

# Theorizing the Judicialization of International Relations

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This article introduces a Thematic Section and theorizes the multiple ways that judicializing international relations shifts power away from national executives and legislatures toward litigants, judges, arbitrators, and other nonstate decision-makers. We identify two preconditions for judicialization to occur—(1) delegation to an adjudicatory body charged with applying designated legal rules, and (2) legal rights-claiming by actors who bring—or threaten to bring—a complaint to one or more of these bodies. We classify the adjudicatory bodies that do and do not contribute to judicializing international relations, including but not limited to international courts. We then explain how rights-claiming initiates a process for authoritatively determining past violations of the law, identifying remedies for those violations, and preventing future violations. Because judicializing international relations occurs in multiple phases, in multiple locations, and involves multiple actors as decision-makers, governments often do not control the timing, nature, or extent to which political and policy decisions are adjudicated. Delegation—and the associated choice of institutional design features—is thus only the first step in a chain of processes that determine how a diverse array of nonstate actors influence politically consequential decisions.

International relations (IR) are now experiencing what has become the norm in many domestic systems: the judicialization of politics. International rules have long regulated a range of important topics—how and when war is waged, what barriers to imported goods states can impose, which nation owns islands and rocks in the sea, when and how borders shift, and how governments treat their own citizens. The extent to which these rules can be challenged in court, however, and the diversity of actors that can invoke and influence adjudication processes and outcomes, are novel, wide-ranging, and underspecified both theoretically and empirically.

Judicialization is the process by which courts and judges increasingly dominate politics and policy-making (Tate 1995, 28).<sup>1</sup> At the international level, judicialization—where it exists—can diminish the sovereignty of states and the autonomy of their leaders. Several recent examples illustrate

this effect around the world. In Latin America, the Inter-American Court of Human Rights' rejection of amnesties for the perpetrators of human rights violations and atrocities has pushed governments in Argentina, Brazil, Peru, El Salvador, and other countries to prosecute international crimes without destabilizing domestic political bargains (Fortes et al. 2017). China's vociferous opposition to an arbitral ruling rejecting its expansive claims to the South China Sea may suggest that legal bodies can do little when opposed by powerful interests. Yet, commentators have identified a variety of ways in which the ruling may be a "game changer" for negotiations between China and its Southeast Asian neighbors and for international maritime politics more generally (Graham 2016). In the United States, President Trump continues to attack the World Trade Organization (WTO) and North American Free Trade Agreement (NAFTA), both of which include international adjudication mechanisms. The political rhetoric is often extreme, but government advisors have channeled concrete proposals in ways that are more legally defensible, and some proposals—like border value-added taxes—are shelved altogether because they would likely trigger WTO adjudication (Worstell 2017).

These examples—and others explored in this Thematic Section—illustrate how judicialization creates a "profound shift in power away from legislatures [and executives] and toward courts and other legal institutions around the world." (Ferejohn 2002, 41) To be sure, this shift does not mean that officials cannot flout law—whether domestic or international. Rather, where government actions are subject to judicial review, the ability to label an act as a legal violation may mobilize rights-claiming and a turn to courts, producing outcomes that may be quite different from what the absence of judicialized politics would otherwise have engendered.

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<sup>1</sup> For a discussion of the ways in which politics become judicialized, see Hirschl (2004) and Hudec (1971).

While judicialization can, under certain conditions, reduce state control over political processes and outcomes, this result may or may not be normatively desirable. The intervention of judges and arbitrators can foster neutral decision-making, help states to send credible signals, and help to resolve collective problems. Expanding venues for nonstate actors, such as nongovernmental organizations (NGOs), to influence politics can generate a sense of inclusion, fairness, and transparency. Yet, judicialized international relations also have potential vices. Judicialization can lead to politics by other means, privileging well-resourced and law-savvy actors (Galanter 1974). It can thwart policies that have popular support and create legitimacy problems when judges and arbitrators cannot be held accountable for their actions. Under some conditions, judicialization can augment (rather than diminish) state power. And precisely because judicialization limits executive and legislative power and constrains domestic policies, it may contribute to backlashes against international regimes.

Whatever its normative valence, the judicialization of international relations has two institutional preconditions. The first is delegation. Scholars have thus far mainly analyzed the existence and forms of state delegation to international courts or arbitral bodies. We focus instead on the conditions under which adjudicatory institutions can shape real world political and policy decisions, demonstrating that treaty-based delegations are but one way to empower adjudicators and that states alone do not determine the content and scope of delegations.

A second, less studied, precondition for judicializing international relations is legal rights-claiming. One or more actors with standing must bring—or threaten to bring—a complaint to an adjudicatory body. The filing of such suits initiates a process for authoritatively naming legal violations, identifying remedies for those violations, and preventing future violations. We thus show that delegation alone is insufficient to explain whether and how adjudication influences domestic politics and international relations.

This introduction to the Thematic Section defines the theoretical and empirical elements of judicialization. We begin by identifying the defining features and range of adjudicatory institutions—including but not limited to courts—that contribute to judicializing international relations. We then theorize the effects of judicialization by focusing on the legal processes through which the phenomenon occurs, noting the ways in which those processes empower different actors and follow a different rhythm and logic than classical models of power politics and bargaining. Specifically, we identify four phases of judicialization, classify the key strategies and decision-makers in each phase, and draw upon the contributions to this Thematic Section to illustrate the operation of particular phases. Our goal is to identify key questions and issues to better understand the causes, dynamics, and political consequences of judicialized international relations. We conclude by explaining how the overarching insights of this framework—that states do not fully determine the content, scope, or impact of delegation or adjudication and that legal processes can diminish the role of executives and legislatures—has important implications for the study of international relations and world order.

### Judicializing Politics: A Trend (with an End?)

International law has long been relevant to international relations, even though international enforcement mechanisms are often lacking and international rules are sometimes violated. For example, Isabel Hull (2014) reveals

that international legality concerns factored into British decision-making during WWI—long before the creation of most international judicial bodies. Abraham Chayes (1974) documents how, in the 1960s, when adjudication of US foreign policy decisions was an unlikely prospect, international law factored into the Kennedy Administration's closed-door strategic decisions during the Cuban Missile Crisis. Judicialized politics differs from these examples in that governments anticipate that international law violations will give rise to external review by an adjudicatory body.

Our investigation is inspired by the observation that the nature and the extent of judicial involvement in international politics grew tremendously following the Cold War. At the domestic level, there has been a proliferation of constitutional courts (Stone Sweet 2000; Ginsburg 2008), which both reflect and shape a growing culture of legality (Huneus, Couso, and Sieder 2011), and a global trend in rights-claiming and legal activism (Epps 1998; Halliday, Karpik, and Feeley 2007). The willingness of national judges to adjudicate human rights abuses (Sikkink 2011), to restrict foreign sovereign immunity (Roht-Arriaza 2005; Verdier and Voeten 2015), and to claim extraterritorial jurisdiction has also increased (Raustiala 2009; Putnam 2016). At the international level, the number of permanent international courts has grown (Romano 1999; Alter 2011), as has litigation before both newer and older international courts and arbitral bodies (Alter 2014, 103–7).

