CLEARING THE AIR: DEMYSTIFYING ISDS IN THE CLIMATE DEBATE

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In his report dated July 13, 2023, United Nations Special Rapporteur David R. Boyd highlighted several concerns about the investor-State dispute settlement (ISDS) system, particularly its implications for climate action and human rights. While some of the concerns raised in the report are valid, others appear to be misleading or unclear. This article provides a concise analysis of the key concerns surrounding the current ISDS system in light of Boyd's report, aiming to foster a transparent discussion on this significant issue. The urgency of combating climate change has never been greater, underscoring the need for accuracy and impartiality in addressing the challenges within international investment law. It is imperative that these efforts support rather than impede the crucial fight against climate change.

I. INTRODUCTION

On July 13, 2023, the United Nations Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David R. Boyd, submitted a report to the General Assembly on the adverse effects of investor-State dispute settlement (hereinafter ISDS) on the fight against climate change (hereinafter Report).[1] The Report raises valid concerns about the current

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1. David R. Boyd (Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment), *Paying polluters: the catastrophic consequences of investor-State dispute settlement for climate and environment action and human rights*, U.N. Doc. A/78/168 (July 13, 2023) [hereinafter Report].

system of international investment arbitration, namely its potential detrimental effects on efficient coal-phase out and the enforcement of human rights. However, it also contains numerous inaccuracies and fallacies because it attempts to shift the blame (at least partly) away from the true rule-makers of the ISDS system, States. This is counterproductive, as effective reform is impossible until the true ambit of the current issues of the ISDS system is identified.

The issue of climate change is more pressing than ever. In order to achieve the goals set out by the Paris Agreement,[2] States must maximize their efforts to reduce greenhouse gas emissions. ISDS undoubtedly bears a significant impact on the energy sector and the protection of the environment. The Report rightfully observes that international investment agreements (hereinafter IIAs) *may*, in certain cases, stand in the way of some regulatory measures related to the phase out of fossil fuels, as well as the regulation of renewable energy sources.[3] However, it is essential to address these issues accurately and transparently in order to provide a clear road for the relevant governmental actors to successfully achieve their climate goals. The Report falls short of this by misjudging certain problems of the ISDS system that primarily stem from the substantive rules of the underlying investment treaties. The Special Rapporteur, when describing ISDS, omits that it is the States that are the rule-makers of the system, rather than its "victims" exclusively. Finally, it is unlikely that terminating all IIAs as suggested by the Report would be beneficial for the enforcement of human rights and environmental obligations on the long term.

II. Critiques of ISDS

The Special Rapporteur identifies various flaws in the ISDS system from a human rights and environmental standpoint, labeling them as fundamental.[4] Some of these critiques hold merit, while others are grossly exaggerated or misleading. This

2. Paris Agreement to the United Nations Framework Convention on Climate Change art. 2(1), Dec. 12, 2015, T.I.A.S. No. 16-1104.

3. *See* Sevilla Beheer B.V. v. Kingdom of Spain, ICSID Case No. ARB/16/27, Award (May 22, 2023).

4. Report, *supra* note 1, at 6.

section analyzes each issue raised by the Report from a critical point of view.

A. *One-sidedness and Limited Scope*

The Report critiques the power dynamics of the ISDS system, namely that it is one-sided and only confers rights on investors to be exercised against States.[5] However, the Special Rapporteur disregards the fact that this is due to the inherent limitations of the underlying IIAs, which have as their object and purpose to protect foreign investors and investments against certain State conduct.[6] This naturally determines the way tribunals interpret the provisions of such IIAs, under the generally accepted rules of treaty interpretation.[7]

The Report also contends that arbitral tribunals in ISDS take no account of human rights,[8] however, this is merely due to the fact that the jurisdiction of the tribunals is limited to the interpretation and application of the specific treaty in question. There is no judicial body of general jurisdiction in international investment law, and it will likely take time until a multilateral investment court is set up.[9] There is ongoing debate over whether, under the current state of public international law, international human rights are *jus cogens* norms,[10] with their application as customary international law by tribunals being contested in practice and also restricted by the parties'

5. *Id.*

6. *See, e.g.*, U.N. Conference on Trade and Development, Netherlands model Investment Agreement 1 (Mar. 22, 2019), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download [hereinafter Dutch Model BIT]. *But see* Orascom TMT Investments S.à r.l. v. Alg., ICSID Case No. ARB/12/35, Final Award, ¶ 543 (May 31, 2017) (denying jurisdiction based on a restrictive reading of the object and purpose of the treaty).

