Association,[8] this author discredits ISDS as a rule of law breakdown and a neo-liberal privilege of foreign investors that is, moreover, hard to reconcile with CJEU case law on external jurisdictional bodies. Less critical is Dias Simoes in Chapter 14 when he describes the transparency policy implemented by the EU in its TTIP negotiations. I share his assessment when he maintains that 'while the EU Commission has adopted an unprecedented standard of transparency in the negotiations, opposition to the TTIP is unlikely to wane in the near future'[9] since a certain degree of privacy is necessary for any fruitful international negotiation.[10]

Two particularly relevant case analyzes bring the book to an end: A study of the investment relations between the EU and Russia (Trunk-Federova, Chapter 15) and between the EU and China (Zhang, Chapter 16). Both chapters analyze the feasibility of and the legal and political obstacles to a future investment agreement between the EU and each of these two countries. Their content is more speculative despite the fact that an EU-China investment agreement has been under negotiation since 2013.

The foregoing description clearly shows that the book points to the state of the art in EU investment policy. Drafted immediately after Opinion 2/15,[11] it goes through all the investment policy options the EU will have to articulate in the near future with a particular in-depth analysis of the Multilateral Investment Court proposal. Some authors are closer to the EU Commission in their arguments while others voice sharp criticism of the EU proposals and of ISDS in general. Thus, the reader will find different but equally learned perspectives on EU investment policy, including those of two of the EU partners (Rusia and China). In sum, this book is an excellent work to keep the reader up to date in the quickly evolving landscape of EU investment regulation and it is suitable for any scholar specializing in EU investment law.

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Yuval Shany, *Questions of Jurisdiction and Admissibility before International Courts*, Cambridge, Cambridge University Press, 2016, 166 pp., ISBN 9781107038790 (hb), $110,00

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The book *Questions of Jurisdiction and Admissibility before International Courts* is based on a lecture series delivered by Yuval Shany in the Lauterpacht Centre for International Law at the University of Cambridge during the spring of 2012. In this

8 German Magistrates Association, Opinion on the establishment of an investment tribunal in TTIP, No 04/16, February 2016, available at www.foeeurope.org/sites/default/files/eu-us_trade_deal/2016/english_version_deutsche_richterbund_opinion_ics_feb2016.pdf.
9 Fach Gómez, *supra* note 1, at 374.
10 A. Bianchi and A. Peters (eds.), *Transparency in International Law* (2013), 75–220.
11 Opinion of the Court (Full Court) of 16 May 2017 (EU:C:2017:376).
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book, the author discusses jurisdiction and admissibility as aspects of the legal power of international courts and tribunals on the international plane. At the outset, he explains that a consequence of these legal powers is the authority of international courts to choose the cases they pursue ('case selection'). In Shany's view, this is one of the most important ways in which courts influence international law and international relations.

The book contains three parts. Part I engages with a theoretical analysis of the concepts of jurisdiction and admissibility as policy tools. In this context, rules of jurisdiction are perceived as a means by which the parties establishing a court ('mandate providers') and the parties using the court ('disputing parties') control its scope of judicial operation and ultimately its functional utility. Rules of admissibility are defined as instruments that allow international courts to resist attempts to use them in ways they consider inappropriate or harmful to their institutional interests or those of their constituencies.[1] He then turns to an explanation of the advantages and disadvantages of resorting to international adjudication of disputes from the perspective of effectiveness and legitimacy. This part is a useful introduction to the rest of the work, although sometimes too concise. The work would benefit here from a succinct exposition of the meaning of effectiveness.

