

The most thought-provoking part of the book, from this reviewer's perspective, is the discussion of the relationship between the new climate change law and international trade law, raising "perhaps the most controversial and difficult interface issues" (p. 327). As soon as states (and the European Union) begin to implement the Paris Agreement in earnest, they will inevitably invoke and apply domestic legal instruments that are bound to have significant transnational effects—from carbon taxes to emission trading schemes, higher environmental standards, and subsidies (e.g., for renewable vs. fossil-fuel energy sources). In order not to penalize their own industries for complying with onerous new climate protection requirements (*vis-à-vis* potential free-riding foreign competitors), they are likely to resort to trade-related "response measures" such as import restrictions and border tax adjustments, any one of which might conflict with GATT/WTO free-trade rules and "disciplines." While Article 3.5 of the FCCC (followed by Article 2.3 of the Kyoto Protocol) neither condones nor forbids such unilateral measures, that ambivalent "hands-off approach" (p. 348) may no longer suffice in the event of trade disputes under the Paris Agreement, with its heightened reliance on "nationally determined" action. Rather than falling back on the Agreement's own dispute settlement rules,³⁶ a state challenging such measures would instead tend to turn to the World Trade Organization's Dispute Settlement Body, which has dealt with climate-related issues before,³⁷ and which is likely to "play

significant roles in shaping bottom-up climate action" (p. 349) in the future. In the turbulent legal climate ahead, the Bodansky-Brunnée-Rajamani treatise will provide a reliable manual for servicing the architectural edifice now in place.

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Questions of Jurisdiction and Admissibility Before International Courts. By Yuval Shany. Cambridge: Cambridge University Press, 2016. Pp. x, 174. Index. \$110, £69.99.
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One of the international law concepts most difficult for counsel to explain to their clients in international litigation and arbitration, whether they are public or private entities, is the difference between jurisdiction and admissibility. The same can be said for academics and their students of international procedural law. The puzzle comes down to this: if an international court has jurisdiction, how can it nonetheless refuse to hear the case as inadmissible? And what is the difference?

Professor Yuval Shany, the Hersch Lauterpacht Chair in International Law at the Law Faculty of the Hebrew University of Jerusalem, has come to the rescue with his latest book—*Questions of Jurisdiction and Admissibility Before International Courts*. After acknowledging the difficulty in explaining the difference, Shany immediately confronts the puzzle by offering, in the first paragraph of the Introduction, a (deceptively) simple functional definition: "jurisdictional rules define the legal powers of courts and . . . admissibility rules define their ability to refrain from exercising legal power" (p. 1).

Shany has long focused on jurisdiction issues facing international courts. His doctoral thesis, supervised by Professor Philippe Sands, is titled "The Competing Jurisdictions of International

programs, including those for "adaptation to climate change"); see also THE ROUTLEDGE HANDBOOK OF DISASTER RISK REDUCTION INCLUDING CLIMATE CHANGE ADAPTATION (Ilan Kelman, Jessica Mercer & Jean-Christophe Gaillard eds., 2017).

³⁶ Article 24 of the Paris Agreement incorporates by reference the traditional procedural options of FCCC Article 14 (which have never been used in practice).

³⁷ See pp. 343–47, on the cases concerning Canada's and India's renewable energy "feed-in tariffs"; Reports of the WTO Appellate Body: WT/DS412/AB/R (2013), WT/DS426/AB/R (2013), and WT/DS456/AB/R (2016).

Courts and Tribunals: Which Rules Govern?”¹ His 2014 book *Assessing the Effectiveness of International Courts* contains a chapter entitled “Jurisdictional Powers and Issues of Admissibility,” in which he observes that the existing practice and literature on jurisdiction suffer serious shortcomings.² Shany developed these ideas in his 2012 Sir Hersch Lauterpacht Memorial Lectures, which form the basis for this welcome new book.

In summary, Shany explains that jurisdictional conditions and admissibility rules are separate and meant to apply at different stages of proceedings. Applied with discipline, jurisdiction is the legal power delegated to an international court to adjudicate a dispute—if the parties fulfill the jurisdictional requirements, the court must exercise its jurisdiction unless there is a valid reason not to. Such valid reasons include admissibility rules, to be used only with discretion and exceptionally. The conceptual problems arise because discipline is often lacking.