7. Vienna Convention on the Law of Treaties art. 31(2)., May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

8. Report, *supra* note 1, at 7.

9. *See* U.N. Comm'n on Int'l Trade L. Working Grp. III (Inv.-State Disp. Settlement Reform), Report on the Work of Its Forty-Second Session, U.N. Doc. A/CN.9/1092 (Mar. 23, 2022).

10. Evan J. Criddle & Evan Fox-Decent, Fiduciaries of Humanity: How International Law Constitutes Authority 78 (2016).

pleadings before the tribunals.[11] This is also confirmed by the very U.N.G.A. report the Special Rapporteur relies on in this regard.[12]

It is a legitimate concern that international investment law is unreceptive to human rights and environmental concerns. However, this will always be the case until States are willing to commit to such considerations, be it in IIAs or elsewhere. This is merely the consequence of the general principle of *pacta sunt servanda* and consensualism in public international law.[13] Whether or not States ultimately benefit from incoming investments pursuant to signing an IIA, their choice to provide said treaty protections voluntarily must be respected. Disregarding this choice is patronizing, particularly because States can always form and modify the rules on which the ISDS system rests.

In fact, new generation IIAs tackle this issue by clarifying the relationship between treaty protection standards and legitimate policy concerns, expressly providing that legitimate policy measures aimed at the protection of the environment do not violate the specific IIA.[14] However, such policy exceptions were relied upon by tribunals even *in lieu* of any explicit provision of the underlying treaty.[15] Still, the inclusion of these rules into the treaties ensures a more uniform arbitral practice on the subject.

On the other hand, it seems inappropriate to vest powers in tribunals, rather than institutionalized multilateral international courts, to rule on issues of human rights law, a field that is highly sensitive and symbolic. Nevertheless, this does not mean

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11. *See* Eco Oro Minerals Corp. v. Republic of Colom., ICSID Case No. ARB/16/41, Procedural Order No. 6, ¶ 30 (Feb. 18, 2019); Suzanne Spears, *Chapter 9: Reconciling Human Rights and Investor Rights: The Case of Climate Change*, *in* Investment Arbitration and Climate Change 207, 228-231 (Annette Magnusson & Anja Ipp eds., 2024).

12. Juan Pablo Bohoslavsky (Independent Expert), *Effects of foreign debt and other related financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights: Note by the Secretary-General*, ¶ 22, U.N. Doc. A/69/273 (July 17, 2017).

13. S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

14. *See* Dutch Model BIT, *supra* note 6, art. 2(2).

15. Saluka Investments B.V. v. Czech Republic, PCA Case No. 2001-04, Partial Award, ¶¶ 254-255 (Mar. 17, 2006). *See also* Eskosol S.p.A. in liquidazione v. It. Rep., ICSID Case No. ARB/15/50, Award of the Tribunal, ¶ 482 (Sept. 4, 2020).

that international investment law and all IIAs should be abrogated. First, it is not the fault of the ISDS system that the multilateral enforcement of international human rights norms is challenging. Second, ISDS and investment law can be regarded as the manifestations of the international rule of law,[16] holding States responsible for conduct that is arbitrary, unreasonable, or discriminatory. This is even in line with the Report's interpretation on the notion of the rule of law.[17]

It is true that in the age of multinational enterprises, some companies' resources can amount to a sum similar to the total resources of small States. It is also undeniable that the origin of investment protection rules can be traced back to the colonial era, when such standards were unilaterally imposed on developing countries by their colonizers, essentially benefitting Western investors.[18] This creates a situation where it is difficult to find a one-size-fits-all solution for assessing all involved States' interests. However, this is merely due to the fact that public international law generally does not treat States with less bargaining power in a preferential manner. The rules on duress do not cover indirect, economic coercion,[19] such as vis-à-vis developed states. It is plausible that, in certain cases, a developing State might be discouraged by threats of investment claims, due to their potential magnitude and impact. But for this to be remedied, the general rules of international treaty law would have to be expanded to cover the above situations under the rules of duress.

