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UN FORUM SERIES – Are infrastructure investors exempt from human rights duties? G20 surely thinks so...

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With this year's United Nations (UN) [Business and Human Rights Forum](#) (November 16-18) scheduled to take place at almost the same time as the [Group of 20 Summit](#) (November 14-15), the temptation to highlight the dissonance between what is happening in each of these venues is just too great to resist.

At the Forum on Business and Human Rights, the main theme will revolve around a report on measuring implementation of the UN [Guiding Principles on Business and Human Rights](#) (UNGPs), submitted last July by the Working Group on Business and Human Rights.

The G20 is expected to adopt the second of two reports that contain "effective approaches" to implementing the [High Level Principles on Long Term Investment Financing by Institutional Investors](#) ("the HL Principles"), produced at the G20's request by the Organization for Economic Cooperation and Development (OECD).

The HL Principles, also produced by the OECD, were endorsed by the grouping back in 2013. They are part of the body of work the G20 has been carrying out, for the last five years, on approaches to finance infrastructure. According to several estimates, financing the infrastructure gap in developing countries will take more than an additional USD one trillion a year (by the way, developed countries also have an infrastructure gap that requires gigantic financing).

The G20's main line of action focused on mobilizing, to that purpose, part of the USD 85 trillion reportedly held by institutional investors such as pension funds, insurance companies, private equity funds, and the High Level Principles are among a battery of documents whose production the G20 spearheaded to assist countries in such endeavor.

The premise of this model of financing is that the infrastructure finance needs, which call for long term financing, are a fitting match to the institutional investors' need for long term investment vehicles.

Surprisingly, though, for an area so often associated to human rights abuses, none of the documents produced by the OECD has even a passing reference to the Guiding Principles.

Of course, in "OECD language" the relevant normative instrument on business and human rights would be the [OECD Guidelines on Multinational Enterprises](#) which have, as of 2011, broadly incorporated the UN Guiding Principles on Business and Human Rights (however debatable it is how well they did that). The OECD has, further, interpreted that investors are bound to respect the principles, even when they are in minority shareholding positions.

But the only reference to the OECD Guidelines can be found in the Preamble of the HL Principles which says the High Level Principles are "based on" and "consistent with" other documents, including the OECD Guidelines on Multinational Enterprises. With no other mention to human rights throughout the over 400 paragraphs of guidance the OECD developed for ease of implementation of the HL Principles, such assertion of consistency sounds more like an article of faith than a verifiable proposition.

The closest the OECD gets to making a recommendation on the matter is in an implicit way and leaving no doubt as to the discretionary nature of such considerations. It states that "Governments **may** establish a "code for responsible investing", which gives institutional investors guidance As such, the "code" may contain sustainability considerations, acceptance of responsibilities of . . . avoidance of potential conflicts of interest situations, transparency about policies, and where appropriate, a collaborative approach to promoting acceptance and implementation of applicable codes and standards." (emphasis added)

In contrast, recommendations on rights of investors are quite explicit. For instance, the OECD recommends governments "adopt measures that help to create a supportive business environment, by reducing administrative burdens and simplifying bureaucratic procedures to the extent feasible, increasing the quality of contract enforcement . . . in order to provide a good climate for private sector investment," and that they "support long-term investment by ensuring efficient market functioning, through adequate regulation and supervision, . . . and an appropriate degree of investor protection."

Here are a few things that the G20 and OECD could do to strengthen coherence and implementation of the Guiding Principles.

The first benchmark of implementation is whether the HL Principles embrace explicitly the GPs. A preambular assertion of consistency that one is supposed to trust without interrogation is not acceptable and does not send the right message to either companies or states. More specifically, the HL Principles could recommend that:

- Governments that are home to the institutional investors have a regulatory and policy framework to ensure these investors are accountable for prevention of human rights violations and effective remedies when they occur.
- Governments that are hosting the infrastructure (when not the same that is home to the institutional investors) make sure that legislative, administrative and policy measures related to projects financed by such investors are suitable to ensure the human rights of their population.
- Use of public resources in co-financing, whether via subsidies, guarantees or any other form of instrument to “leverage” private finance, immediately triggers application of GPs by the favored private investors. [Civil society has come up with solid proposals](#) on how this could be done. There is no excuse for home or host states or their dependencies (e.g. a publicly-run pension fund or a state-owned company) that are co-financing infrastructure projects to not have regulatory and operational frameworks that require vetting of co-investors on their stance regarding the GPs.
- As an extension of the previous point, member governments of multilateral financial institutions preparing and co-financing the projects ensure activities by such institutions and their co-investing firms are in accordance with the GPs.
- Institutional investors uphold their duty to respect human rights, which includes their own activities and those of companies or entities to which they are linked by a business relationship. This translates into requirements for the governing bodies of the institutional investors and the fiduciary duties of their asset managers. There is ongoing controversy as to whether upholding human rights would be contradictory with the fiduciary agent’s duty to act in the best interest of the asset owners. Arguments showing that human rights fall under such duty because of the impacts of human rights on the sustainability of investments are becoming increasingly popular. But this is a fallacious debate. The GPs did not create but merely restated existing obligations and law. However one conceives the duty of fiduciary agents nobody could seriously argue that duty requires them to act in breach of the law.

The HL Principles are called to play a heightened role in an envisioned world where institutional investors would be financing infrastructure to the tune of trillions. Therefore, since a main pillar of implementation is what the Working Group on Business and Human Rights called “embedding the GPs in global governance frameworks,” it is hard to diminish their omission in this framework as a mere and inconsequential oversight. It is time that the G20 and OECD take action to correct it.

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* This post was also published on [RightingFinance.org](#).

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