Subsequently, the author explains jurisdiction as delegated authority, starting from the notions of 'foundational' and 'specific' jurisdiction first proposed in his standard-setting work on the effectiveness of international courts.[2] He explains that delegation is broadly considered the basis of international courts' jurisdiction. However, he also clarifies that this approach is not entirely uncontroversial; how can a state delegate to an international court the authority to decide upon another state, when pursuant to the *par in parem* principle such power is not vested in it to begin with? In his view, this riddle can be solved by a reconceptualization of the precise object of delegation. In short, Shany explains that states do not delegate to international courts judicial or adjudicative power *per se* but rather the regulatory power of decision-making. Put differently, states delegate to international courts the power of auto-interpretation or auto-determination previously held by them as a manifestation of state sovereignty. Such delegation, however, is conditional, in that international courts are mandated to reach their decisions only through a judicial methodology.[3] Here, Shany seems to build on the obvious (i.e., that courts should not make politically motivated decisions), to reconceptualize the delegation theory, in order to avoid some difficulties inherent in its operation due to the principle of sovereign equality of states. By distinguishing between adjudicative power and regulatory/decision-making power, Shany's explanation offers new insights into the function of delegation on the international plane, one that is consistent with the role of international courts either as agents of states or as their trustees.[4] This position is interesting; however, it is premised on the idea that states have a power of auto-

1 Y. Shany, *Questions of Jurisdiction and Admissibility before the International Courts* (2015), 8.
2 Y. Shany, *Assessing the Effectiveness of International Courts* (2014), 69–70.
3 Shany, *supra* note 1, at 28.
4 M.A. Pollack and M. Elsig, 'Agents, Trustees and International Courts: The Politics of Judicial Appointments at the World Trade Organization', (2012) *European Journal of International Relations*, 1–25; see also K.J. Alter, 'Del-

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interpretation or auto-determination, which they delegate to international courts. Here, one may wonder whether such power actually exists, or what exactly happens to it, once a state has joined an international court. Conceivably, if such delegation took place, would it not entail that the delegating authority loses its power to auto-interpret in whole or in part? It is not clear how this approach is reflected in state practice, namely whether states consider themselves restrained in the existence or exercise of their power to proceed with regulatory decision-making solely by virtue of acceding to the jurisdiction of an international court. Arguably, it is an entirely different matter how such power of auto-interpretation enables an international organ, by way of delegation, to render legally binding decisions on other states, if none would otherwise exist. After all, whether in relation to judicial or regulatory matters, the power of decision-making would conflict with the principle of sovereign equality, were it to be used in order to impose obligations on a foreign state without its consent. Regardless of these questions, however, the idea is interesting and worthy of further exploration.

Part I of the book closes with chapters on jurisdiction as a power constraint on international courts, the role of admissibility in the exercise of judicial power, and the conflicting considerations governing the review of jurisdiction and admissibility. These chapters explain how different courts have tackled jurisdiction as a power constraint to their authority, the sources of admissibility, and finally the conflicting policy considerations in preliminary decisions of international courts. The last part is particularly important. The author explains that international courts usually choose their cases after balancing different policy considerations. On the one hand, effectiveness and goal-attainment may lead international judges to prioritize teleological considerations; on the other, legitimacy concerns may encourage a more textual and formal approach, requiring, for example, that there is a clear proof of consent to jurisdiction, in the absence of which the case is dismissed.[5] The choice of priority depends on the context. Furthermore, the author identifies a host of other considerations that may be decisive in a jurisdictional ruling. These are aptly labelled as 'the idiosyncratic institutional interest of the court in question'.[6] The conclusion is interesting, although, presumably, the category of 'idiosyncratic interest' may be just another way of politely explaining away decisions that are difficult for the author to square away in the two main categories previously identified. 'Difficult', however, does not mean impossible. For example, Shany presents two cases as examples, where the ICJ's conception of its jurisdiction went beyond what some commentators considered proper (*Nicaragua* v. *USA*) or took a more restrictive approach (*Kosovo* Advisory Opinion). However, while the categorization of these cases as 'idiosyncratic institutional' may be warranted from one point of view, it may be equally refuted from another. For example, even if the Court's position in *Nicaragua* v. *USA* was geared towards bringing more business to the Court's docket and the

egating to International Courts: Self-Binding vs. Other-Binding Delegation', (2008) 71 *Law and Contemporary Problems* 37–76.

