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Increased Risk in Energy Investment Strategies due to demands for Societal Justice

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Key Messages

- Societal justice risks are creating new barrier for fossil fuels.
- Energy project developers must consider justice risks during project life-cycles.
- Energy project developers need to consider the case law from around the world and show their project responds to justice risks

Rise in Energy Infrastructure Development

The world always needs new energy infrastructure for multiple reasons, for example, to further economic growth, to increase energy access, to reduce energy poverty, to replace aged infrastructure, and to meet carbon dioxide reduction policies. This will continue to be the case after COVID-19 and this financial crisis with many focusing on the green recovery. Indeed, new energy investment will be seen as the catalyst to restart many economies across the world.

There are a range of international reports from international energy institutions that state *circa* $40–50 trillion will be invested in the energy sector by 2050; this includes expenditure in the extractives, waste management, electricity grids, and upgrading existing infrastructure. It is within this context that this research addresses this scenario of increased energy investment activity and the issue of risk for this investment.

Exploring New 'Risks' in Energy Project Development

The unique contribution advanced here is the identification (from legal and legal practitioner and economic literature) of a collective group of new 'justice' risks and exploring these in the context of legal case law (which provides the data from 40 national cases between 2015–2021) from the Global South. These risks emanate from more calls for more justice throughout the energy sector. The types of justice we are seeking improvements on are: distributive, procedural, restorative, recognition, and cosmopolitan justice [1]. We class them as justice risks as they are not obligatory with specific requirements for a Government to enforce and variation is permitted. Nevertheless, they will influence energy investment strategy as they increase risks in energy project development.

Justice risks have existed before, but it is as a collective group where the actions are happening; that is, there is a 'perfect storm' of events that has resulted in these risks materializing. Societal justice risks for energy projects include disclosure & transparency; taxation; project finance; environmental impact assessments; insurance; rules of foreign investments; rise in imagery & data; bankruptcy; climate change action; economics; 2015 Paris Agreement; and UN Sustainable Development Goals.

All these issues can be classified as 'justice risks'. These justice risks have come about because in each of these 12 forms of risk there have been calls for more fairness, inclusiveness, equitable solutions, sustainability, and resolving inequality in a variety of ways. In essence, they aim to address a normative situation, which is the way society wants the world to be, and they provide a future pathway for just societal development. This is the difference from the past where 'the just outcome' was not always the main aim.

Risk Across the Energy Project Lifecycle

This brief summarizes research about how and when these new societal justice risks affect a project. It utilizes three legal research methods, which are: (1) the doctrinal method which assesses key legislation and regulation introduced since the Paris Agreement; (2) the case law method which is analysing case law from national courts; and (3) comparative law methods, where legal issues (law or cases) are explored across different jurisdictions. Here, 40 national legal cases from the Global South are considered since 2015 – using this year due to the Paris Agreement.

The result of these methods identifies how these risks apply across the four stages of the energy project lifecycle (expressed in **Figure 1**) and its associated activities, that is from planning to development to operational to the decommissioning stage. In the past, for example, it is clear that the risk associated with the decommissioning phase was not always considered at the outset of a project [2] – and hence this was a major advantage for fossil fuel projects.

New Barriers to Project Development

New energy infrastructure has more demands placed on it today. For example, the risk in an energy project development is now considered across the project lifecycle. For example, this includes decommissioning, which was generally not thought of at the outset when developing a project. There are key parts of these stages which will be researched here, such as Environmental Impact Assessments (EIAs), the Social Licence to Operate (SLO) which operates across the full project life-cycle, and the Energy Finance Research Obligation (EFRO).

Current case law indicates projects are failing at the planning stage at the outset in the global south, such as projects are not getting approval in the planning phase (such as in Kenya in 2019). However, today there is increasing recognition of other

