Introduction

The research question and this book's perspective

How can and how should respondents and judges react to unilateral forum shopping before international tribunals? This is the question that gives rise to this book. It is a very practical question facing litigants and adjudicators in increasingly numerous cases and forums across the spectrum of international adjudication. At the World Trade Organization (WTO), cases involving Argentina and Brazil,[1] and Mexico and the United States[2] have spurred discussion about the use of multilateral dispute settlement to circumvent regional dispute settlement. Chile and the European Union (EU) have struggled with an overlap in related disputes before the WTO and a chamber of the International Tribunal on the Law of the Sea (ITLOS).[3] The European Commission, Ireland, and the United Kingdom grappled with multiple proceedings before four different adjudicative bodies in connection with the

[1] Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003 (deciding that anti-dumping duties imposed by Argentina on certain poultry from Brazil were WTO-inconsistent); *Aplicação de Medidas Antidumping contra a exportação de frangos inteiros*, Award by MERCOSUR Arbitral Tribunal, 21 May 2001 (previously deciding that the same anti-dumping duties imposed by Argentina on certain poultry from Brazil were MERCOSUR-consistent).

[2] Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006; Panel Report, WT/DS308/R, adopted 24 March 2006, as modified by Appellate Body Report WT/DS308/AB/R.

[3] *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community)*, ITLOS Case No 7, discontinued 16 December 2009; *Chile – Measures Affecting the Importation and Transit of Swordfish*, WT/DS193, last joint communication by the parties to the DSB dated 3 June 2010, WTO doc. WT/DS193/4.

construction and operation of a nuclear plant.[4] A distinguished arbitral tribunal has been at pains to justify a jurisdictional option by Belgium and the Netherlands in the face of the likely exclusive jurisdiction of the European Court of Justice (ECJ).[5] Japan has successfully argued that an outside treaty – to which itself, Australia, and New Zealand were parties – divested an arbitral tribunal established under the United Nations Convention on the Law of the Sea (UNCLOS) of its jurisdiction.[6] A company that was 99 percent owned by Ukrainian nationals has been authorized to proceed with claims against Ukraine as a Lithuanian investor under an investment treaty between Ukraine and Lithuania,[7] and a private investor from Greece has been prohibited from pursuing alleged investment-treaty rights after litigating an investment dispute before Albanian domestic courts.[8] Philip Morris Asia Limited has sought arbitration against Australia under a bilateral investment treaty (BIT) between Australia and Hong Kong, where the company alleges that Australia's plain-packaging tobacco campaign violates, among others, WTO obligations that would have been incorporated into the bilateral treaty by virtue of an "umbrella clause."[9] Individuals have had their communications before the Human Rights Committee (HRC) blocked because they had brought cases before the European Court of Human Rights (ECtHR) previously.[10]

The term *unilateral forum shopping* depicts the idea that rational litigants exploit existing avenues for litigating cases to their own advantage. In domestic and private international law procedures, forum shopping is often used to refer to the selection of one among multiple

[4] *Access to Information under Article 9 of the OSPAR Convention (Ireland* v. *United Kingdom)*, Arbitral Award, 2 July 2003; *The MOX Plant Case (Ireland* v. *United Kingdom)*, ITLOS Case No 10, Order on Provisional Measures, 3 December 2001; *MOX Plant Case (Ireland* v. *United Kingdom)*, Arbitral Tribunal under ITLOS Annex VII, terminated 6 June 2008; *Commission* v. *Ireland*, C-459/2003, Judgment of the Court, 30 May 2006.

[5] *Iron Rhine Railway (Belgium* v. *The Netherlands)*, Arbitral Award, 24 May 2005.

[6] *Southern Bluefin Tuna Case (Australia and New Zealand* v. *Japan)*, Award on Jurisdiction and Admissibility, 4 August 2000.

[7] *Tokios Tekelès* v. *Ukraine*, ICSID Case No ARB/02/18, Decision on Jurisdiction, 29 April 2004.

[8] *Pantechniki S.A. Contractors & Engineers (Greece)* v. *Albania*, ICSID Case No ARB/07/21, Award of 28 July 2009.

[9] *Philip Morris Asia Limited* v. *Australia*, Arbitration under UNCITRAL Rules, Notice of Arbitration of 21 November 2011; Australia's Response to the Notice of Arbitration of 21 December 2011.

