Theorizing the Judicialization of International Relations

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This article 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,

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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). At the international level, judicialization – where it exists – can diminish the sovereignty of states and the autonomy of their leaders.

Judicialization also 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.

While judicialization has upsides, the loss of state control over political processes and outcomes 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 to influence politics can generate a sense of inclusion, fairness, and transparency. Yet, judicialized international relations can also be 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.

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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 excerpt of a longer article 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, identifying four phases of judicialization, and we classify the key strategies and decision-makers in each phase. We conclude by explaining how the overarching inights 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.

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.

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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) and geographic zones where international judicialization is all but absent (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. 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.

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

Any adjudicatory body that meets these four criteria is a potential venue for judicializing politics. Together, these four criteria establish decision-making dynamics that differ from political processes. Adjudicatory bodies

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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.

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, our definition substantially broadens the number and range of actors and institutions that scholars have traditionally recognized as influencing politically consequential outcomes. The definition also helps to identify 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.

Table 2 categorizes the types of institutions that do and do not satisfy the four criteria, describes their attributes, and provides additional examples. 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.

International courts (ICs) are the most obvious and among the most studied institutions that fulfil 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. 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 discretion of states and their officials (Weiler 1991; Burley and Mattli 1993; Alter and Helfer 2010; Huneeus 2013).

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. In countries in which ratified treaties have auto-

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matic domestic effect, national courts can review international law claims directly. In others, judges interpret treaties indirectly via implement ing legislation and by interpreting domestic statutes consi tently with international law.

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. Investment arbitration has been increasingly criticized, and Gins burg and Abebe identify states that have refused to consent to investor-state dispute settlement (Ginsburg and Abebe2019). Yet, there is an entire world of international commercial arbitration beyond the realm of investment disputes.

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 out- comes in much the same way as judicial rulings. 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).

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Table 2. Types of institutions that contribute to judicialized politics

Category	*Attributes*	*Examples*
Adjudicatory bodies		
International courts and tribunals	◦ Created mainly by state delegations in treaties ◦ Adjudicate complaints in disputes alleging violations of international law ◦ Issue legally binding rulings and advisory opinions ◦ May indicate remedies for violations	◦ International Criminal Court ◦ International Court of Justice ◦ International Criminal Tribunal for the Former Yugoslavia ◦ Appellate Body of the World Trade Organization ◦ Appellate Body of the World Trade Organization European Court of Human Rights ◦ East African Court of Justice
National courts	◦ Preexisting judicial institutions within a national legal system ◦ Adjudicate complaints in disputes alleging violations of international law, extraterritorial application of domestic law, or transnational contracts or torts ◦ Issue legally binding rulings ◦ Order remedies for violations	◦ National trial or appellate courts with jurisdiction over violations of international law or disputes raising ◦ transborder legal issues ◦ 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)
International arbitration	◦ Established by arbitral institutions or ad hoc ◦ Reviews disputes involving violations of international law or contracts with transborder aspects ◦ Issue legally binding awards ◦ Remedy for violations is usually monetary damages	◦ International Center for the Settlement of Investment Disputes ◦ Permanent Court of Arbitration ◦ Hong Kong International Arbitration Centre ◦ Ad hoc arbitration under the UN Commission on International Trade Law (UNCITRAL) Rules
Quasi-judicial bodies	◦ Created by treaties or Ios ◦ May perform both judicial and nonjudicial functions ◦ For judicial functions, review communications in disputes alleging violations of international law ◦ Issue nonbinding decisions identifying legal violations ◦ May recommend remedies for violations	◦ UN human rights treaty bodies ◦ NAFTA binational panels ◦ Complaint procedures of national human rights institutions ◦ Implementation Committee of Montreal Protocol on Substances that Deplete the Ozone Layer ◦ World Bank inspection panels ◦ Eritrea-Ethiopia Claims Commission ◦ ILO Committee on Freedom of Association
Non-adjudicatory institutions		
International political bodies	◦ Established by treaty or international organization ◦ Adopt resolutions and decisions applicable to member states	◦ UN Security Council ◦ UN General Assembly ◦ UN Human Rights Council ◦ Council of the European Union ◦ ECOWAS Council of Ministers

