BOOK REVIEWS

Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes

Wolfgang Alschner

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The International Investment Law *('IIL')* regime originates from the colonial and imperial activities of developed European states in the seventeenth century.[1] This regime has been associated with oppressive investment agreements and protections which operated to the determent of host-states' public policy objectives.[2] In light of this historic reality, and ongoing processes of decolonisation, the past two decades has seen significant efforts on the part of contracting states, international bodies, and academic institutions to reform 'old-generation' International Investment Agreements *('IIAs')* in favour of more detailed and host-state friendly new-generation *IIAs*.[3] Despite these significant reforms, the *IIL* regime remains 'easily the most controversial field of international law', with several recent arbitral awards suggesting that reforms have done little to secure host-state regulatory autonomy.[4] Within this historical context, Wolfgang Alschner's book, *Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes,* aims to provide both a highly detailed critique of the contemporary *IIL* arbitral regime and provide substantive proposals for reform.

Alschner's stated intention is to challenge the traditional narrative of *IIL* reform espoused in contemporary literature: that new-generation treaties

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[1] Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press, 2013) 17 – 122.

[2] Ibid 17 – 122; Jeanrique Fahner, 'The Contested History of International Investment Law: From a Problematic Past to Current Controversies' (2015) 17(1) *International Community Law Review* 373, 374.

[3] Wolfgang Alschner, *Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes* (Oxford University Press, 2022) 3.

[4] Ibid 3. See, eg, *Bear Creek Mining Corporation v Republic of Peru* (Award) (ICSID Arbitral Tribunal Case No 14/21, 30 November, 2017); *Eco Oro Minerals Corp. v Republic of Colombia* (CSID Case No. ARB/16/41, Ongoing).

have secured host-state regulatory autonomy.[5] Alschner posits that despite significant state-based reforms, the simultaneous presence and application of both new and old-generation *IIAs* within the *IIL* regime has caused arbitral tribunals to undermine the state-based innovation present in new-generation *IIAs*.[6] Such outcome, it is argued, flows from the combined forces of Most-Favoured-Nation *('MFN')* clauses, international customary law, and arbitral precedent which intertwines the interpretation of new and old-generation treaties and acts as a firebreak against reform.

Alschner's book is structured in three key sections. The first details the epistemological and methodological underpinnings of the text while also tracing the historical development of *IIA*s. In this section, multiple computational legal studies methods are used to map the development of each generation of *IIA* design.[7] Specifically, Alshner analyses over 3300 *IIA*s using 'natural language processing' and 'principal component analysis', which records the frequency of key terms within *IIA*s and highlights the key differences in substance, complexity, and comprehensiveness between new and old-generation treaties.[8] This process enables Alschner to draw clear distinctions between new and old-generation *IIA*s, serving as the empirical basis for the second section of the text where Alschner analyses how each *IIA* has been interpreted by tribunals.[9]

This first section highlights a key success of Alschner's work: the adoption of novel forms of legal research. For instance, the use of methods based on computational legal studies allows Alschner to manage large quantities of data in a consistent and coherent manner. In turn allowing him to conduct a uniquely systemic analysis of the *IIL* regime otherwise absent from scholarship.[10] Furthermore, as Alschner argues, this method allows 'treaties to speak for themselves', and provides a valuable contribution to an academic field dominated by deductive and theory-driven analysis of

[5] Alschner (n 3) 1.

[6] Ibid 41.

[7] Ibid 23–7.

[8] Ibid.

[9] Ibid.

[10] For instance, Alschner notes multiple examples of limited traditional studies including Mark Clodfelter, 'The Adaption of States to the Changing World of Investment Protection through Model BITs' (2009) 24(1) *Foreign Investment Law Journal* 165, among others.

the *IIL* regime.[11] Beyond computational legal studies, Aslchner's work commonly draws from multiple theoretical frameworks to contextualise his analysis, including classical contractual theory, economic theory, and complexity sciences. This mixture of both empirical and theoretical approaches forms the basis of a convincing and evidence-based argument.