Shany tackles the sources of this conceptual confusion. Going beyond his basic power-versus-restraint distinction, he examines the policies underlying the functional divide between jurisdictional and admissibility rules in international litigation. His theoretical prism is his interest in “the legal power that international courts can exercise in the international realm” (p. 1), with emphasis on instances in which courts should decline to exercise jurisdiction delegated to them in order to protect their legitimacy and/or effectiveness. For Shany, the theoretical fulcrum is case selection: with jurisdiction turning on delegated category-based case selection, for example, jurisdiction *ratione personae*, and admissibility on case-by-case selection based on specific factors. He identifies his belief in the “centrality of case selection for understanding and appreciating the scope of international judicial power” as the reason he focuses the book “almost exclusively on the implications of jurisdiction and admissibility rules for case selection” (p. 2). Fortunately for

the reader, Shany anchors his approach with detailed examples of case selection by international courts, primarily in International Court of Justice (ICJ) decisions, some of which receive his approval and others his (reasoned) criticism.

Practitioners and advocates, who are responsible for spotting and articulating the basis for jurisdictional versus admissibility objections in active cases, will be most aided by the author’s selection of cases illustrating proper and improper tribunal acceptance or dismissal of cases on jurisdictional versus admissibility grounds. Practitioners and advocates (outside the ICJ), however, are not expected to explain (or even necessarily understand) Shany’s in-depth analysis of the theoretical framework underlying jurisdiction versus admissibility. It is the academics who will most value his examination of the theoretical framework.

The book is thematically divided into three parts. Part I is a primarily theory-based overview of the concepts of jurisdiction. Parts II and III examine how international courts apply the rules of jurisdiction and admissibility, respectively, in specific cases. Shany unapologetically offers that his analysis in Parts II and III “is as much prescriptive as descriptive,” because he believes that his functional approach has “the potential to address many of the shortcomings found in the existing practice and literature and to explain in coherent terms the exercise of judicial power” (pp. 2–3).

Part I, entitled “The Concept of Jurisdiction and Admissibility in International Adjudication,” sets the stage for Parts II and III. Consisting of five chapters, it is the longest part of the book. The breadth and depth nonetheless are warranted, at least for practitioners and academics not well versed in the jurisdiction-admissibility puzzle.

Chapter 1 addresses international court jurisdiction as a policy tool in the hands of states, as the courts’ mandate providers, and in the hands of specific sets of disputing parties. Chapter 2 turns to jurisdiction as delegated authority, both foundational authority provided in the relevant treaty and specific authority later provided by a set of parties presenting a dispute to the

¹ YUVAL SHANY, *THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS* (2003).

² YUVAL SHANY, *ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS* (2014).

court. The relationship between foundational and specific jurisdiction, argues Shany, necessarily raise legitimacy and effectiveness implications for international courts. Such implications also arise if courts exceed their delegated authority, which leads to Chapter 3, where Shany examines the jurisdictional conditions limiting the delegated authority of international courts. He argues that “the authority-constraining effect of conditions such as consent, exhaustion of local remedies or no-multiplicity of proceedings renders them matters of jurisdiction and not of admissibility,” as embraced by the ICJ in *Armed Activities on the Territory of the Congo* (p. 38).³

In Chapter 4, Shany crosses into admissibility territory with this straightforward paragraph:

If jurisdiction reflects legal power—that is, the power to adjudicate a dispute—then I propose to treat rules of admissibility as pertaining to the terms permitting an international court to decline to exercise its legal powers. In other words, international courts may be authorized not only to decide a legal case, but also to decide not to decide it. (P. 47)

Admissibility—this power to decide not to decide—may be explicitly stated in a court’s constitutive instruments or derived implicitly under general international law. An instance of the former is Article 294 of the United Nations Convention on the Law of the Sea (UNCLOS), which directs the relevant court to determine “whether the claim constitutes an abuse of legal process or whether *prima facie* it is well founded.”⁴ As an instance of a claim found inadmissible on a general rule of international law, Shany cites *Monetary Gold*, where the ICJ considered the vital issue at stake to concern the responsibility of a third non-consenting state.⁵

³ *Armed Activities on the Territory of the Congo* (DRC v. Rwanda), Judgment, 2006 ICJ Rep. 6, 39–40 (Feb. 3).