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International investigation, compliance, and norm-development institutions	◦ Established by a treaty ◦ Review state party reports ◦ Document patterns of international law violations ◦ Investigate possible violations of international law ◦ Suggest new international legal norms	◦ International Atomic Energy Agency ◦ Conference of the Parties (CoP) of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) ◦ International Law Commission's preparation of draft treaties
Mediation and conciliation bodies	◦ Assist states and private actors in amicably resolving disputes ◦ Do not issue a decision identifying legal violations	◦ WIPO Arbitration & Mediation Center ◦ Singapore International Mediation Centre ◦ Mediation and conciliation by National Human Rights ◦ Institutions, such as the South African Human Rights Commission
Administrative review bodies	◦ Created by a treaty or international organization ◦ Receive and review requests from nonstate actors ◦ Forward factual findings to other bodies for further review	◦ Prepare factual findings Do not identify legal violations ◦ Ombudsperson reviews of requests for removal from lists adopted by UN Security Council Sanctions Committees ◦ Factual records prepared by the commissions of NAFTA labor and

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 autho rization. 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

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adjudicatory bodies (Helfer 1999; Hafner-Burton 2005a). This is another way in which judicialization can diminish state influence.

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. 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 full length version of this article links each phase discussion to literature.

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, Hungry, Turkey, and Russia have developed many techniques for doing so (Scheppele 2018). 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

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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. 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 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 (Huneeus 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 (Such bargaining can be akin to diplomacy and negotiation, occurring outside of public view, ever, 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 counter strategy designed to avoid, derail, or blunt the impact of adjudication.

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Table 3. Four phases of judicialized politics

Phase	*Key actors*	*Strategies*
Shadow politics individuals, firms	◦ Litigants with legal standing (states, and/or NGOs or interest groups) ◦ Government agencies or officials ◦ Legal and other representatives of these actors	◦ Mobilize and frame claims and arguments using legal language and rights-claiming ◦ Engage in out-of-court negotiations with the threat of adjudication in the background ◦ Defensive actions to avoid or improve litigation outcomes
Adjudication politics	◦ Parties to the dispute ◦ Third-party interveners (e.g., amicus briefs) ◦ Adjudicators (judges, arbitrators, or members of quasi-judicial bodies)	◦ Litigants select cases, venues, evidence, and legal arguments ◦ Out-of-court defensive actions to influence adjudicators and shape adjudication outcomes ◦ Adjudicators choose interpretive rules, determine legal violations, and indicate potential remedies
Compliance politics	◦ Parties to the dispute ◦ Interest groups that favor or oppose compliance ◦ Government agencies or officials asked to comply with rulings	◦ Post-litigation bargaining ◦ Public amplification strategies (e.g., media campaigns, follow-on investigations, copycat suits) ◦ Follow-on enforcement proceedings before national and international courts ◦ Retaliation and issue linkages if noncompliance persists
Feedback politics	◦ Parties to the dispute ◦ Politicians and interest groups that want to expand or undercut future litigation ◦ Adjudicators in parallel legal bodies (judges, arbitrators, or members of quasi-judicial bodies)	◦ Spillover to issues presenting similar legal violations ◦ Modification of laws and institutions to generalize, preempt, hinder or weaken future litigation. ◦ Backlash: reframing and organizing countermobilizations against unwanted legal rulings ◦ Dejudicialization: states withdraw from or terminate a treaty or strip jurisdiction

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

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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.

We are only beginning to understand the reasons motivating the initial decision to adjudicate. Studies of specific systems and litigants 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.

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). 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

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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.

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. 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. 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.

