brunell 1999, Stone Sweet and McCown 2004), evolution of the separation of powers rules (McCown 2003a) and, indeed, the creation of entirely new policy areas (Cichowski 1998, 2001). The Court's preliminary reference case law, those

resulting access patterns of private interests to the EU institutions, see Bouwen (2002 and 2004a).

cases filed by private parties, has been the major source of these rulings (Slaughter et al 1998).

3.1 How do interest groups obtain policy change by litigating?

EU law and the activist case law of the ECJ provide interest groups with potentially powerful legal tools for promoting policy change. In conflicts between national laws and EU law, where the EU has competence, it has long been established that EU law has primacy over national laws of any kind (ECJ 6/64 *Costa v. ENEL*, ECJ 35/76 *Simmenthal*). A similarly fundamental point of EU law holds that, unlike other international law, EU law does not hold member states as its sole object, but also private actors and, moreover, EU law 'does not impose only obligations on individuals it also confers upon them rights' (ECJ 26/62 *Van Gend en Loos*). Declaring that EU law applies to individuals as well as member states opened the door for private interest litigation.

Although cases can come before the ECJ by a variety of means, private parties' disputes are brought to the Court through the preliminary reference mechanism of Article 234 of the treaties. Article 234 allows national courts to refer a case that they are reviewing to the ECJ wherever they think that it may implicate a relevant point of EU law, the applicability of which is unclear. All courts may send such references and courts of final appeal must refer them. From the point of view of interest groups, litigation is, thus, a strategy for targeting EU policy that begins at the national level, by bringing a case in a national court, based on a point of EU law.⁵

Although litigation is often viewed as a means removing national rules that inhibit some aspect of European integration (Scharpf 1999: 50), ECJ decisions often have an impact more akin to lawmaking. The ECJ's rulings can be quite prescriptive and when it makes rulings that strike down national rules, and widen the applicability of EU ones, it is often rather explicit about what the amended national or European rules should look like in order to be in conformity with the treaties. In this way, interest groups that successfully litigate in order to shape EU policy, not only effect the removal of national rules, on the basis of EU law, but also typically shape the form of future legislation.

⁵ In addition to the preliminary reference procedure which is the mechanism through which private parties' cases arrive before the Court, EU institutions and member states may bring cases directly for a number of reasons, including challenging the legitimacy of legislation or suing another institution for failure to act, Art. 235-6. Private actors may and do lobby these bodies to bring such suits, but this paper will only consider litigation choices over which private parties have a direct influence: those instances in which they can bring suit, themselves.

3.2 The institutional environment and incentives to litigate

Choosing to go to court places actors in a distinctive strategic environment with its own incentive structures – certain situations favor litigating as a means of seeking policy change and as a strategy it advantages some actors relative to others. It is commonly held that litigating is a useful strategy where actors are faced with relatively large numbers of oppositional member states: actors often litigate where some organizational actor, often at least part of a member state government, is very opposed to an EU rule, or where there is insufficient consensus amongst member states to facilitate changes in the relevant law through legislation. Litigation can be effective in these circumstances because ECJ decisions are handed back to and announced by national courts, which are harder for member states to ignore (Weiler 1999). Moreover, in periods of legislative deadlock, when the EU is producing very few new measures, litigation can be the most effective means of stimulating policy change, both in terms of getting the rule change litigants want and reducing the likelihood that any challengers might be able to pass legislation compromising it.

3.3 Resources, organizational form and capacity to litigate

In addition to the institutional environment in which they operate, characteristics intrinsic to interest groups shape their recourse to litigation strategies just as they do their choice of access strategies. At the most basic level, the initiation of litigation strategies is costly and, thus, interest groups with more resources are advantaged relative to those with fewer in using this approach.

Successfully pursuing a litigation strategy is also resource intensive and requires an ability to maintain focus over the long-term. Interest groups' greatest successes come as a product of fairly sophisticated litigation strategies that usually bring not one, but planned sets of cases. Litigants have enjoyed success at changing legislation through legal means even in the face of significant member state hostility by deploying strategies of rapid repeat litigation (McCown 2003b). This is essentially a strategy whereby litigants, once they have won a case, rapidly bring a subsequent suit before the court. This has the effect of locking in the earlier, favorable ruling, by having it applied as precedent in later decisions. Writers have long pointed to the advantages that accrue to repeat litigators (e.g. Galanter 1974)

and private actors have found that being repeat litigators is particularly effective in EU judicial politics. The strategy works most effectively where a very organized interest group with a narrow mandate and well endowed with resources is able to swiftly bring several cases. It is even more effective if those actors that oppose the policy change embodied in the court rulings, are less organized, and have difficulty effectively opposing these strategies, either by filing counter suits or enacting legislation that might qualify the effects of court rulings.⁶ In the time in which it takes the opposition to mount a counter, the repeat litigators have brought multiple, subsequent suits. This strategy has proved effective for actors even where it has been quite difficult to obtain any legislative changes to compliment and support legal rulings (McCown 2003b).