The nature of state commitments to external legal review has also changed. States have increasingly accepted compulsory jurisdiction (Romano 2007; O'Connell and VanderZee 2014) and access rules that allow nonstate actors to initiate litigation or arbitration (Alter 2014, 81–85). In addition, international and transnational law are increasingly linked to emerging networks and institutions, such as national human rights institutions (NHRIs) that monitor and promote the implementation of international human rights standards, and the Financial Action Task Force that aims to trace and suppress cross-border money laundering and terrorist financing. Viewed collectively, these changes have increased the possibility of raising formal complaints about state and private actor conduct and policies that violate international law.

The theoretical roots of judicialized international relations are grounded in two distinct traditions. First, we build on the “Legalization and World Politics” special issue of *International Organization* (IO) (Goldstein et al. 2000, 386). That volume's central claim is that the legal characteristics of international agreements and institutions vary across issue area and time, and both influences are affected by world politics (Abbott et al. 2000). Delegation—which we argue is a necessary but not sufficient condition for judicialization—is a central theme in that special issue, and two articles examine how the design of delegation is politically consequential.<sup>2</sup>

Second, we embrace Jeffrey Staton and William Moore's (2011) suggestion that international relations scholars shed the classic assumption that domestic politics is hierarchical while international politics is anarchical, and with it the corollary presumption that legalized domestic politics must be fundamentally different from legalized international politics. Our framework thus builds on comparative

<sup>2</sup>Keohane et al. focuses on the difference between delegation where only states could initiate litigation versus delegation where private actors could seize an international court. Alter discusses factors that generate cross-national and cross-issue variation in the invocation and influence of the European Court of Justice (Keohane, Moravcsik, and Slaughter 2000; Alter 2000). We broaden the types of institutions examined and theorize the dynamics that delegation generates.

judicial politics and comparative law literatures that analyze the growing contribution of domestic courts and rights-claiming to judicializing domestic politics.<sup>3</sup> Like international courts, national supreme and constitutional courts have no means to compel governments to follow their rulings (Goldsmith and Levinson 2009). They rely instead on legitimation strategies that create pressure on governments to respect the rule of law and to adhere to judicial rulings. Following these literatures, we accept that legal processes—a feature of all functioning legal systems—have their own dynamics and that these processes can be politically consequential because social sanctions (including outcasting and publicly naming policies as illegal) shape state behavior and because legal violations sometimes also give rise to coercive sanctions (Hathaway and Shapiro 2011).

Most of the comparative judicialization literature is court-focused. As the next section explains, in the international realm a broader array of adjudicatory bodies contribute to judicializing politics. In addition, these bodies often span institutions and borders, making it harder for the executive or legislative branch in any one state to control legal processes that they oppose.

Although judicialization is a global phenomenon, it is neither uniform nor static. There are issue areas where judicialization efforts were never tried or failed (Katzenstein 2014; Romano 2014b; Alter, Helfer, and Madsen 2018; de la Rasilla and Viñuales 2019) and geographic zones where international judicialization is all but absent (Kahler 2000; Kingsbury 2011; Romano 2014a; Romano 2019). Moreover, we are witnessing a period of backlash against these trends. Political resistance to assertions of legal authority—both domestic and international—is hardly new (Alter 2000, 2018a; Helfer 2002; Greenhouse and Siegel 2011). But the current nationalist-populist backlash arguably has a broader resonance and impact than the reactions that preceded it. A strength of our framework is that it incorporates backlash as a type of feedback politics and explores its varied outcomes.

The scope conditions we define below allow us to observe the number and type of adjudicatory bodies, and the four-phase framework we develop helps to conceptualize the political dynamics that drive an expansion or decrease in judicialization. If the conditions for judicializing politics substantially change, we would expect judicialization to also change. Ginsburg and Abebe's (2019) contribution to this Thematic Section addresses this issue, applying our framework in reverse to theorize the conditions that contribute to "dejudicialization" (Ginsburg and Abebe 2019).

The contributions to this Thematic Section focus on specific phases, institutions, and mechanisms. The larger framework, described below, identifies the conditions that contribute to judicializing and dejudicializing international relations.

### Scope Conditions for Judicialized Politics

The existence of adjudicatory bodies that can issue authoritative legal rulings is a necessary condition for politics to become judicialized. A central contribution of our project is to define the types of bodies that can produce this result. We identify four cumulative criteria, summarized in Table 1.

First, the body must decide concrete legal disputes between contesting parties. Second, the body's decision-

<sup>3</sup>Whereas American judicial politics scholars have emphasized understanding judicial behavior, the comparative politics literature focuses on the role of courts in influencing politics and policy processes. Examples we build on include: Ferejohn (2002); Epps (1998); Stone Sweet (1992a, 1992b, 2000); Hirschl (2004, 2014); Tate and Vallinder (1995).

**Table 1.** Four criteria of adjudicatory bodies that can judicialize politics

1. Formal authority to decide concrete legal dispute between contesting parties
2. Independent decision-makers that apply preexisting rules and procedures to review facts, evidence, and legal claims
3. Reaches authoritative determinations of violations of law (binding or nonbinding)
4. Orders or suggests actions to remedy legal violations and prevent their recurrence

makers must be formally independent, in that they do not officially represent states and must apply preexisting rules and procedures to the disputes that arise. Third, adjudicators must have the power to authoritatively declare whether violations of the law have occurred. Fourth, the body must have the ability to order or at least suggest actions that the losing party must take to remedy legal violations and prevent their recurrence. Together, these four criteria establish decision-making dynamics that differ from political processes. Adjudicatory bodies that meet these criteria can incentivize potential litigants to raise legal arguments, making their demands for policy change more credible and specific and generating additional pressures on states and national decision-makers to change their policies.

Any adjudicatory body that meets these four criteria is a potential venue for judicializing politics. Since this definition includes national courts that hear cases with international law or transborder dimensions, as well as quasi-judicial bodies that do not issue legally binding rulings, it substantially broadens the number and range of actors and institutions that scholars have traditionally recognized as influencing politically consequential outcomes. The definition also identifies institutions that fall outside of these criteria—as might occur, for example, if the second element (independent decision-makers) is compromised—and issue areas, such as arms control, that are unlikely to be judicialized because no adjudicatory body fulfilling all four criteria exists.

In what follows, we briefly discuss a variety of these institutions, highlighting the actors that shape the design decisions that determine whether an institution meets these four criteria. Table 2 categorizes the types of institutions that do and do not satisfy the four criteria, describes their attributes, and provides additional examples.

The twenty-four international courts (ICs) now in operation around the world are the most obvious, and among the most studied, institutions that fulfill the four criteria. The decision of states to delegate adjudicatory powers to ICs brings with it important and consequential design choices, such as which actors can file complaints, the criteria for electing or selecting judges, which international law violations judges can review, and the kinds of remedies they award.<sup>4</sup> These design decisions affect whether and how the existence of an IC motivates rights-claiming for a particular issue. For example, if a court lacks compulsory jurisdiction or can only award limited remedies, this may inhibit whether the threat of litigation is credible and thus, in turn, whether actors mobilize to assert legal rights and judicialize the issue.

While states define key elements of an IC's jurisdiction and access rules, international judges have themselves expanded their reach by broadly interpreting these rules, enhancing their remedial powers, and diminishing the

<sup>4</sup>For studies seeking to explain the design choices for international adjudicatory institutions, see McCall Smith (2000); Allee and Elsig (2016); Koremenos and Betz (2013); Hooghe et al. (2016).

