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978-1-107-03596-6 - Forum Shopping in International Adjudication: The Role of Preliminary Objections

Luiz Eduardo Salles

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## **Forum Shopping in International Adjudication**

Forum shopping, which consists of strategic forum selection, parallel litigation, and serial litigation, is a phenomenon of growing importance in international adjudication. Preliminary objections (or a party's placement of conditions on the existence and development of the adjudicatory process) have been traditionally conceived as barriers to adjudication before single forums. This book discusses how adjudicators and parties may refer to questions of jurisdiction and admissibility in order to avoid conflicting decisions on overlapping cases, excessive exercises of jurisdiction, and the proliferation of litigation. It highlights an emerging, overlooked function of preliminary objections: transmission belts of procedure-regulating rules across the "international judiciary." Activating this often dormant, managerial function of preliminary objections would nurture coordination of otherwise independent and autonomous tribunals.

LUIZ EDUARDO SALLES is a partner at Barretto Ferreira e Brancher (BKBG) in São Paulo, where he practices international trade and competition law. He holds a PhD (summa cum laude) in International Law from the Graduate Institute of International and Development Studies, Geneva, and he has taught international law at several Brazilian universities.

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*À minha “Grande Família”*

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## Foreword

Watching a student brilliantly defend a doctoral thesis is a professor's delight. To witness the upgrading of that thesis to a sophisticated, practice-oriented monograph marketed by one of the world's most prestigious legal publishing houses truly marks an occasion. Dr Salles has achieved both.

Fragmentation of international law and forum shopping before a proliferating number of international tribunals are surely not novel topics. To write a book about them, after nearly twenty years of heated debate, is daring. What news can be added?

This book does break new ground and will, no doubt, become a reference work for both academics and practitioners. Rather than taking a normative stand on fragmentation and proliferation, Salles takes a pragmatic, procedural turn, looking for coordinated solutions under international law as it stands today.

This is the first major work that combines two traditional legal debates in international law: forum shopping and – a topic even older than forum shopping and too often neglected today – preliminary objections.

In a world of few international tribunals (think of the pre-1990s age), preliminary objections were the internationalist's nightmare: procedural shields invoked by sovereignty-conscious defendants aimed at blocking the legal adjudication of international disputes. Today, in a world of many tribunals, preliminary objections re-emerge as coordination tools or transmission belts to divide and coordinate the operation of an increasing diversity of tribunals. Offering procedural-technical tools such as inadmissibility of claims (notwithstanding jurisdiction of the tribunal) or stay of proceedings awaiting the outcome before another tribunal, preliminary questions offer a focal point for

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managing the international judiciary, case-by-case, “nurturing procedural cosmopolitanism in international adjudication.” As Dr Salles puts it: “Procedure is the filter for forum shopping activity, and preliminary questions referring to jurisdiction, action and procedure in a narrow sense are the filtering elements.” This is a world where the distinction between, for example, jurisdiction (tribunal-centered) and admissibility (claim-centered), “makes a difference.”

The book’s uniqueness further resides in its scope: drawing together experiences and insights from all relevant branches of international law, including the ICJ, WTO law, investor-state arbitration, and the law of the sea.

Starting with the original concerns of forum shopping (some party-driven, others system-wide) and ending with the coordination tools it proposes (abstention, aggregation, and preclusion norms), the book takes a hands-on, solutions-oriented approach. Construing international law as ultimately a single, albeit extremely diverse, “system” of law, the book rightly highlights the inherent jurisdiction or power of international tribunals to sort out overlaps, dismiss, or stay a proceeding, even though the tribunal may be operating to enforce a limited set of treaty rules, such as WTO-covered agreements only.

Salles forces us to shift our attention from substantive, often value-driven debates on fragmentation, conflict of norms, and forum shopping, to a procedural, pragmatic approach, to be decided case-by-case but following general rules of thumb. As he puts it, “admissibility shifts the focus of analysis from the architecture of the international judiciary or overt clashes of legal regimes to the preclusive effects of procedural norms on litigation strategies.”

This book brings us considerably closer to implementing the idea of an international judiciary at the service of both the disputing parties and the overall system of international law.

Joost Pauwelyn

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# Acronyms and abbreviations

ACHR	American Convention on Human Rights
ACtHPR	African Court on Human and Peoples' Rights
<i>Afr YBIL</i>	<i>African Yearbook of International Law</i>
AJCL	<i>American Journal of Comparative Law</i>
AJIL	<i>American Journal of International Law</i>
<i>Arb Int'l</i>	<i>Arbitration International</i>
<i>Arch Phil D</i>	<i>Archives de philosophie du droit</i>
<i>Australian YBIL</i>	<i>Australian Yearbook of International Law</i>
<i>Berkeley JIL</i>	<i>Berkeley Journal of International Law</i>
BIT	Bilateral Investment Treaty
BYBIL	<i>British Yearbook of International Law</i>
CCJ	Caribbean Court of Justice
CCSBT	Convention for the Conservation of Southern Bluefin Tuna
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CETS	<i>Council of Europe Treaty Series</i>
<i>Chi J Int'l L</i>	<i>Chicago Journal of International Law</i>
CJAC	Court of Justice of the Andean Community
<i>Colum J Transnat'l L</i>	<i>Columbia Journal of Transnational Law</i>
<i>Cornell ILJ</i>	<i>Cornell International Law Journal</i>
CTEI	Center for Trade and Economic Integration
<i>Curr Leg Probs</i>	<i>Current Legal Problems</i>
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes/Dispute Settlement Understanding (WTO)
<i>Duke J Comp&amp;Int'l L</i>	<i>Duke Journal of Comparative and International Law</i>