[10] *Béatrice Marin* v. *France*, Communication No 1793/2008, UN doc. CCPR/C/99/D/1793/2008, 14 September 2010; *Edith Loth – and her heirs* v. *Germany*, Communication No 1754/2008, UN doc. CCPR/C/98/D/1755/2008, 21 May 2010.

alternatively available forums.[11] Throughout this book, the term *forum shopping* includes, in addition to choosing between alternative avenues for litigation, other options prompted by the overlapping jurisdictions of international tribunals. Specifically, forum shopping consists of (i) *strategic forum selection*; (ii) attempts to litigate identical or related actions or claims in more than one forum at the same time – or *parallel litigation*; and (iii) attempts to litigate claims sequentially – or *serial litigation*.[12]

In answering the question of the manner in which aggrieved respondents and adjudicators can cope with unilateral forum shopping, this book adopts a procedural standpoint. From this perspective, forum shopping raises issues about the existence and reach of adjudicators' jurisdiction, the propriety of its exercise, and the admissibility of claims and submissions before an international tribunal. In a nutshell, forum shopping gives rise to *preliminary questions* and *preliminary objections*. Preliminary questions, which refer to requirements for the existence and development of an adjudicatory process as such, and preliminary objections, by which parties raise these requirements, are old widgets in the international lawyer's toolbox. Unwilling litigants have challenged the jurisdiction of tribunals or the admissibility of the claims brought against them since the dawn of modern international adjudication.[13] In doing so, reluctant litigants essentially try to avoid a ruling based on factors extrinsic to the ultimate merits

[11] *See* Note, 'Forum Shopping Reconsidered,' 103 *Harv L Rev* (1990) 1677, using Black's Law Dictionary definition of forum shopping as "a litigant's attempt to have his action tried in a court or jurisdiction where he feels he will receive the most favourable judgment or verdict."

[12] *See* Laurence Helfer, 'Forum Shopping for Human Rights,' 148 *U Penn L Rev* (1999) 285, at 290. See also Robert Cover, 'The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation', 22 *W&M L Rev* (1981) 639, at 646–8, calling the three possibilities described here "strategic choice," "synchronic redundancy," and "sequential redundancy."

[13] For instance, in one of the first arbitrations under the Jay Treaty, a jurisdictional question was raised. See *Cunningham's Case*, Mixed Commission under Article VI of the Treaty between Great Britain and the United States of 19 November 1774, as described in John Bassett Moore, *International Adjudications: Ancient and Modern, History and Documents,* vol. II (Oxford University Press, 1929) 47–52. Already in its second case, the Permanent Court of International Justice (PCIJ) had to deal with an objection related "not merely [to] whether the nature and subject of the dispute before the Court are such that the Court derives from them jurisdiction to entertain it, but also [to] whether the conditions upon which the exercise of this jurisdiction is dependent are all fulfilled in the present case." *See Mavrommatis Palestine Concessions*, Judgment of 30 August 1924, PCIJ Ser A No 2 (1924), at 10.

of a given case. This unveils the essence of preliminary objections: they are *procedural shields*.

As procedural shields, preliminary objections have often been portrayed as hurdles to the judicial settlement of disputes. In fact, from a consent-oriented perspective, preliminary objections reflect a sovereign right to curtail even discussion of a matter before an impartial adjudicator unless the disputing states jointly agree to do so.[14] As it happens, however, the objective of preliminary objectors may be achieved, contrary to their opponents' (and most international lawyers') desire for international justice.[15] This mismatch may offer an almost psychological explanation for the international legal scholarship's oversight of preliminary objections during the last five decades.[16] It is as

[14] See, for example, *Barcelona Traction Light and Power Company, Limited (New Application) (Belgium* v. *Spain)*, Preliminary Objections, Judgment of 24 July 1964, at 44: "the object of a preliminary objection is to avoid not merely a decision on, but even any discussion of the merits."