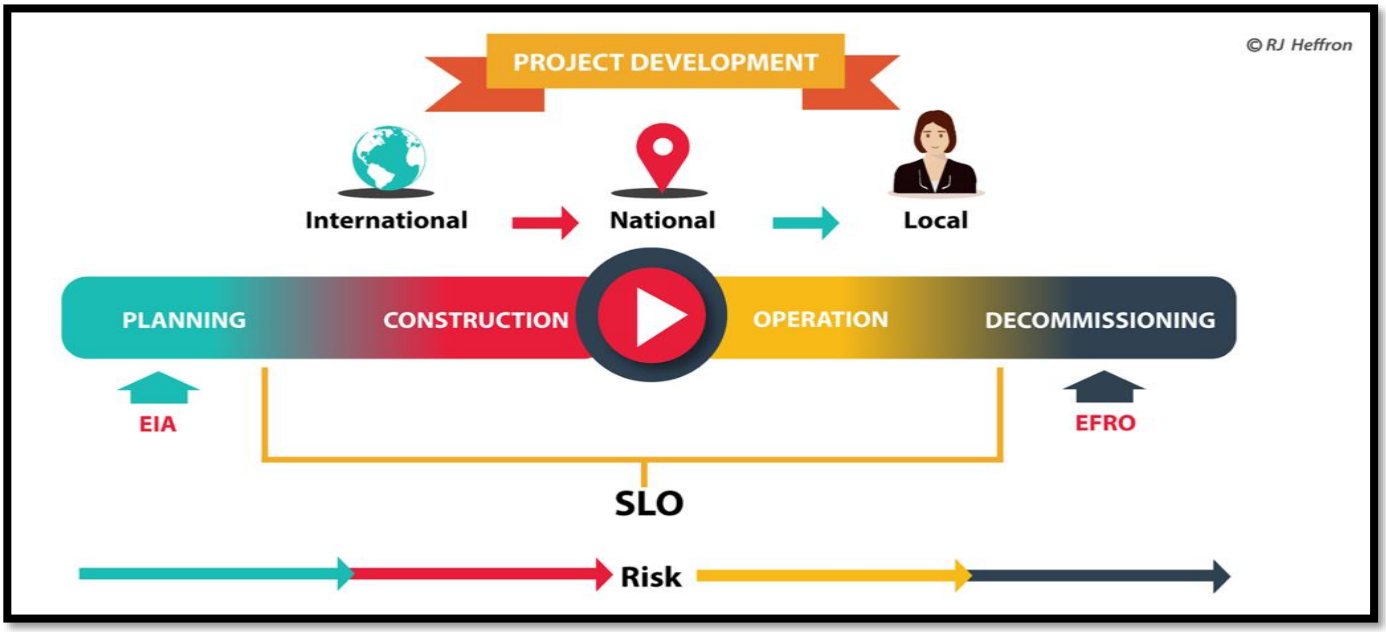

__Figure 1:__ Project Risk across the Project Development in the Energy Sector [3]. __Key:__ EIA – Environmental Impact Assessment; SLO – Social Licence to Operate; and EFRO – Energy Finance Reserve Obligation.

phases of the project lifecycle and projects are being stopped at the construction, operation, and decommissioning phase of the project. The case law from national courts reveals that actions are happening increasingly because of these justice risk issues.

For example, in Australia, a recent case highlighted the importance of the waste and decommissioning issues – *Gloucester Resources Limited v Minister for Planning [2019] NSWLEC 7*. In this case, Judge Brian Preston considered stakeholders beyond the Australian border when deciding to not grant permission for a coal mine. People overseas would be affected by carbon dioxide emissions from coal; this is a form of cosmopolitan justice that is becoming part of legal decision-making. And this case in Australia is not isolated and there are many similar cases in the Global South such as in Africa and South America.

Recommendations

The key issue here is, as a result of these 12 societal justice risks, projects are no longer getting permits and finance to begin construction. More justice is diffusing into energy decision-making over the development of energy projects. With greater justice, there will be a reduction in commercial risk and project finance costs will be lower. Generally, the search for justice is driven by a need to rebalance a relationship that has become unbalanced [3] and this is particularly the case in the Global South. That is why governments, companies, and individuals enter into contracts. It is also why one goes to court, to ensure compensation or behavioural change as a result of an imbalanced relationship. In this context, what is in essence at stake is that an individual's or group's rights are being infringed. If you can prove that, you can achieve change.

There are two key recommendations for action and they are based on the case law research on how rights are being infringed around the world. These demonstrate that these 'justice risks' are on the rise.

- Firstly, energy project developers need to account for these justice risks across the four stages of the energy project life-cycle.
- Secondly, energy project developers need to consider the case law from around the world and show how their project is responding to such 'justice risks' so as to ensure they will not end up in a dispute in a respective national court.

References

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Notes

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