A more refined image of treaty negotiation should be applied in the modern age of international investment law. IIAs are still actively being negotiated and concluded on the north-south axis, with more and more emphasis and clarity on

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16. Jeswald Salacuse, The Law of Investment Treaties 114 (2010).

17. Report, *supra* note 1, at 8.

18. Lauge N. Skovgaard Poulsen, Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries 48 (2015). *See also* Dan Ciuriak, *A New Name for Modern Trade Deals: Asset Value Protection Agreements*, Centre for Int'l Governance Innovation (Apr. 11, 2017), https://cigionline.org/articles/new-name-modern-trade-deals-asset-value-protection-agreements; Anthea Roberts & Nicolas Lamp, Six Faces of Globalization: Who Wins, Who Loses, and Why It Matters 112–113 (2021).

19. VCLT, *supra* note 7, art. 52; Charles E. Partridge, *Political and Economic Coercion: Within the Ambit of Article 52 of the Vienna Convention on the Law of Treaties?*, 5 The Int'l Law. 755, 767 (1971).

modern issues, such as climate change.[20] The newly proposed advisory center of the UNCITRAL might mitigate the imbalance between developing and developed States by providing legal assistance to the former,[21] but it remains to be seen how the center will gain sufficient funding from States, especially from the global north, who may be reluctant to act against their own procedural interests.

Finally, the Report submits that ISDS is inherently investor friendly as investors statistically win more arbitral proceedings than States.[22] However, the Report distorts the statistics it relies on in order to justify its conclusions. The Report only considers that the majority of cases decided on their merits were favorable to the investors,[23] while, in fact, statistically more cases are dismissed or rejected—i.e., in practical terms, won by States.[24] This shows once again that the Report tries to depict States as defenseless against investors while arbitral tribunals more often than not dismiss the investors' claims in two-thirds of the cases.[25] States generally being victorious equally questions the Report's argument of the impact of investors threatening States with ISDS proceedings.

The Report briefly touches upon the question of counterclaims introduced by respondent States.[26] The debate is ongoing on the subject, but this could be an efficient way to balance out ISDS to the benefit of States specifically in the context of

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20. *See* Décret 2020-1282 du 22 octobre 2020 portant publication de l'accord entre le Gouvernement de la République française et le Gouvernement de la République de Colombie sur l'encouragement et la protection réciproques des investissements [Decree 2020-1282 of October 22, 2020 publishing the agreement between the government of the French Republic and the government of the Republic of Colombia on the reciprocal encouragement and protection of investments], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 10, 2014, art. 10.

21. U.N. Comm'n on Int'l Trade L. Working Group III (Investor-State Dispute Settlement Reform), Possible reform of investor-State dispute settlement (ISDS): Draft statute of an advisory centre on international investment dispute resolution, art. 2, U.N. Doc. A/CN.9/WG.III/WP.238 (Feb. 7, 2024).

22. Report, *supra* note 1, at 11.

23. *Id.*

24. UNCTAD, *Facts on investor-State arbitration in 2021: With a special focus on tax-related ISDS-cases*, *in* IIA ISSUES NOTE, No. 1, 4 (July 2022).

25. *Id.*

26. Report, *supra* note 1, at 6.

human rights and environmental protection.[27] The States are adamant in trying to establish the possibility of counterclaims on a procedural basis.[28] Nevertheless, the biggest obstacle before an effective system of counterclaims is the one-sidedness of the substantive provisions of the IIAs. Investors cannot be held liable as long as they do not have any precise substantive obligations under the IIAs that could be asserted by the host States.[29]

If included, human rights and environmental counterclaims could balance out the system by potentially reducing the amount of damages awarded in case of such violations by the investor in the host State. At the same time, this would preserve the effectiveness of the ISDS system by not incorporating human rights and climate litigation *per se* into the system, only as regards to the question of the legality of the investment, which could be easily adjudicated by the tribunals. This might also encourage host States to appoint more arbitrators with relevant human rights and environmental law backgrounds.

B. *Lack of Transparency*

The Report criticizes ISDS for its secrecy and lack of transparency and public participation.[30] This is indeed a shortcoming of the current system, as the impact of the awards can be significant on local populations. Moreover, even though there is no explicit *stare decisis* in ISDS, the interpretations provided by tribunals on vague treaty provisions are often followed in subsequent awards, almost amounting to arbitrators serving a quasi-legislative function.[31]

Although the lack of transparency of the process is a true concern, even the Report acknowledges the recent efforts that have been made in this regard, with States attempting to

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27. Maxi Scherer et al., *Environmental Counterclaims in Investment Treaty Arbitration*, 36 ICSID Rev. - Foreign Inv. L. J. 413, 434 (2021).