[15] *See* Mohieddine Mabrouk, *Les exceptions de procédure devant les juridictions internationales* (Paris: LGDJ, 1966), at 2: "Il est, certes, à déplorer que l'État qui a souscrit à l'obligation arbitrale ou judiciaire ne se considère pas pour autant avoir accepté la justice internationale. D'une main il essaie de retirer ce qu'il a donné de l'autre … Est-il cité en justice, le premier réflexe de l'État devenu défendeur consiste, le plus souvent, à soulever nombre d'exceptions de procédure. En conséquence, la marche de l'instance, vers le déroulement final, est entravée …"; see also Hugh Thirlway, 'Preliminary Objections,' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2007, electronic version), at 28: "Since 1987, preliminary objections have been brought in the majority of cases before the [International] [C]ourt [of Justice]. This is perhaps in itself hardly a development to be welcomed"; Alexander Orakhelashvili, 'The Concept of International Judicial Jurisdiction: A Reappraisal' 3 *LPICT* (2003) 501, at 501: "[I]nternational tribunals are often expected to contribute to international justice and maintenance of the basic values of the international community, and the jurisdictional objections may indeed operate as a factor preventing them from accomplishing this task, thereby causing serious concerns for those safeguarded and protected by international law."

[16] For a review of the extensive literature on preliminary objections until the late 1960s, see J. Witenberg, 'La recevabilité des réclamations devant les juridictions internationales,' 41 *Recueil des Cours* III (1932) 1; J. Witenberg, *L'organisation judiciaire, la procédure et la sentence internationales: Traité pratique* (Paris: Pedone, 1937); Maarten Bos, *Les conditions du procès en droit international public* (Leiden: Brill, 1957); Ibrahim Shihata, *The Power of the International Court to Determine Its Own Jurisdiction* (The Hague: Martinus Nijhoff, 1965); Mabrouk, *Les exceptions de procédure*; Georges Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour Internationale* (Paris: Pedone, 1967). Academic development of the topic slowed down after the *South West Africa* and *Barcelona Traction* judgments by the ICJ (see *Barcelona Traction Light and Power Company, Limited (New Application) (Belgium* v. *Spain)*, Second Phase, Judgment of 5 February 1970; and *South West Africa Cases (Ethiopia* v. *South Africa) (Liberia* v. *South Africa)*, Second Phase, Judgment of 18 July 1966). These judgments have been lamented as unhappy decisions on preliminary issues or "technicalities." See, for

if preliminary objections, enmeshed in international law's primitive structure and sheltering potential wrongdoers from international justice,[17] were an obstacle to the international lawyer's dream of compulsory jurisdiction.[18] Perhaps it is then understandable that, in the field of international adjudication – long troubled by claims of its irrelevance – preliminary objections have not attracted major academic interest lately.

While preliminary objections may prevent adjudication of claims, the dearth of recent studies focusing on them should be seriously lamented. Preliminary objections have always been a technique whose primary aim is to control the existence and exercise of jurisdiction and the respect for other procedural requirements. In a terrain where jurisdiction is invariably granted by delegation – normally directly by the very states that will later be subject to adjudication – this makes for an object worthy of study in its own right. But even if these reasons were not enough, certain structural changes in international adjudication have elicited an expansion in the use and function of preliminary objections, making their study all the more important. First, the multiplication of international tribunals increases the number of venues where preliminary objections come to the fore. This speaks to the use of preliminary objections, and detailed accounts of this use in the new landscape of international adjudication have yet to be given. Regarding the function of preliminary objections, many of the newly established forums have automatic and overlapping jurisdictions. This

example, 'Apartheid Foes Lose Suit in World Court over South-West Africa; an 8–7 Verdict; South Africa is Victor on a Technicality in UN Mandate Case,' *New York Times*, 19 July 1966. See also Shabtai Rosenne, *Procedure in the International Court: A Commentary of the 1978 Rules of the International Court of Justice* (The Hague: Martinus Nijhoff, 1983), at 160: "It is probably true to say that of all factors that have harmed the Court as an institution in recent years (and in an inhospitable political climate), the handling of preliminary objections … has been the most powerful and in some respects the most politically oriented of the Court's actions."

[17] See references in n. 15 above.

