8

Dissecting Backlash

The Unarticulated Causes of Backlash and its Unintended Consequences

David Caron and Esmé Shirlow

In October 2015, a newspaper in the United Kingdom ran an opinion piece in which it was asserted that:

TTIP's [the Transatlantic Trade and Investment Partnership's] biggest threat to society is its inherent assault on democracy. One of the main aims of TTIP is the introduction of Investor-State Dispute Settlements (ISDS), which allow companies to sue governments if those governments' policies cause a loss of profits. In effect it means unelected transnational corporations can dictate the policies of democratically elected governments.[1]

In the same month, over 150,000 protestors took to the streets of Germany to protest against the same treaty.[2] Such incidents, along with others, are increasingly cited as evidence of 'a rising backlash' against the regime of investor-State arbitration.[3]

[1] Lee Williams, 'What Is TTIP? And Six Reasons Why the Answer Should Scare You' *The Independent* (6 October 2015) <http://www.independent.co.uk/voices/comment/what-is-ttip-and-six-reasons-why-the-answer-should-scare-you-9779688.html>.

[2] Janosch Delcker and Cynthia Kroet, 'More than 150,000 Protest against EU-US Trade Deal' *Politico* (10 October 2015) <http://www.politico.eu/article/germany-mobilizes-against-eu-u-s-trade-deal-merkel-ttip-ceta/>. Some reports put the number of protestors as high as 250,000: 'Hundreds of Thousands Protest in Berlin against EU-U.S. Trade Deal' *Reuters* (Berlin, 10 October 2015) <http://www.reuters.com/article/us-trade-germany-ttip-protests-idUSKCN0S40L720151010>; Chris Johnston, 'Berlin Anti-TTIP Trade Deal Protest Attracts Hundreds of Thousands' *The Guardian* (10 October 2015) <http://www.theguardian.com/world/2015/oct/10/berlin-anti-ttip-trade-deal-rally-hundreds-thousands-protesters>.

[3] See, eg: Asha Kaushal, 'Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime' (2009) 50 Harvard International Law Journal 491, 492; Charles N Brower and Stephan Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' (2008) 9 Chicago Journal of International Law 471, 473; Francesco Francioni, 'Foreign Investments, Sovereignty and the Public Good' (2014) 23(1) Italian Yearbook of International Law 1, 4–5; Vernon Cassin, '"Investment Arbitration Is Now On Broadway, And The Critics Are Not Being Kind"' <http://kluwerarbitrationblog.com/2015/01/23/investment-arbitration-is-now-on-broadway-and-the-critics-are-not-being-kind/>.

Dissecting Backlash: The Unarticulated Causes of Backlash and its Unintended Consequences. David Caron and Esmé Shirlow.

Other chapters of this book raise thoughtful cautionary notes concerning the meaning of the notion of 'backlash'. The term 'backlash' indicates the presence of something more than scrutiny, critique, or even crisis.[4] Whereas critique of a system might lead to suggestions for reform, 'backlash' implies actions taken in opposition to the system itself. Extrapolating from a definition proffered by Sunstein, 'backlash' can be defined as: *Intense and sustained public disapproval of a system accompanied by aggressive steps to resist the system and to remove its legal force.*[5] 'Backlash', therefore, manifests as 'intense', 'sustained', and 'aggressive' calls for the abandonment of a system or for the adoption of a radically alternative structure.

Taking this definition of backlash as its starting point, this chapter considers how 'backlash' against investor-State arbitration has manifested (Section 1). In particular, it considers the forms of backlash, from whom or what it comes, and what motivates it. The chapter suggests that 'backlash' is a complex phenomenon, and argues that much of the 'backlash' against investor-State arbitration materializes as a result of, and therefore reflects, broader concerns about globalization. The concerns underlying the latter cannot, however, necessarily be addressed by reforms to investor-State arbitration. With this in mind, the chapter moves to consider how the regime of investment arbitration has evolved, and what has prompted that evolution (Section 2). The chapter charts key procedural and substantive reforms to the regime, highlighting that care must be taken in characterizing such reform as evidence of backlash or a response to it. Finally, the chapter considers the unintended consequences of backlash (Section 3). Whereas, as Section 2 shows, reform founded on critique can be sweeping, it is at the same time measured and reasoned. By contrast, reform prompted by backlash is rooted in anger and is as likely to do harm as it is to do good. Where Francis Bacon observed that 'Revenge is a kind of wild justice', we suggest that 'Backlash is a kind of wild reform'.[6] By exploring these themes, the chapter illustrates how concerns about diffuse forces such as globalization add hyperbole to critiques of investment treaty arbitration, turning them into a 'backlash'. Section 2 illustrates how reform has sought to separate the rhetoric from reality. States and institutions have responded to changing circumstances—rather than backlash—to implement a raft of modifications to investment treaty arbitration. To the extent that backlash raises issues incapable of being addressed within the existing investment arbitration regime, Section 3 identifies its potentially unintended consequences.

While the chapter focusses upon investment treaty arbitration, it seeks also to illuminate the complexities of evaluating opposition to international regimes, as well as the cyclical nature of contestation and reform. These issues hold particular relevance to investor-State arbitration given current negotiations of major bi- and multi-lateral treaties with investor-State protections. These issues are also likely to gain in relevance

[4] Cf Michael Albert Waibel (ed), *The Backlash against Investment Arbitration: Perceptions and Reality* (Wolters Kluwer Law & Business 2010) xxxvii.

[5] Cass R Sunstein, 'Backlash's Travels' (2007) 42 Harvard Civil Rights—Civil Liberties Law Review 435, 435. Sunstein focusses on backlash against particular cases in domestic law, defining backlash as 'Intense and sustained public disapproval of a judicial ruling, accompanied by aggressive steps to resist that ruling and to remove its legal force'.

[6] Francis Bacon, 'On Revenge' (1625) available at <https://www.bl.uk/collection-items/bacons-essays-on-revenge-envy-and-deformity>.

in light of the many investment treaties which will in the coming period come up for renewal or termination.[7]

1 Backlash against What? The Forms, Sources, and Focal Points of Backlash

A large range of acts are cited under the banner of 'backlash'. These include decisions of States to review,[8] not renew,[9] terminate, or withdraw from existing treaties;[10] refusals by States to negotiate or sign investment treaties;[11] and changes in the approaches of States to the negotiation of new treaties.[12] In these senses, backlash is not merely a critique and request for a particular reform, but rather action away from the regime even if the alternative is not fully articulated. There are also forms of 'backlash' which are not manifested in the actions of States, but arise instead from civil society, non-governmental organizations, and academia. For these groups, 'backlash' often manifests in the form of protests, comments in public consultation processes, and increased reporting and academic discussion of the 'crisis' said to face

[7] 'International Investment Policymaking in Transition: Challenges and Opportunities of Treaty Renewal' (United Nations Conference on Trade and Development 2013) IIA Issues Note No. 4 <http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d9_en.pdf>.

[8] Jan Kleinheisterkamp, 'Investment Treaty Law and the Fear for Sovereignty: Transnational Challenges and Solutions' (2015) 78 (5) Modern Law Review 798; Luke Eric Peterson, 'Norway Proposes Significant Reforms to Its Investment Treaty Practices' *IISD Investment Treaty News* (27 March 2008) <http://www.iisd.org/pdf/2008/itn_mar27_2008.pdf>; Damon Vis-Dunbar, 'Norway Shelves Its Draft Model Bilateral Investment Treaty' *IISD Investment Treaty News* (8 June 2009) <http://www.iisd.org/itn/2009/06/08/norway-shelves-its-proposed-model-bilateral-investment-treaty/>; B Bland and S Donnan, 'Indonesia to Terminate More than 60 Bilateral Investment Treaties' *Financial Times* (26 March 2014) <http://www.ft.com/cms/s/0/3755c1b2-b4e2-11e3-af92-00144feabdc0.html>; UNCTAD (ed), *Reforming International Investment Governance* (United Nations 2015); SA Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements' (2010) 13 Journal of International Economic Law 1037, 1043.

[9] Anne van Aaken, 'Perils of Success? The Case of International Investment Protection' (2008) 9 European Business Organization Law Review (EBOR) 24 <http://www.journals.cambridge.org/abstract_S1566752908000013> (accessed 12 January 2016).

