Protecting Foreign Companies, the Energy Charter Treaty, International Trade Justice, and Bangladesh

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ABSTRACT

The Energy Charter Treaty (ECT), which became legally effective in 1998, is an energy sector-specific legally-binding multilateral agreement that protects and safeguards foreign direct investment (FDI) and multinational enterprises (MNEs). Bangladesh, an energy-importing, and FDI-attracting-state has completed almost all the formalities to soon become a member of the ECT and declared that it is ready to embrace the legal obligations of the treaty. Its declaration of joining the ECT was motivated by an expectation that doing so would benefit the country. The positive expectation from the ECT requires a reality check, taking into account the context of the energy sector of Bangladesh. This article checks this reality based on a particular theoretical perspective that links justice with international trade and investment. It is argued here that the inherent structural features of the ECT confirm that it places corporate profit and safety over people and ecology, and thus Bangladesh must not join it.

Setting the Context

The history of protecting the interests and security of companies and investors operating in foreign lands is not new. The origin of this history lies in the European pre-colonial and colonial eras. The European colonial states counted on them for capitalist expansion and empire-building. They offered the companies and investors administrative, legal, or military shields when necessary. To capture this phenomenon that existed in international relations in the 16th, 17th, and 18th

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centuries and to understand the embedded relationship between a colonial state and its foreign land-bound European companies, Philips & Sharman (2020: 6- 7) bring the concept of "company-states," into the analysis. They define the "company-state" as an entity that shares the power of the sovereignty of the state. This shared sovereign power allowed the company states to create currencies and oversee civil and criminal justice within their premises. The company-states could also mobilize military forces, wage war, and conduct diplomacy with the colonized rulers and people other than their usual charter-granted monopoly over trade in particular goods (Philips & Sharman, 2020: 7). The historian Philip Stern coined the term.

However, with the European colonial states growing strong in the 18th and 19th centuries, the shared sovereign power of the company-states declined and eventually disappeared with the decolonization following the Second World War (Philips & Sharman, 2020: 17). During, and in the aftermath of the war, states (including the USA, Germany, the UK, and Japan) with the capacity of exporting capital were desperate for setting up an international legal framework to protect foreign investments (Snyder, 1963: 1090). The USA had as many as twenty-one bilateral treaties signed with developing countries by the mid-1940s, while Britain had one with Iran signed in 1959 (Snyder, 1963: 1090). The provisions of the treaties confirmed that the host states do not appropriate foreign enterprises and their investments without compensation (Snyder, 1963: 1090).

More importantly, bilateral investment protection treaties received an institutional impetus in a multilateral forum when Germany and the UK drafted a legal document for the Abs-Shawcross Convention on Investment Abroad, for submission to the Organization for European Economic Co-operation (OEEC), the predecessor of the Organization for the Economic Co-operation and Development (OECD) (Snyder, 1963: 110). Germany presented it to the OEEC in 1959, and the OECD never approved it, as the southern European Members opposed it (Muchlinski, 1999: 1036). This futile effort did not indicate that OEEC or OECD had not been ready to prepare a framework to protect foreign investments and enterprises. They did so differently, by adopting Codes of Liberalization of Capital Movements and Current Invisible Operations in 1961. It came to be known as the Code of Capital Movement in 1984. The World Bank was also exploring a way for such

legal instruments, which ultimately led to the adoption of the Convention on the Investment Disputes between States and Nationals of Other States in 1965.

Multilateral organizations, including the General Agreement on Trade and Tariffs (GATT), the World Trade Organization (WTO), the United Nations (UN), International Labor Organization (ILO), and North American Free Trade Agreement (NAFTA), did the same for the protection of foreign companies and investors between the 1970s and 1990s. For instance, the UN adopted the Code of Conduct on Transnational Corporations (1977), the ILO, the World Bank, and the WTO respectively adopted the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1977), the Guidelines on the Treatment of Foreign Direct Investments (1992), and Trade-Related Investment Measures (TRIMS) (1994).

Whatever the nature of the protection of foreign/multinational companies/enterprises incorporated in those legal documents, the concept of state sovereignty received due importance and acknowledgment for putting safeguard structures into practice. But, it took a different twist when the OECD began negotiations for preparing a draft of the Multilateral Agreement on Investment (MAI) in 1995. The MAI initially did not have anything concerning labor and environmental standards, and it proscribed performance requirements for foreign investors, local investors, and firms (Muchlinski, 1999: 1048; Khor, nd). The draft MAI offered multinational enterprises (MNEs) and individual investors the right to sue contracting states if their health, labor, or environmental legislation put their interests at risk and if they failed to comply with legal obligations (Khor, nd). When the draft got leaked in 1997, it created a global uproar, and even the French prime minister expressed unwillingness to continue with the negotiation because the proposed document had some "fundamental problems" and put private interests above state sovereignty (UN, 1999: 4, see note 2). In response, the OECD had to shelve the negotiations in 1998.

In hindsight, a sector-specific look-alike agreement called the Energy Charter Treaty (ECT) remained unheard of and continues to exist until now. ECT is a legally binding sector-specific multilateral trade and investment plus agreement signed in 1994 (Roe & Happold, 2011: 8). It came into force in 1998 to deal with four broad issues that include: i) the protection of foreign investment in the energy sector in terms of the principles of national treatment and most favored nation

treatment (MFN); ii) ensuring the implementation of the principle of non-discrimination for trade in energy materials, products, and energy-related equipment and reliable transit and transportation of energy across borders through pipelines, grids, and other means; iii) the resolution of disputes between states and between host states and investors; iv) the advocacy for energy efficiency and minimizing environmental risks for energy production and use (The Energy Charter Secretariat, 2019). Fifty-four countries representing Europe, Asia, America, and Africa concluded the treaty. The European Union and European Atomic Energy Community are the other contracting parties (Roe & Happold, 2011: 8).

Bangladesh, a country desperate to attract Foreign Direct Investment (FDI), has confirmed that it will soon join the ECT. The government expects that it will benefit the country in several ways, in terms of foreign investments, energy business roadmap, energy savings, and green funds (BSS, 2018). The country has already signed the International Energy Charter, which paves the way for getting membership in the Energy Charter Treaty. Given the evolution of the different international legal and voluntary frameworks for protecting and safeguarding foreign investments and enterprises and Bangladesh relatively not being a capital-exporting country, the latter's decision to join the ECT invites a couple of queries: First, why does Bangladesh look forward to becoming a member of the ECT? Second, how beneficial will it be to an energy-importing country like Bangladesh?