Table 2. Types of institutions that contribute to judicialized politics

<i>Category</i>	<i>Attributes</i>	<i>Examples</i>
<b>Adjudicatory bodies</b>		
International courts and tribunals	<ul style="list-style-type: none"> <li>◦ Created mainly by state delegations in treaties</li> <li>◦ Adjudicate complaints in disputes alleging violations of international law</li> <li>◦ Issue legally binding rulings and advisory opinions</li> <li>◦ May indicate remedies for violations</li> </ul>	<ul style="list-style-type: none"> <li>◦ International Criminal Court</li> <li>◦ International Court of Justice</li> <li>◦ International Criminal Tribunal for the Former Yugoslavia</li> <li>◦ Appellate Body of the World Trade Organization</li> <li>◦ European Court of Human Rights</li> <li>◦ East African Court of Justice</li> </ul>
National courts	<ul style="list-style-type: none"> <li>◦ Preexisting judicial institutions within a national legal system</li> <li>◦ Adjudicate complaints in disputes alleging violations of international law, extraterritorial application of domestic law, or transnational contracts or torts</li> <li>◦ Issue legally binding rulings</li> <li>◦ Order remedies for violations</li> </ul>	<ul style="list-style-type: none"> <li>◦ National trial or appellate courts with jurisdiction over violations of international law or disputes raising transborder legal issues</li> <li>◦ Specialized national courts with jurisdiction over international law or transborder legal issues (e.g., US Court of International Trade, criminal courts of East Timor and Kosovo, China's Belt and Road courts)</li> </ul>
International arbitration	<ul style="list-style-type: none"> <li>◦ Established by arbitral institutions or ad hoc</li> <li>◦ Reviews disputes involving violations of international law or contracts with transborder aspects</li> <li>◦ Issue legally binding awards</li> <li>◦ Remedy for violations is usually monetary damages</li> </ul>	<ul style="list-style-type: none"> <li>◦ International Center for the Settlement of Investment Disputes</li> <li>◦ Permanent Court of Arbitration</li> <li>◦ Hong Kong International Arbitration Centre</li> <li>◦ Ad hoc arbitration under the UN Commission on International Trade Law (UNCITRAL) Rules</li> </ul>
Quasi-judicial bodies	<ul style="list-style-type: none"> <li>◦ Created by treaties or IOs</li> <li>◦ May perform both judicial and nonjudicial functions</li> <li>◦ For judicial functions, review communications in disputes alleging violations of international law</li> <li>◦ Issue nonbinding decisions identifying legal violations</li> <li>◦ May recommend remedies for violations</li> </ul>	<ul style="list-style-type: none"> <li>◦ UN human rights treaty bodies</li> <li>◦ NAFTA binational panels</li> <li>◦ Complaint procedures of national human rights institutions</li> <li>◦ Implementation Committee of Montreal Protocol on Substances that Deplete the Ozone Layer</li> <li>◦ World Bank inspection panels</li> <li>◦ Eritrea-Ethiopia Claims Commission</li> <li>◦ ILO Committee on Freedom of Association</li> </ul>
<b>Non-adjudicatory institutions</b>		
International political bodies	<ul style="list-style-type: none"> <li>◦ Established by treaty or international organization</li> <li>◦ Adopt resolutions and decisions applicable to member states</li> </ul>	<ul style="list-style-type: none"> <li>◦ UN Security Council</li> <li>◦ UN General Assembly</li> <li>◦ UN Human Rights Council</li> <li>◦ Council of the European Union</li> <li>◦ ECOWAS Council of Ministers</li> </ul>
International investigation, compliance, and norm-development institutions	<ul style="list-style-type: none"> <li>◦ Established by a treaty</li> <li>◦ Review state party reports</li> <li>◦ Document patterns of international law violations</li> <li>◦ Investigate possible violations of international law</li> <li>◦ Suggest new international legal norms</li> </ul>	<ul style="list-style-type: none"> <li>◦ International Atomic Energy Agency</li> <li>◦ Conference of the Parties (CoP) of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)</li> <li>◦ International Law Commission's preparation of draft treaties</li> </ul>
Mediation and conciliation bodies	<ul style="list-style-type: none"> <li>◦ Assist states and private actors in amicably resolving disputes</li> <li>◦ Do not issue a decision identifying legal violations</li> </ul>	<ul style="list-style-type: none"> <li>◦ WIPO Arbitration &amp; Mediation Center</li> <li>◦ Singapore International Mediation Centre</li> <li>◦ Mediation and conciliation by National Human Rights Institutions, such as the South African Human Rights Commission</li> </ul>
Administrative review bodies	<ul style="list-style-type: none"> <li>◦ Created by a treaty or international organization</li> <li>◦ Receive and review requests from nonstate actors</li> <li>◦ Prepare factual findings</li> <li>◦ Do not identify legal violations</li> <li>◦ Forward factual findings to other bodies for further review</li> </ul>	<ul style="list-style-type: none"> <li>◦ Ombudsperson reviews of requests for removal from lists adopted by UN Security Council Sanctions Committees</li> <li>◦ Factual records prepared by the commissions of NAFTA labor and environment side agreements</li> </ul>



discretion of states and their officials (Weiler 1991; Burley and Mattli 1993; Alter and Helfer 2010; Huneeus 2013). For example, Staton and Romero's contribution to this Thematic Section considers how judicial choices regarding remedial orders influence human rights politics in Latin America. They espouse a model of judicial opinion writing that connects the clarity of legal rulings to both the informational challenges judges face and the likely reaction by national actors (governments and judges) to those rulings. (Staton and Romero 2019). Larsson and Naurin's contribution investigates how multidimensional alignments of interests across shifting coalitions of European Union (EU) members give the Court of Justice of the European Union interpretative latitude that limits state discretion (Larsson and Naurin 2019).

Scholars have long studied why states consent to international judicial review (Moravcsik 1995, 2000; Helfer and Slaughter 2005; Helfer 2006; Koremenos 2008) and the factors that influence the design of ICs. What this literature omits, however, are the diversity of other adjudicatory bodies that can influence international politics, as well as the different phases in which these bodies shape actor incentives.<sup>5</sup>

An often overlooked category of adjudicators are national courts that hear cases involving violations of international law and transborder legal issues, such as the extraterritorial application of US securities or antitrust statutes, suits challenging Argentina's failure to repay its sovereign debt, or the enforcement of foreign judgments and international arbitral awards, including against states.<sup>6</sup> In countries in which ratified treaties have automatic domestic effect, national courts can review international law claims directly. In others, judges interpret treaties indirectly via implementing legislation and by interpreting domestic statutes consistently with international law (Alford 2006; Szcwycik 2014; Alter 2018b). The extent to which national courts directly or indirectly apply international law varies. In this Thematic Section, Lupu, Verdier, and Versteeg identify two legal tools that national judges can employ in suits alleging violations of international human rights law, explain how these tools influence whether and how those violations are adjudicated, and test whether the availability of these tools influences the relationship between treaty ratification and human rights abuses (Lupu, Verdier, and Versteeg 2019).<sup>7</sup>

International arbitral bodies are a third type of adjudicatory institution. Individuals, corporations, and governments often prefer private decision-makers to handle legal disputes, choosing arbitration over judicial venues. Some treaties make arbitration the default mode of dispute resolution. Many bilateral investment treaties, for example, authorize foreign firms to use international arbitration to challenge host-state regulations (Büthe and Milner 2014; Hafner-Burton, Steinert-Threlkeld, and Victor 2016). Investment arbitration has been increasingly criticized, and Ginsburg and Abebe identify states that have refused to consent to investor-state dispute settlement (Ginsburg and Abebe

2019).<sup>8</sup> Yet, there is an entire world of international commercial arbitration beyond the realm of investment disputes. Arbitration implicates a set of customizable design choices selected by the drafters of a treaty or contract, including the applicable substantive rules, the "seat" where proceedings occur, and whether claims are heard by a permanent institution or ad hoc panels. These decisions can also affect whether and where litigation to enforce arbitral awards occurs.