[10] Emmanuel Gaillard, 'The Denunciation of the ICSID Convention' (2007) 237 New York Law Journal; van Aaken (n 9) 24; UNCTAD, *Reforming International Investment Governance* (n 8); UNCTAD (ed), *Investing in the SDGs: An Action Plan* (United Nations 2014); Damon Vis-Dunbar, Luke Eric Peterson, and Fernando Carbrera Diaz, 'Bolivia Notifies World Bank of Withdrawal from ICSID, Pursues BIT Revisions' <http://www.bilaterals.org/?bolivia-notifies-world-bank-of>; Fernando Carbrera Diaz, 'Ecuador Continues Exit from ICSID' <http://www.iisd.org/itn/2009/06/05/ecuador-continues-exit-from-icsid/>.

[11] Spears (n 8) 1043; van Aaken (n 9) 9, 22. Cf: Stephan Schill, 'The Sixth Path: Reforming Investment Law from Within', *Society of International Economic Law* (Online Proceedings, Working Paper 2014) 4; Charles N Brower and Sadie Blanchard, 'What's in a Meme? The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States' (2013) 52 Columbia Journal of Transnational Law 689, 701.

[12] Andreas Kulick, 'Narrating Narratives of International Investment Law: History and Epistemic Forces' in Rainer Hofmann, Christian Tams, and Stephan Schill (eds), *International Investment Law and History* (Edward Elgar 2016) 20; Cassin (n 3); Jürgen Kurtz, 'Australia's Rejection of Investor-State Arbitration: Causation, Omission and Implications' [2012] ICSID Review—Foreign Investment Law Journal; van Aaken (n 9) 23.

the regime.[13] Currently, non-governmental organizations, some governments, and various national publics focus critically on bi- or multi-lateral agreements such as the TTIP and TPP and specifically the foreign investment chapters of these treaties. The acts and criticisms directed at those treaties are often described as a 'backlash' against investment arbitration generally.

Backlash against investment arbitration may emanate from a variety of sources. These sources include civil society or 'the public' generally, non-governmental organizations, academics, the media, and States themselves.[14] The source of backlash matters because it may influence the form in which such backlash is expressed as well as the motivations and focal points of that backlash. Identifying the sources of backlash is furthermore important because it influences the appropriate responses to backlash, dictating to whom (or to what) such responses are being offered. Finally, identifying the sources and forms of backlash might indicate shifts in the relevant debates and their focal points over time.

Of course, any one source or form of 'backlash' necessarily interacts with and informs the other sources and forms through which 'backlash' might be expressed. Take, for example, the European Commission's 2014 'public consultation on modalities for investment protection and ISDS in TTIP'.[15] The consultation process garnered almost 150,000 responses. While not all responses were critical of TTIP, the sources of those responses are nevertheless instructive in considering from where responses criticizing the regime may actually originate.[16] While 148,830 of the responses came from 'citizens', 'approximately 145,000 of these were submitted through NGOs [non-governmental organizations] which had provided respondents with "pre-defined" answers'.[17] In this case, then, there is a mixed source of 'backlash' comprising a range of actors including individuals, academics, and NGOs. This example also illustrates that there are, furthermore, many strands to the critique where expert opinion and public opinion reinforce and shape one another in a more generalized way.[18]

[13] Francioni (n 3) 4–5; UNCTAD, *Reforming International Investment Governance* (n 8) 176; Karsten Nowrot, 'How to Include Environmental Protection, Human Rights and Sustainability in International Investment Law?' (2014) 15 The Journal of World Investment & Trade 612, 619; Malcolm Langford, 'Cosmopolitan Competition: The Case of International Investment' in Cecilia Bailliet and Katja Aas (eds), *Cosmopolitan Justice and its Discontents* (Routledge 2011) 178, 183.

[14] Cassin (n 3) (contending that 'In Germany, a public consensus appears to have formed that investor-state dispute settlement should be dropped entirely from the TTIP'). See, also, Kulick (n 12) 19 (noting that 'International investment law is in the limelight, not only in international law scholarship but in mainstream public opinion'); Chen Huiping, 'The Expansion of Jurisdiction by ICSID Tribunals: Approaches, Reasons and Damages' (2011) 12 Journal of World Investment & Trade 671, 671.

[15] The consultation process was open from 27 March–13 July 2014: European Commission, 'Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)' (2015) Commission Staff Working Document—Report SWD(2015) 3 Final.

[16] ibid 9. [17] ibid 10.

[18] Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107 American Journal of International Law 45, 84.

The diverse range of sources and forms of 'backlash' necessarily means that that backlash may reflect a range of differing motivations and concerns. Teasing apart the types of acts said to constitute 'backlash', it is clear that they are diverse and specific to both the situation and source. Apart from the question of what it means to say there is a backlash, then, there is an important and complex question of stating what the backlash is against. Is it against a particular tribunal or investment arbitration generally, or is it against something else? The aim here is not to scrutinize each critique of the investment arbitration regime or to offer responses to, or endorsements of, the positions articulated therein. Instead, the critical point here is to highlight that some cases of 'backlash' focus upon a particular tribunal or the arbitration regime because they provide a focal point for criticism that is discrete and focused, while the force motivating that 'backlash' is actually directed at a more diffuse target other than investor-State arbitration. It is clear in our analysis that the critique is not directed solely, or even in all cases, at tribunals. Rather, tribunals form a focal point for broader concerns.

A primary concern underlying much of the 'backlash' said to be about investor-State arbitration is globalization. The concept of 'globalization' covers many phenomena and is difficult to define. Indeed, those motivated by concerns related to globalization themselves may not necessarily share a common understanding of what it comprises. It suffices for present purposes to observe that, at base, 'globalization' results in the 'denationalization of clusters of political, economic, and social activities that undermine the ability of the sovereign state to control activities on its territory'.[19] In so doing, globalization 'challenges the idea of the state as the sovereign guardian of the public interest',[20] and gives increased power to non-national actors, including multinational corporations. Concerns about the perceived negative effects of globalization are very frequently articulated through critique of investor-State arbitration.[21] The linkage of investor-State arbitration with broader concerns about globalization has resulted in a 'strong ideological and functional opposition' to investment arbitration.[22] Many see it as the embodiment of broader forces with which they are concerned, including the 'upward transfer of wealth,

[19] Karsten Nowrot, 'Legal Consequences of Globalization: The Status of Non-Governmental Organizations Under International Law' (1999) 6 Ind. Law Journal 579, 586.

[20] Barnali Choudhury, 'Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?' (2008) 41 Vanderbilt Journal of Transnational Law 775, 777.

[21] See, eg: Claire Provost and Matt Kennard, 'The Obscure Legal System That Lets Corporations Sue Countries' *The Guardian* (10 June 2015) <https://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corportations-sue-states-ttip-icsid> (observing that 'it seems increasingly likely that the massive financial risks associated with investor-state arbitration will effectively grant foreign investors a veto over government decisions'). George Monbiot, 'This Transatlantic Trade Deal Is a Full-Frontal Assault on Democracy' *The Guardian* (4 November 2013) <http://www.theguardian.com/commentisfree/2013/nov/04/us-trade-deal-full-frontal-assault-on-democracy> (observing that the TTIP 'would allow a secretive panel of corporate lawyers to overrule the will of parliament and destroy our legal protections').

[22] LE Trakman, 'Resolving Investor-State Disputes under a Transpacific Partnership Agreement—What Lies Ahead?' [2012] Transnational Dispute Management 9.

constraint of government, and liberalization of markets'.[23] Concern about foreign investment is thus in part directly a concern about the fairness and legitimacy of investor-State arbitration. It is also, however, a manifestation of broader concerns about globalization, about economic dislocation and other social interests, about jobs and livelihoods.[24]

Such underlying concerns are reflected, for example, in the statements of Senator Warren—a vocal opponent of investment arbitration. Senator Warren has asked:

> Who will benefit from the TPP? American workers? Consumers? Small businesses? Taxpayers? Or the biggest multinational corporations in the world? … Agreeing to ISDS in this enormous new treaty would tilt the playing field in the United States further in favor of big multinational corporations. Worse, it would undermine U.S. sovereignty … ISDS would allow foreign companies to challenge U.S. laws—and potentially to pick up huge payouts from taxpayers—without ever stepping foot in a U.S. court.[25]

Underlying Senator Warren's critique of investment arbitration is a broader concern about the forces of globalization and denationalization. And yet, '[t]he focus of her ire is the Investor-State Dispute Settlement (ISDS) process'.[26] For Senator Warren, investment arbitration forms a focal point for the articulation of a broader concern about a more diffuse target: globalization. Similarly, looking more closely at the placards held by protestors at the 2015 TTIP rally in Germany, it is clear that many reflect broader concerns, predominantly relating to fear of foreign takeover and a shifting of domestic decision-making power to geographically removed actors.[27] In these cases, '[t]hose who advocate withdrawal from the investment law regime' are also 'those who argue against globalization more generally'.[28] Former US President Obama has noted that he 'understand[s] the skepticism people have about trade agreements, particularly in communities where the effects of automation and globalization have hit workers and families the hardest'.[29] More than this,

[23] Gus Van Harten, 'Five Justifications for Investment Treaties: A Critical Discussion' (2010) 2 Trade, Law and Development 19, 24.