For the answers, the first section of the article begins by reflecting on the origin of the ECT, in brief, to understand what motivated the founding members to bring it into operation. In the second section, a particular theoretical framework of justice in international trade is adopted that offers the basis for examining the probable implications of the obligations the state will assume under the ECT. Before analyzing the potential consequences, the third section discusses the existing reality of Bangladesh concerning the energy sector. The fourth section assesses the ECT's text and resorts to experiential reflections of the ECT member states.

The Origin of the ECT

Former Dutch Prime Minister Rudd Lubbers proposed to create a European energy community at the European Council Meeting in Dublin in June 1991 (Axelrod, 1996: 497). This proposal paved the way for the EU to assume a leadership role in the negotiations. To this end, the

Energy Charter Conference involving more than 50 states took place to formulate the European Energy Charter signed by 49 states and the former Soviet Union in December of the same year (Happold & Roe, 2011: 8; Axelrod, 1996: 497).

Whatever the declared objectives for cooperation in the energy sector and membership coverage of the treaty, the politico-economic and geopolitical calculation of the European Union members primarily provided the basis for bringing this sector-specific multilateral agreement into existence. Thus, the ECT essentially had its root in the European Energy Charter (EEC), often termed the "new paradigm" for the energy sector (Axelrod, 1996: 497).

The appearance of the EEC coincided with the context that Soviet Union-led communism was on the verge of collapse, but with 15 Soviet republics having an abundant reserve of fossil fuel. Thus, they had an enormous investment potential for many energy multinationals from Western Europe. The Netherlands, the United Kingdom, France, and Norway, among others, hosted many globally prominent companies, including Royal Dutch Shell, Total Energies SE, BP PLC, and Saga Petroleum. The EEC offered them the opportunity to allocate expertise, capital, and technology to Central Asia and East European states as well as the Soviet Union (Axelrod, 1996: 497).

The West European states also needed to minimize their traditional dependence on Middle Eastern countries for energy security. For that, they wanted to ensure long-term access to the energy resources of the Soviet Union (Happold & Roe, 2011: 9). The USA and non-European OECD were worried that EEC might help the EU monopolize access to the energy sector of the Soviet Union. Thus, the USA, Canada, Japan, Australia, and New Zealand engaged in the EEC negotiations (Happold & Roe, 2011: 9). The Central and East European countries with weak investment capacity thought that the EEC would be a gateway for them to integrate economically with the Western states and develop the energy sector for export-earning, avoiding the political division of the Cold War (Happold & Roe, 2011: 9).

All the motivations of European and other Western and East European countries eventually led to the formation of the legally non-binding EEC in December 1991. The Charter identifies the necessity for a legally binding agreement for the governance of the energy sector, as the Cold War ended with the demise of the Soviet Union and the emergence of fifteen independent states. The embrace of the market

economy by the former Soviet republics led Western multinational companies to invest in the newly independent states of Central Asia, Central, and Eastern Europe, and elsewhere. Against this backdrop, legally binding ECT came into existence in 1994, after three years of the non-binding EEC. It became legally operational in 1998.

The evolutionary trajectory discussed above illustrates that the ECT adoption process was not politics/power neutral or exclusively driven by economic interests. It emanated mainly from the geopolitical and politico-economic calculation of the Western countries with good investment capacity and energy multinationals. The investment-scarce countries with ample fossil fuel resources also did not have options other than becoming part of this multilateral trade and investment agreement.

The contrasting realities involving the two categories of countries—one with available capital for investment, import dependency for energy, and technological advancement and the other with plentiful fossil hydrocarbon resources but capital scarcity—offer an impression that the first category of states under the leadership of the European Commission had relatively more political and economic clout in the ECT-making process. For instance, the USA, the East European, and the West European countries reached a stalemate over the principles of national treatment and MFN status (Hober, 2020: 4). The USA demanded that the principle of national treatment be applicable at the pre-investment stage. But the West European and East European countries had the opposite preference (Hober, 2020: 4).

Again, none other than the European Commission (EC) brokered a deal to overcome the stalemate, by offering a two-stage compromise approach to accommodate its Western counterpart (Hober, 2020: 4). The EC resolved that the national treatment would be applicable at the pre-investment stage in a separate treaty, and the contracting parties would deal with other issues considering the ECT (Hober, 2020: 4). The two-stage approach did not satisfy the USA, which led to its eventual withdrawal from the negotiations (Hober, 2020: 4).

This context of negotiations reflects the predominant role the powerful actors play in the charter formulation process, to a certain extent. In such a reality, a query arises, regarding international trade and investment agreements: can multilateral trade and investment agreements ensure justice for the weaker counterparts when they are at the receiving end of negotiations in terms of material, diplomatic, and bargaining capacities, at least?

Before answering the question, empirically considering the ECT, it is pertinent to make two kinds of theoretical explanations—first, general and second, sector-specific—regarding the relationship between justice and trade. In other words, the first one addresses, in general, how scholars perceive the relevance of international trade in a global justice theory; and, the second one focuses on how the concept of justice can be relevant to the energy sector.

The Theoretical Framework: Global Justice, International Trade, and the Energy Sector

When the issue of justice comes to trade practices, it raises the question of whether the governance of trade has anything to do with it as it involves, for instance: "…the distribution of gains [from trade] or … [how] traders ought to interact, or how trade relates to a range of topics in the domain of global justice (human rights, justification of states, climate change)" (Risse & Wollner, 2014: 202).

In finding the place of trade in a theory of global justice, scholars propose three ontological explanations based on: i) voluntary transaction; ii) state-centric fair distribution; and iii) exploitation (Risse & Wollner, 2014: 201-203; Brandi, 2014: 227-228).

The first category of explanations assumes that international trade is a set of individual transactions between a seller and a buyer in a market system (Brandi, 2014: 228). The market is the ultimate place that helps individuals and companies select from the available means to lead their respective lives. In such voluntary transactions, fairness and justice do not have anything to do with international trade and investment (Brandi, 2014: 228). This perspective focuses more on the individual level of transactions involving individuals and companies, representing mainly the apolitical views of a neoclassical economist. Neoclassical economists look at the function of a market system by separating the behavior of exporters, importers, and consumers from the influence of other non-economic factors, ignoring the role of the state in providing the structure (whatever it is) for an exchange relationship in a market (Brandi, 2014: 229).