In order to effectively use strategies of rapid repeat litigation, however, interests must be organizationally structured so that they can maintain focus and consistent preferences over complex policy issues over long periods of time. Large individual companies and specialized associations have often the required organizational characteristics and resources to engage in such litigation strategies. It follows that specialized sectoral associations are more likely to engage in sequential litigation than encompassing peak associations

In practice, although groups with few resources may be able to occasionally bring suit and win a case when an opportune point of law presents itself, larger, better-organized groups with more extensive resources can make use of a wider range of litigation strategies. Alter and Vargas (2000) and Conant (2002) have pointed out that even if actors get a ruling from the ECJ making a legal interpretation favoring their policy preferences, where they fail to follow through at the national level by lobbying member states to change legislation in response to ECJ rulings and by mobilizing interests to focus sustained attention on issues, all of which consolidate legal gains, the benefits may be marginal.

4. Lobbying versus litigation: How to decide?

It is well established in the interest group literature that private interests seek to effect policy change both by lobbying and litigation (Baumgartner and Leech, 1998: 152). A number of survey studies in the U.S. have established some basic empirical facts regarding private interests' use of lobbying and litigation strategies (Schlozman and Tierney, 1986; Knoke, 1990; Walker, 1991; Nownes and Freeman, 1998). These studies show that private interests

⁶ Although this is hard to do where the ECJ has interpreted the treaties, in its decisions, because that is effectively constitutional interpretation which legislation cannot modify.

more frequently employ access than litigation strategies. Although it is sometimes assumed that litigation is the preferred strategy of minority interest groups, where actors do litigate, contemporary research tends to suggest that factors such as group resources and the institutional environment in which groups operate are motivating factors in the choice (Olson 1990, Wanemaker 2002, Krishnan 2002). Whether private interests undertake voice or litigation strategies more often remains unclear. Indeed, while protest politics are significantly less popular with private interests than litigation, information politics seems to be at least as important as litigation. Notwithstanding the insightful results of these empirical studies, very little is known about what effects the choice of private interests to pursue lobbying rather than litigation or vice versa.

There is only a small theoretical literature, which addresses this issue. It is common for authors to examine lobbying and litigation as a sequential choice, in which the latter follows the former and requires that interest groups make decisions about how to allocate resources over the actions as two stages in the policy cycle (De Figueiredo and De Figueiredo, (2002), Holburn and Vanden Bergh 2002) . Although the question of how firms choose to allocate limited resource between the two actions is also the central focus of this article, it is not always appropriate to conceptualize the choice this way, at least in the EU: Interest groups do not inevitably wait until the end of the policy cycle to litigate, reserving it as a ‘threat’, but also do so as another way of initiating policy change. There is also a great tendency in the literature to focus on how features of government institutions shapes the choice to litigate or lobby, but to overlook how the features of firms influence this choice. (But see Rubin, Curran and Curran 2001, who argue that firms may have a “technological advantage” for litigating or lobbying that influences their choice, although they do not explore the nature of this advantage.)

In the EU literature relevant to litigation and interest group mobilization, several writers point to the dynamic relationship between lobbying, interest group organization and litigation. Some scholars see a mutually reinforcing dynamic between ECJ output, legislation and interest group formation (Fligstein and Stone Sweet 2002). Others identify litigation as most or even only effective where it is backed up by effective interest group lobbying, to focus extended attention on the issue and push member states to make legislative changes in response to ECJ case law (Alter and Vargas 2000, Conant 2002). Nevertheless the variables underpinning this interplay are not yet well specified. As Conant notes, the “factors that empower actors to coordinate legal and political resources require greater attention in the literature” (Conant 2002: 23).

How interest groups lobby and go to court is extensively studied in EU politics and a broader comparative literature. In addition, the empirical studies discussed above have established the relative use that private interests make of lobbying and litigation strategies. However, what factors intrinsic to interest groups and what issues inherent in the institutional environment guide how they choose between lobbying and litigation has rarely been considered. Indeed, on the basis of which variables private interests make this choice is far from clear and is therefore analyzed in the next section. Taking into account the predominance of access vis-à-vis voice strategies in EU interest politics, the focus is solely on access strategies in the analysis of lobbying and litigation strategies. Moreover, based on the agreement in the literature that business interests are much better represented in Brussels than other societal groups (Coen 1997, Mazey and Richardson 1999:121), the theoretical and empirical part of this paper studies the behavior of business interest groups only.

4.1 The impact of interest group characteristics

The discussion earlier in this paper of lobbying and litigation strategies has shown that private interests are differentially advantaged depending on their organizational form and resources. Given the impact of these two variables on the shape of both access and litigation strategies, whether they also influence private interests' choice to pursue one strategy over another becomes a highly compelling question.

a) RESOURCES:

It has become clear that the resources that private interests have at their disposal have an important impact on the access and litigation strategies they can employ. On the one hand, the level of resources influences the extent to which private actors can combine access strategies to the different EU institutions (Bouwen, 2002). On the other hand, the level of resources also determines, to a large extent, the degree to which interest groups are able to deploy resource-intensive long-term litigation strategies bringing multiple cases to court (McCown 2004, Conant 2002, Harlow and Rawlings 1992).