[18] See, for example, Heinhard Steiger, 'Plaidoyer pour une Juridiction Internationale Obligatoire,' in Jerzy Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century: Essays In Honour of Krzystof Skubiszweski* (The Hague: Kluwer, 1996) 817; Wilfred Jenks, *The Prospects of International Adjudication* (London: Stevens & Sons, 1964); Hans Kelsen, 'Compulsory Adjudication of International Disputes,' 37 *AJIL* (1943) 397. See also Marcelo Kohen, 'Manifeste pour le droit international du XXIe siècle,' in Laurence Boisson de Chazournes and Vera Gowlland (eds.), *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab* (The Hague: Kluwer, 2001) 123; Antonio Cançado Trindade, *International Law for Humankind: Towards a New* Jus Gentium (Leiden: Martinus Nijhoff, 2010), at 567–591.

enhances complainants' ability to initiate litigation unilaterally and enlarges their spectrum of choice of adjudicatory venues. Moreover, the emergence of private parties as litigants or as the true force underlying litigation has undermined the capacity of sovereign states to control recourse to and use of international tribunals. In short, the doors are opening to forum shopping in international law. This development upsets the usual perception that preliminary objections are exclusively *obstacles* to promoting the judicial settlement of disputes. It emphasizes that preliminary objections also *protect* and may actually *promote* judicial settlement – for instance, by preventing litigation before an inappropriate forum.

This book stresses that preliminary questions and the technique of preliminary objections ensure procedural due process and may foster jurisdictional and procedural coordination. A defendant who invokes a preliminary objection brings to the attention of the adjudicator procedure-regulating norms that may govern the parties' resort to adjudication. These norms may address forum selection, as well as parallel or serial litigation across international tribunals. In applying these norms, the international judge decides on the legality and appropriateness of a party's use of a particular adjudicatory mechanism and possibly on the relationship between tribunals and proceedings. In this sense, preliminary objections can be seen as devices to guarantee the integration of procedural norms. They are transmission belts of procedural rules that bind the parties beyond the directly governing instruments of a tribunal seized of a case. In a world of multiple international tribunals with overlapping jurisdictions, preliminary objections can thus help enforce predictability for litigants and guarantee a more orderly flow of complaints to the various tribunals. They may also allow tribunals to avoid conflicting decisions, notwithstanding the facts that the institutional context of international law is noncentralized and horizontal and that international tribunals are autonomous in relation to each other.

Preliminary objections, therefore, can be a technique for the governance of the new "international judiciary." Although their managerial function was practically dormant throughout most of the nineteenth and twentieth centuries, preliminary objections have served a managerial role for a long time in domestic legal systems and in private international litigation. Notions such as *conflits de compétence*, *res judicata*, *lis pendens*, or *forum non conveniens* and other "abstention doctrines," while representing obstacles to adjudication, also act as mechanisms

for coordinating between various actors in a common judicial enterprise.[19] Formerly superfluous tools in a landscape where one might not find a single tribunal to turn to – let alone two whose jurisdiction overlapped – preliminary objections can now be studied as a means of supervising forum selection, coordinating the exercise of jurisdiction in overlapping cases across tribunals, and avoiding conflicting decisions. They can promote the judicial settlement of disputes by enabling a cosmopolitan application of procedure-regulating norms that permits the management of forum shopping.

The importance of the framework suggested in this book

The present book combines two superimposed stories that have so far been told disjunctively. By bringing the stories of preliminary objections and forum shopping together, it suggests that a new age may be forthcoming with regard to preliminary objections, one in which they are properly seen as devices to ensure the just resolution of disputes and to permit coordination between international tribunals. Under this perspective, the activation of preliminary objections' managerial function is a reflex of international law's becoming more complex and sophisticated.

The focus on procedure adopted here is also important because forum shopping raises intertwined substantive and procedural questions. However, there has been a disproportionate focus on the substantive law issues raised by the use of different tribunals to adjudicate similar questions of law. Indeed, the boom in international tribunals in the 1980s and 1990s motivated a flurry of scholarship about the question of whether specialized tribunals linked to specific regimes might lead to incoherence and the fragmentation of international law.[20] The attitude of the International Law Commission (ILC) Study

[19] See, for example, Arthur von Mehren, 'Theory and Practice of Adjudicatory Authority in Private International Law: A Comparative Study of the Doctrine, Policies and Practices of Common and Civil-Law Systems,' 295 *Recueil des cours* (2002), at 306 ff., discussing *forum non conveniens* and *lis pendens* as means to fine-tune exercises of adjudicatory authority. See also Stephen Burbank, 'Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law,' 49 *AJCL* (2001) 203.