The second explanation emphasizes the significance of the background structures of international trade set up by states in ensuring fairness and justice (Brandi, 2014: 229). In this view, international trade implies that economic activity occurs only among states when they set up and maintain "cooperative and coercive background structures" and

end contractual transactions and their continuous existence (Brandi, 2014: 229). The gains from trade are a collective product, and all participating states have equal entitlements (Risse & Wollner, 2014: 202). The problem with such a view is that it is unclear how one determines the baseline to assess the equal share of states in international trade and how states distribute the social benefits of trade and investment. The benefits from trade and investment do not refer only to economic achievements; they can even cause plight to people and ecological harm to a state. A state-centric explanation of the link between justice and trade, and investment only in terms of economic activity, will not be of much help for analysis if the energy trade is, in perspective, having environmental consequences.

The third explanation focuses on exploitation in international trade. One way of looking at it is that the weak actors voluntarily take part in transactions that put them into exploitation for their background inequalities (Brandi, 2014: 240). This exploitation perspective has three main features that make it more relevant in discussing a sector-specific multilateral agreement on trade and investment (see Risse & Wollner, 2014: 202-225 for details). For instance, first, this perspective does not treat exploitation only in terms of domination. It analyzes exploitation from a twin perspective—"taking advantage of the vulnerable" and "taking advantage of rule violations"—or anything that puts any actor in a relatively more advantageous position than other actors in international trade and investment (see Risse & Wollner, 2014: 202-225 for detail). Second, this exploitation approach relates ideas of exploitation that arise from economic activities (like trade and investment) with the mandates incorporated in the legally-binding agreements involving states, companies, individuals, and other relevant entities (Risse & Wollner, 2014: 203). It also concentrates on the procedural aspects of trade and investment based on the principles for the state and non-state actors to interact with each other. They are pertinent for analyzing who is taking what advantage through the interactions. Third, this exploitation-based approach equates justice with responsibilities, meaning that duties do not get into interplay only from trading and investing. It also emanates from humanity and shared citizenship, even if no allegation of exploitation appears (Risse & Wollner, 2014: 212).

The exploitation-based explanation accepts that production activity operates through international trade and investment involving all the relevant actors (states, companies, workers, and other non-involved citizens) and that their mutual responsibilities stem from the background

(Risse & Wollner, 2014: 212). Again, this notion does not take ecological concerns of production and trade activities into account. In other words, it treats global justice in international trade only from the perspective of humanity in a collective sense, without addressing the issue of ecological degradation. But, once this third exploitation-based understanding of justice comes into the interplay about energy and energy-sector-specific investment, it must incorporate an extended meaning to include ecological concerns. The energy sector is highly ecology-sensitive or vice versa for product distribution and consumption, particularly when it involves trade and investment in fossil fuels.

The existence of a multilateral treaty for more than three decades is enough time for an evaluator to evaluate who is getting what from it. The ECT also creates room for gauging its implications for the energy, capital, and technology-scarce countries that have already signed or politically intended to sign it. The above discussion connects energy sector-specific international trade and investment with the concept of global justice and offers the necessary ground to examine the European Commission and capital-affluent Western countries-led ECT.

The third explanation of the relationship between international trade and justice represents exploitation in a broader sense going beyond the traditional idea of structural domination or subordination of one group/class by another. In this context, as already discussed elsewhere, exploitation is defined as taking advantage of the vulnerability of the politico-economically less powerful countries (like Bangladesh) and the violation of rules by the relevant actors, in which powerful and weak countries may become vulnerable to the energy multinationals when they are in a binding agreement to secure the international traders and investors. The extended concept of humanity indicates shared ecological citizenship combining ecological concerns and the responsibilities of human beings. Thus, the twin perspective of "taking advantage of the vulnerable" and "taking advantage of rule violations" with an extended concept of humanity is more relevant than the other theoretical explanations for assessing the probable implications of the treaty. Since Bangladesh is not yet a signatory state of the ECT, one can question what relevance the ECT has for a country that is not a contracting party. To answer this question, one can evaluate the existing reality of the energy sector of Bangladesh. In other words, this analysis of the Bangladesh energy sector will also provide a glimpse of the vulnerabilities that put it at a certain disadvantage.

The ECT and Bangladesh

The ECT has placed energy-importing developing countries like Bangladesh with its insufficient investment capacity, into a catch-22 position, broadly for several reasons. First, their demand for investment in the energy sector to achieve viable economic growth has made it imperative to attract foreign investment from donor countries, financial institutions, and multinational companies. The ECT, thus, is more like an insurer, putting the contracting party into a legally binding process to protect the capital of the investors and traders in the sector, including third-party financers/co-financers as incorporated in Article 6(1). Second, the preamble of the Charter also commits the contracting parties to liberalize trade and investment in the energy sector. Bangladesh signed the International Energy Charter in May 2015, the non-binding political document that paves the way for future accession to the ECT. The country became an observer of the ECT Conference (International Energy Charter, 2015). The recent statement of the state minister for power, energy, and mineral resources assured that Bangladesh had completed the necessary formalities for becoming a member of the ECT. He now lured the investors: “There are more opportunities to invest in [the] energy sector in Bangladesh and the investment in this sector is surely profitable” (*The Daily Star*, 2018).

The reason for such an allurement is simple. The government has now aimed to become a developed state by 2041, for which it needs viable production of electricity in proportion to its targeted GDP growth. The country has been experiencing GDP growth of 6.5% per year since 2010 (The World Bank, 2022). In 2018, an increase in GDP of 7.9% accompanied the increase in primary energy consumption by 8.6% (Ichord Jr. 2020: 3). With the ambition of high economic growth, per capita power generation also almost doubled between 2008 and 2018 (Moazzem & Ali, 2019: 5). Scholars estimate that Bangladesh requires USD 21 billion between 2021 and 2031 for power generation (Mahbuba & Jongwanich, 2019: 178). To attain this goal, the Power Division of the country felt the necessity to have the Power Sector Master Plan (PSMP) in 2010 and revise it in 2016.

This PSMP documents how Bangladesh has planned to increase electricity generation from 12.5 GW in 2015-16 to 60 GW by 2041, with 91% fossil fuel dominating (Debnath & Mourshed, 2022: 217; Power Division 2018: 41). The PSMP 2010 offers a roadmap to generate 50% of electricity from coal, 25% from natural gas, and 20% from other

sources by 2030. In the revised version of the document, the Power Division reduced coal to 32.2%, gas/LNG to 43%, nuclear liquid fuel to 7%, and other sources to 17.8% by 2041 (JICA & TEPCO, 2011: 2-6; Power Division 2018: 47).

The revised PSMP makes sure that the dependency on fossil fuels increases with the growing involvement of bilateral and multilateral donors, investors, and foreign companies, as the government will have to depend on them for FDI to achieve its declared development goal. But, it negates the pledge Bangladesh made in the 26th Conference of Parties (COP26). At that conference, it committed that it would reduce carbon dioxide emissions by 21.85% from the current level by 2030 (Illius, 2021), not to mention that the energy sector in Bangladesh accounts for 55% of the total carbon emissions (Illius, 2021).