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<i>Duke LJ</i>	<i>Duke Law Journal</i>
EC	European Community/European Communities
ECHR	European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms)
ECtHR	European Court of Human Rights
ECJ	European Court of Justice/Court of Justice of the European Union
ECOWAS	Economic Community of West African States
ed./eds.	editor/editors
edn	edition
EEC	European Economic Community
EFTA	European Free Trade Association
<i>EJIL</i>	<i>European Journal of International Law</i>
<i>Emory LJ</i>	<i>Emory Law Journal</i>
EU	European Union
EURATOM	European Atomic Energy Community
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
<i>Geo Wash ILR</i>	<i>George Washington International Law Review</i>
<i>German L J</i>	<i>German Law Journal</i>
<i>GTCJ</i>	<i>Global Trade and Customs Journal</i>
<i>Harv L Rev</i>	<i>Harvard Law Review</i>
<i>Hastings Int'l Comp LR</i>	<i>Hastings International and Comparative Law Review</i>
<i>HILJ</i>	<i>Harvard International Law Journal</i>
HRC	Human Rights Committee
IACtHR	Inter American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
<i>ICLQ</i>	<i>International and Comparative Law Quarterly</i>
ICSID	International Centre for the Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
<i>ICSID Rev</i>	<i>ICSID Review</i>

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ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILM	<i>International Legal Materials</i>
ILR	<i>International Law Reports</i>
Int'l Lawyer	<i>International Lawyer</i>
IO	<i>International Organization</i>
ITLOS	International Tribunal on the Law of the Sea
IUHEI	Institut universitaire de hautes études internationales
JI Crim Just	<i>Journal of International Criminal Justice</i>
JIDS	<i>Journal of International Dispute Settlement</i>
JIEL	<i>Journal of International Economic Law</i>
JWIT	<i>Journal of World Investment and Trade</i>
JWT	<i>Journal of World Trade</i>
LGDJ	Librairie générale de droit et jurisprudence
LJIL	<i>Leiden Journal of International Law</i>
LPICT	<i>Law and Practice of International Courts and Tribunals</i>
L Policy Int'l Bus	<i>Law and Policy in International Business</i>
Max Planck YBIL	<i>Max Planck Yearbook of International Law</i>
Max Planck YB UN L	<i>Max Planck Yearbook of United Nations' Law</i>
McGill LJ	<i>McGill Law Journal</i>
Mel JIL	<i>Melbourne Journal of International Law</i>
MERCOSUR	Southern Common Market
MFN	Most Favored Nation
Minn JGT	<i>Minnesota Journal of Global Trade</i>
Minn L Rev	<i>Minnesota Law Review</i>
MJIL	<i>Michigan Journal of International Law</i>
NAFTA	North American Free Trade Agreement
NILR	<i>Netherlands International Law Review</i>
Nw J Int'l L Bus	<i>Northwestern Journal of International Law &amp; Business</i>
Nw ULR	<i>Northwestern University Law Review</i>
NYUJILP	<i>New York University Journal of International Law and Politics</i>
NYULR	<i>New York University Law Review</i>
OSCE	Organization for Security and Co-operation in Europe
OSPAR Convention	Convention for the Protection of the Marine Environment of the North-East Atlantic
PCA	Permanent Court of Arbitration

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PCIJ	Permanent Court of International Justice
PRT	Permanent Review Tribunal (MERCOSUR)
RBDI	<i>Revue belge de droit international</i>
RGDIP	<i>Revue générale de droit international public</i>
RHDI	<i>Revue hellénique de droit international</i>
RTA	Regional Trade Agreement
<i>S Cal L R</i>	<i>Southern California Law Review</i>
SCM Agreement	Agreement on Subsidies and Countervailing Measures (WTO)
SFDI	Société française pour le droit international
SPS Agreement	Agreement on Sanitary and Phytosanitary Measures (WTO)
<i>Stanf L Rev</i>	<i>Stanford Law Review</i>
<i>Syracuse LR</i>	<i>Syracuse Law Review</i>
TBT Agreement	Agreement on Technical Barriers to Trade (WTO)
<i>Texas ILJ</i>	<i>Texas International Law Journal</i>
<i>Trade L&amp;Dev</i>	<i>Trade Law and Development</i>
TRIPS (Agreement)	(Agreement on) Trade-Related Aspects of Intellectual Property Rights
<i>U Cal L Rev</i>	<i>University of California Law Review</i>
<i>U Chi L Rev</i>	<i>University of Chicago Law Review</i>
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
UNRIAA	<i>United Nations Reports of International Arbitral Awards</i>
UNTS	<i>United Nations Treaty Series</i>
<i>U Penn L Rev</i>	<i>University of Pennsylvania Law Review</i>
US	United States of America
<i>U Wash L Rev</i>	<i>University of Washington Law Review</i>
<i>Va JIL</i>	<i>Virginia Journal of International Law</i>
<i>Vand JIL</i>	<i>Vanderbilt Journal of International Law</i>
VCLT	Vienna Convention on the Law of Treaties
<i>W&amp;M L Rev</i>	<i>William and Mary Law Review</i>
WTO	World Trade Organization
WTR	<i>World Trade Review</i>
<i>Yale L J</i>	<i>Yale Law Journal</i>
<i>YB Comm Arb</i>	<i>Yearbook of Commercial Arbitration</i>

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- Case Concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, Decision of 14 March 1978, 18 UNRIAA (2006) 271. 269
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- 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). 3
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