The level of resources available to a private interest also plays an important role in its choice between lobbying and litigation strategies. Nevertheless, it is difficult to argue that private interests prefer one strategy to the other because it would require systematically fewer resources. Like the elaboration of a litigation strategy, the development of a fully-fledged access strategy requires a substantial resource-investment. However, the resource-threshold to initiate some form of influence strategy is different for lobbying and

litigation. Whereas a basic lobbying strategy can be initiated with a minimal level of resources, this is not the case for a litigation strategy. Over a decade ago, Harlow and Rawlings estimated that the minimum cost for initiating a European legal case in the UK to be £40,000 (Harlow and Rawlings 1992). The initial resource-level required both in terms of material resources and know-how is lower for lobbying than for litigation: it suffices to call your local MEP or the responsible Commission service to initiate an access strategy. The minimal legal know-how necessary for initiating a litigation strategy requires, on the contrary, a considerable investment in resources. It is therefore hypothesized that there is an inherent bias in favor of lobbying and against litigation in the European Union because of the differential initial resource-threshold between the two influence strategies. The U.S. literature on interest politics seems to confirm this bias (Schlozman and Tierney, 1986; Knoke, 1990; Walker, 1991; Nownes and Freeman, 1998)

H: Because of the different initial resource-thresholds required, business interests will choose lobbying more often than litigation.

b) ORGANIZATIONAL FORM:

The previous discussion has shown that the organizational characteristics of interest groups have an important impact on their capacity to deploy lobbying and litigation strategies. Based on the insight that there is a relationship between the organizational form of interest representation and its capacity to provide access goods (and consequently gain access), it has been demonstrated that private interests gain access to the EU decision-making process by managing the organizational forms of their interest representation (Bouwen, 2004a:359). Furthermore, their organizational form also influences the decision of private actors to lobby or to litigate. Whether private interests are organized as an individual firm, a national association or a European association should also have an impact on their decision to lobby or to litigate. Interest groups with a narrow mandate and constituency are more likely to turn to a litigation strategy. The broader and more encompassing the interest group's mandate and constituency, the less likely it will choose for a litigation strategy (Alter and Vargas, 2000:473). It is more challenging for broad and encompassing interest groups to opt for litigation because they find it more difficult to reach the necessary consensus over a relatively specific set of preferred policy outcomes for the longer periods of time necessary to execute an effective multi-case litigation strategy. Moreover, the broader the group, the greater the risk that any ruling may go against the interests of some elements the group's constituency. This is less likely to

happen to narrowly focused interest groups. Following this reasoning, individual companies should turn to litigation strategies more often than associations. In addition, national associations are expected to litigate more frequently than European associations. It follows from the fact that while the former are narrowly focused on representing the interests of a single Member State, European associations represent a broader constituency that tends to include interests from all the Member States of the Union.

However, narrowly focused interests do not enjoy a similar advantage when they seek to deploy access strategies. Not only individual firms, but also national and European associations each have their own advantageous access strategy to a specific EU institution. While individual companies have a relatively high degree of access to the European Commission, national and European associations have the highest degree of access to the European Parliament (Bouwen, 2004a:358).

When these insights are combined with those on litigation discussed above, the following hypotheses can be generated. Firstly, it can be hypothesized that individual companies are more likely to undertake both lobbying and litigation strategies. Secondly, national, and to an even greater extent, European associations are more likely to restrict their action to lobbying. In more general terms:

H: While business interest groups with a narrow mandate or constituency are more likely to undertake both lobbying and litigation strategies, interest groups with a broader mandate are more likely to turn to lobbying strategies alone.

4.2 The Impact of EU Decision-making output

The EU decision-making process, both in terms of its organization and output at any given time, also shapes interest groups' relative incentives to litigate or lobby. For the purposes of this paper, it can vary in terms of how swift and efficient the supranational institutions are at producing legislation and how prompt the ECJ is at delivering rulings. For both institutions these vary across policy sector and have varied a great deal over time.

a) THE LEGISLATIVE BRANCH:

Although the legislative process in the EU is subject to far less deadlock than one would imagine, given its decisional processes (Héritier 1999), how easy it is to propel legislation through the supranational bodies varies across issue area and time. Whether the legislative process functions fairly smoothly and efficiently or is subject to lengthy delays or

deadlock makes a substantial difference to interest groups' decision to lobby. Where deadlock delays legislation considerably or makes it unlikely that the EU will produce particularly effective legislation, interest groups may turn their attention to litigation.

b) THE JUDICIAL BRANCH:

Structural factors on the European Court of Justice (ECJ) can also make it more or less attractive from the litigant's point of view. The ECJ is generally quite slow at delivering rulings. The average time it takes to decide a case has only increased over time and currently averages several years. Although the Court of First Instance was created in order to alleviate this problem, it has only been moderately effective in this because the number of annual references has continued to rise and the ECJ has no powers of docket control. It therefore seems probable that the delays in delivering decisions will continue or increase. As with legislative deadlock, this will decrease litigants' inclination to pursue policy change through this strategy.