⁴ United Nations Convention on the Law of the Sea, Art. 294, *opened for signature* Dec. 10, 1982, 1833 UNTS 397.

⁵ *Monetary Gold Removed from Rome in 1943* (It. v. Fr.), Judgment, 1954 ICJ Rep. 19, 32 (June 15).

In Chapter 5, Shany essentially assumes the perspective of the international judge facing case selection decisions amidst competing concerns implicating effectiveness and legitimacy. To describe the conflicting considerations briefly:

The advancement of the goals set for the court by its mandate providers may militate in favour of focusing judicial efforts on a specific category of cases, most likely to promote the normative agendas and policies consistent with such goals . . . [but] [a]t the same time, legitimacy concerns—that is, the need to preserve the image of international courts in the eyes of relevant constituencies as rule of law institutions who are themselves governed by law—may restrict the court’s freedom of manoeuvre in pursuit of a general normative agenda (such as promoting international peace and security or ending impunity). (Pp. 54–55)

Shany observes that effectiveness considerations may encourage a teleological interpretation of jurisdictional and admissibility guidelines, while legitimacy concerns may encourage textualism and formalism. Where courts are too flexible in their teleological approach to assert jurisdiction on a case-by-case basis, the result is erosion of the more disciplined category-based jurisdiction case selection rules. The result can be incoherence.

Shany moves into his thesis proper in Part II of the book: “Jurisdictional Decisions of International Courts.” He examines international court practice in applying jurisdiction rules from four viewpoints: jurisdiction *in abstracto* and *in concreto* (Chapter 6); jurisdiction as distinguished from substantive law (Chapter 7); jurisdiction as a form of category-based case selection (Chapter 8); and jurisdiction as individual case selection (Chapter 9).

Shany devotes most space and attention to Chapter 6, “Jurisdiction *In Abstracto* and *In Concreto*.” Drawing upon his explanation of foundational jurisdictional authority in Part I, he defines jurisdiction *in abstracto* as the general power to adjudicate categories of cases—

jurisdiction *ratione personae*, *ratione materiae*, *ratione temporis*, *ratione loci*—found in constitutive instruments and supplemented by general international law. Jurisdiction *in concreto*, like specific jurisdictional authority, is a combination of both general and specific conditions that bring a particular dispute within a court’s jurisdictional purview. The author surveys selected jurisprudence of the ICJ, International Criminal Court, European Court of Human Rights, and World Bank International Centre for Settlement of Investment Disputes (ICSID) tribunals, and their underlying treaties, to illustrate the separate and sometimes overlapping grants and exercise of jurisdiction *in abstracto* and *in concreto*.

Looking first at the preliminary nature of foundational jurisdiction *in abstracto*, Shany examines *Use of Force (NATO)*, which involved claims by Serbia and Montenegro against Belgium for wrongful use of force, raising issues of whether the Applicant was a member of the United Nations and a state party to the ICJ Statute at the relevant time. He squarely takes issue with the ICJ’s characterization of jurisdiction *ratione personae* over states as concerning “access” to the Court under Article 35 of the ICJ Statute. In Shany’s terminology, access—or the question of whether a state has conferred jurisdiction on a court, by consent—is merely one element of foundational jurisdiction *ratione personae*.⁶ Other jurisdictional *in abstracto* authorizations and conditions may also confer jurisdiction, for example, the authority of specialized agencies of the United Nations to request advisory opinions from the ICJ. Such requests may also raise questions of jurisdiction *ratione materiae* at the preliminary stage, as did the World Health Organization’s defective request for an advisory opinion in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*.⁷ This is particularly the case where a tribunal possesses specialized subject matter jurisdiction, as ICSID tribunals do.

⁶ *Legality of Use of Force (Serb. and Montenegro v. Belg.)*, Judgment, 2004 ICJ Rep. 279, 299 (Dec. 15).