[24] See, also, Langford (n 13) 182.

[25] Elizabeth Warren, 'The Trans-Pacific Partnership Clause Everyone Should Oppose' *Washington Post* (25 February 2015) <https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html>.

[26] Kevin O'Marah, 'Elizabeth Warren On TPP: Bad For Business' *Forbes* (22 May 2015) <https://www.forbes.com/sites/kevinomarah/2015/05/22/elizabeth-warren-on-the-tpp-bad-for-business/#76a21e7d685d>.

[27] See, eg: Caroline Copley, 'Hundreds of Thousands Protest in Berlin against EU-US Trade Deal' *The Sydney Morning Herald* (11 October 2015) <http://www.smh.com.au/world/hundreds-of-thousands-protest-in-berlin-against-euus-trade-deal-20151011-gk66kx.html>.

[28] Spears (n 8) 1074. See, also, Brigitte Stern, 'The Future of International Investment Law: A Balance Between the Protection of Investors and the States' Capacity to Regulate' in Alvarez (ed), *The Evolving International Investment Regime: Expectations, Realities, Options* (2011) 175 ('I wondered whether there had not been some confusion between the difficulties raised by globalization in general and the difficulties encountered within the investment arbitration system in particular. Of course, I know that some are more or less embedded in the others, but I am still not sure that we can solve them with the same solutions, and at the same level.').

[29] Barack Obama, 'Obama Op-Ed—"The TPP Would Let America, Not China, Lead the Way on Global Trade"' *The Washington Post* (2 May 2016) <https://www.washingtonpost.com/opinions/president-obama-the-tpp-would-let-america-not-china-lead-the-way-on-global-trade/2016/05/02/680540e4-0fd0-11e6-93ae-50921721165d_story.html>.

though, we would suggest that investment arbitration has attracted such strong critique because it forms a focal point for the articulation of concerns about globalization. Globalization, as a diffuse force, does not itself form a concrete enough target.

A similar phenomenon was associated with the protests that accompanied the 1999 World Trade Organization (WTO) Ministerial Conference in Seattle. In the context of immense civil society protest against the WTO in Seattle, Professor Georges Abi Saab argued that it should not be surprising that the WTO was the object of such protests. He observed that the forces of globalization were diffuse, that there is no clear agent of globalization and that in such a situation protests often centre on particular symbols of the more general phenomenon of concern.[30] The focus placed on investment arbitration within the TTIP is similar.[31] Many parts of the TTIP will have far greater social impact than the arbitration scheme or the worst possible single arbitration one can imagine. One macroeconomic study, for example, predicts that the TTIP will result in net export and job losses, as well as a lowering of wages and growth rates, with northern European economies suffering the largest losses.[32] The particular focus upon the investor-State arbitration provisions in TTIP, however, is something that provides a relatively clear focus for the articulation of concern about these more general impacts. This is borne out in the European Commission's Report on the European Union (EU)'s TTIP Consultation Process. In that Report, the Commission notes that '[w]hile the scope of the consultation was limited to the proposed EU approach to investment protection/ISDS in TTIP, a first category of statements indicates opposition or concerns to TTIP in general'.[33] In fact, 'quite a majority of replies oppos[ed] TTIP in general'.[34] Arguably, here, responses criticize the investor-State provisions of the TTIP because that is the focus of the consultation process: although other chapters of the TTIP may arguably have a greater effect in terms of displacement, they are not as public and therefore not as apt a site for criticism and input in the same way as the investment chapter.

Let us be clear. We are not suggesting that investment arbitration is not deserving of reform, or that it should not be held to the highest standard. What we are suggesting is that there are complexities to backlash, and the investment arbitration mechanism may not in fact be the principal reason for the intensity of the backlash directed against it. The concerns are in part concerns about investment arbitration, but they also reflect and manifest concerns that are deeper and broader. This is critically important for three reasons. First, it is important because it means that reform of the investment arbitration regime may not be capable of responding to all of the concerns underlying

[30] See, also, Langford (n 13) 183.

[31] See, also, Roger Alford, 'Scholars Debate Investment Arbitration Chapter in TPP and TTIP' *Kluwer Arbitration Blog* (7 April 2015) <http://arbitrationblog.kluwerarbitration.com/2015/04/07/scholars-debate-investment-arbitration-chapter-in-tpp-and-ttip/>; Langford (n 13) 178, 182, 183–84.

[32] Jeronim Capaldo, 'The Trans-Atlantic Trade and Investment Partnership: European Disintegration, Unemployment and Instability' (2014) Working Paper No. 14-03 Global Development and Environment Institute Working Paper.

[33] European Commission (n 15) 3. [34] ibid 14.

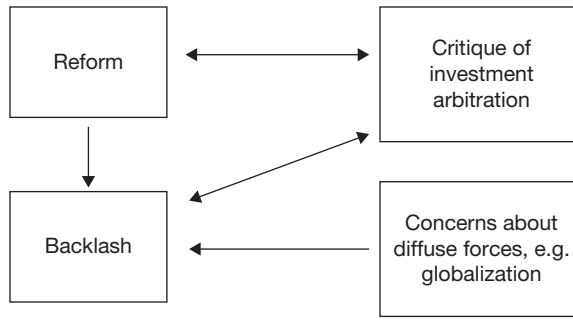

Figure 8.1 The complexities of backlash (arrows indicating direction of influence)

the criticisms directed against it. Second, there is a danger in characterizing acts manifesting these concerns as a 'backlash' directed solely against the investment arbitration regime insofar as that may over-inflate the level of public dissatisfaction with that regime itself. Brower and Blanchard have argued in this respect that 'backlash' stems from, and results in, the proliferation of a 'meme … of a broken system'.[35] They argue that 'objections that began as ideologically driven polemics have come to be widely, but inaccurately, presumed as truths'.[36] Finally, it is important because it risks missing and leaving unaddressed broader underlying concerns. As Irene Ten Cate argues:

> societal opposition to the investment law regime does not stem from hostility to the concept of foreign investment or to the objective of establishing international rules to govern foreign investment per se, but rather from concerns about the non-participatory manner in which the global economy's rules are being written and about restrictions on governments' ability to address the pernicious effects of globalization. Eliminating the global economy's rules or foreign investors' rights under [international investment agreements] all together would not be a productive way to address these two fundamental concerns.[37]

To assume that the strength of backlash is directed at investor-State arbitration rather than globalization risks misdirecting reform efforts. Whether or not one agrees with this particular conclusion, the underlying observation remains: it is necessary to dissect the motivations of backlash from its focal point(s) before it is possible to identify the responses appropriate to it. In identifying what backlash is against, one must ask whether the apparent backlash is against a particular institution or something else entirely. In identifying the possible responses to backlash, it is necessary to thus bear in mind its complexities. As Figure 8.1 illustrates, these complexities relate, in particular, to the interrelationships between motivations, focal points, and

[35] Brower and Blanchard (n 11) 699. The authors define a 'meme' as 'a unit of cultural transmission that replicates itself through individuals by inducing repetition'.

[36] ibid.

[37] Irene M Ten Cate, 'International Arbitration and the Ends of Appellate Review' (2012) 44 New York University Journal of International Law and Politics 1109, 1111. See also, Trakman (n 22) 17–18.

responses to backlash. Section 2 further expands on the relationship between these features of backlash.