Now the PSMP has attracted more foreign companies and investors in coal-fired power plants, including, among many others, 3D Investment Partners Ltd (Singapore), Adani Power Company Ltd (India), Afro-Asia Trade and Investment (Mauritius), Blackrock, General Electric (USA), UBS Asset Management (Switzerland), Blackrock Advisers (UK), China Energy Engineering Group Company Ltd, China Huadian and Science and Technology Group (China), Doosan Group (South Korea), Daiwa Asset Management Company Limited, Toshiba Corporation, and Sumitomo Corporation (Japan) (BWGED, 2022). Bangladesh now ranks 7th among the first ten recipients of USD 2.1 billion from China for coal-fired power plants between 2000 and 2019 (Gallagher et al, 2021: 2).

To materialize the goal of a new energy mix incorporated in the PSMP, the government signed several Memoranda of Understanding (MoUs) in the last decade or so with Qatargas (Qatar), Astra Oil Trading Energy Ltd (Switzerland), Pertamina Corporation (Indonesia), Gunvor Singapore Pvt Ltd (Singapore), JERA, the subsidiary of Tokyo Electric Power Company (TEPCO) and Chubu Electric Power Group, for importing LNG. Excelerate Energy (USA) now owns one of the two LNG terminals in Bangladesh (BWGED, 2022; HSNW, 2020). Rosatom State Atomic Energy Corporation is installing a nuclear power plant. Chevron Bangladesh, ConocoPhillips, ONGC, Gazprom, and Equinor have been operating in the energy sector for mining and exploration of Bangladesh.

The most troubling issues involving the power and energy sector are the enactment of the Power and Energy Fast Supply Enhancement

(Special Provisions) Act 2010 and the formulation process of a national planning document for the energy sector. The supply enhancement act and the PSMP have exposed our vulnerability to donor agencies and MNCs, to a large extent arising from the need for investment, in both pre-and post-investment phases.

The 2010 Act permits the government to award contracts to foreign companies without any bidding, as the former offers legal immunity to the government for quick initiation and implementation of any energy and power project (Khan, 2020: 284). It also revokes the right of the citizens to take any legal action if any operational glitch emerges or human rights violation occurs (Khan, 2020: 284). This background of legal impunity encourages foreign companies to invest massively in the coal-fired power plants with the already existing flexible FDI regime, even though Bangladesh signed the Paris Agreement (TIB, BAPA & Market Forces, 2019: 14).

Again, the despair to attract foreign investors in the power and energy sector also compelled the government to get the Japan International Cooperation Agency (JICA) and the Tokyo Electric Power Co., Inc (TEPCO) involved in the formulation process of the PSMP. The same TEPCO got the contract for building the Matarbari Coal-Fired Power Plant and Associated Facilities and Anowara-Matarbari 400 kV Transmission Line Project (see TEPCO, 2013 for detail; Bangladesh Bank, 2020: 5). In 2018, TEPCO, through its newly formed subsidiary JERA, invested 49% of the equity in the Reliance Meghnaghat Combined Cycle Power Plan, and bought 22% of the outstanding shares of Summit Power International Limited (SPIL) (JERA, 2019a, 2019b), not to mention that TEPCO was the operator of the disastrous Fukushima Daiichi Nuclear Power Plant in Japan and set up JERA after the nuclear disaster. Summit Power with its head office in Singapore under the name Summit India (Tripura) also acquired 23.5% of the shares of ONGC Tripura Power Company (OTPC) of India in 2021 (Khan & Sajid, 2022). All these contributed to making the Summit an MNE.

The aftermath of the PSMP, indeed, witnessed an overdependence of Bangladesh on coal-fired power plants for electricity generation, with the largest coal-tied power pipeline in the world. The government planned to construct 29 coal-fired power plants (Baxter, 2020). The government has recently announced that it will scrap ten coal-fired power plants, examining the prospect of the twenty-six planned coal-

fired power plants, other than the plants located at Rampal, Payra, and Matarbari (Roy, 2021). The country still has the fourth-largest coal-fired power pipeline in the pre-construction stage. The power plants in the pipeline can produce 10.9 GW of electricity (Staff Correspondent, 2022).

The formulation of PSMP has not only witnessed so many foreign companies, investors, and donor agencies getting involved in the power plants of Bangladesh, including coal-fired power plants. But their involvement in the power and energy sector through investment, construction activities, and operation does not paint a rosy picture for the people, society, and nature. For instance, the Rampal Power Plant, a joint venture of Bangladesh and India near the ecologically sensitive mangrove forest Sundarbans, caused the displacement of 400 families; 44% of the households surveyed complained that they had not received compensation (Backtrack, 2015: 13-14). In a study report, Transparency International Bangladesh (TIB) claims that corrupt public representatives, government officials, brokers, and an NGO—involved in land acquisition for three power plants at Barisal, Bashkhali, and Matarbari—misappropriated an amount of 3.9 billion (390 crores) taka (TIB, 2022: 13). The study also finds that the power plants acquired more land than the actual requirement. The government obtained 942 acres of extra land while their original requirement was 418 acres (TIB, 2022: 13). Intimidation from local thugs, physical violence, forcible eviction, and other forms of human rights violations were the everyday phenomena the local people witnessed, not to mention the prospect of destroying the world's largest mangrove forest (TIB, 2022: 14).

The stories are the same for power plants located in other parts of Bangladesh. In a different study on eight proposed power plants located at Cox's Bazar, the Finland-based Centre for Research on Energy and Clean Air (CREA) estimates that the plants would emit 1,600 kg of mercury annually. One-third of the emitted mercury would get stored in land and freshwater ecosystems, putting 7.4 million inhabitants at health risk (CREA, 2020: 6). As many as 30,000 people would die due to air pollution (CREA, 2020: 6). On the health impacts of the Rampal Power Plant, Greenpeace predicts that it will cause at least 6000 premature deaths (Staff Correspondent, 2017). When the powerplants in the pipeline start operation, they would release approximately 115 million tons of carbon dioxide annually by 2031 (TIB, BAPA, and Market Forces, 2019: 11). It would be 291% more than the 36 million tons of carbon dioxide per year that the country aims to reduce in compliance

with the Nationally Determined Contribution (INDC) incorporated in the Paris Agreement (TIB, BAPA, and Market Forces, 2019: 11).

