productivity'. In the United States, policymakers ought to be wary of maintaining and extending the oppressive paternalism, surveillance, and social control that has defined many public programs. As Jamila Michener argues in her work on Medicaid, scholars and policymakers should listen to the experiences of those impacted by their policies and recognize how 'political processes fail to incorporate them as full and equal participants in American democratic practices'.[16] While I think the history of political and economic thought can help us consider how to critique and correct the paternalistic elements of public programs,[17] justifying social safety nets with 'secret knowledge' of their productivity gains risks continuing to create a dichotomy between people who deserve assistance and those who supposedly do not, long seen in the history of paternalism in public policy.[18] A more democratic approach to policymaking is particularly important in light of the increasing adoption of artificial intelligence by governments and private contractors alike.[19]

Despite these concerns, Pelc successfully offers not just a unique reimagining of political economy but a vision of liberalism 'in the service of countless individual uprisings'.[20] Much as Mill reckoned with the assumptions of his father and Bentham without rejecting them entirely, Pelc's new approach to political economy retains much of its broader tradition. His methodological eclecticism, combining rich interpretative work of historical texts with more recent social science and cultural analysis, recalls the discipline's foundational texts, such as Smith's and Mill's, which blended descriptive and normative arguments and attended to questions of aesthetics and moral philosophy. Pelc's reflections should encourage specialists to reconsider the history of political and economic thought as well as the moral and political assumptions that underlie even positivist research today. Nevertheless, pursuing his policy goals will require not just passion but also the intentional work of communal collaboration, beyond self-interest.

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

by Wolfgang Alschner
Oxford University Press

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A senior colleague of mine once noted something to the effect of: 'As a social scientist studying the politics of law and courts, it is hard not to feel like an imposter – I always fall asleep when I try

[16]J. Michener (2018) *Fragmented Democracy: Medicaid, Federalism, and Unequal Politics*. Cambridge: Cambridge University Press, 169.

[17]K.R. Collins (2020) 'Observed without Sympathy: Adam Smith on Inequality and Spectatorship', *American Journal of Political Science* 64(4), 1034–46, https://doi.org/10.1111/ajps.12544.

[18]J.Soss, R.C. Fording, and S.F. Schram (2011) *Disciplining the Poor: Neoliberal Paternalism and the Persistent Power of Race*. Chicago, IL: University of Chicago Press, 85–101.

[19]V. Eubanks (2019) *Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor*. New York, NY: Picador.

[20]Pelc, 37.

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to read legal texts.' My colleague's statement, while a bit exaggerated, points to an important point: Straddling the line between different academic disciplines – what we often call interdisciplinary work – is hard. There are many reasons for this, but two challenges stand out to me. First, different academic tribes have distinct communicative norms. Second, tribes differ in their views about how we best generate new knowledge. In short, what counts as a good text and what is seen as appropriate methods vary across disciplines. There are, however, a select few that seem to navigate these interdisciplinary challenges with ease. With his recent book, *Investment Arbitration and State-Driven Reform*, Wolfgang Alschner cements himself as a navigator extraordinaire of the seas of international economic law.

In the introduction to his book, Alschner situates himself within the current legitimacy crisis of international investment law. He notes that the crisis is driven by two criticisms. The first is procedural and concerns the use of international arbitration to solve investor–state disputes. The second is substantive and concerns the lack of balance between investment protection and host state sovereignty in investment agreements. States have responded to these criticisms by concluding a new generation of agreements. The new agreements address procedural concerns with transparency obligations, arbitrator codes of conduct, and, in the case of the European Union, replacing investment arbitration with a standing tribunal and appeal instance. On the substantive side, the new agreements include innovations to balance investment protection and states' right to regulate, such as new preambular language, clarifications of existing protections, and various carve-outs and exception clauses. It is the substantive innovations and their empirical effects that Alschner focuses on in *Investment Arbitration and State-Driven Reform*.

As both Alschner and I have discussed elsewhere (Alschner and Hui, 2019; Berge, 2020), introducing more precision, flexibility, and exceptions to investment agreements has not translated into more balanced outcomes in the investment regime. Alschner notes that commentators have made sense of the lack of impact in two ways. The first view sees it as temporary growing pains in a regime that is still finding its footing in a new world. The second view focuses on investment arbitration as the main structural obstacle for change, noting that arbitrators are unilaterally revolting against the new generation of investment agreements through their role as final arbiters in a regime with no real avenue for appellate review.

Alschner is neither as optimistic as the first group of commentators nor as convinced as the second group of commentators that procedural reform will solve underlying substantive issues in the investment regime. He advocates a third perspective: the main problem in the investment regime, he notes, is systemic bifurcation, that is, reformed agreements sitting alongside unreformed agreements. This bifurcation is problematic because the contents of old, outdated investment agreements can undermine innovations introduced in new agreements. Alschner's view is best summarized in his own words: '[W]e should think of the universe of investment agreements as an armada of steamships and slow sailboats forming a fleet that can only travel as quickly as the slowest ship' (11). In this treaty fleet, old investment agreements halt the impact of newer agreements.

The rest of the book is organized into three parts, which, when taken together, bolster Alschner's view that substantive bifurcation is the most fundamental obstacle to change in the investment regime. In Part I, Alschner provides a comprehensive picture of what sets new and old investment agreements apart, while also telling the history of the investment regime and how we got to where we are today. The two main messages in this part are that states have been proactive lawmakers rather than reactive litigants, and that the evolution of investment agreement design not only has been about lowering investment protection – it has also been about getting the balance within agreements just right.