2 Responding to Backlash

As noted in Section 1, a range of State initiatives and actions to reform the investor-State arbitration regime have themselves been cited as evidence of (or at least acts in response to) the perceived backlash against the regime. This Section emphasizes two points. Section 2.1 examines the history of reform over the past approximately fifteen years to illustrate how the regime has evolved and adapted.[38] It is argued that the significant range of both procedural and substantive reforms that have taken place within investment arbitration over this period reinforces Section 1's observation that backlash is not a reaction only to investment arbitration, but rather a response to something broader. Section 2.2 illustrates that the actions of States in reforming the investment arbitration regime are primarily taken in response to shifting circumstances, and would arguably have occurred even absent the backlash against investment arbitration itself. This highlights that it is important not to assume that all actions and reforms are forms of, or responses to, backlash. As a whole, the Section illustrates how investment arbitration has been reformed to respond to concrete critiques and concerns, but has nevertheless been unable to reform in a way capable of dissipating the backlash directed against it. The Section thus seeks to illustrate that there are elements to backlash which reform to the investment arbitration regime may be incapable of addressing.

2.1 A story of reform

The last fifteen years have seen the investment arbitration regime evolve significantly. In fact, one would be hard pressed to identify an international dispute settlement mechanism that has reformed more over the same period, or indeed any equivalent length of time.[39] Since at least 2000, States have been engaged in an active process of reform. Reform has taken place both at the level of individual State treaty practice as well as institutionally, and has encompassed procedural, substantive, and systemic changes. Given the extent of the regime's evolution, this is not the place to consider each reform in detail. Instead, this subsection briefly traces the major components of that reform to support the following subsection's consideration of what has motivated that reform.

[38] Note that the investment arbitration 'regime' is comprised of 'large networks of components with no central control'. In this sense, not all reforms impact upon all elements of the 'regime'. The Section thus illustrates some of the more major reforms having a significant impact upon important components of the regime. Melanie Mitchell, *Complexity: A Guided Tour* (OUP 2009) x.

[39] Nowrot (n 13) 620.

2.1.1 Procedural reforms

The first generation of investment treaties only incidentally addressed issues of arbitral procedure, instead relying upon institutional rules to fill the gaps.[40] The last fifteen years have seen a shift in treaty drafting practice towards more detailed procedural provisions, as well as reforms to treaty and institutional rules.

Changes to the procedural rules governing transparency are a good example of this evolution. Very few, if any, early investment treaties expressly regulated the issue of transparency. Instead, these treaties opted to leave the matter to the discretion of each arbitral tribunal for decision in accordance with the applicable procedural rules. Until the mid-2000s, the majority of such procedural rules contained only minimal transparency provisions, which usually provided for transparency to operate on an opt-in basis (ie, with the consent of both parties).[41] This minimal regulation of transparency did not, however, persist for long.

At the level of treaty practice, States made a raft of changes from the early 2000s onwards to increase the transparency of investor-State proceedings. As Table 8.1 highlights, these included joint interpretations on the transparency regime governing arbitrations under existing treaties as well as a commitment to negotiating for increased transparency in future treaties.[42] This resulted in the negotiation of a 'new generation' of investment treaties providing for greater transparency of arbitral proceedings.[43] This included provision for public hearings, the publication of arbitral documents, and *amicus curiae* intervention.[44] This trend has been solidified in

[40] David Gaukrodger and Kathryn Gordon, 'Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community' [2012] OECD Working Papers on International Investment 64.

[41] Andrew P Tuck, 'Investor-State Arbitration Revised: A Critical Analysis of the Revisions and Proposed Reforms to the ICSID and UNCITRAL Arbitration Rules' (2007) 13 Law & Business Review of the Americas 885, 897. The ICSID Convention and Rules, eg, provided that awards could not be published without party consent: Rules of Arbitration of the International Centre for Settlement of Investment Disputes. Similarly, the 1976 UNCITRAL Arbitration Rules provided for closed hearings and the non-publication of awards absent party agreement to the contrary: Arbitration Rules of the United Nations Commission on International Trade Law 1976.

[42] See, eg: Trade Act of 2002 s 2102 (providing that future US treaties should adopt 'the fullest measure of transparency in the dispute settlement mechanism'); Canada, 'Model Investment Treaty' art 38; Norway Model Investment Treaty art 19; NAFTA Free Trade Commission, 'Notes of Interpretation of Certain Chapter 11 Provisions' ('[n]othing in the NAFTA imposes a general duty of confidentiality on the disputing parties [or] … precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven Tribunal'). See, further: David Gantz, 'The Evolution of FTA Investment Provisions: From NAFTA to the United States-Chile Free Trade Agreement' (2003) 19 American University of International Law Review 679, 704; Mary Footer, 'BITs and Pieces: Social and Environmental Protection in the Regulation of Foreign Investment' (2009) 18 Michigan State University College of Law Journal of International Law 33, 47.

[43] Gantz (n 42) 707.

[44] See, eg: Korea-Australia Free Trade Agreement 2014; Athina Fouchard Papaefstratiou, 'The EU Proposal Regarding Investment Protection: The End of Investment Arbitration as we Know It?' <http://kluwerarbitrationblog.com/2015/12/29/the-eu-proposal-regarding-investment-protection-the-end-of-investment-arbitration-as-we-know-it/>; Sonja Heppneron, 'A Right of Public Access to Investor-State Arbitral Proceedings?' <http://kluwerarbitrationblog.com/2015/12/09/a-right-of-public-access-to-investor-state-arbitral-proceedings/>; European Parliament Directorate-General for External Policies, 'The Investment Chapters of the EU's International Trade and Investment Agreements in a Comparative Perspective' (2015) EP/EXPO/B/INTA/2015/01 74.

Table 8.1 15 Years of Procedural Change

	2000–2001	2002–2003	2004–2005	2006–2007	2008–2009	2010–2011	2012–2013	2014–2015
Treaty-based Developments	NAFTA FTC interpretation, including on transparency (2001)	US TPA: pro-transparency position in future negotiations (2002)	CAFTA-DR: increased transparency for ISDS proceedings (2004)	Norway Model BIT: increased transparency for ISDS proceedings (2007)				EU-Singapore Free Trade Agreement, detailed disclosure requirements for arbitrators (2014)
			US Model BIT: increased transparency for ISDS proceedings (2004)					EU-Canada Comprehensive Economic and Trade Agreement, guidance on arbitrator regulation (2014)
								Norway Model BIT: increased transparency for ISDS proceedings (2015)
								India draft Model BIT: provisions regulating arbitrator conflicts of interest (2015)
								TPP: provisions for mandatory public disclosure of certain documents, open hearings, *amicus curiae* participation (2015)
								German Model BIT: standing appellate body (2015)
Institutional Developments			IBA Guidelines on Conflicts of Interest (2004)	Amendment of ICSID Rules (2006)		Amendment of UNCITRAL Rules (2010)	UNCITRAL Transparency Rules (2012)	UN Convention on Transparency (2014)

(*continued*)

Table 8.1 Continued

2000–2001	2002–2003	2004–2005	2006–2007	2008–2009	2010–2011	2012–2013	2014–2015
		ICSID Secretariat working papers on possible reforms (2004–2005)			ICC Statement of Independence for Arbitrators (2010)	ICSID report on annulment mechanism (2012)	Revised IBA Guidelines on Conflicts of Interest (2014)
					LCIA starts publishing abstracts on arbitrator challenges (2011)	ICC revised practice notes on duties and remuneration of administrative secretaries (2012)	
						IBA Guidelines on Party Representation (2013)	

recent treaty practice. Broadly speaking, the past fifteen years have seen a shift from silence on the issue of transparency, to an opt-in transparency regime, to a regime which increasingly imposes a 'duty of transparency'.[45] In fact, as the European Parliament's Directorate-General for External Policies has noted, some provisions on transparency currently being negotiated 'go beyond the level of transparency and public access that can be found in developed domestic legal orders'.[46] At the very least, these reforms have meant that '[i]nvestor-State treaty arbitration ceased to be hidden from public view long ago'.[47]

These changes in State treaty drafting practice have been accompanied by a range of amendments to applicable procedural rules. In 2004, the ICSID (International Centre for Settlement of Investment Disputes) Secretariat published a working paper focusing, inter alia, upon possible responses to the lack or delayed publication of information from ICSID proceedings as well as the scope for third party access to such proceedings.[48] In 2005, the Secretariat published a follow-up paper which contained text to implement the reforms flagged in the 2004 paper.[49] In 2006, both the ICSID and ICSID Additional Facility Rules were amended to include detailed provisions on the filing of *amicus curiae* submissions as well as provision for public hearings.[50] The UNCITRAL Rules likewise underwent a process of revision in 2010. During this process, the issue of transparency was identified as an area for particular reform. Subsequently, the UNCITRAL (United Nations Commission on International Trade Law) Rules on Transparency in Treaty-Based Investor-State Arbitration were negotiated and incorporated into the 2013 UNCITRAL Arbitration Rules. The Transparency Rules operate to 'reverse the presumptions of confidentiality and privacy in investment treaty arbitration in favour of a presumption of openness'.[51] Thereafter, a further treaty was drafted to provide additional scope for the application of the Rules on Transparency, including in non-UNCITRAL proceedings.[52]

Treaties and institutional rules have also been revised to address 'the characteristics, selection and regulation of arbitrators in ISDS'.[53] Early provisions regulating arbitrator conduct provided codes of conduct addressing disclosure requirements,

[45] Federico Ortino, 'External Transparency of Investment Awards' (2008) Working Paper No. 49/08 SIEL Online Proceedings Working Papers 1.