5 Shany, *supra* note 1, at 55.

6 Shany, *supra* note 1, at 59.

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formulation of the *Kosovo* Advisory Opinion was aimed at limiting future requests, why is it that regulating the Court's case-load is not part of its core mission? Can it not be that, inherently, simply by being a court of law, part of the ICJ's mission is to ensure that, for example, the Court signals to states that certain questions are not proper for its determination and avoid a backlog to the detriment of cases properly before it? It is not clear whether, and if so, why, such consideration would be more 'idiosyncratic' and less efficient or legitimate.

Part II of the book addresses four main aspects of jurisdiction in four corresponding chapters.

The first discusses the implications arising from the distinction between foundational jurisdiction – or jurisdiction as established by the constituent instrument of a court – and specific jurisdiction, namely jurisdiction concerning the particular case at hand. The author examines jurisdiction through the interplay of these two 'interlocked sets of jurisdictional authorization and conditions' with emphasis on the jurisprudence of the International Court of Justice.[7] Against this background, the author presents two principal claims. He starts with the position that objections to 'foundational jurisdiction' – namely challenges to the Court's *in abstracto* jurisdictional parameters laid down by its constitution – should arguably enjoy procedural priority. He concedes that in practice this is probably not very important, but it would help to avoid conceptual confusion, particularly since specific jurisdictional authorizations and conditions in an instrument of specific jurisdiction derive their legal effect and are regulated by the ICJ Statute. By way of example the author presents the question of Serbia's 'access' to the ICJ in the notorious *Bosnia Genocide* and *NATO Use of Force* litigations[8] as a question of 'foundational jurisdiction' that needed to be dealt with before other, specific, jurisdictional issues. Secondly, the author takes the principled position that there is a hierarchical relationship between foundational and specific jurisdiction; the latter cannot be used to circumvent (expand or limit) the former, without explicit provision to that effect in the ICJ Statute. Attempts to do so are efforts to use the Court for purposes other than those for which it was established and are classified as jurisdictional 'hijacking'.[9] By way of example, the author refers here to a number of cases, such as the *ILOAT/IFAD* Advisory Opinion,[10] which he perceives as an attempt to use the ICJ as an appellate labour court. Shany's analysis is convincing in this part. His analysis on point is masterful and aptly supported by the ICJ's case load.

The second chapter of Part II is dedicated to the distinction between jurisdiction and substantive law. The author makes it clear that jurisdictional and substantive questions are often intertwined in the jurisprudence of international courts. He aptly notes that while a decision on the merits of a dispute logically presupposes an

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7 Shany, *supra* note 1, at 66.

8 *Application on the Convention and Punishment of the Crime of Genocide (Bosnia v. Serbia)*, Judgment of 26 February 2007, [2007] ICJ Rep. 43, at 85; *Legality on the Use of Force (Serbia and Montenegro v. Belgium)*, Judgment of 15 December 2004, [2004] ICJ Rep. 279, at 299.

9 Shany, *supra* note 1, at 75.

10 *Judgment No. 2867 of the Administrative Tribunal of the International Labor Organization Upon a Complaint Filed against the International Fund for Agricultural Development*, Advisory Opinion of 1 February 2012, [2012] ICJ Rep. 10.

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affirmative finding of jurisdiction, the issues are not always neatly distinguishable, not least because of their common factual and legal basis. The author then turns to the ICJ's approach to distinguish jurisdiction from substance, and juxtaposes it with the relevant jurisprudence of human rights bodies. Shany points out that judges enjoy discretion in deciding the order of the proceedings. He provides many examples of instances where questions of jurisdiction are joined to the merits, as well as instances where findings on the merits are included in decisions on jurisdiction. He considers that this practice holds considerable advantages in terms of procedural economy, but also advises caution in its implementation, lest it cause adverse effects to procedural rights of the parties. The author concludes this chapter with a discussion on the classification of claims as procedural or substantive, using the exhaustion of local remedies rule as a case study on point. As will be discussed later on, one of the main disadvantages of this Part is that the author avoids the question of classification of a certain issue as procedural or substantive, or whether this classification is useful to begin with.