[20] See, for example, Jonathan Charney, 'Is International Law Threatened by Multiple International Tribunals?' 271 *Recueil des cours* (1998) 101; Cesare Romano, 'The Proliferation of International Judicial Bodies: the Pieces of the Puzzle,' 31 *NYUJILP* (1999) 709; Georges Abi-Saab, 'Fragmentation or Unification: Some Concluding Remarks,' 31 *NYUJILP* (1999) 919; Pierre-Marie Dupuy, 'L'unité de l'ordre juridique

Group on the "fragmentation of international law" was emblematic of these concerns. The Commission decided to focus on "substantive problems" and to leave the issue of institutional competencies aside, since those issues could, according to the Commission, better be dealt with by the institutions themselves. Hence, whereas the ILC implicitly recognized the potential of jurisdictional and procedural coordination in the course of specific proceedings, it refused to study the matter further.[21]

But substantive law considerations do not provide a complete response to the concerns arising from forum shopping. To put it simply, even if one accepts the view that "international law is a system" and that international tribunals, absent an explicit rule to the contrary, are entitled to apply all international law – which is the view to which this study subscribes – forum shopping will still happen. Tribunals may apply the law differently in concrete cases. More importantly, the authority of international tribunals to address claims of violation with finality is established on treaty lines and is therefore limited and asymmetrical. The procedure and remedies tribunals offer also vary, and complainants will find incentives to frame their cases to maximize their litigation outcomes. Hence, while forum shopping relates to the broader issue of fragmentation of international law, it is necessary to go beyond substantive law and analyze existing procedural mechanisms that can promote links between the various international tribunals and proceedings before them. This study draws on scholarship focused on the applicability of norms to coordinate the exercise of jurisdiction by international tribunals,[22] while taking a step back to look

international: cours générale de droit international public,' 297 *Recueil des cours* (2000) 1; Thomas Buergenthal, 'Proliferation of International Courts and Tribunals: Is It Good or Bad?' 14 *LJIL* (2001) 267; Shane Spelliscy, 'The Proliferation of International Tribunals: A Chink in the Armor,' 40 *Colum J Transnat'l L* (2001) 143; SFDI, *La juridictionnalisation du droit international* (Paris: Pedone, 2003); Gilbert Guillaume, 'Proliferation of International Courts: A Blueprint for Action,' 2 *JI Crim Just* (2004) 300; Pemmaraju Rao, 'Multiple International Judicial Forums: a Reflection of the Growing Strength of International Law or its Fragmentation?' 25 *MJIL* (2004) 929; Rosa Riquelme Cortado, *Derecho Internacional: Entre un Orden Global y Fragmentado* (Madrid: Ortega y Gasset, 2005).

[21] International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (2006), Report of the Study Group, UN doc. A/CN.4/L.682.

[22] See, for example, Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press, 2003); Andrea Gattini, 'Un regard procédural sur la fragmentation du droit international,' 110 *RGDIP* (2006) 303; Vaughan Lowe, 'Overlapping Jurisdictions in International Courts and Tribunals,' 20 *Australian*

at the procedural techniques through which defendants and adjudicators generally utilize those norms in the context of proceedings to foster coordination.

The procedural angle adopted here also supplements an emerging scholarly call for international adjudicators to consider themselves as part of a "global community"[23] guided by a cosmopolitan conception of the rule of law.[24] Legal scholars from different perspectives have agreed that the fate of the international judiciary lies ultimately in the hands of the adjudicators.[25] If adjudicators perceive their function through a perspective of identity, that is, as judges rather than through allegiances to specific substantive agendas,[26] then the task of jurisdictional and procedural coordination may come within reach. International adjudicators, just as domestic judges, fulfill a common

YBIL (1999) 191; Joost Pauwelyn and Luiz Eduardo Salles: 'Forum Shopping Before International Tribunals: (Real) Concerns, (Im)Possible Solutions,' 42 *Cornell ILJ* (2009) 77; August Reinisch, 'The Use and Limits of *Res Judicata* and *Lis Pendens* as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes,' 3 *LPICT* (2004) 37. See also, focusing on specific regimes, Helfer, 'Forum Shopping for Human Rights'; Joost Pauwelyn, 'How to a Win World Trade Organization Dispute Based on Non-World Trade Organization Law? Questions of Jurisdiction and Merits,' 37 *JWT* (2003) 997; Kyung Kwak and Gabrielle Marceau, 'Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements,' in Lorand Bartels and Federico Ortino (eds.), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press, 2006) 465; Giles Cuniberti, 'Parallel Litigation and Foreign Investment Dispute Settlement,' 21 *ICSID Rev* (2006) 381.