⁷ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Judgment, Advisory Opinion, 1996 ICJ Rep. 66, 82 (July 8).

Shany submits that these considerations of jurisdiction *in abstracto* go beyond access. Although an international court has discretion on how to sequence its proceedings, it often will make most sense to decide foundational jurisdiction decisions prior to determining whether (and how) foundational jurisdiction, once accepted, should be exercised under tests of jurisdiction *in concreto* (and admissibility). Shany refers to the ICJ’s use of the term “access” as not fully capturing what he views as the hierarchical relationship between jurisdiction *in abstracto* and *in concreto*, observing that this vertical relationship reflects the legal relationship between the court’s mandate providers and unique disputing parties. He notes the ICJ’s acknowledgment in *Use of Force (NATO)* that “it must independently verify the existence of its foundational and specific jurisdiction, and the existence of the latter does not necessarily imply the existence of the former”⁸ (p. 73). However, in Shany’s view, the ICJ’s reasoning misses “the more profound point that specific jurisdiction derives from foundational jurisdiction and is governed by its terms” (*id.*). Jurisdiction *in concreto* cannot (properly) create new obligations for the mandate providers or extend the court’s foundational jurisdiction.

It is this jurisdictional hierarchy, Shany argues, that prevents “jurisdictional hijacking.” This is why international courts are required to examine *proprio moto*, within their category-based foundational jurisdiction framework, the suitability of specific disputes for resolution. He cites the ICJ’s Advisory Opinion on *ILOAT/IFAD* as an example of an (inappropriately) “successful attempt to ‘hijack’ the jurisdiction of the ICJ,”⁹ and its Advisory Opinion on *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* as an (appropriately) unsuccessful attempt (pp. 77–78).¹⁰ Developing his position that

⁸ *Legality of Use of Force*, *supra* note 6, at 295.

⁹ Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed Against the International Fund for Agricultural Development, Advisory Opinion, 2012 ICJ Rep. 10 (Feb. 1).

¹⁰ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, *supra* note 7, at 73.

foundational jurisdiction must trump specific jurisdiction, Shany dissects the ICJ's reasoning in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, questioning the validity of the Court's application of *res judicata*, in the context of Serbia and Montenegro's having raised one jurisdictional objection only after its other preliminary objections,¹¹ and offers similar views on selected decisions by the International Tribunal for the Law of the Sea and ICSID tribunals.

After covering the ICJ's treatment of jurisdiction vis-à-vis substantive law and the comparative approach of human rights courts in Chapter 7, Shany moves into the heart of his thesis in Chapters 8 and 9, titled "International Court Decisions on Jurisdiction as a Form of Category-Based Case selection" and "Individual Case-by-Case Selection," respectively. Shany argues that category-based case selection, which is derived from an international court's foundational jurisdiction or jurisdiction *in abstracto*—"inevitably contains strong discretionary features" (p. 104). Yet the courts do not explicitly discuss those discretionary policy considerations, submits Shany, in "many, and probably most, of these cases" (p. 105).

Focusing on certain ICJ cases that *do* include policy considerations, Shany identifies issues of fairness, judicial economy, perceived legitimacy (of the Court), future caseload, administration of justice, the maintenance of peace and security, and "'high politics' disputes" as having an impact upon the Court's jurisdictional case selection process (p. 109). He (critically) observes that policy considerations have led the ICJ in recent years to issue "rather bold provisional measures without a clear mandate for doing so," suggesting "a broader policy of judicial activism in the field of international peace and security" (p. 110). Express use of such considerations may lead to similar findings in future similar disputes, thereby developing category-based jurisdiction case selection jurisprudence for circumstances,

it would seem, better addressed in case-by-case admissibility determinations.

Moving from the ICJ to specialized courts, Shany notes that policy considerations may be influenced by a court's "in-built mission bias, which might lead adjudicators to embrace maximalist protective positions" in selecting categories of cases subject to their jurisdiction (p. 110). In one example, Shany advances that "investment tribunals often tend to construe the term investment broadly, and to downplay the significance of objections to jurisdiction based on contractual choice of forum provisions" (p. 112).¹² He supports this pronouncement with citations only to the *Fedax v. Venezuela* and *Vivendi v. Argentina* ICSID cases, ignoring that broad interpretations of the term "investment" by investment treaty tribunals generally correspond with broadly worded definitions in the applicable treaty, while an arbitration agreement in an investment contract is distinguishable from treaty arbitration clauses and the investor generally is not precluded from pursuing parallel claims.