In the third chapter of Part II the author attempts to identify patterns of international court decisions on jurisdiction. To start with, he accepts that disputing parties have a right to have their case adjudicated, and international courts a corresponding duty to adjudicate, provided that a case falls within the court's jurisdictional parameters. At the same time, he accepts that, international courts' decisions over their jurisdiction show strong discretionary features that, in effect, may lead to case-selection on the basis of a categorization of cases. This discretion is evidenced, according to Shany, in many ways; the control over their dockets and the ordering of the cases therein on the basis of importance for the institution's goals; the sequencing of certain aspects of a case and the summary dismissal of cases without hearing them fully; discretionary admissibility decisions on grounds of judicial propriety; and finally, the interpretation of jurisdictional provisions according to the prevailing policy considerations in each case. This latter aspect takes pride of place in Shany's work. By way of example, following a thorough examination of the ICJ's jurisprudence, he contends that the Court has shown a particular policy interest in addressing cases falling in the category of international peace and security. For more specialized courts, however, Shany argues that their jurisdictional provisions have been construed with an 'in-built mission bias',[11] which may lead to an endorsement of maximalist protective positions, as demonstrated by human rights decisions on jurisdiction. At the same time, however, he does note that even in 'specialized courts', there may be serious disagreements on what the dominant policy should be and how it should be implemented best. This is supported with case studies from the field of investment arbitration. Shany's analysis here focuses on their jurisdictional decisions. However, it is worth bearing in mind that states may also have a significant role to play in such determinations. It is difficult to square 'in-built mission bias' with *forum prorogatum* for example.[12] Taking an exclusive institutional view

[11] Shany, *supra* note 1, at 110.
[12] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment of 4 June 2008, [2008] ICJ Rep. 177, at 204–6, paras. 60–5.

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to such determinations may not necessarily provide a complete picture in certain circumstances.

The last chapter of Part II is by far the most interesting of this part, if not of the entire book. Here the author discusses jurisdiction as a tool for engaging in individual, case-by-case selection by international courts. The author explains that this practice has both advantages and disadvantages. On the one hand, individual case-by-case selection can be a potent policy tool of judicial effectiveness because it allows international courts the freedom to choose cases that will best promote their mission. On the other, it risks presenting international courts as selective arbiters who treat like cases differently. If consistency is a building block of legitimacy, inconsistencies in the interpretation of their jurisdictional provisions carry significant legitimacy costs for the institution and may minimize their effect in international relations. Against that backdrop, the author proceeds to discuss cases from the ICJ's docket. Among many cases presented in summary or extensively, his treatment of the ICJ cases involving the conflict in the Balkans is noteworthy. Shany discusses the Court's reasoning in upholding its jurisdiction in the *Bosnia Genocide* case, while declaring that it lacked jurisdiction to hear the *Use of Force* cases. He explains convincingly that the Court engaged in legal acrobatics on the question of jurisdiction over the UN membership of the state of former Yugoslavia and later Serbia. He aptly notes that the Court brought itself to an extremely difficult position by upholding jurisdiction through the controversial use of *res judicata* in *Bosnia Genocide*, by narrowly construing the concept of 'new facts' in the *Bosnia Genocide Revision* case and ultimately by declaring that it had jurisdiction in *Croatia* v. *Serbia* because it could ignore easily curable flaws in jurisdiction at the moment of *seisin* which could be remedied by resubmission of the case to the Court. He rightly criticizes the Court for inconsistency in its jurisprudence and examines how some of these concepts could have been applied *proprio motu* in the *Use of Force* cases. Ultimately, he considers that the Court's decisions can be explained through specific case selection considerations. Such could be the Court's 'little appetite' to deal with humanitarian intervention,[13] or the view that some judges may have had a 'victim-oriented' attitude towards potential victims of genocide. He further considers that, arguably, upholding jurisdiction against a state suspected of genocide while refusing jurisdiction against states trying to stop it, was the right thing to do for the Court's institutional reputation and its 'outcome legitimacy'.[14] One cannot but agree with Shany on his reading of these decisions as inconsistent and somewhat contradictory. However, at the risk of over simplification, this position begs the question; how is the suggestion that the Court was essentially pro-victim (and by implication anti-perpetrator or anti-Serbian) in its jurisdictional findings in order to preserve its 'outcome legitimacy' reconciled with the Court's final disposition of the cases? Surely, jurisdictional findings and the final decision contribute to the Court's outcome legitimacy. In hindsight, even if Shany is right and these considerations were prevalent at the time of the jurisdictional decision, today it may be questioned whether the