A fourth category comprises quasi-judicial bodies that are similar to ICs with one exception—they do not issue legally binding rulings. For example, the ten United Nations (UN) human rights treaty bodies review complaints against states by individuals and NGOs, issue reasoned decisions identifying violations, and recommend remedies (Hafner-Burton 2013). Although nonbinding, these decisions and recommendations can mobilize actors and influence political outcomes in much the same way as judicial rulings (Kirby 2001; Hafner-Burton 2012; van Alebeek and Nollkaemper 2012). A further expansion of quasi-judicial bodies, and of rights-claiming, has occurred at the domestic level via a network of National Human Rights Institutions, many of which allow individuals to file complaints challenging human rights violations committed by government agencies or officials (Linos and Pegram 2016; 2017). Quasi-judicial bodies are also found in other issue areas of international law, including environmental protection, finance, labor, and trade (Tignino 2016; Chiara 2017).

We emphasize that many familiar international institutions fall outside of this definition or occupy grey areas that meet some but not all of the four criteria. Table 2 identifies the key attributes of institutions that do and do not meet our definition.

Table 2 illustrates several core insights of the judicialization framework. First, although some adjudicatory bodies are created by state delegations, many are not. Agreements to arbitrate, for example, may be the result of private contracting, and national court litigation of international or transborder suits often occurs without explicit state authorization. Moreover, national courts and arbitral bodies may also apply domestic law or private contacts, diminishing the role of executives or legislatures in making decisions relevant to international affairs (Büthe and Mattli 2011).

Second, states do not fully determine the content and scope of the delegation. While states sometimes augment or shrink an IC's jurisdiction (such as by adding the crime of aggression to the Rome Statute), adjudicatory bodies themselves can extend a body's reach in ways that states neither intended nor anticipated. For example, many national legal systems, national courts may apply international law directly and give it primacy over domestic laws, a broad delegation that gives these courts considerable discretion (Verdier and Versteeg 2015). The existence of multiple venues also introduces an iterative dynamic to judicialized politics. Litigants can shift adjudication across venues, such as from ICs to arbitration, or quasi-judicial bodies to national courts, and litigants and judges may adjust their legal interpretations and strategies in response to the decisions of other adjudicatory bodies (Helfer 1999; Hafner-Burton 2005a). This is another way in which judicialization can diminish state influence.

<sup>5</sup>The Oxford Handbook of International Adjudication includes international courts and international arbitration but excludes quasi-judicial bodies (Romano, Alter, and Shany 2014). In earlier work, Romano provided a helpful list of both judicial and quasi-judicial international bodies Romano (2011).

<sup>6</sup>Another example is the domestication of the Rome Statute creating the International Criminal Court via national laws that authorize domestic prosecutions of genocide, war crimes, and crimes against humanity committed at home or abroad. On the growth of extraterritorial law enforcement, see Raustiala (2009); Putnam (2016); Bookman (2015, 1108–19).

<sup>7</sup>See also Verdier and Versteeg (2015); Bookman (2015).

<sup>8</sup>Recent debates regarding investment treaty arbitration focus on whether arbitrators privilege the rights of foreign investors over other domestic laws and policies, such as environmental, public health, and consumer protection. Critics charge that international arbitration has a chilling effect on domestic policy-making (Rogers 2013), and their concerns have generated a search for alternative ways to resolve treaty-based investment disputes (Roberts 2018).

Table 3. Four phases of judicialized politics

Phase	Key actors	Strategies
Shadow politics	<ul style="list-style-type: none"> <li>◦ Litigants with legal standing (states, individuals, firms, and/or NGOs or interest groups)</li> <li>◦ Government agencies or officials</li> <li>◦ Legal and other representatives of these actors</li> </ul>	<ul style="list-style-type: none"> <li>◦ Mobilize and frame claims and arguments using legal language and rights-claiming</li> <li>◦ Engage in out-of-court negotiations with the threat of adjudication in the background</li> <li>◦ Defensive actions to avoid or improve litigation outcomes</li> </ul>
Adjudication politics	<ul style="list-style-type: none"> <li>◦ Parties to the dispute</li> <li>◦ Third-party interveners (e.g., amicus briefs)</li> <li>◦ Adjudicators (judges, arbitrators, or members of quasi-judicial bodies)</li> </ul>	<ul style="list-style-type: none"> <li>◦ Litigants select cases, venues, evidence, and legal arguments</li> <li>◦ Out-of-court defensive actions to influence adjudicators and shape adjudication outcomes</li> <li>◦ Adjudicators choose interpretive rules, determine legal violations, and indicate potential remedies</li> </ul>
Compliance politics	<ul style="list-style-type: none"> <li>◦ Parties to the dispute</li> <li>◦ Interest groups that favor or oppose compliance</li> <li>◦ Government agencies or officials asked to comply with rulings</li> </ul>	<ul style="list-style-type: none"> <li>◦ Post-litigation bargaining</li> <li>◦ Public amplification strategies (e.g., media campaigns, follow-on investigations, copycat suits)</li> <li>◦ Follow-on enforcement proceedings before national and international courts</li> <li>◦ Retaliation and issue linkages if noncompliance persists</li> </ul>
Feedback politics	<ul style="list-style-type: none"> <li>◦ Parties to the dispute</li> <li>◦ Politicians and interest groups that want to expand or undercut future litigation</li> <li>◦ Adjudicators in parallel legal bodies (judges, arbitrators, or members of quasi-judicial bodies)</li> </ul>	<ul style="list-style-type: none"> <li>◦ Spillover to issues presenting similar legal violations</li> <li>◦ Modification of laws and institutions to generalize, preempt, hinder or weaken future litigation.</li> <li>◦ Backlash: reframing and organizing countermobilizations against unwanted legal rulings</li> <li>◦ Dejudicialization: states withdraw from or terminate a treaty or strip jurisdiction</li> </ul>

Third, the criteria and the list of nonjudicial bodies underscores the ways in which adjudication, and the politics it inspires, can be degraded. States can sometimes reassert control by tasking political bodies to make factual determinations about violations of international agreements or by creating specialized review mechanisms to siphon a class of cases away from existing international review bodies. In addition, mediation, conciliation, and internal administrative processes provide alternative approaches to resolve disputes that may not apply preexisting rules and procedures or may not be politically independent. These qualities contribute to the sense that politics, rather than law, shapes these processes.

### Phases of Judicialized Politics

The two necessary conditions for judicializing international politics involve delegation to an adjudicatory institution and legal rights-claiming. The previous section identified the adjudicatory bodies that fall within our framework. Here, we focus on rights-claiming and the politics it engenders, analyzing and illustrating four phases of the process. As we explain, each phase turns on the decisions of different key actors, such as adjudicators, winning and losing parties, potential litigants, interest groups, and collectivities of states. Executives and legislators cannot determine when potential litigants engage in legal rights-claiming or how judges respond to their arguments because these actions, as well as compliance and feedback politics, can be affected by multiple factors beyond their control.