[46] European Parliament Directorate-General for External Policies (n 44) 74.

[47] Brower and Blanchard (n 11) 717. See, also, Roberts (n 18) 92.

[48] ICSID Secretariat, 'Possible Improvements of the Framework for ICSID Arbitration' (2004) 7–11 <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf>.

[49] ICSID Secretariat, 'Suggested Changes to the ICSID Rules and Regulations' (2005) 3–4 <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Suggested%20Changes%20to%20the%20ICSID%20Rules%20and%20Regulations.pdf>.

[50] Rules of Arbitration of the International Centre for Settlement of Investment Disputes (n 41) Rules 32 and 37; ICSID Additional Facility Arbitration Rules arts 39 and 41.

[51] Stephan Schill, 'Transparency as a Global Norm in International Investment Law' <http://kluwerarbitrationblog.com/2014/09/15/transparency-as-a-global-norm-in-international-investment-law/>.

[52] UN Convention on Transparency in Treaty-Based Investor-State Arbitration.

[53] Gaukrodger and Gordon (n 40) 3, 44. See, also, European Parliament Directorate-General for External Policies (n 44) 59.

conflicts of interest, and confidentiality obligations.[54] A number of other treaties provided for the creation of pre-established rosters of arbitrators.[55] Once again, these treaty practices were supplemented by institutional reform. Institutional reforms to arbitrator regulation were encapsulated in ICSID's 2004–2006 reform process discussed above. That process resulted in amendments to the ICSID Rules in 2006 to impose additional disclosure requirements on arbitrators.[56] In the same year, the International Bar Association (IBA) adopted Guidelines on Conflicts of Interest in International Arbitration.[57] In 2014, the IBA Guidelines were amended, to address 'a number of issues that have received attention in international arbitration practice since 2004'.[58] A number of institutions have also sought to provide greater information about expectations around conflicts of interest and disclosure, including through publication of decisions on arbitrator challenges or the release of guidance notes.[59] These issues have also been subjected to detailed study. In 2015, for example, a Task Force of the American Society of International Law and the International Council for Commercial Arbitration released a draft report and recommendations on issue conflicts in investor-State arbitration.[60] More recently, in September 2015, the EU Commission released a proposal in the context of the TTIP negotiations which elaborates on requirements for the selection and appointment of arbitrators in investor-State disputes.[61]

The issue of the cost of investment arbitration has also been a further site for reform. Arbitrator fees, for example, were reviewed institutionally by ICSID as part of its 2004 reform process. In 2006 the ICSID Rules were amended to allow

[54] See, eg: EU-Singapore Free Trade Agreement 2014 art 9.21.

[55] See, eg: EU-Canada Comprehensive Economic and Trade Agreement 2014; EU-Singapore Free Trade Agreement (n 54). European Parliament Directorate-General for External Policies (n 44) 10. On proposals on the same for future treaties, see: Athina Fouchard Papaefstratiou, 'TTIP: The French Proposal For A Permanent European Court for Investment Arbitration' <http://kluwerarbitrationblog.com/2015/07/22/ttip-the-french-proposal-for-a-permanent-european-court-for-investment-arbitration/>.

[56] See, for further information about these reforms: Tuck (n 41) 892, 900; Choudhury (n 20) 820; International Law Association, 'Final Report of the Committee on the International Law of Foreign Investment' (2008) 73 International Law Ass'n Rep Conf 752, 783.

[57] International Bar Association Guidelines on Conflicts of Interest in International Arbitration 2004. These Guidelines are referred to in a number of treaties, see eg: EU-Canada Comprehensive Economic and Trade Agreement (n 55). The Guidelines have also been applied in a number of arbitral proceedings: European Parliament Directorate-General for External Policies (n 44).

[58] International Bar Association Guidelines on Conflicts of Interest in International Arbitration 2014 ii.

[59] The London Court of International Arbitration (LCIA) began publishing abstracts of arbitrator challenge decisions in 2011: Herbert Smith Freehills, 'LCIA Publishes Arbitrator Challenge Decisions' <http://hsfnotes.com/arbitration/2011/11/24/lcia-publishes-arbitrator-challenge-decisions/>. See, for further discussion of such amendments: Catherine Rogers, 'What If the Ghost of Christmas Present Visited the International Arbitration Community of 1995?' <http://kluwerarbitrationblog.com/2015/12/26/what-if-the-ghost-of-christmas-present-visited-the-international-arbitration-community-of-1995/>.

[60] ICCA-ASIL Joint Task Force, 'Report of ICCA-ASIL Joint Task Force (Discussion Draft)' <https://www.asil.org/sites/default/files/ASIL-ICCA%20Joint%20Task%20Force%20-%20Discussion%20Draft%2010%20March%202015.pdf>.

[61] Fouchard Papaefstratiou (n 55); Fouchard Papaefstratiou (n 44).

for the 'prompt termination of meritless claims'.[62] The 2010 amendments to the UNCITRAL Rules also sought to improve efficiency, incorporating the option for parties to request that an arbitrator indicate that they can 'devote the time necessary to conduct [the] arbitration diligently, efficiently and in accordance with the time limits in the Rules'.[63] Other institutions, too, have issued 'practice notes' on matters such as arbitrator fees or efficient case management.[64]

Of course, many further areas of procedural reform could be cited. Looking only to these reforms, as set out in Table 8.1, however, it is evident that the system has done much to evolve procedurally in the space of fifteen years.

2.1.2 Substantive reform

As to substance, the changes are even more substantial. At a general level, treaties in this time have moved from less to more detailed treaty provisions, that is, from 'light touch regulation' to 'more comprehensive regulation'.[65] During this period, States have amended the standards of substantive protection in both model and actual investment treaties.[66] Treaties have become both more detailed and more nuanced in their approach to the protection of investment, including by restricting the substantive protections accorded to investors under their terms.[67] In addition, treaties are increasingly also referring to non-investment related objectives that are presumably to play some role in limiting the scope of the protection of investment protection. For example, 'sustainable development-oriented clauses are on the rise', as are references to the 'right to regulate' and 'environmental protection'.[68] Equally, exceptions

[62] Rules of Arbitration of the International Centre for Settlement of Investment Disputes (n 41) Rule 41(5). See, for further background on these reforms: ICSID Secretariat (n 48); Gaukrodger and Gordon (n 40) 21.

[63] UNCITRAL Arbitration Rules 2010.

[64] See, eg: 'UNCITRAL Notes on Organizing Arbitral Proceedings'; 'ICC Techniques for Controlling Time and Costs in Arbitration'; Remy Gerbay, 'The LCIA's New Guidance Notes—An (Uneasy) Exercise in Relative Normativity' <http://kluwerarbitrationblog.com/2015/09/01/the-lcias-new-guidance-notes-an-uneasy-exercise-in-relative-normativity/>.

[65] European Parliament Directorate-General for External Policies (n 44) 8. See, also, Footer (n 42) 37; Nowrot (n 13) 624.

[66] See, eg: Canada, Foreign Investment Protection Agreement 2004; Norway Model Investment Treaty (n 42); United States Model Investment Treaty 2012; India, Model Investment Treaty. See, further: UNCTAD, *Reforming International Investment Governance* (n 8); Kaushal (n 3) 534.