The ECJ also has some marked decision-making biases. It is conventional to attribute a pro-integration preference to it (Garrett 1995, Tsebelis and Garrett 2001, McCown and Jun 2003) and a liberal economic bias (Maduro 1999). Actors hoping to roll back European integration or institute trade protectionist measures would be rather unlikely to press these interests before the Court. Other authors have noted that the ECJ is not particularly solicitous of the interests of non-EU traders, especially in dumping or customs disputes (Vermulst 1994). These actors probably also do not turn to the ECJ first for policy change.

It can be concluded that changes in the volume and pace of output from either the legislative or judicial branches of government are likely to have an impact on actors' choice of strategy for promoting policy change. It is hypothesized that increasing deadlock or slowness in one branch of government will tend to push actors towards the other venue, irrespective of their preferences over strategy of interest representation. Factors such as the preferences of the supranational branches of government over specific policy outcomes could be expected to have the same effect.

H: Increasing deadlock in one branch of government will encourage interest groups to more develop influence strategies in the other branch.

H: The similarity of interest groups' preferences with that of a branch of government will encourage interest groups to develop influence strategies in that branch rather than in the other.

5. Decisions Interest Groups Make over Political and Legal Strategies

In section 4, we introduced sets of variables that we expect to influence interest groups' choice of litigation versus lobbying strategies. In the following section we discuss the choices that interest groups actually make with regard to lobbying versus litigation and then our hypotheses about what factors would point groups towards different choices.

Interest groups that seek to shape policy in accordance with their preferences must make choices over how to allocate time and action. As presented in this paper, a major decision is whether to invest in lobbying, litigation or both. Before turning to the question of how the variables discussed in section 4 affect this choice, we begin by analyzing the choices presented to interest groups.

Interest groups may construct one of several different strategies. They may chose to lobby exclusively, to litigate only or some combination of both. With regard to combination strategies, there may still tend to be a dominance of either lobbying or litigation over the other – these choices exist on a continuum (see Figure 1). We hypothesize that the variables we introduced in the previous section relating to interest groups characteristics and the EU decision-making output can be argued to primarily determine the choice of strategy.

5.1 A Lobbying-Only Strategy

Interest groups may choose a strategy that relies exclusively on lobbying. This may, in fact, be the most common strategy choice. This finding can be understood on the basis of the resource-variable. We hypothesized there is a bias in favor of lobbying and against litigation in the European Union because of the differential initial resource-threshold between the two influence strategies. It is less costly in almost every way to initiate a lobbying strategy. Particularly where an interest group seeks only marginal changes to a policy initiative or where its preference is close to the status quo, it is likely to lobby only. The organizational form of the interest group will also influence the choice of a lobbying only strategy. As hypothesized earlier, associations are much more likely to favor lobbying over litigation, relative to firms. We expect that the decision-making output variable ought also to play a role – how speedy either the legislative institutions or the judiciary is at producing laws or rulings and the nature of this output will play into groups' calculations.

5.2 A Litigation-Only Strategy

In the past, interest groups have pursued strategies of primarily litigation, typically in eras or policy areas marked by significant legislative deadlock. The ECJ has proved an

invaluable source of rules promoting European integration in periods when the other institutions have been simply unable to produce any legislation. Even interest groups that are not as inclined to litigate, can be pushed in that direction by the decision-making output. Another factor that could play a role is a strong preference for negative integration on the part of an interest group. When removing status quo rules is the priority or where the interest group is targeting a very specific legislative provision or national law or practice, they may choose a strategy that focuses resources primarily on legal action. It is very likely, that the interest groups choosing litigation-only strategies are individual firms that have the resources and focus to bring cases but because of their narrow focus and constituency have difficulties accessing the European Parliament and to a lesser extent the European Commission.

5.3 Combined Strategies Where Lobbying Predominates

It can also be the case that interest groups devote the preponderance of their time, resources and action to lobbying and still support some litigation activities. Even if there is a strong bias in favor of lobbying, interest groups with sufficient resources might still attempt to undertake a litigation strategy after a lobbying strategy has failed or to strengthen a lobbying strategy by bringing additional pressure on certain member states or to raise the saliency of the issue to EU-level institutions. The organizational form variable would lead us to expect that firms would be more successful at litigation strategies and so, perhaps quicker than associations to take them up. Associations, however, may well engage in these strategies, particularly where lobbying has failed or not been as effective as they wish. Where a lobbying strategy fails, however, they may plan a more elaborate legal strategy in its place.