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. *Backlash politics* tries to overturn a precedent, abrogate or circumvent a ruling, or avert future losses in similar cases. 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 (Alter, Gathii, and Helfer (2016); Madsen, Cebulak, and Wiebush (2018))

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*. 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 ground- work 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.[4]

Positive feedback and backlash effects may arise during other phases of judicialization, regardless of whether a complaint results in a final legal

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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.

Politics between and across the Four Phases

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).

This discussion 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. 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).

Transnational litigation of LGBT rights illustrates this point. The last two decades have seen numerous domes tic 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

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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. Knowing 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 ju dicialized 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 counterproducive? 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.

When Judicialized Politics Matter

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

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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. 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 (Brunnée and Toope 2017). 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 and China's Belt and Road Initiative to create new judicial mechanisms for adjudicating commercial disputes relating to Chinese investments. 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

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proposed African Court of Justice and Human Rights, and it may spur national judges to launch their own war crimes prosecutions.

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 Appellate Body (Shaffer, Elsig, and Pollack 2017), and to a populist backlash against trade liberalization. In 2018, 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.

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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 impor tant 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 out- comes 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.

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. 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,

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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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Our iCourts experience

Karen J. Alter

Reflections on my collaboration with iCourts

Working with iCourts has become one of my greatest professional joys. Mikael and I had started to collaborate before iCourts was created. Our first pre-iCourts collaborative effort was actually a Bourdieu focused project (no surprise for Mikael, of course), focused on the separated-at-birth founding of Europe's Court of Justice and Court of Human Rights. Although that project collapsed, the founding of iCourts took our collaboration to a whole new level.

Mikael's original plan was that I would move to Copenhagen. Because of this plan, I was added to the initial application and thus I was part of iCourts from the very beginning. Shortly after receiving the Danish National Research Centre award, Mikael met me in Berlin to brainstorm iCourts and my involvement. I was at the first staff meeting with the Danish National Research Council, 7 December 2011, where we discussed how important it would be to have a permanent staff that set a tone, and many ideas that were later implemented were envisioned at that meeting, including interdisciplinary collaborations, a working paper series, retreats, the science b-b-q, the summer Phd institute, an inter-disciplinary dual Phd degree, and collaborative projects that draw scholars from around the world.

Imagining is one thing. Realizing something that depends on collaboration is something else entirely. Mikael wanted iCourts to be a physical space where everyone who studies international courts would pass through and spend some time. He had the energy, vision, wisdom, temperament, and political skills to build a supportive and productive intellectual community. There were bumps along the way, but each time the iCourts family pulled together, finding workarounds and informal solutions for every problem that arose.

iCourts has always been an out of the box place, and this helped me to imagine bigger. Sometimes Mikael would creatively interpret the rules to work around blockages, but mostly iCourts took full advantage of creative license. For example, when researching backlash politics in Africa, we knew that no one would speak to us directly about backlash efforts.

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Mikael supported our idea to hold a workshop in South Africa with practitioners, no papers, and a rather fuzzy list of topics, all focused on the value added of African regional courts. The idea was research in the form of a conference, with a dual mission of bringing the people we wanted to interview to us, while introducing iCourts to African lawyers, scholars, and key regional and governmental officials.

Another out-of-the-box experiment involved hiring an in-house data-guy (Yoannis) to make iCourts a data resource center, even if all involved were not yet sure of how the data might later be useful. Yoannis assembled an amazing collection, including scraping a set of legal rulings that came complete with information about lawyers and the filing process. I could then ask for every ruling that mentioned a complicated cigarette litigation. This data will be a gift that keeps on giving. Someday, someone could even trace the legal advisors if they so wished.