28. U.N. Comm'n on Int'l Trade L. Working Group III (Investor-State Dispute Settlement Reform), Possible reform of investor-State dispute settlement (ISDS): Draft provisions on procedural and cross-cutting issues, Draft provision 11, U.N. Doc A/CN.9/WG.III/WP.231 (July 26, 2023).

29. *See* Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, ¶ 412 (Aug. 30, 2000).

30. Report, *supra* note 1, at 9–10.

31. Catherine Rogers, Ethics in International Arbitration 317 (2014).

promote and incorporate transparency into the system, such as the UNCITRAL Rules on Transparency.[32] These efforts are especially important to ensure the general access to the dynamic body of international investment law. Of course, with such model rules being soft law instruments, they will only be applied by tribunals once they take the form of explicit treaty provisions in IIAs or if more States ratify the Mauritius Convention generally incorporating the UNCITRAL Rules on Transparency.[33]

Interestingly, it was exactly under the auspices of the UNCITRAL that the tribunals' powers to promote transparency on the parties has recently been significantly curtailed. In the final version of the so-called Code of Conduct, the default rule applicable to investment arbitration once again seems to be confidentiality, rather than transparency.[34] This unfortunate development questions the UNCITRAL's commitment to fostering public access to ISDS.

The question of third-party participation equally relates to the jurisdiction of the arbitral tribunals, highly limited by the underlying IIAs. These IIAs only empower qualifying investors and not third parties to initiate proceedings under the treaties. Nevertheless, we can now see a clear move towards allowing interested parties to participate in the proceedings in the form of submitting *amici curiae* briefs.[35] It is unsurprising, however, that such parties are barred from initiating proceedings against investors under the ISDS system, which is inherently designed for and limited to settling disputes between investors and States. Moreover, ISDS revolves around the mutual consent

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32. *See* U.N. Comm'n on Int'l Trade L., Rules on Transparency in Treaty-based Investor-State Arbitration (2014), https://uncitral.un.org/en/texts/arbitration/contractualtexts/transparency [hereinafter UNCITRAL Rules on Transparency]. *See also* United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) (Mauritius Convention on Transparency) [hereinafter Mauritius Convention].

33. Loretta Malintoppi & Natalie Limbasan, *Living in Glass Houses? The Debate on Transparency in International Investment Arbitration*, 2 BCDR INT'L ARB. REV. 31, 38–45 (2015).

34. U.N. Comm'n on Int'l Trade L., Draft code of conduct for arbitrators in international investment dispute resolution and commentary, art. 8(3), U.N. Doc. A/CN.9/1148 (Apr. 28, 2023) [hereinafter Code of Conduct].

35. *ICSID Arbitration Rules*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, Rule 37, https://icsid.worldbank.org/rules-regulations/convention/arbitration-rules/introductory-note (last visited Mar. 28, 2024).

of the respondent State and the investor, an essential criterion of any type of arbitration.[36] This consent generally does not extend to third parties.

It is also unnecessary to allow interested parties, such as NGOs or governmental bodies, to initiate proceedings against investors under international investment arbitration as they can do so under domestic law before national courts, independently of a potential arbitration.[37] If the Report truly believes in the efficiency of domestic courts,[38] then it would seem unreasonable to integrate such claims into the ISDS system and to condemn investment arbitration for not fulfilling a function that it was never intended to fulfil.

C. *Biased Decision-Makers*

The Report accuses arbitral tribunals of being biased towards investors because of investors' ability to participate in the constitution of the tribunal. This however is merely the manifestation of the principle of mutual consent and due process. It seems contradictory that, while advocating for the rule of law and international human rights, the Special Rapporteur would abolish the investors' right to a fair and independent decision maker and due process.[39]

In fact, many improvements have recently been made in terms of restricting biases in ISDS, such as through the aforementioned Code of Conduct.[40] Nonetheless, it is evident that biases can never be completely eliminated from the minds of arbitrators or other international decision-makers.[41] Moreover, the push towards a higher level of diversity among arbitrators and counsel in ISDS has never been more vocal and successful. The abolition of ISDS in its current form, as suggested by the

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36. The Oxford Handbook of International Investment Law 831 (Peter Muchlinski et al. eds., 2008).