[23] Anne-Marie Slaughter, 'A Global Community of Courts,' 44 *HILJ* (2003) 191.

[24] Campbell McLachlan, Lis Pendens *in International Litigation* (Leiden: Martinus Nijhoff, 2009).

[25] See Georges Abi-Saab, 'Whither the Judicial Function? Concluding Remarks,' in Laurence Boisson de Chazournes, Cesare Romano and Ruth Mackenzie (eds.), *International Organizations and International Dispute Settlement: Trends and Prospects*, (New York: Transnational Publishers, 2002) 241, at 247: "In sum, it all depends on the epistemic community of those who act as judges, in affirming what the judicial function is, what its limits are, and what are its incompressible minimum requirements." See also Gilbert Guillaume, 'Préface,' in Olivier Delas *et al.* (eds.), *Les juridictions internationales: complémentarité ou concurrence?* (Brussels: Bruylant, 2005) vii; Charles Koch Jr, 'Judicial Dialogue for Legal Multiculturalism,' 25 *MJIL* (2004) 879; Jenny Martinez, 'Towards an International Judicial System,' 56 *Stanf L Rev* (2004) 429.

[26] See the cautionary notes of Martti Koskenniemi and Paivi Leïno, 'Fragmentation of International Law? Postmodern Anxieties,' 15 *LJIL* (2002) 553 and Andreas Fischer-Lescano and Gunther Teubner, 'Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law,' 25 *MJIL* (2004) 999, which underscore the limits to the compatibilization of different rationalities or policies inbuilt and advanced by different regimes, including through the work of adjudicators.

function – to decide legal disputes – through the use of a common code, the binary code of legality/illegality.[27] It may be circular, but the essential thing about judges is that they are judges.[28] And, as Anne-Marie Slaughter puts it, if international courts and tribunals look at each other from that "perspective of identity" rather than from a "perspective of difference," then "the power shifts from the dispute resolvers to the disputes themselves, and to the common values that all judges share in guaranteeing litigant rights and safeguarding an efficient and effective system."[29] If this mindset prevails, it may play a fundamental guiding role. Yet, it is necessary to take it beyond the realm of "judicial sisterhood," to jump from broad notions of a common judicial enterprise, which reflect at best a loose inclination for systematization, to coordination in practice.[30] This simply cannot be done without an understanding of how the existing procedural techniques for coordination play out in international adjudication.

More specifically, certain international trade scholars have pointed to a technical deadlock preventing procedural coordination between WTO and preferential trade agreement dispute settlement. On the practical front, North American Free Trade Agreement (NAFTA) members have shied away from challenging each other's selection of the WTO, when an argument could be made that the NAFTA agreement itself determined that certain disputes be brought before NAFTA, not the WTO. This book takes issue with the apparent limitation of WTO dispute settlement to recognize forum selection clauses in preferential trade agreements allegedly because the WTO's "limited jurisdiction" or "exclusive jurisdiction" deters a solution to jurisdictional overlaps. It

[27] See generally Niklas Luhmann, *Law as a Social System* (Cambridge University Press, 2004).

[28] See generally Daniel Terris, Cesare Romano and Leigh Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (Oxford University Press, 2007).

[29] Slaughter, 'Global Community of Courts,' at 217.

[30] Abi-Saab notices that "[u]ntil recently, there was a dearth of international judicial bodies with very little probability of their collision. There was no need for a system relating them into a constellation in a coherent manner. Now, we do need such a judicial system, but we do not dispose of the necessary institutional arrangements." See Abi-Saab, 'Whither the Judicial Function?' at 247. This study illustrates that some coordination is already possible even without major institutional reform. The framework developed here explains coordination without centralization of international tribunals. To some extent, it enables what Abi-Saab has called, in a previous piece, a "cumulative process" that may "condense and crystallize the different particles of consensual or authoritative jurisdictional empowerment into a certain structure." Abi-Saab, 'Fragmentation or Unification,' at 927.