The good will that iCourts built within and outside has made iCourts a destination for scholars working on international courts. The plan was always to be committed to methodological innovation, to empirical and fact-driven research, and to mixing research with good food and fun. This mixture is a key attraction. Once you become part of the iCourts family, you stay a part. The many inventive titles (the oxymoronic title of a "permanent visiting professor" was Northwestern's unfortunate contribution), and the various types of affiliations (professors with special responsibilities, and global research fellows), were Mikael's way of keeping people attached to iCourts. More fundamentally, however, iCourts realized its vision of becoming an interdisciplinary research institute with open-minded scholarly objectives.

iCourts has run multiple collaborative projects. Whereas many edited volumes feature faculty presenting work they are already doing, we could get people to play in our sandbox, drawing on their backpack of knowledge. By collectively theorizing, by being responsive to the feedback we received, and by being open to findings that cut against our theory, we generated a collective stake in figuring out if and how the theoretical ideas provided new insights on topics the many collaborators already knew. This collective theorizing inevitably spurred an additional search for data that might confirm or disconfirm our hunches. The result was true original interdisciplinary collaborative research.

Many people have pitched in to make iCourts what it is. Part of Mikael's genius is that everyone is tasked with helping the Center work. Phd students and visitors have been called upon to make sure that future visitors did not face the challenges that the first international visitors faced. The Dean's office provided crucial support, as did a small team of collab-

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orators inside and outside of the University of Copenhagen, all sharing our most scarce and sacred resource- our time and energy. Collaborative projects were always treated as incubation exercises that should involve junior scholars and doctoral students. Senior scholars who visited and engaged were later asked to sit on Phd committees or Phd defenses. This spirit of collaboration and giving has a multiplier effect. Many visitors and judges have spent time helping others on the assumption that everyone who we help will some day do the same for others. Students benefited, but so did all of us who have been part of iCourts. Creating the many means for practitioners and senior scholars from around the world to help improve the research of an extremely international group of young scholars been a gift that iCourts has given to mentors and to students.

All of this is adding up to the same rather simple but not all that common observation. iCourts is fundamentally productive. Mikael and the team of full-time staff keep the administrative part in the background, so that the foreground is always focused on research in a real way. Scoring points, bashing others, pieties to this or that scholar (ourselves included), and the 50th study on topic X are a waste of time and energy. Let's get to the real stuff, and be willing to go wherever our interest and creativity can take us. This focus on productive innovation is why senior scholars devote their time, repeatedly. Every visit energizes me, and I know that others agree. I am energized because at iCourts I learn new things, I meet people who are unafraid to take risks or to try new things, and I can encourage and help others to reach higher and to make their research better.

I know that I am not supposed to write a tribute to Mikael, yet I can't help but do so. I too have research, language, collaboration, and project management skills. But Mikael's management and mentoring skills are simply exceptional. The positivity, the productivity, and the commitment to excellence attracts and builds success to the point that iCourts is almost too productive. iCourts is almost too productive and successful insofar as there are only so many hours in a day, and Mikael is also a father and an active researcher in addition to being Centre director. Yet too much success, and the pressures and challenges this engenders, are truly gourmet problems.

My scholarly goal when I started studying comparative international courts was to elevate the debate while leaping over and moving beyond unproductive eddies. Mikael helped to achieve this goal through his generous engagement with scholars. Students, visitors and junior faculty sense that iCourts leaders want everyone to succeed, and that they know how to generate success. Mikael's track record of helping others publish, win grants and find jobs, and thus build their own success, is truly impressive.

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iCourts mainly builds and succeeds through the attraction of new empirics, persuasive arguments, and fresh thinking. Alone none of us could have generated the success that is iCourts. But together, especially with Mikael's exceptional management and leadership, the Centre has managed the all-to-rare feat of becoming greater than the sum of its parts.