In the second section, Alschner undertakes a highly detailed analysis of the first wave of arbitral decisions made under new-generation *IIAs*, concluding that the arbitral reasoning and awards mirror those rendered under old-generation *IIAs*. Alschner posits that this is a result of three factors. Firstly, *MFN* clauses have been interpreted widely by tribunals, allowing more favourable investor protections to be read into new-generation *IIAs*.[12] Secondly, host-state protections outlined in new-generation *IIAs* have been watered down through tribunals 'equating them with pre-existing customary international law flexibilities'.[13] Finally, the over reliance by tribunals on historic arbitral precedent rendered under old-generation *IIAs* has resulted in a highly conservative interpretation of key new-generation *IIA* provisions.[14]

This second section represents the most substantial part of the text and is meticulously researched and argued. Despite its rigorous detail, the text is highly accessible, and makes good use of case studies and practical examples when explaining complex concepts. However, a weakness of this part of the text is its lack of discussion of the fact that new-generation *IIAs* are only just beginning to be litigated. Ostensibly, the results and findings of this section may change substantially with the development of the law moving forward and a greater sample size of arbitral awards.[15]

The third and final section of Alschner's work provides three solutions to reform the *IIL* arbitral regime to refocus on new-generation *IIAs*. The first is that states should make better use of interpretive measures under public international law, for instance through the issuance of 'joint interpretations' or the application of the 'subsequent practice' doctrine by

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[11] Alschner (n 3) 23. Cf Miles (n 1). See, eg, Jonathan Bonnitcha, Large N Skovogaard Poulsen and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford University Press, 2017).

[12] Alschner (n 3) 2, 25.

[13] Ibid 154.

[14] Ibid 184.

[15] Ibid 41.

contracting states to *IIAs*.[16] The second proposal recommends that states initiate a regime of targeted renegotiation and consolidation of existing *IIA*s to limit the presence of historical agreements, and to highlight contemporary reforms.[17] Alschner argues for the adoption of a 'data-driven approach' so that 'legal analytics' can assist in identifying particular treaties or provisions with the greatest ability to provide systemic reform.[18] Finally, Alschner's third proposal for reform is perhaps the most significant, and suggests a multilateral reform to all *IIAs*, akin to that recently established within the international taxation regime.[19]

Despite the obvious practical utility of each of these proposals, as Alschner expressly recognises, his analysis does not consider how the power asymmetries present within the international community would impact the implementation of such proposals.[20] The failure to consider such factors represents the singular shortcoming of this section. As a rich body of literature demonstrates, the unequal relationship between developed and developing states within the *IIL* regime has historically led to unfair negotiations and *IIA* outcomes.[21] Ostensibly, the above reforms, involving broadscale renegotiation and reinterpretation, would be largely driven by developed states, which may have significant bearing on the effective implementation of the overall policy objectives of new-generation *IIAs*. How unequal bargaining power would potentially impact Alschner's recommendations for reform, and what options exist to mitigate these impacts, are unfortunately unaccounted for in this text.

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[16] Ibid 230.

[17] Ibid 245.

[18] Ibid 250.

[19] Ibid 269; See generally Ruth Mason, 'The Transformation of International Tax' (2020) 114(3) *American Journal of International Law* 353, 353-402.

[20] Alschner (n 3) 17.

[21] See generally, Alex Mills, 'The Balancing (and Unbalancing?) of Interests in International Investment Law and Arbitration' in Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press, 2014) 436.

Overall, Aslchner's work provides an important and timely contribution to *IIL* scholarship and offers a strong basis for substantial reform of the *IIL* arbitral regime. This text is accessible to students and experts alike. It should be considered essential reading for those wishing the understand the history and likely future of the *IIL* arbitral regime.

*George Grover**

* BSc-LLB (Hons) (University of Tasmania) Candidate and Editorial Board Member of the *University of Tasmania Law Review* for 2022.