13 Shany, *supra* note 1, at 120.
14 Shany, *supra* note 1, at 121.

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Court's 'outcome legitimacy' was helped by its decision to engage in legal acrobatics to refuse jurisdiction in certain cases and keep jurisdiction over others, in which it ultimately found that a state did not commit genocide. This may be the case particularly with *Croatia* v. *Serbia*,[15] which took place well after the jurisdictional determinations in *Bosnia Genocide* and the *Use of Force* cases. It is unclear whether this decision was made in order to promote the Court's institutional reputation or in spite of it.

Part III of the book is dedicated to admissibility. It is separated into two sections; the taxonomical challenge, and admissibility as a policy tool. In the first, Shany defines admissibility as the power of international courts to refrain from exercising their adjudicative authority. In his view, the legal power of international courts to refuse to exercise their jurisdiction may be explicitly provided in their constitution or implicitly deduced by their inherent powers.[16] In making admissibility decisions, Shany notes that international courts are guided by certain underlying considerations, such as preserving legality (e.g., third-party rights) and protecting the judicial function. In closing this chapter, he explains the significance of the classification of an objection as one to the admissibility of a claim on two points; the sequencing of the objection in the judicial process, and the burden of proof. In the second chapter, Shany explains the use of admissibility as a policy tool by international courts. He identifies three categories: admissibility as a quintessential legitimacy tool, used to protect judicial propriety; admissibility as an effectiveness tool in the service of the institutional mission of international courts; and ultimately, admissibility as a jurisdiction-regulating tool, allowing the allocation of authority among overlapping jurisdictional claims from multiple international courts. This Part is enriched with a host of examples from the jurisprudence of a variety of international courts, aiming to clarify the criteria on the basis of which international courts use their discretionary power to declare cases inadmissible.

In many ways, this book builds upon and enriches the ideas laid down in Shany's earlier work on the effectiveness of international courts. Readers conversant with Shany's prolific scholarship may identify in these lecture series familiar themes, such as the different types of legitimacy of international courts,[17] or the fundamental concept of jurisdiction and its classifications.[18]

One of the main criticisms that can be formulated about this book is that its functional approach appears to take place along a 'legitimacy–effectiveness' axis. However, while the author spends considerable space explaining the concept of legitimacy at pages 17–19, it is only at page 42 that effectiveness is explained laconically as 'the ability of the Court to attain its norm-advancing goals', followed with a reference to the author's previous book on the effectiveness of international courts. To the reviewer's mind, the work under review would have benefited greatly from a clear – if brief – introductory review of effectiveness as well.

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15 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, Judgment of 18 November 2008, [2008] ICJ Rep. 412.