As Larry Helfer writes, iCourts emerged perhaps when the proliferation and influence of international courts was at a peak. For scholars, studying a rise and a decline can both be of interest. In this sense, the perception that IC influence is diminishing, a view proffered by skeptics, nationalists and sovereigntists to generate a self-fulfilling prophesy, has never per se been a problem for the iCourts research enterprise. Yet given that iCourts scholars have also invested in historical analysis, we have a long memory. We remember that we have been here before, which is to day ICs and international institutions have weathered political storms and battles of political titans before. That said, nothing attracts scholarly attention or funders like political success. So it is surely true that to some extent the success of iCourts is related to the visible success of international courts as they adjudicate important issues and produce high stakes rulings. Since student interest, research funds, the allocation of scarce publishing space tend to follow whatever seems to be news-worthy and important, we can expect the size of iCourts to decline as interest in ICs declines. Given what I wrote above, a modest reduction of interest in being and working with iCourts will mean that iCourts does not have to make breadth versus depth trade-offs where scarce time is spread thin.

Institutions are hard to kill off, and ideas never die. The idea of using international courts to develop international law, and the resource that international adjudication provides as a slow-time-release capsule for international law with a built in safeguard (a state's ability to ignore an IC ruling) may become less relevant in the moment, but it remains a background condition of international law and politics. The analogy I use is sleeping beauty. We have learned a lot about what happens with politics and international adjudication push in the same direction, and what happens when they do not. Ebbs and flow are a natural part of politics, which in some respects is inevitably cyclical. After all, change requires viewing the past as a not so nice place to be, and imagining a future that is more desirable. We happen to think that the contribution of international courts is to this day underappreciated. The politics will change, at which point the many insights iCourts has created will provide valuable material, even if it is both historical and future-oriented material.

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Laurence R. Helfer

It's hard to believe that nearly a decade has passed since my friend and coauthor Karen Alter told me about a new center in Copenhagen devoted to the study of international courts. I was unsure what to expect when I first visited iCourts, then comprised of a few sparse offices clustered around a large white conference table on the second floor of an old university building in the Latin quarter. But even a brief meeting with Mikael Madsen made two things clear to me: Mikael had big, bold plans for the center and I wanted to be part of them.

So began one of the most productive and enjoyable collaborations of my academic career. iCourts has been my second professional home and it has supported and enriched my scholarship in innumerable ways: conferences of academics, judges, and attorneys; field research to understand the origins and evolution of lesser-known courts in Africa and South America; co-editing *International Court Authority* with Mikael and Karen, and co-authoring *Transplanting International Courts* with Karen; teaching in the Summer School; and serving on hiring and PhD committees. I was also proud and humbled to receive an honorary doctorate in law from the University of Copenhagen in 2014.

Perhaps more than all of these, the most rewarding part of being a permanent visiting professor at iCourts has been the ongoing conversations with faculty, post-docs, PhD students, and staff. For many visits, I came to the Center directly from the airport after a long flight from the U.S., happy to spend the day (fortified by numerous cups of capsule espresso) discussing research agendas and draft papers with colleagues, to be followed – in typical Danish style – by an excellent dinner and drinks! The hard stop on travel that COVID-19 imposed in March 2020 came, disappointingly, just days before a workshop in Copenhagen. But even a global pandemic could only delay the completion of a second iCourts symposium in Duke University's *Law and Contemporary Problems* journal.

The Center has helped to launch the careers of many academics in law, political science, and sociology. Its network of collaborators and alumni is extensive, and its intellectual footprint is broad and deep. It has been a privilege for me to serve as a mentor to several of these scholars and to assist in advancing their careers, both at iCourts and other universities.

The environment in which international courts operate has shifted dramatically over the last decade. The judicialization of international relations was central to the post-Cold War Zeitgeist – part of a commitment to building the international rule of law and peacefully settling disputes. Although no one knew it at the time, iCourts was born just as that hopeful

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era was coming to a close. Today, international adjudication is far more politically contentious. Even judicial stalwarts such as the European Court of Human Rights and the Court of Justice of the European Union face significant challenges. Mikael and the scholars he has brought into the Center have documented, analyzed, and publicized those threats and suggested strategies for international courts to pursue as they navigate this fraught and unstable terrain.

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