The transnational nature of adjudication involving international law illustrates why the judicialization of international relations is a different phenomenon than the judicialization of domestic politics. At the domestic level,

executive and legislative branches can more easily reclaim a central, if not exclusive, role in politics. Populist leaders in Venezuela, Poland, Hungary, Turkey, and Russia have offered “worst practices” guidebooks on how to reclaim executive prerogatives (Scheppele 2017). Yet, because the adjudicatory bodies we discuss exist outside of national legal orders, these strategies are more difficult to execute. This is in large part because other states, which are themselves often pressured by nonstate actors, may reject efforts to undermine international adjudicatory bodies.

In what follows we focus on politics within each phase. But we also explain the interactive effects across phases. Table 3 previews the four phases and the key actors, strategies, and outcomes associated with each phase.

*Shadow politics*—the first phase—refers to mobilization, bargaining, negotiations, and responses generated by a plausible threat of adjudication.<sup>9</sup> Such threats empower potential litigants and increase the risks associated with arguably illegal behavior, thereby shaping the incentives of actors and the voices of those with the law on their side. The primary actors involved in shadow politics include government agencies or officials that are potential targets of lawsuits or arbitration, as well as individuals, interest groups, firms, and states that assert legal claims, issue formal demands for policy changes, and engage in out-of-court negotiations.

The strategies that these actors deploy include framing rights-claims in legal terms, threatening adjudication, identifying adverse policy consequences linked to law violations, and offering settlements or adjusting policies to ward off litigation. For example, in Colombia both proponents and opponents of the peace accord between the government and

<sup>9</sup>The term *shadow politics* draws inspiration from Mnookin and Kornhauser (1979).

the Revolutionary Armed Forces of Colombia—People’s Army (FARC) rebels have used litigation threats and court challenges to bolster their respective arguments, mobilize supporters, and sway referenda on the peace agreement. The strategies, terms, and viability of recent peace accords in Colombia have also been shaped by the prospect of an investigation by the International Criminal Court (ICC), by litigation threats before the Inter-American Court of Human Rights, and by suits in Colombian courts alleging violations of international and domestic law (Huneus 2018).

Another example of shadow politics is unfolding in response to President Trump’s decision to withdraw from the Joint Comprehensive Plan of Action, an agreement in which Iran committed to the monitored cessation of its nuclear program in exchange for the five permanent members of the UN Security Council and the EU lifting economic sanctions against that country. After exiting the agreement, the Trump administration reinstated sanctions, including against non-US companies that do business in or with Iran. The remaining signatories have pledged to uphold the agreement, and US sanctions may run afoul of a Security Council resolution that gives effect to the Iran nuclear deal (Nephew 2018). In addition, Iran has asked the International Court of Justice to order the United States to lift the sanctions (van den Berg and Sterling 2018), and the EU has enacted legislation to bar European companies from complying with the sanctions (Davenport 2018). As this article goes to press, businesses are assessing their legal risks in anticipation of the restored sanctions and lawyers are mobilizing to advise clients in multiple jurisdictions (BlankRome 2018).

A different aspect of shadow politics involves efforts to avoid adjudication. Settlement may well be the most common—yet one of the least studied—manifestation of judicialized politics (Hafner-Burton, Puig, and Victor 2017). Such bargaining can be akin to diplomacy and negotiation, occurring outside of public view (Risse, Ropp, and Sikkink 1999, 2013). Judicialized shadow politics is distinctive, however, in that a third-party adjudicator stands ready to review claims that the parties cannot resolve themselves. Politics may become judicialized even if the defendant does not recognize a legal threat as such; authoritarian leaders, for example, often dismiss the relevance of legal claims and adverse court rulings. But where international law violations can be adjudicated, even recalcitrant defendants often respond with a counterstrategy designed to avoid, derail, or blunt the impact of adjudication.

Scholars have analyzed bargaining in the shadow of WTO dispute settlement, where states must engage in consultations before adjudication commences (Busch and Reinhardt 2000a, 2000b, 2006; Reinhardt 2001; Steinberg 2002; Davis and Blodgett Bermeo 2009). Studies examine the politics of consultations, follow-up litigation decisions (Reinhardt 1999; Davis 2012), how developing countries seek to strengthen their bargaining position (Shaffer 2003; Shaffer, Badin, and Rosenberg 2008; Halliday and Shaffer 2015), and which countries are politically advantaged by threatening to file a WTO suit (Davis and Blodgett Bermeo 2009). There is also an extensive literature on human rights advocacy strategies, although much of it is focused on political pressure rather than on litigation threats.<sup>10</sup> For other issue areas, scholars have focused on outcomes that follow adjudication rather than those triggered by the threat of suit.

<sup>10</sup>Literature that does focus on the legal component includes: Sieder, Schjolden, and Angell (2005); Sikkink (2005); Hafner-Burton (2013); Hafner-Burton, Victor, and Leveck (2016); Helfer and Voeten (2014); Hafner-Burton and Tsutsui (2005).

Shadow politics raises important questions for international relations scholars: What makes some legal threats more plausible than others? Which actors seize on opportunities to press their legal claims out of court? Perhaps most importantly, when and how is the threat of adjudication enough to influence the behavior of powerful actors, such as multinational corporations, heads of state, or militaries?

*Adjudication politics*—the legal phase of judicialization—encompasses the factors, strategies, and consequences associated with the decision to adjudicate, including which suits are filed, the selection of venue, the gathering of evidence and presentation of arguments, and the decisions of judges, arbitrators, and other adjudicatory bodies. Adjudicators become the dominant actors at this phase, and their independence becomes especially relevant (Brinks and Blass 2017). Because adjudicators determine the outcome of disputes, states must draw on discursive arguments, legal interpretations to shape judicial rulings, and out-of-court maneuvering, which may change the facts on the ground. Such arguments, and the interpretations they generate, can produce politically consequential and enduring outcomes.

Initially, international relations scholars ignored adjudication politics, arguing that preexisting state interests and interstate bargaining determines the resolution of legal disputes (for example, Garrett and Weingast 1993). Our project interjects the litigation process into this inquiry, examining how legal proceedings can be shaped by forces that include the strategic decisions of litigants, the involvement of third parties, and the decision-making choices of adjudicators.

We are only beginning to understand the reasons motivating the initial decision to adjudicate. For example, recent studies of territorial disputes have found that states often adjudicate territorial claims to surmount festering border disputes with neighbors, shift blame to external actors, or secure land rights to attract foreign investment (Simmons 2002, 2005, 2006; Allee and Huth 2006; Huth and Allee 2006). In international trade, states initiate WTO litigation to show domestic audiences that they are defending their economic interests (Davis and Blodgett Bermeo 2009; Davis 2012), to create bargaining chips for future cases, or to shape jurisprudence in ways that advance their interests (Pelc 2014). For example, states may file suit with the WTO to create a precedent that applies to other countries and similar legal issues, but prefer negotiated settlements when seeking a one-off resolution of a dispute (Busch 2007). Private litigants select venues based on factors including the types of remedies available, prior application of international law, and the likelihood of enforcing judgments (Helfer 1999; Alter and Vargas 2000; Hafner-Burton 2005b; Pauwelyn and Salles 2009). These are helpful beginnings, but we still lack systematic studies of adjudication strategies by the contesting parties. We also need greater clarity about whether these insights hold across different types of cases, litigants, and issue areas, as well as how the parties select among available venues, including less visible modes of dispute resolution.