5.4 Combined Strategies Where Litigation Predominates

In contrast with the previous case, here litigation dominates but is complimented by some lobbying activity. The lobbying here follows the litigation but is not considered as a new influence strategy but more as a kind of follow through strategy after the Court has reached a decision. Where a litigant knows that it is unlikely that legislation will be speedily forthcoming or very successful, it may try to consolidate its litigation wins by a lobbying strategy in order to raise the saliency of the issues concerned in the relevant policy community. Nevertheless the emphasis of interest group will remain on litigation rather than on lobbying. In this case, interest groups are likely to invest in strategies like rapid repeat litigation because it has the

strongest effect of consolidating previous policy changes in precedent, insulating them better against later challenges. It is the most effective strategy for cumulatively building policy change through litigation.

6. Empirical Analyses/Cases

In this section, we examine examples of each of the four strategies we identified in the previous section to investigate the extent to which they exhibit the constellations of variables we predict will be associated with each type. From a methodological point of view, one might argue that this leads us to sample on the dependent variable. However, since the aim of this paper is to explore how the variables we propose might individually and through interaction with each other influence the variation in litigation and lobbying strategies that we assume exists in the EU, we feel this is appropriate. This is an exploratory paper which sets forth some propositions that we expect might have an influence over actors' choices. We explore several cases in order to investigate if the variables we identified are present, the direction of their influence on actors and how they might modulate, or not, each other (Eckstein, 1975). We choose case studies from the relevant secondary literature.

6.1 Lobbying-Only Strategies: Free movement of capital

For most policy issues, interest groups more or less use lobbying-only strategies without any systematic litigation. The cost of initiating the strategy is low and it requires relatively less organizational capacity and time than litigation strategies. For many, lower level concerns, interest groups' attentiveness will seldom go beyond lobbying. Even as issues rise in salience, certain organizational forms of interest representation (i.e. associations) may develop more sophisticated and intensive lobbying strategies before they develop serious litigation strategies.

While noting that it is likely that the majority of private interests' influence attempts belong to this category, a particularly interesting case is the free movement of capital issue. Since the expansion and strengthening of free movement of capital provisions in the Maastricht treaty, it has been the subject of attentive interest from financial services groups. The implications of these provisions to interstate banking, state intervention in financial services and so forth are significant. Lobby groups have developed extensive access strategies targeting a range of policy issues implicated by free movement of capital provisions. Bouwen (2004a) describes an 'intense interaction' between private interest groups and the European Commission, the Parliament and the Council over financial

services legislation. This on-going targeting of Brussels has produced a steady stream of legislation (Usher 1994).

There has, however, been very little legal activity concerning free movement of capital. This is despite the relatively high interest in these provisions, an active EU legislative agenda and the fact that the major provisions – Art. 56 (ex-Art 73b), Council Directive 88/361 – are now over a decade old. There is a single ECJ decision in *Sanz de Lera* (ECJ 163/94) filed in the year in which the Art. 56 provisions came into effect, in which the Court finds the articles to be directly effective⁷ opening the way for further litigation. Surprisingly, it has not been extensively used. There have been only five subsequent cases brought on the basis of *Sanz de Lera*. These cases all contest the impact of Art. 56 on cross border property purchases and second residence taxation. The two latter issues could be considered relatively minor issues and not significantly connected with the major lobbying initiatives that have been developed in the financial services sector at the European level. Moreover the cases can be hardly considered as being part of a well-designed strategy because the litigants are mostly defendants in cases brought by national authorities for tax evasion.

Article 56 should be a relatively easy article to litigate. It mirrors the structure of the other three ‘freedoms’, which have been augmented by an extensive interpretive case law and it is arguable that some aspects of the ECJ’s powerful free movement of goods precedent could be applied by analogy (Craig and De Burca 1998: 647). Nevertheless, interest groups seem to be forgoing litigation strategies.

The observations in this case do conform to our understandings of the dynamics of the interest group choices, however. Most importantly, the supranational institutions are doing an effective job of producing EU-level legislation: financial services legislation has been proposed and adopted at an increasing pace over the last decades (Mogg, 1999; Bouwen,). A first acceleration came in the mid-1980s with the single market program and has culminated in the European Commission’s financial services action plan in 1998.⁸ This evolution seems to have pushed both firms and associations in the direction of lobbying rather than the courtroom. Although financial institutions (i.e. banks, brokers and insurance companies) are very well endowed with resources indeed, they also enjoy an effective relationship with the Commission. They therefore seem to be inclined to invest in this intimate relationship rather than to go to Court. Moreover, it seems to be a relatively stable situation

⁷ i.e. To grant rights directly to private litigants.

⁸ Financial Services: Building a Framework for Action. Commission communication of 28/10/98, COM (1998) 625.

at the moment. It looks unlikely that any actors will initiate any major litigation strategies absent some significant change, such as a decrease in legislative output.

6.2 Litigation-Only Strategies: EU intellectual property rights

Litigation-only strategies are observed rather more rarely than lobbying-only strategies. They are strongly characterized by an exceptionally slow legislative processes in a policy area that is of interest to a set of resource rich firms with the organizational capacity to litigate. One such example is, however, intellectual property rights issues in the EU, particularly before the 1990s.