In Chapter 1, Alschner introduces his text-as-data method and draws a temporal map of treaties that tracks the high-level evolution of rulemaking in the investment regime. He concludes by showing that new investment agreements have indeed produced old outcomes when applied in investor–state disputes. In Chapter 2, Alschner presents his theoretical point of departure –

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contract theory – and argues that contractual completeness is a useful framework to understand variations in investment agreement design. In Chapter 3, he shows how the investment regime and its underlying agreements have evolved from low to high levels of contractual completeness.

In Part II, Alschner investigates why new investment agreements have not produced new outcomes. He uses micro-level case data, macro-level treaty data, and contract theory to explain this conundrum. Overall, he paints a convincing empirical picture. While states have tried to rein in investment arbitrators' gap-filling powers (interpretative discretion) through increasing the contractual completeness of investment agreements, the arbitrators themselves have rolled back contractual completeness and created a 'firewall' against change.

In Chapter 4, Alschner zooms in on one component contributing to this firewall: The use of most favoured nation clauses in new agreements to import substantive provisions (with lower levels of contractual completeness) from old agreements. In Chapter 5, he presents another component: the use of customary international law to roll back more contractually complete treaty language in new agreements. Finally, in Chapter 6 he presents the perhaps most pervasive component of this firewall: arbitrators' use of precedent to root current interpretative practice in previous tribunals' readings of old agreements. In combination, Alschner convincingly shows that these three components result in a *de facto* lowering of contractual completeness of new investment agreements.

In Part III, Alschner looks forward and suggests three avenues to shift arbitrators' interpretative focus from old and contractually incomplete investment agreements to new agreements with more contractually complete language. In Chapter 7, he discusses how public international law principles create ample room to institute a more forward-looking reading of investment agreements. Contracting states are, for example, encouraged to use joint interpretative statements to align interpretation of old treaties with their current treaty practice. In Chapter 8, he discusses how renegotiation of old agreements, or replacing old, bilateral agreements with renegotiated regional instruments, is another way of updating the applicable rules in the investment regime. In doing so, he makes a very interesting suggestion: States could make use of data science to identify points of normative convergence that they can anchor renegotiations around. Finally, in Chapter 9, Alschner suggests that policy makers in the investment regime should look to the multilateral tax regime, and he discusses how the ongoing multilateral negotiation track at the United Nations Commission on International Trade Law could be used to update large stocks of outdated investment agreements.

Overall, Alschner makes a series of important contributions to the current debate about the future of international investment law. While he acknowledges the agency of other actors, he puts states front and centre in the reform debate in the investment treaty regime. Instead of seeing states as 'reactive litigants that change their treaties in response to interpretations by tribunals', he holds that '[i]nvestment law's evolution is best understood as proactive state-driven change that is being challenged by an arbitrator backlash' (2).

Alschner also makes a very important methodological point – one that empirical legal scholars in other disciplines should also adopt. He shows that we can draw interesting inferences about legal systems both by analyzing cases individually *and* by looking at quantitative trends in the use of legal language and interpretative patterns over time. His empirical approach is fascinating regardless of what academic discipline you come from. From the point of view of a legal scholar, Alschner highlights how the use of computational legal analysis (text-as-data) is a way to get around the cumbersome process of manually scaling legal texts. For social scientists, echoing a point once made by John Gerring (2012), Alschner highlights the value of mere description and of letting data inductively speak for itself without structuring analysis around *a priori* theoretical assumptions.

Alschner's book is also pedagogically structured. His use of clear and concise language, his intuitive structuring of arguments, and his seamless integration of advanced analysis in a compelling empirical narrative really encapsulates his ability to talk to different disciplines.

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Alschner also makes important suggestions that may guide practitioners, both on the state side and the arbitrator side of the table, in the next few years. For example, his point in Chapter 5 on how both arbitrators and respondent states have failed to understand and utilize the additive role of public policy exceptions in investment agreements is followed up with clear suggestions for how similar mistakes can be avoided in the future.

Moreover, while most will probably see Alschner's book as a contribution to the scholarly debate on reform in the investment regime, it could also be a valuable teaching resource. Combined with other interdisciplinary monographs such as Bonnitcha et al.'s (2017) textbook on the investment regime, Poulsen's (2015) textbook on investment agreements in the Global South, and St John's (2018) archival inquiry into the roots of international investment arbitration, Alschner's contribution could form the backbone of many graduate courses on investment law and the international political economy of investment.

Lastly, Alschner's book represents his wider empirical project very well. In many ways, it can be read as an early *magnus opum*, integrating key arguments and findings from his many influential publications in one comprehensive volume that covers both the history and future of the investment regime. However, what perhaps stands out the most about Alschner's contribution to the scholarly community is his data collection efforts and the way he has contributed to facilitating open-source databases that other scholars can draw upon (Alschner and Skougarevskiy, 2016; Alschner et al., 2018; Alschner et al., 2021).[1] In this book, he demonstrates nicely how we can use those databases to study the investment regime. Overall, *Investment Arbitration and State-Driven Reform* is a must-read if you are interested in the past, present, or future of the investment regime – regardless of what academic tribe you belong to.

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[1]See: http://mappinginvestmenttreaties.com/, https://edit.wti.org/document/investment-treaty/search and https://github.com/mappingtreaties/tota.

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