The construction of coal-fired power plants also witnessed several human rights violations in the country. In one incident, police shot five workers to death at Gondamara, Banshkhali. The workers of the power plant, jointly owned by the S. Alam Group of Bangladesh and SEPCOIII Electric Power Construction Corporation, China, and HTG Development Group Co. Ltd. of China, were demanding payment of arrears and fixed time for duties (Rahaman & Yousuf, 2021). It was not the first time that the killings happened there. In 2016, police killed four villagers when around 500 villagers and the local salt farmers protested the forcible acquisition of 242.811 hectares of land (Pandey, 2016).

The over-reliance on coal-fired power plants for electricity generation, as planned in the JICA and TEPCO-formulated PSMP, contradicts the position of Bangladesh in multilateral forums like the Vulnerable Twenty Group (V-20) and the Climate Vulnerable Forum (CVF) for tackling climate change. It is chairing the CVF second time as one of the most vulnerable countries (TIB, BAPA, and Market Forces, 2019: 11).

The reality of a non-signatory country like Bangladesh discussed above, demonstrates how development aspirations and the necessity for foreign investment in the power and energy sector make the country vulnerable to donor agencies and foreign companies. The formulation of the PSMP involving a donor agency and a foreign company, and offering legal immunity to the energy and power sector through the Power and Energy Fast Supply Enhancement (Special Provisions) Act 2010 Act for attracting foreign investments, has paved the way for different forms of exploitation with the increasing participation of the foreign companies, investors, and donors. Government officials, local government representatives, and national NGOs are not lagging in indulging in corruption and other malpractices, taking advantage of the legal immunity that the power and energy sector currently enjoys. TIB estimates that they misappropriated an amount of BDT 3,900 million (USD 37.52 million @ 103.94) while acquiring land and paying compensation for the coal-fired power plants located at Barisal, Matarbari, and Banshkhali (TIB, 2022: 14).

Under the circumstances, it is relevant to dissect the ECT in terms of the broader exploitation-based perspective that links the theory of justice with international trade and investment in the energy sector, thus to

understand what it offers to a development-aspirant country like Bangladesh on the verge of signing the ECT. If it signs and ratifies the ECT, what changes will it bring to the reality that exists in the energy sector? Will it create more vulnerabilities? Is it going to reduce the scope of exploitation defined in terms of advantage taken by those who are politically and economically more powerful and in an advantageous position? Is it going to ensure justice for the contracting parties in the energy sector, or is it the other way around?

To address these queries, we require a review of the European countries-led ECT to examine its potential for ensuring justice for the state and non-state actors involved in the energy sector. Textual and experiential analyses of the ECT help to understand the relationship between justice/injustice and international trade and investment, because the text of the legally binding treaty has implications for economically and politically less powerful countries. The experiences of the contracting parties are indeed the living witness of how justice/injustice is embedded in the ECT as it has been in operation since 1998. This textual and experiential analysis unmasks what ways foreign investors and MNEs in the energy sector can take advantage of "rule violations" by the FDI-importing countries.

Textual and Experiential Dissection of the ECT

The analysis of this section proceeds in terms of certain thematic categorizations of the issues and provisions that have made the ECT globally controversial and contentious. They include state sovereignty, fair and equitable treatment (FET), ecological concerns, climate change, energy transition, and other related issues. The thematic discussions are as follows:

The provisions for state sovereignty and other issues

Although Article 18 of the ECT recognizes state sovereignty and sovereign rights of the contracting parties over their energy resources, the adoption of a declaration that says it "shall not be construed to allow the circumvention of the application of the other provisions of the Treaty" contradicts this provision of state sovereignty (The Energy Charter Secretariat, 2016: 66). As a result, the sovereignty of states over their energy resources gets subordinated to the interest(s) of foreign investors and companies.

Articles 5, 11, and 14 restrict the government from imposing compulsory local content requirements, employment of local people,

barriers to capital, returns, payments, unspent earnings, remuneration of personnel, and sale proceeds (The Energy Charter Secretariat, 2016: 45, 60). These articles ensure foreign companies and investors excessive freedom in their financial and economic activities. But they curtail the space for host states to generate employment in the energy sector and to produce local goods. More importantly, the provisions related to repatriating money by foreign companies and investors to their home countries put governments at risk when their balance of payments is in crisis as Sri Lanka currently has experienced.

Under the ECT, energy companies are also enabled to sue governments if they decide to impose taxes on unexpected profits, recruit local workers, transfer technology, or process local raw materials (CEO, TIN, & SEATINI, 2020: 15). KrisEnergy Bangladesh Limited, a UK-incorporated oil, and gas company have recently registered a request for arbitration with ICSID against Bangladesh and its state-owned Petrobangla for settling a tax assessment dispute of approximately USD 36 million involving the Bangora field (Bohmer, 2022). It is still pending and Bangladesh is yet to sign the ECT.

However, once the ECT is signed, states lose policy space and sovereignty to act to protect the public interest (Bohmer, 2022). Thus, the ECT makes the contracting party extremely vulnerable to the exploitation arising simultaneously from investment scarcity and violations of its provisions that protect and secure only foreign investment in the energy sector. While doing so, it incorporates an all-encompassing definition of investment covering the direct and indirect investments from investing capital in energy exploration to share-holding, as Article 1(6) reads:

> … every kind of asset, owned or controlled directly or indirectly by an Investor and includes: (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges; (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise; (c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;(d) Intellectual Property; (e) Returns; (f) any Right conferred by law or contract or by any licenses and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector (The Energy Charter Secretariat, 2016: 41).

Again, for addressing energy poverty in Asia, Africa, and Latin America, states require taking measures to regulate electricity prices, impose a limit, and curb a company's profit if needed (CEO, TIN & SEATINI, 2020: 14). But, the ECT provides opportunities for foreign companies and investors to file cases even against the host states in such events. Hungary and Bulgaria had these experiences as AES, a US-based British subsidiary, and Evolution Mining (EVN), an Australia-based company, filed cases against them, claiming compensation for lowering energy prices (The Energy Charter Secretariat, 2016: 41). Though the judge did not rule in favor of AES, Hungary paid the bills of its solicitors and shaved 50% of the tribunal's costs amounting to US$5.9 million in total (The Energy Charter Secretariat, 2016: 41). In such cases, taxpayers of the host country bear the cost of litigation. The story goes the same when the foreign entity wins and claims monetary compensation (TJM, n.d).