It is an area marked by an extreme lack of consensus between the member states such that very little legislation had been passed relating to intellectual property rights at the European level. In addition, the legislation that had been passed has often proved ineffectual. This has changed somewhat since the mid 1990s, but the Commission has had a long track record of unproductivity and the Council one of obstructionism with regard to the issue (McCown 2003b: 8, Bentley and Sherman 2001: 16; Vinje 1995: 361). How it is that firms can use their copyright, patent and trademark rights to inhibit the import of parallel goods from other member states is, however, an issue which commands the attention of a number of large, wealthy and highly organized interests in the EU. The majority of IPR cases have been brought by either recording industry firms or pharmaceutical companies, and so litigation in this area is dominated by firms. Indeed, only one litigator in the set of IPR references decided by the ECJ, the French Association of Recording Professionals, is an association.⁹

The firms were highly successful at deploying strategies of rapid repeat litigation, such that the majority of EU level rules on IPRs are still court-created. The substance of the rules predominantly reflects the business concerns of a small group of firms to the extent to which one writer notes that ‘trademark lawyers complain that classic trademark law has been rewritten in response to the needs of the pharmaceutical industry’ (Forrester and Nielson 1997: 15) Throughout much of the 1970s and 1980s, these firms engaged in some issue-specific lobbying, but redirected their attention to their litigation strategies.

The history of intellectual property rights disputes conforms to our expectations about the circumstances under which litigation only strategies will occur. Legislative output was slow, decision-making was deadlocked due to extreme lack of consensus between the member states. The interests affected by it were, however, largely firms relatively well

endowed with resources and with a clear long-term interest in the area – companies like Hoffman La Roche and EMI records. Their litigation strategies, while expensive and time consuming, were highly effective: despite fervent member state opposition, an extensive set of IPR rules was constructed by the Court and, eventually, became the template for the legislative initiatives that finally began to emerge in the 1990s.

6.3 Combined Strategies Where Lobbying Predominates: EU Tariff Classification

In this strategic approach to seeking policy change, interest groups devote the majority of their resources to lobbying, with intermittent recourse to litigation. Customs duties being a classic target of business interest groups' political attention, it seemed profitable to examine the EU's tariff provisions and examine the strategies that interest groups deploy to change them.

The rules setting up the EU's common customs system are amongst the oldest of the organization. Stipulated in the Treaty of Rome and rapidly implemented by the Commission, the Member States shared a broad consensus that creating a customs union with a common external tariff for goods was a prerequisite for the establishment of the Common Market. Indeed, the EU's Common Customs and Tariff Code, creating a classification system for all goods and applying tariff rates to them, is one of the first harmonizing measures taken by the EU. Tariffs are, however, obvious targets of interest group activity and traders will frequently contest the classification of goods if another, possibly applicable classification carries a more advantageous tariff rate. Moreover, it is well accepted in the literature that tariff rates and classifications are frequently reflective of relative political influence (Mayer 1984). And while a large portion of that influence is certainly exerted by lobbying, some authors note that litigating in order to change classifications in beneficial ways is so common as to be a 'product strategy' (Hoekman and Kostecky 2001).

In the EU, interest groups' attempts to influence the application of tariff classifications presents an interesting study in the relative strength of strategies. It is a less well-researched area of EU politics and business, but it appears, from the handful of extant studies, that interests have pursued rather ineffective litigation attempts and very effective lobbying efforts.

Private actors attempts to get changes in the tariff classifications of products are not a surprise, in any market. The U.S. Bureau of Customs and Border Patrol¹⁰ has decided some 11000 cases since 1989, which makes the 250 odd decisions that came before the ECJ by

⁹ The association, SACEM did, however, engage in a fairly sophisticated litigation strategy, bringing cases ECJ 22/79, ECJ 402/85, ECJ 270/86, ECJ 110/88, with some success.

1998 unsurprising. What is striking is how unresponsive the ECJ was to these petitions, especially in the first fifteen years of the customs union, even as it issued rulings elsewhere that strongly favored private litigants. The ECJ delivered decisions deferential to national customs authorities, frequently failed to cite precedent or even to discuss the positions of the private litigants very extensively and, in fact, created rather incoherent case law (McCown 2004: chapter 3). With time and repeated petitions from litigants, the clarity of its decisions increased somewhat, but litigation to change tariff classifications never proved to be a particularly fruitful approach for litigants. Interestingly, most of the litigating parties were private firms as is consistent with our expectations as to which actors choose litigation strategies.

Lobbying, however, has proved to be far more effective for business interests. It has been demonstrated that lobbying rather than the introduction of new products or changes in technical standards explains much of the variation in tariff classification in the EU (Costa Tavares 2005a). Subsequent to the Single Europe Act, when the Commission acquired much greater discretion at setting the EU's Common Customs and Tariff Classification Scheme, business interests shifted their attention to Brussels. Litigation of the CCT in this same period began to fall off. Even as successive rounds of the GATT managed to reduce tariffs across the board, pan-European, rather than nationally based, lobbying groups managed to secure protectionist changes in tariff classifications beneficial to them (Costa Tavares 2005b).

