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Bilateral Investment Treaties in the Energy Sector



→ **Energy Investments: International Initiatives, Trends, Governance**

→ **Principles Based Approach to Energy Law**

→ **Conclusion: The Way Forward**



Energy Investments (BITs)

→ International Initiatives

→ UN Sustainable Development Goal 7

→ Ensure access to affordable, reliable, sustainable and modern energy for all

→ Paris COP21

→ 2023 global stock-take

→ EU Building on these with its own *Energy Union* plan



Energy Investments (BITs)

→ Energy Trends

→ **\$11 to 44 trillion in investment**

→ **\$11 in electricity generation until 2040**

→ **In the EU estimate is €300 billion plus by 2030**

→ **Other Drivers in the EU: public health, environmental & climate, old infrastructure**

Heffron R. J. *et al.* 2017. The Global Future of Energy Law. *International Energy Law Review*, 8, 291-302.
(to be translated into Chinese in 2018) (Available via Westlaw)



Energy Investments (BITs)

→ **Governing these energy investments**

→ **Bilateral Investment Treaties**

→ **Provide investor protection**

→ **1 form of International Investment Agreement: DTT, EPA and FTAs**

→ **BITs and DTTs on the increase**

→ **Supported by other legal instruments - EIAs, Basel Conventions (Equator Principles)**

→ **Scope of BITs is increasing (for example).**



Energy Investments (BITs)

→ Example of BIT scope increasing

→ Realisation that BITs do not address obligations of foreign investor sufficiently

→ **Japan-Viet Nam BIT (Art. 21):** “The Contracting Parties recognize that it is *inappropriate to encourage investment by investors of the other Contracting Party by relaxing environmental measures*. To this effect each Contracting Party should not waive or otherwise derogate from such environmental measures as an encouragement for the establishment, acquisition or expansion in its Area of investments by investors of the other Contracting Party.”



Energy Investments (BITs)

→ **Why BITs?**

→ **Aim of BIT to lower risk for energy projects**

→ **But now factor in future, could be held accountable for**

→ **SDG Goal 7 is not been met (2017)**

→ **Need a 'Just' Transition to a low-carbon economy (G7 and UN)**

→ **Transition too slow (*Nature*, Figueres et al. (2017))**



Energy Investments (BITs)

New guide for Energy Investments

→ Principled Approach to Energy Law

- The Principle of National Resource Sovereignty
- The Principle of Access to Modern Energy Services
- The Principle of Energy Justice
- The Principle of Prudent, Rational and Sustainable Use of Natural Resources
- Principle of the Protection of the Environment, Human Health & Combatting Climate Change
- Energy Security and Reliability Principle
- Principle of Resilience

Heffron, R. J., Ronne, A., Bradbrook, A., Tomain, J. P. and Talus, K. 2018. [A Treatise for Energy Law](#). *Journal of World Energy Law & Business*, 11 (1), 34-48.



Conclusion – The Way Forward

- **Risk is increasing**

- **BITs will be more important, but may not provide enough protection**

- **New Investment must respect other factors are diffusing into the energy sector**
 - **Rethinking ‘Competition law’ in the energy sector**
 - **Environmental and social obligations**
 - **The Just Transition to a Law-Carbon Economy**
 - **Increasing importance (G7 Talks)**



Just Transition to a Low-Carbon Economy

→ **Recent G7 Talks:**

The G7 communiqué contains a reference to climate finance and the Just Transition

« Canada, France, Germany, Italy, Japan, the United Kingdom, and the European Union reaffirm their strong commitment to implement the Paris Agreement, through ambitious climate action, in particular through reducing emissions while stimulating innovation, enhancing adaptive capacity, strengthening and financing resilience and reducing vulnerability, as well as ensuring **a just transition**, including increasing efforts to mobilize climate finance from a wide variety of sources. »

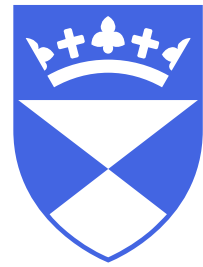
<https://www.nytimes.com/reuters/2018/06/09/business/09reuters-g7-summit-communiqué-text.html>)

See also: Heffron R. J. and McCauley, D. 2018. [What is the 'Just Transition'?](#) *Geoforum*, 88, 74-77.



Conclusion – The Way Forward

- Risk is increasing
- BITs will be more important, but may not provide enough protection
- New Investment must respect other factors are diffusing into the energy sector
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 - The Just Transition to a Law-Carbon Economy
 - Increasing importance (G7 Talks)
- *Increasing influence long-term obligations may challenge the legal status of BITs*



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Forms of Justice in the Just Transition to a Low-Carbon Economy

→ **Justice – 5 major forms**

→ Distributional

→ Procedural

→ Restorative

→ Recognition

→ Cosmopolitanism