[67] For further consideration of such changes, see further: UNCTAD, 'Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking' (2007); Footer (n 42) 42; Spears (n 8) 1071; Roberts (n 18) 80.

[68] UNCTAD, 'Recent Trends in IIAs and ISDS' (2015) IIA Issues Note No 1 <http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf>. See, eg: EU-Canada Comprehensive Economic and Trade Agreement (n 55) Preamble; India-Singapore Free Trade Agreement 2005 Preamble. See, further: Spears (n 8) 1068; National Board of Trade (Sweden), 'The Right to Regulate' in the Trade Agreement between the EU and Canada—and Its Implications for the Agreement with the USA' 4; European Parliament Directorate-General for External Policies (n 44) 8; Alessandra Asteriti, 'Waiting for the Environmentalists: Environmental Language in Investment Treaties' id2028405 SSRN; Kathryn Gordon and Joachim Pohl, 'Environmental Concerns in International Investment Agreements: A Survey' (2011) Paper No 2011/1 OECD Working Papers on International Investment 3, 7, 10 <www.oecd.org/daf/investment>.

and carve-outs to obligations placed on the host State are both increasingly included and expanding in scope.[69] A range of measures are being placed outside the scope of liability, including public health measures, prudential regulations, or measures related to public morality, social welfare, or sustainable development.[70] A number of standards of protection have also been the subject of refinement, clarification, or exclusion. The fair and equitable treatment standard, for example, has been the subject of reform, including through express linkage to the minimum standard of treatment under customary international law or the inclusion of open or closed lists of the treatment included within its scope.[71] Expropriation, too, has been made the subject of detailed annexures setting out the treaty parties' understanding of what does (and does not) constitute expropriation, along with the tests that ought to be applied by tribunals in assessing allegedly expropriatory acts.[72] Umbrella clauses have also been the subject of reform, having been restricted, clarified, or excluded altogether.[73]

2.1.3 Implications: frequent adaptation, responsiveness to critique, backlash is not only about investor-State arbitration

This brief historical overview supports three key observations. First, the investor-State regime has adapted—a lot, and frequently. It is commonly recognized that there has been an exponential increase in both the conclusion of treaties and the incidence of arbitral proceedings.[74] The above history of adaptation shows the resilience of the regime: its ability to absorb a significant amount of change whilst maintaining a high degree of stability and function.[75] Second, this history illustrates that many

[69] European Parliament Directorate-General for External Policies (n 44) 136; Spears (n 8) 1059; M Sornarajah, 'Mutations of Neo-Liberalism in International Investment Law' (2011) 3 Trade, Law and Development 203, 229; Kenneth Vandevelde, 'Rebalancing through Exceptions' (2013) 17 Lewis & Clark Law Review 449, 451.

[70] See, eg: US–Peru Free Trade Agreement 2006 art 10.21; Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore; US-Colombia Free Trade Agreement 2006 art 10.21; United States Model Investment Treaty (n 66) Annex B. See, further: Andrew Newcombe, 'General Exceptions in International Investment Agreements', *BIICL Eighth Annual WTO Conference* (2008) 7 <http://www.biicl.org/files/3866_andrew_newcombe.pdf>; International Law Association (n 56) 771.

[71] United States Model Investment Treaty (2004) art 5; Canada, Foreign Investment Protection Agreement (n 66) art 5; EU-Canada Comprehensive Economic and Trade Agreement (n 55); EU-Singapore Free Trade Agreement (n 54). See, further: European Parliament Directorate-General for External Policies (n 44) 139.

[72] See, eg: United States Model Investment Treaty (2004) (n 71); Canada, Foreign Investment Protection Agreement (n 66); India-Singapore Free Trade Agreement (n 68); 2007 COMESA Common Investment Area Agreement; EU-Singapore Free Trade Agreement (n 54); United States Model Investment Treaty (n 66); Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment 2005.

[73] See, eg: EU-Canada Comprehensive Economic and Trade Agreement (n 55) (omitting the clause altogether); EU-Singapore Free Trade Agreement (n 54) (restricting the clause). See, further: UNCTAD, *Reforming International Investment Governance* (n 8) 144; European Parliament Directorate-General for External Policies (n 44) 162.

[74] Daniel S Meyers, 'In Defense of the International Treaty Arbitration System' (2008) 31 Houston Journal of International Law 47, 80.

[75] Langford (n 13) 185; Roberts (n 18) 91; Meyers (n 74) 80; Ten Cate (n 37) 1114.

features of the regime forming the subject of current 'backlash' have not gone unaddressed.[76] This throws into question the widespread assumption that the regime is facing some kind of pressing 'crisis'.[77] In this context, it must be asked whether continued criticism of the regime fails to take historic reforms into account;[78] exhibits some kind of inadvertent or even strategic blindness to those reforms;[79] or merely illustrates that the reforms have failed, have not had widespread impact, or are yet to influence arbitral approaches in any appreciable way.[80] Third, the history and success of these reforms reinforces the earlier point that backlash is not only about arbitration. If backlash were only about the arbitration mechanism, it would be reasonable to expect that that backlash would decrease as the regime adapted in a manner apt to respond to the backlash. Instead, the opposite has been witnessed: backlash has increased alongside reform.[81] This is not to suggest that the agenda of reform is complete. Investment arbitration, like any other regime, can always do better.[82] Rather, it is to highlight the necessity of asking how responsive any reform agenda *can* be to the concerns underlying the current backlash.

2.2 Responding to what?

There is an equally crucial issue of *to what* exactly the above reforms responded. As with the forms and sources of backlash, the motivations underlying the regime's history of reform are also diverse.[83] The suggestion in this subsection is that the actions of States to substantively limit the protections afforded to foreign investors, and to modify the procedures attaching to investor-State proceedings, are not responses to (or indications of) 'backlash' per se but are instead primarily an action taken in response to shifting circumstances. In particular, States are engaged in an iterative process of modification in response to arbitral jurisprudence as well as their own changing risk profiles.[84] The particular circumstances to which States

[76] Paul Michael Blyschak, 'State Consent, Investor Interests and the Future of Investment Arbitration: Reanalyzing the Jurisdiction of Investor-State Tribunals in Hard Cases' (2009) 9 Asper Rev International Business and Trade Law 99, 99; European Parliament Directorate-General for External Policies (n 44) 20; Kleinheisterkamp (n 8) 797.

[77] Sergio Puig, 'Recasting ICSID's Legitimacy Debate: Towards a Goal-Based Empirical Agenda' (2013) 36 Fordham International Law Journal 465, 468.

[78] National Board of Trade (Sweden) (n 68) 4.

[79] Douglas Johnston, 'Functionalism in the Theory of International Law' (1988) 26 Canadian Yearbook of International Law 3, 3; Eric Ip, 'Globalization and the Future of the Law of the Sovereign State' (2010) 8 International Journal Const Law 636, 649 (suggesting that '[t]he public belief that sovereignty is under stress provides officials and lawyers with fuel to shift the blame to transnational forces').

[80] Brower and Schill (n 3) 473; European Parliament Directorate-General for External Policies (n 44) 139, 142; Spears (n 8) 1045; Nowrot (n 13) 644; Asteriti (n 68) 154.

[81] Meyers (n 74) 80.

[82] Leon Trakman, 'The ICSID Under Siege' (2013) 45 Cornell International Law Journal 603, 656; David Caron, 'Investor State Arbitration: Strategic and Tactical Perspectives on Legitimacy' (2008) 32 Suffolk Transnational Law Review 513, 515; Kaushal (n 3) 534.

[83] Nowrot (n 13) 618.

[84] Jurgen Kurtz, 'Building Legitimacy Through Interpretation: Investor-State Arbitration: On Consistency, Coherence and the Identification of Applicable Law' in Zachary Douglas, Joost Pauwelyn, and Jorge Vinuales (eds), *The Foundations of International Investment Law: Bridging Theory Into Practice* (OUP 2014).

are responding can be broken into four key groups, which are each canvassed in the following paragraphs. Of course, critiques of investment arbitration may themselves also be prompted by these factors. What the following subsection illustrates, however, is: first, in responding to these factors, State actions may be mistakenly taken as themselves evidence of 'backlash' and, in turn, generate further unwarranted critique; and second, 'backlash' itself typically does not prompt reform, which is instead motivated by other factors.