Articles 12 and 13 of the ECT incorporate provisions for the 'Compensation for Losses' and rules relating to "expropriation" (The Energy Charter Secretariat, 2020: 59-60). The ECT confirms that a foreign investor shall receive compensation equal to the "fair market value" of the investment if s/he loses it fully or partially because of requisition or nationalization described as expropriation by a host government (The Energy Charter Secretariat, 2020: 59-60). Thus, it is no longer that easy for a government to bring energy infrastructure under public ownership or even move away from fossil fuels and nuclear power because of the principle of "fair market value" as compensation in the ECT (TJM, n.d.). Germany had to compensate US$2.9 billion to Sweden's Vattenfall AB and other utilities for the decision to phase out nuclear power (Dlouhy, 2021). In another case, Rockhopper, a UK-based oil, and the gas company sued the government of Italy for its refusal to award a concession for oil drilling in the Adriatic Sea, claiming compensation of USD 275 million (Maggiore, 2021). The compensation amount was seven times more than the amount invested in the project development (Dlouhy, 2021). The case came into being when the Parliament imposed a ban on hydrocarbon resource exploration near the coast (Dlouhy, 2021). More importantly, the exploration company claimed compensation after Italy withdrew from the ECT as a signatory. Article 47 keeps the ECT effective for twenty more years for a signatory state even if it pulls out. (The Energy Charter Secretariat, 2016: 104).

The extended definition of investors and investment has also created a space for some mailbox companies to register lawsuits for

compensation. Mailbox companies are the firms that exist only on paper with hardly any employees (CEO & TNI, n.d.). Large corporations use mailbox companies to shift profits and avoid paying taxes (CEO & TNI, n.d.). For example, twenty-four of the twenty-five "Dutch" investors, who lodged lawsuits by the end of 2021, are mailbox companies (CEO & TNI, n.d.). They included Khan Netherlands, Isolux Infrastructure Netherlands, and Charanne. Khan Resources, a Canadian Uranium miner sued Mongolia, even though Canada is not even a contracting party to the ECT (CEO & TNI, n.d.). Similarly, two Spanish businessmen used Isolux and Charranne to sue Spain (CEO & TNI, n.d.).

The compensation states must pay is determined by three arbitrators, often private lawyers, through a mechanism called Investor-State Dispute Settlement (ISDS). Article 26(3)(a) of the charter provides, "… each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration" (The Energy Charter Secretariat, 2020: 79). As a result, governments do not have any option but to depend on expensive international lawyers often with no background in public international law (TJM, n.d.).

The fair and equitable treatment (FET) provisions and other related issues

Article 10 of the charter obliges a contracting party to ensure fair and equitable treatment to:

> Investments of investors of other contracting parties … [s]uch Investments shall also enjoy constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations (Energy Charter Secretariat, 2016: 54).

Such a provision, without giving a clear definition of 'unreasonable' and 'discriminatory', leaves an undefined scope for interpretation. If foreign investors or contracting parties deem that any host state's initiative goes against their interests, they can identify it as a violation of the FET provision and sue against the former (TJM, n.d.). In a lead case between Mexico and a Spanish commercial company, the Tecnicas Medioambientales Tecmed S.A., involving the issue of FET, among others, the arbitral tribunal of the International Centre for Settlement of International Investment Disputes (ICSID) opined,

> … the Contracting Parties to provide to international investments treatment that does not affect *the basic expectations* that were taken into account by the foreign investor to make the investment (ICSID, 2003: 61). [emphasis added]

Again, in another case between Liman Caspian Oil BV and NCL Dutch Investment BV, and Kazakhstan, the tribunal observed:

> [W]hen assessing the Respondent's actions, *a specific standard of fairness and equitableness above the minimum standard* must be identified and applied for the application of the ECT (Vig, 2021: 37). [emphasis added]

Therefore, as these judgments confirm, how one considers a violation of the FET provision depends on the subjective interpretations of the tribunal. Foreign companies and investors can take advantage of the subjective interpretation of the FET provisions. It discourages the governments from bringing any change or taking any measure that can harm the profits of the foreign investors and, thus, also limits the regulatory capacity of states (TJM, 2016).

More importantly, the exceptions incorporated in Article 24(1) of the GATT agreement for taking regulatory measures to protect human, animal, or plant life or health do not apply to any of the provisions of the ECT. The ECT provides for compensation to protect foreign investors and companies from expropriation and supposed unfair treatment by any institution of the state, including courts, parliaments, and the executive. But, it does not contain any mechanism to award the host state or its people compensation or other forms of redress for any ecological damage, social injustice, and human rights violations arising from economic activity defined in terms of "the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products…" (The Energy Secretariat, 2016: 40). It has a controversial Article 24(2) on exceptions. It reads:

> The provisions of this Treaty … shall not preclude any Contracting Party from adopting or enforcing any measure … designed to *benefit Investors who are aboriginal people or socially or economically disadvantaged individuals or groups provided that such measure has no significant impact on that Contracting Party's economy* (The Energy Charter Secretariat, 2016: 74) [emphasis added].

What legal implications does this article on exceptions have? It authorizes a contracting party to take measures only to protect the investors who are either aboriginal or disadvantaged. But it does not apply to those who do not have any investment (TJM, 2016). More frightening is the other part of the provision. The contracting party can adopt measures when it has “no significant” impact on its economy. It indicates that if the indigenous and local farmers own a significant amount of land with an impact on the national economy, then the ECT does not provide any room for their land holdings or rights. In contrast, any measure to protect inhabitants in such cases might encourage foreign companies and investors to claim compensation (TJM, 2016).

The same goes with Article 7 of the ECT on energy transit. It puts all the burdens on the host county to build pipelines and other infrastructure that they might have rejected if there were no legal compulsion. It obliges governments to:

> … take the necessary measures to facilitate the Transit of Energy Materials and Products ... without distinction as to the origin, destination or ownership of such Energy Materials and Products ... and without imposing any unreasonable delays, restrictions or charges… the Contracting Parties shall not place obstacles in the way of new capacity being established, except as may be otherwise provided in applicable legislation… (The Energy Charter Secretariat, 2016: 48-49; TJM, 2016)

In other words, Article 7 guarantees that the protection of investment and investors’ profits and their repatriation gets more priority over people and nature (TJM, 2016). An ISDS case filed by TransCanada against the USA is relevant here. The USA is not a signatory state, but this example helps comprehend how such rules might cause difficulty even for an economically and politically powerful country, let alone the opposite (TJM, 2016). The Canadian company, TransCanada, has sued the US government for US$15 billion under the now-defunct NAFTA agreement and the USA, the United Mexican States, and Canada Agreement (USMCA) for canceling the pipeline project between Canadian tar sands and refineries in the USA (The US State Department, 2022: 5). The reasons for rejecting the pipeline construction project were public interests, i.e., that it would not lower gas prices or improve the economy or energy security (TJM, 2016). This investment arbitration case demonstrates how such rules incorporated in Article 7 of the Charter, can influence the decision-making process, making public consultation futile (TJM, 2016).