Scholars have also examined the factors shaping judicial decision-making (for example Pauwelyn and Elsig 2012; Stone Sweet and Brunell 2012; Larsson and Naurin 2016). In this Thematic Section, Lupu, Verdier, and Versteeg explore how national judges modulate their decisions to avoid political backlashes and enhance the extent to which international human rights law is given direct effect. Their finding suggests that variations in national judicial decision-making as well as the substance of the law (e.g., the



particular human right at stake) can have important consequences for determining whether, how, and to what extent international rules shape domestic policy (Lupu, Verdier, and Versteeg 2019). Larsson and Naurin, in their study of the Court of Justice of the European Union (CJEU), venture beyond traditional behavioral approaches to examine the relationship between varying state preferences for retaining sovereignty and distributional concerns about European social policies. This approach helps to identify when the CJEU should worry about political backlash and when its judges have greater political latitude. Their study reveals the underappreciated point that the preferences of states and nonstate actors who do not participate in adjudication also shape IC decision-making (Larsson and Naurin 2019).

Other contributions to this Thematic Section analyze how decisions made in the adjudication phase are related to later phases of judicialization. In the context of the Inter-American Court of Human Rights, Staton and Romero explore how the adjudication and compliance phases of judicialization are deeply intertwined, revealing that judges strategically attempt to influence state reactions to their rulings through manipulating their choice of language in judicial opinions (Staton and Romero 2019). In a similar vein, Busch and Pelc use automated text analysis to examine the incidence of affective terms in WTO Appellate Body rulings. They argue that this international court employs affect-laden phrases to offer governments normative resources to persuade domestic audiences to comply with its rulings. The authors find that affective terminology is more prevalent for trade disputes that encroach on politically sensitive topics, such as health and environmental standards, and that it varies systematically according to the legal issue at stake, suggesting an awareness by adjudicators of the risks of judicializing issue areas traditionally reserved for domestic regulation (Pelc and Busch 2019).

*Compliance politics*—the third phase—refers to the strategies and actions of the litigants or other actors who press for or against adherence to legal rulings. Decisions by governments about whether, when, and how to comply with the law often shift once an IC or other third-party adjudicator has issued a ruling. By naming a certain policy or action as a violation, such rulings undercut the legitimacy of the condemned action. By specifying what compliance with the law requires, adjudication narrows the plausible arguments for maintaining a policy and creates a focal point for pressuring respondents (often states) to change their behavior.

Pundits often suggest that major policy changes necessarily—or likely—follow an adverse legal ruling. Scholars of judicial politics, however, know that the impact of legal rulings can be nonexistent, indirect, unintended, delayed, or difficult to discern (Rosenberg 1993). Numerous factors influence how post-litigation compliance politics unfolds. The key actors in this phase shift back to the litigants. Immediately following a ruling, losing defendants have a choice. They may accept the financial or political costs of continued noncompliance, agree to only symbolic concessions, or seek more time by creating an inadequate or feigned implementation response, as Japan did when it initially sought to define itself out of complying with an ICJ ruling (Butler-Stroud 2016).<sup>11</sup> The choice among these decisions can trigger further litigation in which adjudicators are asked to declare additional remedies or to moderate the remedies they previously demanded.

Should the state fall short, a broader set of actors may mobilize to push for full compliance. States that did not

participate in the litigation may retaliate, apply preexisting domestic provision that withdraw benefits (such as aid, market access, new agreements or political exchanges) so long as the violation persists. NGOs can use the violation for mobilization and political leverage (e.g., with legislators and local officials). International institutions can factor the violation into their decision-making. Legal rulings may also be enforced in different venues, including domestic courts in countries where assets are held. All of these actions can increase the costs of flouting a ruling.<sup>12</sup>

As this discussion reveals, compliance politics are much larger than the question of whether or not a state follows a particular ruling. This binary question is often far too simplistic, especially because compliance is often partial (Hawkins and Jacoby 2010). The key analytical inquiry of this phase is whether, when, and how adjudication becomes a useful tool to promote respect for the law. Examining compliance may require that scholars recognize that the preferences of governments and other powerful actors are not always the only, or even the primary, factors shaping compliance politics and compliance decisions.<sup>13</sup> Studying compliance politics helps to explain why judicialization shifts power away from executives and why political leaders respond to adjudication by making arguments and policy decisions that can have unintended or unanticipated consequences.

Several articles in this Thematic Section speak to state compliance. For Staton and Romero (2019), noncompliance with a judicial ruling is not necessarily a sign that a court—in their case, the Inter-American Court of Human Rights—is weak; rather, it reflects a need in the adjudication phase to reduce the clarity of legal rulings in the face of political uncertainty surrounding how to effect policy change. Similarly, for Pelc and Busch (2019), one reason that WTO rulings are often laden with affective language is to strategically provide governments a resource to mobilize pro-compliance interest groups around those rulings where compliance is likely to be a political struggle. The trade-off for doing so is that such language may encourage compliance in a specific case but reduce the case's applicability beyond the dispute at hand. Lupu, Verdier, and Versteeg (2019) seek to explain how national variation in how judges apply international law also affects compliance with human rights. Trying to deter backlash politics in the feedback phase of judicialization, national judges act strategically in the adjudication phase to shape the degree of compliance.

The study of compliance per se has been strongly and justifiably critiqued (Checkel 1999; Börzel 2001; Howse and Teitel 2010; Martín 2013). Yet, respect for legal rulings still matters. New questions about compliance politics are arising as governments seek to limit judicial interference in their agendas. For example, the European Court of Human Rights (ECtHR) has issued judgments against European governments that assisted the United States in detaining suspected terrorists at “black sites” and rendering them to third countries (BBC 2018), and the ICC prosecutor opened an investigation that included similar allegations as well as potential war crimes in Afghanistan (Moorehead and Whiting 2018). These rulings may complicate any attempt by the Trump Administration to

<sup>12</sup> Hathaway and Shapiro discuss a range of social sanctions that are used as part of “outcasting” to signify often less formal means to pressure for compliance (Hathaway and Shapiro 2011). See also Harlow and Rawlings (1992).

<sup>13</sup> This idea is further developed in Alter et al. (2018), which focuses on how contextual factors beyond the control of judges and governments affect IC authority, influence, and power.

<sup>11</sup> See also Hafner-Burton and Tsutsui (2004).



revive “enhanced interrogations.” International courts are also being asked to weigh in on government restructuring of national judiciaries. The CJEU recently ruled that national judges can block extradition requests to Poland due to concerns that criminal trials in that country are unfair, and the EU Commission launched an infringement action to protect the independence of the Polish Supreme Court, which has been threatened by executive interference ([Court of Justice of the European Union 2018](#)). These examples reveal how judicial rulings, by providing future litigants with validated legal claims and by facilitating external sanctions, provide signals intended to deter future noncompliance.

*Feedback politics*—the strategies and actions that follow from a legal victory or loss—reflect the fact that adjudication generates a precedent that can create a new political status quo. There are two forms of feedback politics. *Positive feedback* seeks to amplify a legal ruling applicable only to the parties into a larger policy change or to new legal obligation that is owed to all.<sup>14</sup> *Backlash politics* tries to overturn a precedent, abrogate or circumvent a ruling, or avert future losses in similar cases.<sup>15</sup> Although contestations over compliance may take months or even years to play out, feedback politics can take even longer, becoming fully evident only when publics inculcate a legal ruling, new actors enter the political arena, or legal entrepreneurs attempt to broaden the impact of a precedent.