16 Shany, *supra* note 1, at 158.

17 Shany, *supra* note 1, at 143–5.

18 Shany, *supra* note 2.

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Secondly, the author considers that one of the unfortunate disadvantages of international litigation before international courts is the creation of pressure not to settle on the winning party. In the author's own words:

> it could be argued that the ICJ advisory opinions in the Western Sahara case and in the Wall in the Occupied Palestinian Territories case hardened the negotiating positions of the parties, favoured by the said opinions (Polisario and the Palestine Liberation Organization) in ways which made it more difficult for them to surrender their internationally recognised rights, notwithstanding their political and military weakness. If this is true, then the issuance of these two opinions might have complicated the political processes designed to settle the two conflicts, contributing to their perception as intractable in nature.[19]

In the reviewer's opinion, although the point is probably valid, the examples are not very helpful; it is not clear why political and military weakness should always require a surrender of internationally recognized rights to attain settlement, particularly when such rights are as fundamental (and scarce) as the right to self-determination of peoples in these occupied territories. Moreover, it is questionable whether the Court's judicial intervention in these cases made the difference between a long war or a fast peace, since the disputes in question already existed for a long time and were – arguably – already intractable at the time that the ICJ heard the relevant cases at the request of the UN General Assembly.[20]

Thirdly, it would have been very interesting to read the author's views on why he considers rules of jurisdiction to be rules of procedure. At page 98, the author discusses the difficulty in the classification of certain rules as 'jurisdictional or substantive' (while the heading refers to 'classifying claims as procedural or substantive'). Here, the work would have benefited from a succinct explanation of whether rules of jurisdiction are actually rules of procedure. Domestic courts do not always see eye-to-eye on this point,[21] and it would be interesting to read the author's opinion in the light of the *Jurisdictional Immunities* case.[22]

In conclusion, this book investigates jurisdiction and admissibility as policy tools in the service of the case selection function of international courts. Shany's declared hope was that this investigation would lead to more transparency in the criteria of the case selection process and ultimately more accountability for international judges. Any student of international law would immediately consider this a nigh impossible task. It is true that a careful study of many international decisions on

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[19] Shany, *supra* note 1, at 20–1 (references omitted).

[20] The question of Palestine has been pending since at least 1967, whereas the UN recognized Western Sahara as a non-self-governing territory in 1963. In detail for Palestine, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep. 136, at 166, paras. 71–3; for Western Sahara, E. Kassoti, 'The Front Polisario v. Council Case: The General Court, Völkerrechtsfreundlichkeit and the External Aspect of European Integration (First Part)', (2017) 2 *European Papers* 339, at 342–3.

[21] See, for example, *Erdal v. Council of Ministers*, Arbitragehof (Constitutional Court), Decision no. 73/2005, Oxford Reports on International Law in Domestic Courts, ILDC 9, (BE 2005) (20 April 2005) (Belg.), with comments by Cedric Ryngaert (rules of jurisdiction as substantive criminal law rules).

[22] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February 2012, [2012] ICJ Rep. 99, at 140, para. 93.

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jurisdiction and admissibility tends to leave the reader with the suspicion that the final outcome was influenced to varying degrees by unnamed considerations or, exceptionally, considerations that were mentioned only through sybillic and brief dicta. However, it is also true that these considerations are typically protected by the confidentiality of the deliberation room. In these circumstances, considering that the present work is not an 'insider's account' by a judge participating in the relevant ICJ/ECHR deliberations, the author's task would seem to be very difficult, simply because the evidence required to support his arguments might be unavailable or scarce. Nonetheless, Shany does not hesitate to tackle it head on, and with particular *gusto* to boot. Far from engaging in the accustomed hair-splitting usually associated with such topics, Shany's work takes an analytical look at the black box of case selection policies of international courts in an engaging and systematic manner. He investigates methodologically, word-to-word on occasion, a number of decisions, and through a process of meticulous analysis identifies patterns in judicial reasoning that allow him to construct a number of thought-provoking arguments. The result is a stimulating book. In fact, his root idea of dealing with jurisdiction and admissibility as functional policy tools makes this work stand out in the relevant literature. It departs from the usual accounts of jurisdiction as a nigh-mechanical, formal judicial process divorced from policy considerations. It offers refreshing insights in an otherwise overwhelmingly technical and widely explored subject. This perspective makes the book particularly valuable for all practitioners and academics interested in a broader understanding of the delicate balancing exercise underpinning the selection of cases by international courts.

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