Ecological concerns, climate change, and the energy transition

The ECT mainly adopts a hard law approach when it comes to the issues related to the treatment of direct and indirect foreign investment and investors. In addressing environmental and climate change concerns, its legal provisions are paradoxical and reflect the features of the soft law approach, binding the contracting parties with commitments to environmental issues. The preamble to the ECT focuses on the urgency of protecting the environment and recalls the United Nations Framework Convention on Climate Change (UNFCCC). But, Article 19(1) provides that the contracting parties minimize harmful environmental impacts for sustainable development in an economically efficient manner, without explaining what it is (The Energy Charter Secretariat, 2016: 67; TJM, 2016.). By the same provision, the employment of the "polluter pays" approach, in principle, requires that the contracting parties must not distort investment in the energy cycle or international trade (The Energy Charter Secretariat, 2016: 67). In assessing environmental impacts, Article 19(1)(i) of the ECT makes the contracting parties solely responsible for determining "… the extent to which the assessment and monitoring of Environmental Impacts should be subject to legal requirements…" (The Energy Charter Secretariat, 2016: 68; TJM, 2016).

The legally binding provisions of the ECT do not encourage the contracting parties to move away from the investments in climate-wrecking oil, gas, and coal or do the same for a transition to renewable energy. It is also not the opposite in protecting foreign investment in energy efficiency or reducing energy demand (CEO, TNI & SEATINI, 2020: 16).

More importantly, with 61% of global investment in fossil fuels, the ECT's provision for claiming compensation by foreign investors and companies has become a tool for creating barriers to the energy transition (CEO, TNI & SEATINI, 2020: 16). For instance, France made a proposed law to end fossil fuel extraction on its territory and abroad flexible in response to a threat of a lawsuit by Vermilion, a Canadian multinational oil company (Flues et. al., 2020: 5). German energy company Uniper has also done the same against the Netherlands for its law to ban coal-fired electricity production by 2030 and seeking €1 billion in compensation (Flues et. al., 2020: 5). This trend of lawsuits for compensation puts the 45 states and the EU at risk that committed to phasing out coal by 2030 immediately after the Conference of Parties 26

(COP 26) on climate change held in 2021 in Glasgow (Schaugg & Muttitt, 2022). Twenty of them are the contracting parties to the ECT (Flues et. al., 2020: 5). Four of the ECT signatories are also members of Powering the Past Coal Alliance (Flues et. al., 2020: 5).

Uneven ground for the investment dispute settlement

Article 26 of the ECT provides the basis for settling investment disputes between a contracting party and an investor of another contracting party (The Energy Charter Secretariat, 2016: 78). In other words, the ECT establishes an investor-state dispute settlement (ISDS) mechanism for doing so.

The relevant provisions of the ECT confirm that the right to arbitration (or other methods of dispute resolution) emerges solely from the ECT. And, it does not require any exhaustion of local remedies or any contractual dispute resolution mechanisms (Hober, 2010: 162). It provides an amicable solution to the dispute within three months from the date of request (The Energy Charter Treaty, 2016: 78; Hober, 2010: 162). In case of failure to settle the dispute amicably, the foreign investor or company selects the forum for resolving the disputes (The Energy Charter Treaty, 2016: 78; Hober, 2010: 162). According to Article 26(2)(a)(c), they are the national court or administrative tribunals of the contracting party under a previously agreed dispute settlement procedure and international arbitration (Hober, 2010: 163).

The use of the international tribunal has become the preferred remedy available to investors under the ECT, since each contracting party offers unconditional consent, implying that it is irrevocable (Hober, 2010: 163). From 2001 to 2022 (until June), the investors preferred ICSID or the ICSID Additional Facility in 93; United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules in 21; the Stockholm Chamber of Commerce (SCC) in 36 out of the 150 cases (Energy Charter Organisation, 2022). More so, if any contracting party withdraws from the ECT (as mentioned elsewhere in this paper) it also remains under a legal obligation to protect foreign investors and investments for 20 years from the date of withdrawal (Bai, 2015: 124).

In the last decade, the number of known investment arbitration cases has increased by 437% (Flues et al, 2020: 6). The list of the Secretariat does not include all the arbitration cases filed under Article 26 of the ECT, as it does not oblige the contracting parties to notify the Secretariat

of such cases (The Energy Charter Treaty Organisation, 2022). In some cases, the disputing parties prefer to keep some awards and proceedings confidential (Flues et al, 2020: 6). The United National Conference on Trade and Development (UNCTAD) records 1,104 global ISDS cases by the end of 2020 involving all the investment sectors (UNCTAD, 2021: 2).

The ECT incorporates some other specific investment dispute settlement provisions that offer more scope to foreign investors than the host contracting parties in using an international tribunal. This feature is different from other traditional investment arbitrations, especially ICSID arbitration (Bai, 2015: 128). For instance, the ECT not only excludes the right of the host countries to self-defense and local remedies in which they give case-by-case consent, but it also bars the host countries from applying their domestic laws for arbitration (Bai, 2015: 128-130).

More importantly, the investor and the responded states appoint and pay a panel of three arbitrators. Each party selects one arbitrator and jointly another one (CCSI, 2021: 6). This selection process does not have any qualification requirement or ensure the independence of the panel members (Bai, 2015). In most cases, the panel finds a small number of arbitrators appointed and reappointed. Many of them have "double-hat," indicating that they represent claimants in one ISDS dispute and sit as arbitrators in another case (Bai, 2015). It often leads to a typical situation in which lawyers use awards they issued as arbitrators to support their legal positions and vice versa (Bai, 2015). Some counsels and arbitrators are often paid as experts in a dispute or as advisors to third-party funders making arbitration claims (Bai, 2015).

A small number of arbitrators and five elite law firms profit the most from ECT lawsuits. A small group of 25 arbitrators gave judgments in 44% of the total ECT investment cases. The elite law firms—Allen & Overy, King & Spalding, Arnold & Porter, Freshfields, and Weil Gotshal—were involved in almost half of all the lawsuits that were made public (Eberhardt et al, 2018: 47). Allen & Overy took USD 35 million in just five of their 16 ECT cases (Eberhardt et al, 2018: 47). In the case Khan Resources vs Mongolia, the law firm Crowell and Moring reportedly received about USD 7 million as legal fees from the investor (Flues et al., 2020: 7).