An example of feedback politics that includes both positive and backlash elements is the landmark 1980 decision of the US court of appeals in *Filártiga v. Peña-Irala*.<sup>16</sup> That ruling included two provocative findings. First, the court revived a seemingly dead letter of American law, the Alien Tort Statute, to adjudicate human rights claims by foreigners. Second, the court held that the ban on torture was part of customary international law. The case laid the groundwork for the Torture Victim Protection Act, a 1991 statute that codifies the right to sue foreign officials who torture foreigners or US citizens and extends *Filártiga* to extrajudicial killings.<sup>17</sup> The revival of the Alien Tort Statute triggered dozens of lawsuits against states, corporations, and private individuals. These rulings also engendered backlash effects, leading the US Supreme Court to sharply limit the statute in recent years and shield these actors from liability ([Samp 2018](#)). As a result, the right for torture victims to sue for damages is now entrenched in US law, yet the extension of these rights vis-à-vis corporations has been curtailed.

Positive feedback and backlash effects may arise during other phases of judicialization, regardless of whether a complaint results in a final legal ruling. For example, bargaining in the shadow of adjudication may lead to out-of-court settlements that enhance respect for the law or, alternatively, create new policies that eliminate the ability to file complaints. Adjudication politics may spread a single legal victory across a class of similarly situated actors or engender new complaints that elicit more expansive legal rulings. Conversely, such follow-on processes may lead adjudicators to narrow prior findings, limit remedies, or discourage future litigation.

<sup>14</sup> Lawyers label this as an *erga omnes* effect. For a study of the *erga omnes* effects of international court rulings, see [Helfer and Voeten \(2014\)](#).

<sup>15</sup> In the *IO* legalization volume, [Alter \(2000\)](#) considers both forms of feedback effects. For literature on backlash, see [Helfer \(2002\)](#); [Alter, Gathii, and Helfer \(2016\)](#); [Madsen, Cebulak, and Wiebush \(2018\)](#).

<sup>16</sup> *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

<sup>17</sup> Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992). The Act also adds detail, including statutes of limitations and exhaustion of domestic remedies, that constrain post-*Filártiga* adjudication. See [Apostolova \(2010\)](#).

In this Thematic Section, [Lupu, Verdier, and Versteeg \(2019\)](#) theorize about how judges seek in the adjudication phase to strategically avoid backlash. [Ginsburg and Abebe \(2019\)](#) consider whether the expansion of judicialized politics in the 1990s later contributed to dejudicialization—a term they define as extreme instances of backlash in which states remove areas of law from external judicial review. Building on the domestic judicial politics literature and literature on backlash against international courts (see footnote 15), [Ginsburg and Abebe](#) offer a conceptual framework for thinking about how dejudicialization occurs.

### Politics between and across the Four Phases

International relations is a famously state-centric discipline. Studying the individual phases of judicialization sheds light on several understudied issues—how nonstate actors as well as states deploy international legal claims to bargain out of court, how adjudicators rule, and whether and how the parties comply with or resist new legal interpretations that international adjudication generates. While venues, actors, and politics at each phase differ, actors may attempt to build connections across the phases to achieve their goals. Since cases can settle at any time, there is no necessary progression from one phase to the next. But there are interactive effects based on expectations of events later in the process ([Alter 2014](#), 59–60).

Viewed collectively, the contributions to this Thematic Section highlights a more basic point: *decisions at any point in the adjudication process—from delegation, to the choice of whether to sue, and how, if at all, to comply with a ruling—can have effects that are neither direct nor immediate nor fully under the control of governments*. Adjudication can shift the meaning of legal rules, providing a mode of policy and institutional change that may be easier to orchestrate because it does not require multilateral agreement.<sup>18</sup> Legal rights-claiming and participation in adjudication can also deepen political commitments and lead to more fundamental changes in how actors conceive of their rights and interests ([Goodman, Jinks, and Woods 2012](#); [Goodman and Jinks 2013](#)).<sup>19</sup>

Transnational litigation of LGBT rights illustrates this point. The last two decades have seen numerous domestic and international court rulings decriminalizing same-sex relations and requiring governments to recognize same-sex marriages. In addition to changing national policies in individual countries, the shadow of adjudication has shaped transborder strategies to promote LGBT rights. [Helfer and Voeten \(2014\)](#) document the effect of ECtHR rulings on LGBT rights in countries across Europe, including those whose laws were not subject to judicial challenge. LGBT advocacy is spreading to other regions. A 2018 Inter-American Court of Human Rights advisory opinion on gender identity and same-sex marriage is already being implemented by national judges in Latin America ([Contesse 2018](#); [Thapa, Saurav Jung 2018](#)), and a groundbreaking unanimous judgment of the Supreme Court of India cites to earlier pro-LGBT rulings to invalidate the country’s colonial-era sodomy law, emboldening litigants to challenge similar laws across Asia and Africa ([Suri 2018](#)).

These examples of politics inspired or shaped by adjudication highlight how judicialization makes law a distinct kind of norm ([Keohane 1997](#); [Finnemore 1999](#)). Knowing

<sup>18</sup> Reinterpretation is one of the modes of institutional change identified in the historical institutionalist scholarship ([Streeck and Thelen 2005](#)).

<sup>19</sup> The literature on victim participation in mass atrocities prosecution also proceeds from this premise. See [Hoven and Scheibel \(2015\)](#).

more about the influence of these processes and nonstate actors, as well as how adjudicators navigate the discretion available to them, can help to better understand how judicialized outcomes differ from political bargains not refracted through the legal process. For example, does participation in legal rights-claiming and adjudication, and the results it generates, influence how state and nonstate actors frame and articulate preferences both inside and outside of court? When is framing a state action as a violation of international law (e.g., as a war crime or a human rights abuse) helpful and when is this framing counterproductive (Cloward 2014; Helfer and Showalter 2017)? Answering such questions may also contribute to scholarship on the spread of norms, knowledge, and ideas through legal processes, as well as to emerging behavioral studies that examine how the personal traits of individual political leaders, officials, and judges shape international relations (Hafner-Burton et al. 2017).

### When Judicialized Politics Matter

This Thematic Section uses a range of methodologies to investigate the processes and effects of judicializing international politics. In the past, states relied on their own assessments of what actions international law requires. These assessments tended to be shaped by each government's material, political, and strategic interests, leading to self-serving interpretations that privileged national sovereignty. In contrast, where international politics is judicialized, litigation and litigation threats become tools of influence. Political leaders must factor in (1) how adjudicators may rule and (2) the material and legitimacy costs should their policies be found illegal.

The relevance of judicialization to international relations stems from its potential to empower new actors, to shift political disputes into legal venues, and to generate discursive and extralegal strategies to influence legal processes, and thereby to affect outcomes of high political salience—such as armed conflicts, territorial disputes, trade and investment, human rights, and societal well-being and development. Such influence does not require litigants to pass through all phases of judicialization or any particular phase, such as compliance with a legal ruling. To the contrary, it is possible for international relations to become judicialized in a meaningful way—that is, for adjudicatory bodies to change politics and outcomes in ways that shift away from the preferences of states and their officials—at any phase. However, judicialization is not necessarily limited to particular issue areas, although it is more prevalent and more advanced in some policy spaces than others.