Shifting (not entirely clearly) from category-based jurisdictional case selection in Chapter 8 to case-by-case jurisdictional case selection in Chapter 9, Shany accepts the inevitability of discretion in both types of case selection. The distinction is that the court's discretion in selecting cases by jurisdictional category is incidental to that delegated authority, while individual case selection is meant to be, and is by definition, discretionary. This case-by-case discretion may arise from express jurisdiction provisions, for example defining the class of disputes the court is authorized to adjudicate, or from general authority to exercise discretion, which Shany labels the power to determine admissibility. Difficulties arise when jurisdiction provisions are ambiguous and when courts abuse their discretion in admitting (or not) cases for policy reasons.

Shany argues that, just as in the merits phase of proceedings, courts should treat similar cases

¹¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn. & Herz. v. Serb. and Montenegro), Judgment, 2007 ICJ Rep. 43, 101–02 (Feb. 26).

¹² *Fedax NV v. Venezuela*, ICSID Case No. ARB/96/3, Decision, para. 25 (July 11, 1997); *Compania de Aguas del Aconquija SA and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, para. 101 (July 3, 2002).

alike at the jurisdictional phase. An inconsistent approach may suggest, rightly or wrongly, a change in the court's legal approach or that judges are engaging in specific case selection when interpreting a general jurisdictional provision. Shany uses the series of ICJ cases involving questions of jurisdiction over Yugoslavia from 1995 to 2015 as "prime examples of inconsistent law interpretation and application, suggesting resort by the Court to specific case selection in the course of the exercise of its interpretive powers" (pp. 116–20). He argues that, while the Court's specific case selection might have been motivated by well-intentioned political and reputational concerns, legitimacy must be balanced with effectiveness.

To his credit, Shany concludes a somewhat confusing discussion in Chapter 9 by stating: "Just to be clear, there is nothing inherently problematic with a case-by-case approach to the exercise of jurisdiction" (p. 124). He cautions, however, that "selective application of *jurisdictional* provisions may detract from the legitimacy of international courts and erode respect for the rule of law in international relations" (emphasis added) (p. 125). By this point in the book, the reader understands that such selectivity is better reserved for admissibility decisions.

Shany turns his full attention to admissibility in Part III, "Questions of Admissibility Before International Courts." Chapter 10 is focused on what Shany describes as the "taxonomical challenge" of distinguishing admissibility from jurisdiction (p. 129). He opens with the understatement that the literature and case law have "sometimes been less than clear, and at times the very need for offering a distinction between the two concepts has been questioned" (p. 129). His prime example is the PCIJ's reference in *Mavrommatis Palestine Concessions* to "competence" and "jurisdiction" as synonymous.¹³

Shany's position—and, indeed, the very reason for the book—is that the distinction between jurisdiction and admissibility does serve a useful practical and analytical role. He criticizes the

overly simple "common denominator" of past attempts to make the distinction on the basis that jurisdiction addresses more fundamental issues than admissibility (p. 130). Consonant with his thesis, the more useful divide is between the power to adjudicate and the power *not* to exercise the power to adjudicate. As questions of admissibility *presume* the existence of jurisdiction, there must be a separate investigation into whether valid reasons exist to decline that jurisdiction.

The balance of Chapter 10 explores this presumption approach. It first looks at the application of the distinction to jurisdictional conditions or limitations, such as in exceptional circumstances, which may be unhelpfully blurred with admissibility. In this context, Shany argues that the requirement of exhaustion of remedies, usually treated as an admissibility factor, is more appropriately a jurisdictional category. This argument may stand up in relation to ICJ practice, but it reflects less than a full appreciation of the conflicting investment treaty decisions and awards addressing this preliminary objection.