The same goes for the remuneration of the arbitrators. For example, in Stati vs Kazakhstan, the President of the arbitration panel received €400,000 while the other two arbitrators each received €200,000 each in

2011 (Flues et al., 2020: 7). On average, an ISDS case costs a respondent state USD 4.9 million, and US$ 6 million for claimant investors (Flues et al., 2020: 6).

Again, in terms of lawsuits, developing countries are the principal victims across all investment sectors. In the initial fifteen years of ECT, 89% of the cases were lodged against the states with investment scarcity in Central and Eastern Europe and Central Asia, and 67% of the investors' claims were made against West European countries (CEO & TNI, nd). However, Spain and Italy now top the list of the most-sued countries. Investors from the Netherlands, Germany, Luxembourg and the UK account for 60% of the 150 arbitration claims (CEO & TNI, nd).

As the above textual and experiential dissections of the ECT's ISDS confirm, the legal provisions are heavily biased toward foreign investors and companies. The investment dispute settlement mechanism has even become a legal instrument for creating barriers to energy transition and combating climate change. The provisions of the ECT do not address the imbalance of power between an economically strong investor and a country with investment scarcity, making the latter more susceptible to exploitation and injustice. Under the circumstances, it becomes pertinent to ask whether countries like Bangladesh or any country in Asia, Africa, or Latin America having a dire need for foreign investment will reject or live with the ECT.

Bangladesh: To Live or Not to Live with the ECT?

While theoretically reflecting on the link between international trade and investment with the theory of justice, the exploitation-based approach to justice becomes relevant. This approach combines two types of vulnerability in explaining the place of justice in international trade: vulnerability of a country emanating from the dearth of international investment and trade and vulnerability from rule violation.

The reality check of Bangladesh's power and energy sector as described earlier corroborates that the first kind of vulnerability has forced the government to offer legal immunity to the energy and power sector and prepare the PSMP with the involvement of a foreign donor agency and a company. The PSMP promotes a fossil fuels-dominated new energy mix for a climate change victim like Bangladesh, shirking international responsibilities for tackling the global emission of GHGs.

The increase of foreign investment in Bangladesh's power and energy sector has already found expression in different forms of human

rights violations, killings, displacement, livelihood deprivation, ecological destruction, corruption, and whatnot. Ecology is suffering the most, and ordinary people are the victims of such situations as they constantly become more vulnerable. The 2010 Act protects those responsible for leaving all these negative impacts, making people's lives and livelihoods, and nature extremely vulnerable.

The aftermath of the PSMP is now witnessing an ever-growing presence of foreign companies, investors, and donor agencies from a good number of countries, including Australia, China, India, Japan, Russia, the USA, and the UK, among others. Not to mention that China, India, and the trusted US-ally Japan have now installed, or are now constructing, coal-fired power plants in the coastal areas of Bangladesh, close to the Bay of Bengal. Not to mention also that these are the countries that are engaged in great power rivalry in the Indian Ocean, either with their Indo-Pacific Strategy or with their Maritime Silk Road, making Bangladesh strategically more vulnerable with a possibility of becoming a theatre of great power rivalry in the South Asia region. Not to forget, the Russia-Ukraine war has raised the possibility of a new kind of polarization in international politics led by China and Russia.

Given the grim scenarios of some common and strategic vulnerabilities of people and nature that the Bangladesh state is currently experiencing in the pre-ECT signing phase, it is necessary to reflect on what the ECT has in store for the contracting state parties to deal with the vulnerabilities. The provisions of the ECT rarely offer a contracting state scope for dealing with situations of vulnerability, and they encourage foreign energy investors and companies to take advantage. The most frightening is the ISDS mechanism incorporated into the ECT. As discussed earlier, it appears to be a judicial trap for the contracting states. The ISDS provisions, with a hard-law approach, create a vulnerability of the contracting states to compensation for rule violations of the ECT. The judicial procedures of the ISDS provisions inviolably shield the interests of foreign investors and companies. In other words, considering the different forms of vulnerability, these procedures have legally institutionalized international investment and trade injustice as far as the interests of the ordinary people, sovereignty, economy, and ecology are concerned.

Once Bangladesh chooses to sign the ECT, the latter will surely imprison the state in double misery. The ECT pre-signing phase has already witnessed how the 2010 Act and the PSMP have made ordinary

people's lives, livelihoods, nature, and climate change responses subservient to the investment need in the power and energy sector for economic development. The post-ECT signing and ratification period will surely put the state in a position of further exploitation by foreign investors and companies, without any remedy. The corporate-responsive ISDS mechanism is indeed a judicial process that ensures "justice" only to the latter, to a large extent giving priority to profit over people and nature. To avoid this double misery, Bangladesh must reject the ECT, staying far away from signing the legally binding treaty. In other words, the ECT poses a structural threat to democratic decision-making and has the potential to lock in current pro-investor policies. As a result, it will only cement the *status quo* of the energy sector in Bangladesh, which prioritizes profit over people's health and rights, over the protection of the local environment, and making the control of CO2 emissions much harder.

The Last Words

The provisions of the ECT rarely offer a contracting state scope for dealing with situations of vulnerability that encourage foreign energy investors and companies to take advantage. As discussed, the ISDS provisions with a hard-law approach create a vulnerability of the contracting states to compensation for rule violations of the ECT. The judicial procedures of the ISDS provisions shield the interests of foreign investors and companies. In other words, considering the different forms of vulnerability, these procedures have legally institutionalized international investment and trade injustice as far as the interests of the ordinary people, sovereignty, economy, and ecology are concerned. Many critics, including some from the European Union (EU), acknowledge that the ECT is outdated and recommend it be reformed. Some other countries, including Bangladesh, are also eager to join the ECT and have already signed the International Energy Charter, which is the prelude to becoming the contracting parties. The ECT came into existence to protect European energy and power companies that needed to invest their capital in new countries and regions. The policymakers of Western European states just danced to the tune of the energy investors and companies eyeing investment in the former Soviet republics and eastern European states. Not to forget, Dutch prime minister Ruud Lubbers, known as the founding father of the energy charter, was originally a businessman working as a corporate director of Hollandia.

Whatever reforms are done to the ECT, it cannot come out of structural characteristics designed to ensure and protect corporate profit over people and nature. Thus, this ECT that contains the elements of injustice and exploitation in the energy and power sector must not be in operation, and Bangladesh must not join it. Many European countries, including Poland, Spain, Spain, France, Slovenia, Germany, Luxembourg, and even the Netherlands, a founding country, have announced that they are withdrawing from the treaty (JDSUPRA, 2022).

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