The importance of judicialization for international relations is a matter of degree. The phenomenon becomes potentially important when any phase of the process contributes to a shift in political dialogue, processes, or outcomes over which governments once had exclusive or primary control. Judicialization becomes increasingly politically salient as greater numbers and types of actors enter into the process at different phases, increasing legal rights-claiming and pressure for policy reforms—as has occurred, for example, when women successfully pressed for the prosecution of rape during wartime (Askin 2003) and for the investigation of mass rape by police (Ahmed 2018). It takes on greater importance when states or other powerful actors respond to rulings by paying compensation or providing other remedies. And it is most consequential when these actors adopt long-term changes on “matters of outright and utmost political significance that often define and divide

whole polities” (Hirschl 2008, 94)—such as Brexit and the Colombian government's peace agreement with the FARC.

We stress, however, that judicialization is not a one-way phenomenon. To the contrary, politics can become dejudicialized. In this Thematic Section, Ginsburg and Abebe (2019) focus on when states remove adjudicatory bodies from the political equation, but politics can also become dejudicialized when adjudicators lose their independence (Brinks and Blass 2017) and, more generally, when “legality” becomes less normatively or politically salient, leading governments to worry less about flouting law or legal rulings (Dyzenhaus 2012; Brunnée and Toope 2017; Alter 2019). Meanwhile, dejudicialization may occur alongside rejudicialization. For example, several developing countries have recently withdrawn from treaties that allow foreign corporations to seek international arbitration to challenge domestic policies as violating international investment law (Peinhardt and Wellhausen 2016). But this trend has also contributed to new judicialization proposals, including the European Union's push to create a Multilateral Investment Court (Council of the European Union 2018)<sup>20</sup> and China's Belt and Road Initiative to create new judicial mechanisms for adjudicating commercial disputes relating to Chinese investments (Hillman and Goodman 2018; Cohen 2018). Similarly, frustration by African political leaders with the International Criminal Court has generated exit threats and actual withdrawals from the Rome Statute, but it has also led to the Malabo Protocol, which will create a criminal law chamber for the proposed African Court of Justice and Human Rights, and it may spur national judges to launch their own war crimes prosecutions (Sirleaf 2017).

### Conclusion

The advent of judicialization beyond national borders marks a fundamental shift in international relations. Whereas in the past foreign ministries may have decided whether and how to advance the legal claims of their nationals, today firms, citizens, and countries are increasingly turning directly to adjudicatory bodies in the hopes of eliciting a legal ruling that vindicates their position. Although some have argued that this shift is permanent, recent events reveal that some governments have responded by mobilizing political resources and strategies to defend their interests. In addition, populist revolts against European integration and globalization more generally may have been exacerbated by the strength of the courts associated with the EU and the WTO and the international arbitral tribunals that hear investor-state disputes by foreign corporations.

These politics may take a long time to fully play out, so that the ultimate impact of international adjudication may not be immediately apparent. For example, China's entry into the WTO and its acceptance of the obligation to adjudicate trade disputes has had many downstream political effects. The United States no longer uses the threat of withdrawing most favored nation market access because China disrespects the human rights of its citizens. The binding and legally enforceable nature of WTO trade rules has constrained responses to increased Chinese imports, contributing to the US and European strategy of negotiating new trade agreements outside of the WTO framework (Dür and Elsig 2015), to the invocation of national security as a justification for limiting imports, to the current US policy of blocking appointments to the WTO

<sup>20</sup> See Multilateral Investment Court: Council gives mandate to the Commission to open negotiations.

Appellate Body (Shaffer, Elsig, and Pollack 2017), and to a populist backlash against trade liberalization. Most recently, the United States announced its withdrawal from a 144-year-old postal union treaty, because this treaty provides discounted small package shipping rates for Chinese goods sent to the United States (Thrush 2018). The WTO also creates a potential platform for China to take up the mantle of multilateralism that the Trump administration is shedding. These events are not wholly determined by the judicialization processes we discuss. Yet, it is nonetheless the case that the legal rights and obligations associated with China's WTO membership—and the fact that these rights can be judicially enforced—have been a global political game changer.

The overarching insights of the judicialization framework—that states do not fully determine the content, scope, or impact of delegation or adjudication and that legal process can diminish the role of executives and legislatures—has important implications for the study of international relations. A key implication is that some of what the law actually does takes place in the shadows. The mere threat of adjudication can prompt mobilization, bargains, and negotiations in ways that shape political decisions without any formal legal actions—a fact that has gone largely unnoticed by traditional international relations theory, which tends to focus on actual disputes and their settlements. This Thematic Section thus opens up a whole new range for the study of legal influence.

Moreover, the adjudication process itself, once it has kicked in, brings a range of new actors that have not traditionally been the focus of international relations theorists. Alongside states and their well-studied branches of government are many other actors, such as judges and arbitrators, that interject themselves into what traditionally have been considered state matters. Thus, for debates over compliance, looking simply to immediate state-driven outcomes may miss an essential element of law's influence. Legal scholars have long understood that law is a process; interjecting this insight into the study of international politics can—and should—change the way we study what legal institutions actually do and how they help or hinder different actors and actions.

Adjudication—and its very possibility—shapes legal discourse and state and international decision-making. More broadly, the “practice of legality” imparts a stability and a universality to international law that, at least in some circumstances, limits the extent to which the whims of executives are accepted within a single society or diffused around the world (Brunnée and Toope 2018). The constraints of this stability may be limited, as, for example, when President Trump follows prescribed legal steps to execute decisions to withdraw from international agreements or to levy tariffs, thereby avoiding litigation over alleged abuses of presidential authority (Nexon and Cooley, forthcoming). Yet, the “stickiness” of legal processes may also mean that, in the long run, Trump will fail to change the international institutions or laws he dislikes, avoiding a major disruption of the existing multilateral order.<sup>21</sup>

We do not dispute that power undergirds laws and legal practices, such as those concerning the use of force and the pursuit of vital national interests.<sup>22</sup> But the interests

of great powers cannot explain all externally oriented national and international behaviors. It cannot explain why international laws do not maximally advantage hegemonic interests, why human rights advocacy has developed specific understandings of legal rights-claiming, why firms and bankers worry about and respond to legal regulations, or why national judges decide cases by applying settled principles of legal interpretation that ignore guidance from political actors.

This does not mean that state interests no longer matter; indeed, the more powerful a state is, the better it may be able to deflect legal processes or harness law as another tool in its arsenal (Kittrie 2016). But it does mean that state interests may be shaped, limited, and channeled by adjudicatory bodies and nonstate actors in ways not yet fully understood. This Thematic Section sets the stage for future research by theorizing the concept of judicialization as broader than adjudication by international courts and as beyond the control of executives and legislatures and by introducing some of the mechanisms and modalities by which judicialization can shift power away from states in ways that may—or may not—be reversible.

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<sup>21</sup> Koh (2018) argues that transnational legal process leaves the laws and institutions in place, so that Trump is, in effect, “resigning without leaving” (chap. 3).

<sup>22</sup> A forthcoming special issue of *Security Studies*, “Hegemony Studies 3.0: The Dynamics of Hegemonic Orders,” examines how hegemony shape and are constrained by the orders they construct and by the resistance these orders generate.



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