37. *See, e.g.*, People v. Exxon Mobil Corp., No. CGC-23-609134 (Cal. Super. Ct. Feb. 5, 2024).

38. Report, *supra* note 1, at 23.

39. Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11, 14 and 15, art. 6., (last amended Aug. 1, 2021).

40. Code of Conduct, *supra* note 34.

41. Rogers, *supra* note 31, at 313.

Report,[42] may have adverse effects on the fight for diversity by negating the achievements so far, while it is unsure whether other options, such as a multilateral investment court, would ensure a more diverse pool of decision-makers.[43] For now, no rules adopted by the UNCITRAL on a standing mechanism in investment law reflect these considerations.[44]

The concern of double-hatting, arbitration lawyers acting both as counsel and arbitrators in the field, may hold some merit.[45] However, some argue that the system would become dysfunctional if counsel were forbidden from acting as arbitrators,[46] considering the small pool of professionals involved in ISDS.[47] We do see an emerging trend of more and more independent arbitrator practices being set up. Nevertheless, the general ban on double-hatting could restrict the pool of decision-makers even more, posing an obstacle to young professionals seeking experience and entry into the field. This would hinder future efforts to attain true diversity in ISDS.

Amount of Damages Awarded

The Report critiques the ISDS system for its "exorbitant" damages awards rendered by the arbitral tribunals.[48] Critics of investment arbitration have long expressed concerns about the high damages awarded, particularly due to specific valuation methods like the discounted cash flow (DCF) method employed by tribunals.[49]

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42. Report, *supra* note 1, at 21.

43. Andrea K. Bjorklund et al., *The Diversity Deficit in International Investment Arbitration*, 21 The J. of World Inv. & Trade 410, 434 (2020).

44. *See* U.N. Comm'n on Int'l Trade L. Working Group III (Investor-State Dispute Settlement Reform), Possible reform of investor-State dispute settlement (ISDS): Draft statute of a standing mechanism for the resolution of international investment disputes, U.N. Doc. A/CN.9/WG.III/WP.239 (Feb. 8, 2024).

45. Report, *supra* note 1, at 10-11.

46. Nassib Ziadé, *How Many Hats Can a Player Wear: Arbitrator, Counsel and Expert?,* 24 ICSID Rev. - Foreign Inv. L. J. 49, 55 (2009); Electrabel SA v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Proposal to Disqualify an Arbitrator, ¶ 41 (Feb. 25, 2008).

47. International Council for Commercial Arbitration, Report of the ASIL-ICCA Joint Task Force on Issue Conflicts in Investor-State Arbitration 63 (Mar. 17, 2016).

48. Report, *supra* note 1, at 11–12.

49. Thomas W. W. . .lde & Borzu Sabahi, *Compensation, Damages and Valuation in International Investment Law,* 6 Transnat'l Disp. Settlement 1, 4 (2007).

Most ISDS cases involve high-stakes projects, as investors are unlikely to pursue costly proceedings unless significant interests are at stake. The DCF method, also frequently used in the energy sector,[50] is designed to accurately assess the value of income generating assets through "a projection into the future to assess the amount of the revenues which would possibly be earned by the undertaking"[51] Tribunals have applied the DCF method in certain cases, although cautiously, which naturally resulted in the elevation of the damages to be awarded.[52] The DCF method is also frequently used in the domestic litigation context.[53]

Challenging the legitimacy of the DCF method as a whole is unpersuasive, as it does offer an accurate valuation approach in specific circumstances.[54] Naturally, there is a chance for the misapplication of the method by tribunals, as is the case with domestic courts. Nevertheless, concerns with the DCF method do not warrant the complete termination of all IIAs. To address concerns about high damages, States could consider introducing caps on certain types of damages in their investment treaties, aligning with the principles of *pacta sunt servanda* and the rule of law.

D. *Detrimental Effects to the Environment and Human Rights*

Moreover, the Report contends that IIAs have detrimental effects on the environment and human rights.[55] It is outside of the limits of this article to go into a detailed analysis of the

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50. Oliver Hailes, *Chapter 6: Valuation of Compensation in Fossil Fuel Phase-Out Disputes*, *in* Investment Arbitration and Climate Change 139, 152 (Annette Magnusson & Anja Ipp eds., 2023).