Although both political and legal actions of interest groups are less well understood in this policy area than others in the EU, a few interesting observations can be made. First, it seems clear from the volume of cases filed – several hundred – and the number of interests involved – Taveres' (2005b) study tracks 91 relevant manufacturing industries – that significant resources must have been devoted to the execution of both legal and political strategies. With respect to the organizational form variable, we also note some interesting findings. The interests which pursued litigation were, indeed, largely individual firms, rather than more broadly based organizations and those which finally effected change using a lobbying strategy appear to have been broad based pan-European groups. Finally, the output of EU organizations appears to have mattered a great deal in this case – the ECJ was not necessarily slow, but its output was quite unhelpful to litigants, both incoherent and frequently against them. The Commission, in contrast was effective at passing legislation and implementing it and as soon as the SEA made it more available to be lobbied, the interest groups responded accordingly. This is also an interesting case because presumably the

¹⁰ <http://www.cbp.gov>; data from the Customs Ruling Online Search System database <http://rulings.customs.gov/>.

groups litigating and lobbying have opposed interests on the same questions: logic would suggest that firms are only pursuing a requested reduction in tariff rates by reclassification in court, while typically when firms lobby, it is for requested protectionist increases in tariff classification. This case then tends to suggest that where the organizational output of one of the EU actors makes one strategy far more effective than another, interest groups will be differentially advantaged in their ability to exploit that, depending on their organizational form.

6.4 Combined Strategies Where Litigation Predominates: EU rules on non-tariff barriers to trade.

These strategies are driven primarily by litigation but supplemented or supported by lobbying efforts at the EU-level. The classic example of this concerns EU rules on non-tariff barriers to trade, or 'measures having equivalent effect to quantitative restrictions' on trade. These are prohibited by Articles 28-30 (ex. Art. 30-36) of the treaties and now form the backbone of the common market. They were, however, most extensively articulated by the Court and ECJ decision-making has driven the development of this area of EU policy.

In the era of the Luxembourg Compromise, when legislative output enacting the common market was virtually nil, the ECJ famously delivered its *Dassonville* (ECJ 8/74) and *Cassis* (ECJ 120/78) decisions . These decisions substantially weakened member states' capacity to enact regulations and standards that had the effect of discriminating against imports and establishing the principle of mutual recognition. These cases and all of the many following decisions were preliminary references, brought by private actors. Again, the litigants are largely firms and those large enough to have a trans-European interest. Repeat litigators can be identified: e.g. Denkavit, the animal feed company, brings 18 cases before 1988. And again, the litigants are highly successful because the Court's decisions turn out to be foundational to the EU legal order. Nevertheless, interest groups did seek to lobby Brussels and to engage the interests of the supranational institutions. The Commission responded swiftly to the *Cassis* decision, trying to use it as the basis for a renewed legislative agenda but met with little success (Alter and Meunier-Aitsahalia). For a long time, the principle venue for attacking member state measures with protectionist effects and advocating the construction of European rules, was the ECJ. After the Single European Act reinvigorated the integration project in general and market integration in particular, deadlock quickly decreased. Now, it is a policy area characterized largely by QMV and relatively efficient decision-processes. Litigation, in the 1990s has slowed (Stone Sweet and McCown 2004).

For several decades, interest groups concentrated their attention on litigation, only supplementing it with lobbying on issues related to the free movement of goods. This was possible because of the availability of large numbers of firms readily able to deploy litigation strategies and highly worthwhile because of the legislative deadlock of the time. As an area of law it still receives a fairly large number of references, but, as decision-making processes have changed to make it one of the most integrated policy areas, all interest groups have shifted resources towards lobbying and more business associations have become involved in the policy area.

7. Conclusion

In this paper we explored variation in interest groups' choices of litigation and lobbying strategies for influencing policy change. We proposed two sets of variables related to private interests' characteristics on the one hand and the EU decision-making output on the other and hypothesized that they account for much of this variation. We then investigated these variables in the context of four exploratory cases representing various strategies. We find that in the examples we drew from secondary literature, the variables we proposed are present as we would expect. (see Figure 2). Moreover, the interaction of the variables – the ways in which the combination of private interests' characteristics and the decision-making output prompt strategy choices - seemed to be relevant.