2.2.1 Responding to case law

Many amendments in investment treaty practice have occurred in response to the application of treaties in investment treaty cases. The 'first generation' treaties of the 1990s were negotiated at a time before the first arbitral claims, and thus were uninformed by interpretations or procedures adopted by arbitral tribunals.[85] For some time, 'the system of resolving investment treaty claims remained relatively untested' and as such 'there was little need to re-evaluate the status quo'.[86] Arbitral claims, however, subsequently 'surged' and there was a concomitant increase in arbitral jurisprudence and practice.[87] As tribunals interpreted and applied investment treaties, States acted to '"correct" developments in the jurisprudence that [they] did not foresee or with which [they do] not agree'.[88] This prompted amendments to both treaties and institutional rules. The 2004–2006 reform process at ICSID, for example, was prompted by increased use of ICSID as a dispute settlement institution.[89] Similarly, arbitral interpretations of vague 'first generation' treaty standards prompted States to include greater detail in subsequent treaties.[90] Whereas expropriation and fair and equitable treatment provisions in first generation treaties were only a few sentences long, for example, later treaties were revised to include greater detail to guide arbitral tribunals in assessing compliance with these provisions.[91] Similarly, carve-outs or exceptions were incorporated into treaties in response to arbitral proceedings applying earlier generation treaties that had been silent, or otherwise circumspect, on the circumstances to which such exceptions might apply. The TPP tobacco carve-out is a good example of this latter type of reform.[92]

[85] Blyschak (n 76) 166.

[86] Susan Franck, 'Challenges Facing Investment Disputes: Reconsidering Dispute Resolution in International Investment Agreements' 1427590 Washington & Lee Public Legal Studies Research Paper Series 155.

[87] Meyers (n 74) 48; European Parliament Directorate-General for External Policies (n 44) 161; van Aaken (n 9) 9.

[88] Brower and Schill (n 3) 496. See, also, Kleinheisterkamp (n 8) 799; Chen Huiping, 'The Investor-State Dispute Settlement Mechanism: Where to Go in the 21st Century?' (2008) 9 Journal of World Investment & Trade 467, 483; Blyschak (n 76) 166; Spears (n 8) 1048; Langford (n 13) 182; Kaushal (n 3) 534; van Aaken (n 9) 22, 24.

[89] Tuck (n 41) 892.

[90] Blyschak (n 76) 166.

[91] Sornarajah (n 69) 229; European Parliament Directorate-General for External Policies (n 44) 136, 139; Brower and Schill (n 3) 495.

[92] Trans-Pacific Partnership art 29.5.

The increase in proceedings also indicated that claimants were impugning different State acts than had perhaps been expected. As South Africa, in reviewing its approach to investment treaty arbitration in 2009, stated '[e]xisting dispute settlement institutions were not designed to address complex issues of public policy that now routinely come into play in investor-state disputes'.[93] Whilst early expropriations were mostly 'formal expropriations where the title of ownership was transferred',[94] for example, '[t]his pattern has changed and indirect action, often in the form of regulations' became a more commonly impugned measure.[95] As such, new investment treaties increasingly had to accommodate more detailed guidance on the scope of indirect expropriation provisions.[96] A similar phenomenon occurred with respect to the fair and equitable treatment clause, which—in contrast to early expectations—nowadays is widely credited as the 'most important standard in investment disputes'.[97]

States also responded to arbitral jurisprudence to make explicit the assumptions underpinning their treaties.[98] The introduction of the first umbrella clauses into treaties occurred, for example, at a time when those clauses had yet to be applied by arbitral tribunals.[99] Thomas Wälde has argued that the development of the umbrella clause 'envisaged not a commercial law breach, but rather governmental action abrogating a long-term-mostly concession-like-agreement'.[100] Blyschak contends that this underlying assumption meant that 'nobody expected that the umbrella clause, when coupled with investment arbitration and freed from the supervision of the host state, would suddenly make private commercial contract claims arguably actionable under international law'.[101] Yet, in many cases, this is precisely what happened.[102] It is perhaps to be expected, then, that those States which negotiated umbrella clauses with the above expectations in mind would, in light of this jurisprudence, seek to restrict or exclude those clauses altogether in newer treaties. Some argue that the regime itself was originally designed to support this iterative cycle of interpretation and recalibration.[103] At the least, it is clear that this iterative process of refinement

[93] Republic of South Africa, 'Bilateral Investment Treaty Policy Framework Review: Government Position Paper' (Department of Trade and Industry 2009) 45.

[94] Ursula Kriebaum, 'Regulatory Takings: Balancing the Interests of the Investor and the State' (2007) 8 Journal of World Investment & Trade 717, 717.

[95] ibid. [96] ibid.

[97] Gus Van Harten, *International Treaty Arbitration and Public Law* (OUP 2007) 87; European Parliament Directorate-General for External Policies (n 44) 136; Christoph Schreuer, 'Fair and Equitable Treatment in Arbitral Practice' [2005] J w I T 357, 357.

[98] Blyschak (n 76) 166.

[99] Axel Weissenfels, 'Independent BIT Standard or Mere Affirmative Commitment? The Umbrella Clause Interpreted' (2005) 10 Austrian Review of International and European Law 95, 95.

[100] Thomas W Wälde, 'The "Umbrella" (or Sanctity of Contract/Pacta Sunt Servanda) Clause in Investment Arbitration: A Comment on Original Intentions and Recent' Presentation at British Institute of Comparative and International Law 6.

[101] Blyschak (n 76) 146.

[102] European Parliament Directorate-General for External Policies (n 44) 161; van Aaken (n 9) 7.

[103] Santiago Montt Oyarzún, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Hart 2009) 157.

is likely to continue into the future. As newer treaties are applied and interpreted, States are likely to have ongoing cause to engage in further recalibration.[104]

2.2.2 Responding to changing risk profiles

In amending the substantive and procedural rules applicable to investor-State arbitration, States have also responded to their changing risk profiles. The majority of early investment treaties resulted from asymmetric negotiations between an essentially capital-exporting and an essentially capital-importing State. In these negotiations, capital-exporting States placed an 'almost exclusive emphasis on the protection of foreign investment'.[105] They sought only the protection of their own investors in the capital-importing State, and were largely unconcerned with the implications of those treaties for their own liability. Nowadays, the picture is more nuanced. It is increasingly difficult to classify States as solely 'capital-exporting' or 'capital-importing'. Treaties, too, are no longer concluded on a solely asymmetric basis.[106] Instead, States which were traditionally capital-exporters are becoming also capital-importers, and vice-versa.[107] Simultaneously, 'the number of states counting themselves as respondents has also increased dramatically'.[108] The 'increased likelihood that both Contracting Parties may find themselves in the respondent seat in an investor-state arbitration' changes their 'perceptions of the risks and rewards inherent in their treaty programs'.[109] The United States, for example, initiated reforms to its model treaty and negotiating practice 'just after it was challenged by the first NAFTA claim'.[110] Changes in State risk profiles means that an increasing number of States are seeking to balance their regulatory space with the protection of their overseas investors.[111] This necessarily results in modifications to treaty practice.[112]

2.2.3 Responding to changing expectations about investment

The expectations of States in entering into investment treaties are also changing. Whereas the conclusion of treaties in the 1990s was 'based on the widely shared

[104] Luke Nottage and Kate Miles, ' "Back to the Future" for Investor-State Arbitrations: Revising Rules in Australia and Japan to Meet Public Interests' Paper No. 08/62 Sydney Law School Legal Studies Research Paper 5; Tuck (n 41) 902.

[105] Footer (n 42) 37; Christopher M Ryan, 'Meeting Expectations: Assessing the Long-Term Legitimacy and Stability of International Investment Law' (2007) 29 University of Pennsylvania Journal of International Law 725, 726; Spears (n 8) 1042.

[106] UNCTAD (ed), *World Investment Report 2010: Investing in a Low-Carbon Economy* (United Nations 2010) 18–20, 82.

[107] Kulick (n 12) 21.

[108] Roberts (n 18) 90. See, also, European Parliament Directorate-General for External Policies (n 44) 13; van Aaken (n 9) 25; Kulick (n 12) 19.

[109] Roberts (n 18) 90; Kulick (n 12) 22.