51. Amoco International Finance Corp. v. Government of the Islamic Republic of Iran, 15 Iran-U.S. Cl. Trib. Rep. 189, 229 (1987). *See also* Charles N. Brower & Jason D. Brueschke, The Iran-United States Claims Tribunal 576 (1998).

52. ADC Affiliate Limited et al. v. Republic of Hungary, ICSID Case No. ARB/03/16, Award of the Tribunal, ¶ 502 (Oct. 2, 2006).

53. *See* Rohring v. City of Niagara Falls, 84 N.Y.2d 60 (1994).

54. *See* U.N. Comm'n on Int'l Trade L. Working Group III (Investor-State Dispute Settlement Reform), Possible reform of investor-State dispute settlement (ISDS): Draft provisions on procedural and cross-cutting issues, U.N. Doc. A/CN.9/WG.III/WP.231, draft provision 23(4) (July 26, 2023) (allowing ISDS tribunals to award damages based on expected future cash flow).

55. Report, *supra* note 1, at 14–19.

question, but it is important to note that the Report itself does not provide sufficient scientific support for its claims.[56]

The Report raises the issue of regulatory chill caused by the fear of potential investor claims against host States.[57] There is debate over the effectiveness of tribunals in safeguarding the legitimate regulatory powers of States. However, cases certainly exist where tribunals side with States and reject claims of breaches of fair and equitable treatment or unlawful expropriation in the climate context.[58] In any case, including clear environmental and human rights carve outs into IIAs, as well as appointing arbitrators with relevant experience could be sufficient solutions, instead of the termination of all investment treaties, as international investment law also protects investments in the renewable energy sector.[59]

It should be noted that, in the context of climate change, developing countries are in a deficit of $4 trillion per year of foreign direct investment necessary to achieve their Sustainable Development Goals.[60] It is unlikely that States abruptly withdrawing from all IIAs providing the only potential safety network and thus a strong incentive for these investments in the renewable energy sector would serve the fight against climate change on the long term. If the negative effects of the ISDS system are to be rectified, one must take into account the macroeconomic consequences of a proposed reform.

III. Suggestions by the Report, Conclusion

The Report proposes some solutions that rightfully call for systematic reform, while others, such as terminating all

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56. In general, little (and contradictory) research has been done on the question. *See* Emma Aisbett, *Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus Causation*, *in* The Effect of Treaties on Foreign Direct Investments 395 (Karl Sauvant & Lisa Sachs eds., 2009).

57. *Id.* at 16–17.

58. *See* Chemtura Corporation v. Government of Canada, UNCITRAL Arbitration, Award, ¶ 133–163 (Aug. 2, 2010).

59. The Energy Charter Treaty, for example, has seen far more cases introduced by investors in renewables than in the fossil fuel industry. *See* Energy Charter Secretariat, Statistics of ECT Cases (last updated Dec. 1, 2023).

60. U. N. Conference on Trade and Development, *World Investment Report 2023: Investing in Sustainable Energy for All*, 30–31, U.N. Doc. UNCTAD/WIR/2023 (2023).

existing IIAs, would effectively dismantle international investment law.[61]

States have already become aware of many of the issues raised by the Report and started to react by incorporating detailed limitations on treaty protections,[62] as well as new procedural solutions, such as the possibility of counterclaims.

The system of international investment arbitration is an effective tool for investors to hold States responsible for their conduct under international law by protecting investors, including investors in the renewables sector. In the absence of efficient enforcement mechanisms for human rights law, ISDS could also play a role in enforcing human rights and environmental obligations as it modernizes. This could be ensured by the amendment of existing IIAs to include human rights and environmental limitations on treaty protections.

Abandoning a functioning field of public international law on the basis of uncertain issues is counterproductive to promoting human rights, the global rule of law, and combating climate change. The Report, while highlighting valid concerns, overlooks significant risks and deflects responsibility from the true architects of the system: States.

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61. Report, *supra* note 1, at 22–24.

62. *See* European Commission, *Annotations to the Model Clauses for negotiation or re-negotiation of Member States' Bilateral Investment Agreements with third countries*, Non-Paper Ref. Ares(2023)7231517 (Sept. 21, 2023).