Shany canvasses why an international court might choose to decline established jurisdiction, discussing the potential policy considerations of preserving legality and protecting judicial function. This segues to the thorny practical issue of sequencing jurisdiction and admissibility objections: must jurisdiction be decided before admissibility? Shany takes the view that a strict sequential order requires the court to set rigid stages for each type of objection, and thereby might preclude it from dismissing obviously inadmissible claims before unnecessarily deciding complex jurisdictional issues.

The book concludes with Chapter 11, "Admissibility as a Policy Tool." Shany turns first, appropriately, to considerations of "judicial propriety." Where an international court is seized with a case threatening its independence, impartiality or other traits underlying its role as guardian of the rule of law, or might contradict an important principle of international law, it should arguably have the power to defend itself from being "dragged down a harmful procedural road" (p. 149). As an example supporting his

¹³ *Mavrommatis Palestine Concessions* (Greece v. GB), Judgment, 1924 PCIJ (ser. A) No. 2, at 10 (Aug. 30).

argument that this defense mechanism is among the inherent powers of courts, he flags Article 35(3)(a) of the European Convention on Human Rights (ECHR), which allows the European Court of Human Rights (ECtHR) to reject applications as inadmissible if they constitute an abuse of the right of individual application and thereby avoid proceedings that may be unfair or lead to unjust results.

Chapter 11 also considers admissibility as an effectiveness tool, as a way for an international court to attain its broader goals. Shany flags how admissibility decisions may be triggered by policy considerations, for example, the court's substantive mandate, institutional welfare, or efficiency goals. As an example, he cites the ECtHR's practice of summarily dismissing manifestly ill-founded applications that do not raise significant ECHR issues, in order to prioritize cases in which decisions may improve protection of human rights.

Shany next assesses the use of admissibility as a jurisdiction-regulating measure, meaning "a specific case-selection method informed by the availability of other dispute-settlement or problem-solving forums" (pp. 158–59). He acknowledges that this practice appears to be limited and may conflict with an international court's mission to resolve disputes. He speculates that one reason the ICJ has only "timidly" applied its powers to decline jurisdiction may be "its institutional interest in retaining relevance in high-profile conflicts implicating international peace and security, and to strengthen the previously marginalized role of international law in such conflicts" (p. 163).

To conclude, the major contribution of Shany's new book is its integration of the array of issues that make up the challenging—indeed, puzzling—array of preliminary issues in international adjudication, and the innovative way in which he organizes and reorganizes them.

The most likely criticism is that Part III should have been expanded, because the concept of admissibility is less-explored and more elusive than jurisdiction. One part of Shany's admissibility thesis that particularly warrants further examination is, for lack of a better denominator, his

"erosion" concept. In addition to opining that certain issues commonly categorized under admissibility—for example, exhaustion of local remedies—are inherently jurisdictional, he observes that the correct distinction can erode over time as specific case-based admissibility decisions multiply. This can result in category-based case selection (appropriate for jurisdiction) at the *admissibility* level.

Practitioners and advocates need not go far beyond Shany's functional definitions of jurisdiction and admissibility, aided by the illustrations he offers from international jurisprudence. Academics will benefit from his detailed policy discussions and analysis. All alike can hope for a further work focused primarily on admissibility.

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Building International Investment Law: The First 50 Years of ICSID. Edited by Meg Kinnear, Geraldine R. Fischer, Jara Mínguez Almeida, Luisa Fernanda Torres and Mairée Uran Bidegain. Alphan aan den Rijn: Wolters Kluwer, 2015. Pp. xlix, 776. Index. \$263. doi:10.1017/ajil.2017.68

The World Bank's Convention on the Settlement of Investment Disputes Between States and Nationals of Other States has been ratified by 153 states. "[The International Centre for Settlement of Investment Disputes (ICSID)] is the premier international investment arbitration facility in the world, having administered more than 545 cases with parties, counsel, arbitrators and conciliators from virtually every country in the world" (preface, p. li). This celebratory collection of essays by outstanding practitioners and scholars of ICSID is an invaluable analysis of the landmark cases of ICSID's first fifty years.

"Each chapter in this book looks at an international investment law topic through the lens of one or more leading cases. It considers what the case held, how it has been applied, and its overall