[110] Huiping (n 88) 482. See, also, G Gagné and JF Morin, 'The Evolving American Policy on Investment Protection: Evidence from Recent FTAs and the 2004 Model BIT' (2006) 9 Journal of International Economic Law 357.

[111] Spears (n 8) 1042.

[112] van Aaken (n 9) 25; Ryan (n 105) 756.

belief that this would increase foreign investment',[113] empirical evidence as to the expected benefits of entering into investment treaties is increasingly becoming more nuanced.[114] So, too, are State attitudes towards foreign investment. As Brower and Blanchard note, '[t]he increase in criticism of the investment law regime has occurred in tandem with a cyclical cooling of certain states' attitudes toward foreign direct investment generally'.[115] Changing expectations as to the benefits of investment treaties, or of foreign investment more generally, have resulted in shifts in State treaty practice. As van Aaken explains 'the point of optimality between commitment costs and benefits of FDI still needs to be found'.[116]

2.2.4 Responding to changing expectations about dispute settlement

Finally, States have implemented reforms as their expectations of investment arbitration have changed. Investment treaty arbitration was initially modelled from international commercial arbitration, and as such commercial 'philosophies about the role of law, the state, and the function of dispute resolution' informed its early design.[117] Over time, investor-State arbitration came also to be conceptualized as a regime of public international law, or even 'international public law'.[118] As a result, States showed 'a greater willingness to draw inspiration from litigation-based models of dispute resolution' as well as international and public law paradigms.[119] As Catherine Rogers notes, these changing paradigms led to the development of 'an entirely new set of expectations' about how investor-State arbitration should function.[120] Focusing on procedural rules, for example, Rogers argues that:

> [w]ords like 'transparency' and 'accountability' today seem like obvious requirements for a process and important and delicate as arbitrator selection. In 1995, these terms were anathemas.[121]

As different paradigms are used to conceptualize investor-State arbitration, and as new practitioners with particular professional backgrounds enter the field, it is only natural to see a different set of expectations and operating assumptions gain prominence.[122] These new expectations also result in modifications to treaty drafting practice and arbitral procedures.

[113] Roberts (n 18) 90; European Parliament Directorate-General for External Policies (n 44) 20; Spears (n 8) 1040–41.
[114] See, eg: Jason Webb Yackee, 'Are BITs Such a Bright Idea? Exploring the Ideational Basis of Investment Treaty Enthusiasm' (2005) 12 U C Davis Journal of International Law and Policy 195.
[115] Brower and Blanchard (n 11) 764–65.
[116] van Aaken (n 9) 26. See, also, Nowrot (n 13) 644.
[117] Franck (n 86) 155; Roberts (n 18) 54.
[118] Roberts (n 18) 54.
[119] Tuck (n 41) 887; Roberts (n 18) 78.
[120] Rogers (n 59).
[121] ibid.
[122] Roberts (n 18) 55, 84.

2.2.5 Conclusions

This subsection has sought to highlight the range of circumstances to which State reforms of the investment treaty arbitration system have responded. It also bears a cautionary note: it is possible that, in responding to these changing circumstances (or, indeed, backlash generated by reference to these circumstances), State actions are mistakenly being taken as themselves evidence of 'backlash'. In taking care to identify the motivations underlying these reforms, the danger of detecting an exponential increase in 'backlash' as a result of system adaptation and refinement is avoided.

3 Unintended Consequences of Backlash

This Section considers briefly the possible unintended consequences of backlash.

The most extreme consequence of backlash is for the mechanism of treaty arbitration to be replaced with something else entirely.[123] Given that there is evidently a flow of investment disputes, the question is where they would go without treaty arbitration. What are the alternatives?

For many, the assumption is that investment disputes, absent an arbitration mechanism, will go to the national courts of host States. This has been proposed in the statements of various non-governmental organizations as well as some States.[124] At base, it is undeniable that all States 'should strengthen their domestic justice systems for the benefit of all citizens and communities, including investors'.[125] While such a result may be desirable, however, there are nevertheless a number of hurdles to be overcome before it is possible. In particular, there is the issue of how to test whether national courts at present are an appropriate or feasible alternative to treaty arbitration. One option is the development of a ratings or indexing system to assess the adequacy of the treaty arbitration system as compared to national courts.[126] The World Justice Project, for example, issues a Rule of Law Index reporting on ninety-nine countries. Using the Index's methodology, might it be possible to assess the adequacy of the international commercial arbitration system and the treaty arbitration system? For some States, the arbitration system would probably in many respects rank rather high in a list of national judiciaries. Some national courts, for example, are 'not perceived to be sufficiently neutral in resolving disputes between foreign

[123] Chris Campbell, Sophie Nappert, and Luke Nottage, 'Assessing Treaty-Based Investor-State Dispute Settlement: Abandon, Retain or Reform?' (2013) Paper No. 13/40 Sydney Law School Legal Studies Research Paper 1.

[124] See, eg: 'Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity' (Australian Department of Foreign Affairs and Trade 2011).

[125] Gus Van Harten and others, 'Public Statement on the International Investment Regime' (2010) <http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/>.

[126] See, further: Caron (n 82). See, also, John Gaffney, 'When Is Investor-State Dispute Settlement Appropriate to Resolve Investment Disputes? An Idea for a Rule-of-Law Ratings Mechanism' (2015) 149 Columbia FDI Perspectives, Perspectives on Topical Foreign Direct Investment Issues (suggesting the use of the EU Justice Scoreboard).

investors and host states'[127] or otherwise inefficient as compared to arbitration in doing so.[128] One can also imagine pairings of countries with national judiciaries both ranked higher than treaty arbitration, and in that instance it could be argued that mutual recourse to national courts for investment disputes is appropriate.

The issues associated with assessing the appropriateness or feasibility of national courts aside, however, a further hurdle arises: investors would retain the ability to negotiate agreements directly with host States providing for dispute settlement through other means.[129] There is some indication, for example, that in the absence of investment treaties investors will seek concessions from States to better protect their investments.[130] These concessions very frequently channel disputes to commercial arbitration proceedings. Such a situation could lead to significant unintended consequences.[131] It would, for example, benefit the most powerful investors and would also privilege those types of investment capable of protection through contractual arrangements.[132] It also pushes disputes underground, subjecting them to less transparent and largely unregulated procedures as compared to those which would apply in the case of an investment treaty arbitration.

Less extreme consequences are, however, also conceivable. Indeed, there is significant scope for States to continue to build upon, rather than discard, the present regime.[133] Doing so allows them to derive the benefits of the rich history of experimentation and reform sketched above.[134] Whilst critiques manifesting as 'backlash' can thus direct attention to possibilities for improvement of the regime, care must be taken to ensure that such critiques do not cause us to 'overlook the value of that system and the concerns in response to which the system emerged'.[135] In particular, in considering responses to backlash, care must be taken to avoid the trap of assuming that alternatives offer greener pastures.[136] A different system may simply lead to new problems,[137] or may result in current issues manifesting in different ways.[138]

4 Conclusions

This chapter has sought to tease apart the forms and focus of 'backlash' against the investment treaty regime, whilst also considering responses and consequences. It has highlighted the complex and multifaceted nature of these issues, and raised a number of points for further consideration. In particular, it has questioned the claim that State acts to reform the investment treaty regime are a response to, or even a form of, backlash against that regime. Rather, States have worked to refine the regime in light of changing circumstances, and in order to avoid the unintended consequences that

[127] Brower and Schill (n 3) 479. [128] ibid. [129] Roberts (n 18) 90.
[130] H Inadomi, *Independent Power Projects in Developing Countries* (Wolters Kluwer 2010).
[131] Langford (n 13) 187–88.
[132] Brower and Schill (n 3) 481, 482; European Parliament Directorate-General for External Policies (n 44) 163.
[133] Brower and Schill (n 3) 475. [134] Meyers (n 74) 50. [135] ibid 48.
[136] European Parliament Directorate-General for External Policies (n 44) 106.
[137] ibid. [138] Franck (n 86) 157.

might be associated with its complete abandonment. To borrow words from a different context, the chapter has illustrated how 'backlash' against the investor-State regime is not necessarily 'a swelling tide of history but i[s] more like a series of waves that lap on an international beach, retreating repeatedly into domestic seas but leaving incremental changes on the shore'.[139]

[139] S Tarrow, *The New Transnational Activism* (CUP 2005) 219.