Although this is essentially an exploratory paper, some findings can be highlighted. The initial preference of all interest groups towards lobbying, rather than litigation was visible in all of the case studies – even in the litigation-only example, where the firms persisted in their unsuccessful attempts to press for legislation at the EU level.). An important factor in the heavy recourse to litigation in both the case of intellectual property rights and free movement of goods seemed to be the profound legislative deadlock of the 1970s, the period during which many of their landmark decisions were delivered. In the tariff classification case study, the EU actors output also appears to have been important – 'low quality' output of the ECJ, from the perspective of litigants and a comparatively responsive Commission, post-SEA, shaped groups' strategies. Where they were left with no choice, they pursued litigation strategies, but when the Single Europe Act created a viable lobbying target, they switched tactics and enjoyed greater success. More generally, the efficacy of the legislative process appears to be a major factor in pushing actors away from their default tendency to favor lobbying. The resource-variable is somewhat less well

explored in the empirical section of this paper. All the case studies involve interest groups with considerable resources. It follows that, unfortunately, the impact of this variable could not be illustrated. The organizational form variable on the other hand has turned out to be a source of interesting variance. Overall, firms tend to account for most of the litigation strategies explored here. As noted, in the intellectual property rights case study, the organization that was responsible for one of the streams of ECJ cases was a national, not European firm – SACEM, the French association of recording professionals. Similarly, in the tariff classification case, the interests pursuing litigation strategies (if unsuccessfully) were by and large individual firms and the large, pan-European lobbying groups that eventually proved successful pursued litigation strategies alone.

In the contemporary EU, policy making moves as smoothly as it ever has. The use of qualified majority voting has been increased with every treaty revision, and projects like the single market and competition policy have enjoyed sustained attention from the supranational actors for years. The ECJ is not particularly fast at delivering rulings, but is effective enough to still offer a useful venue to actors seeking policy change by litigation and to help provide negative integrative decisions laying the groundwork for the positive integrative legislation of the other supranational actors. As Héritier (1999) has pointed out, there are many formal and informal norms in place that ameliorate the potential deadlocks in the legislative process.

A change in legislative efficiency could well occur if the accession of new member states is not accompanied by significant revision in decisions-making mechanisms, a concern given all the more weight by the rejection of the proposed Constitutional Treaty in France and the Netherlands. This could have far reaching effects on the strategies of interest group representation. A decrease in legislative output would very likely result in a compensating increase in litigation activity. This might lead to an increasing dominance of firms in EU interest representation as associations are relatively disadvantaged at litigation strategies in comparison with individual firms. Finally, it should be emphasized that this is primarily a conceptual and exploratory paper. It seeks to begin to fill a large gap between the literature on judicial integration and on interest group behavior. Although both political and legal strategies of interest representation are well established as central to our understanding of the European integration process, they have been rarely analyzed in relation to each other. With this paper, we hope to provide a basis for future more

empirically rigorous work and to provoke some thought on the interplay between lobbying and litigation in contemporary politics.

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Figure 1

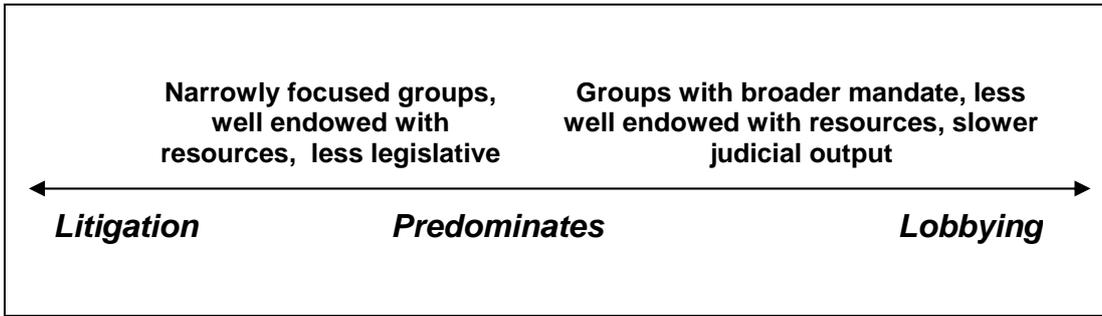
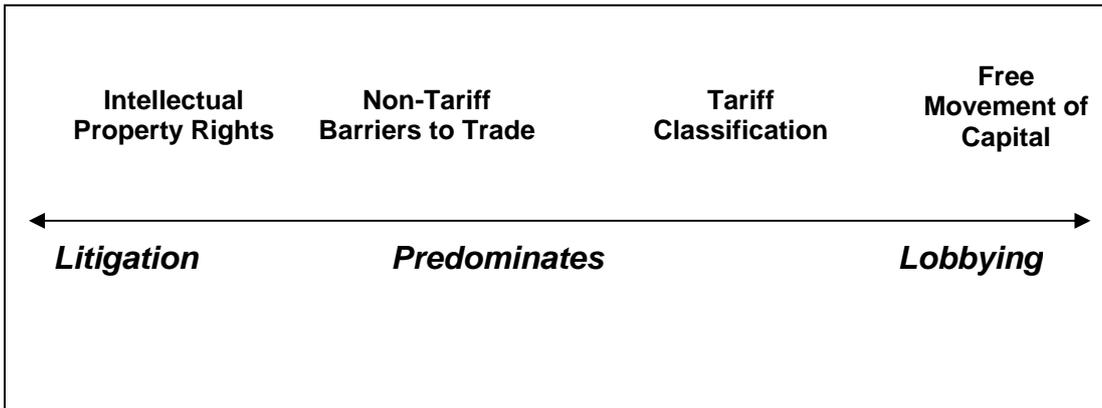


Figure 2:



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