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Research Report

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After intra-EU BITs and the ECT, the EU needs to abandon extra-EU BITs—for legal, energy and climate policy, and political economy reasons

by
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Since 2020, the EU and its member states have adopted legal instruments to terminate intra-EU bilateral investment treaties (BITs) and withdraw from the Energy Charter Treaty (ECT). As a logical next step, they should focus on ending the 1,103 BITs in force between EU members and extra-EU partners. These extra-EU BITs risk undermining the autonomy of EU law, hinder EU energy and climate goals, and fail to establish balanced sustainable investment partnerships with third states, as envisaged by the European Commission.

Legal reasons. In its 2018 *Achmea* ruling, the Court of Justice of the EU (CJEU) held that intra-EU investment arbitration was incompatible with the autonomy of EU law. In 2021, the Court expanded its reasoning to intra-EU arbitration under the ECT in *Komstroy* and to *ad hoc* arbitration between EU members and EU investors in *PL Holdings*.

In contrast, in its Opinion 1/17 on the EU–Canada Comprehensive Economic and Trade Agreement (CETA), the CJEU found no such violation—but not because the principle of mutual trust was inapplicable or because the Agreement only provided for extra-EU arbitration. Instead, the Court relied on specific safeguards built into the investment chapter in finding that CETA sufficiently protected the autonomy of the EU legal order.

Since extra-EU BITs do not contain comparable safeguards, investment arbitration tribunals constituted under these BITs may interpret and apply EU law, without the possibility of asking the CJEU for a preliminary ruling. At first sight, this raises similar doubts as to the compatibility of investor–state dispute settlement (ISDS) under extra-EU BITs with the autonomy of EU law, but the CJEU has not yet addressed this issue.[1]

Energy and climate policy. In its proposal for a Council Decision on ECT withdrawal, the European Commission acknowledged that "the [investment] protection granted to fossil fuels…for an unlimited period of time, does not fit with EU objectives as defined in the European Green Deal, the REPowerEU Plan or the Climate Law". These instruments create legally binding obligations on the EU and its members to accelerate the shift from fossil to renewable energy, achieve greater energy security, cut greenhouse gas emissions by 55% by 2030, and reach net zero by 2050. Consequently, the Commission noted that, remaining a party to the ECT, "is not an option for the EU or its Member States" as the treaty "is not in line with…the EU's energy and climate goals".

Extra-EU BITs grant, for an unlimited time, protections to fossil fuel investments that are similar to the protections under the ECT. Accordingly, extra-EU BITs are just as incompatible with EU energy and climate goals as the ECT. They are also not in line with the EU's determination "to engage with partner countries to promote an energy sector predominantly free of fossil fuels well ahead of 2050".

Political economy. The European Commission intends to forge "Clean Trade and Investment Partnerships" to secure resilient supply chains, promote renewable energy and encourage FDI. To this end, the EU and its members need to meet their partners on an equal footing and develop balanced and mutually beneficial partnerships.

In contrast, most extra-EU BITs date back to the 1970s and 1980s and cement a relationship in which powerful European states mistrusted—or, at best, second-guessed—the rule of law by post-colonial governments in the Global South. ISDS in extra-EU BITs empowers foreign investors to challenge legitimate public-interest measures by host states and to seek large compensation awards.

Because of its asymmetry, ISDS has created a power imbalance that favors the economic interests of investors and undermines the policy space of host countries; EU partners may perceive extra-EU BITs as instruments of hegemony rather than eye-to-eye partnerships.

Moreover, there is no conclusive empirical evidence that BITs increase FDI inflows, including in renewable energy. In fact, ISDS may discourage states from promoting investment in renewables.

The investment protection and arbitration regime is neither an adequate nor equitable basis for forging strong partnerships for the 21st century, and piecemeal reforms have proven ineffective at significantly improving it. Accordingly, the EU should abandon the regime in favor of alternative approaches, e.g., focus on cooperation and facilitation without investment protection and ISDS (such as in the Sustainable Investment Facilitation Agreement with Angola) and rely on other solutions to protect EU investors abroad, such as political risk insurance.

Conclusion. EU members should terminate extra-EU BITs. To facilitate the process, the EU could spearhead an instrument similar to the plurilateral agreement to terminate intra-EU BITs or based on the draft treaty language on termination proposed to UNCITRAL Working Group III.

Breaking free from treaties that work against EU objectives would allow the EU to work with partner countries on developing approaches and legal instruments to strengthen regulatory frameworks and the rule of law globally; facilitate flows of climate-aligned, sustainable investment; and foster investment governance in line with sustainable development, democracy and the autonomy of EU law.

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[1] The German Federal Court (Bundesgerichtshof) recently refused to extend the *Achmea* rationale to ISDS under extra-EU BITs, but did not involve the CJEU via a preliminary reference procedure.

For further information, including information regarding submission to the *Perspectives*, please contact: Columbia Center on Sustainable Investment, Chioma Menankiti, at clm2249@columbia.edu.

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