




Executive Summary

The Other Infrastructure Gap: Sustainability

Human Rights and Environmental Perspectives



UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

 HEINRICH
BÖLL
STIFTUNG

Executive Summary

The Other Infrastructure Gap: Sustainability

Human Rights and Environmental Perspectives



Copyright © 2018 United Nations

This advance summary version, co-published between the United Nations (Office of the United Nations High Commissioner for Human Rights) and the Heinrich Böll Foundation, has not been formally edited. Its contents are subject to change from that of the final print and electronic publication. While reasonable efforts have been made to ensure that its contents are factually correct and properly referenced, the United Nations (OHCHR) and the Heinrich Böll Foundation do not accept responsibility for the accuracy and completeness of the contents, and shall not be liable for any loss or damage that may be occasioned directly or indirectly through the use of, or reliance on, the contents of this advance summary version.

This advance summary version is available open access by complying with the Creative Commons license created for inter-governmental organizations, available at: <http://creativecommons.org/licenses/by/3.0/igo>

Publishers must delete the original emblems from their edition and create a new cover design. Translations must bear the following disclaimer: *The present work is an unofficial translation for which the publisher accepts full responsibility.* Photocopies and reproductions of excerpts are allowed with proper credits.

The designations employed and the presentation of the material in this summary do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory, city or area, or of its authorities, or concerning the delimitation of its frontiers or boundaries.

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a figure indicates a reference to a United Nations document.

The Other Infrastructure Gap: Sustainability
Human Rights and Environmental Perspectives
Executive Summary

Co-published by the Office of the United Nations High Commissioner for Human Rights
and the Heinrich Böll Foundation

This summary has been edited in accordance with elements of the Heinrich-Böll-Stiftung
editorial house style.

Title photo: © Yuri Kozyrev/Noor – laif
Design: feinkost Designnetzwerk, Constantin Mawrodiew
Printing: ARNOLD group, Großbeeren
Heinrich Böll Foundation: ISBN 978-3-86928-186-5
UN/OHCHR: HR/PUB/18/5/Add.1

This executive summary and the full-length publication can be obtained from:

Office of the United Nations High Commissioner for Human Rights (OHCHR),
Palais des Nations, CH-1211 Geneva 10, Switzerland
E publications@ohchr.org **W** www.ohchr.org

Heinrich-Böll-Stiftung, Schumannstr. 8, 10117 Berlin, Germany
T +49 30 28534-0 **F** +49 (0)30 28534-109 **E** buchversand@boell.de **W** www.boell.de

CONTENTS

Acknowledgements	5
Introduction	7
Mega-Infrastructure: Opportunities and Challenges	9
The Role of the Human Rights Framework	11
Micro-, Meso- and Macro-Level Human Rights Impacts	13
Legal Frameworks Governing Infrastructure Investment	15
Infrastructure Finance: The Shifting Landscape	17
Concluding Remarks and Recommendations	19

ACKNOWLEDGEMENTS

This advance executive summary of the forthcoming co-publication, *The Other Infrastructure Gap: Sustainability – Human Rights and Environmental Perspectives*, has been produced in partnership between the Office of the United Nations High Commissioner for Human Rights (OHCHR) and Heinrich Böll Foundation (hbs). The publication draws from OHCHR's Baseline Study on the Human Rights Risks and Implications of Mega-Infrastructure Investment (2017).

The publication on which this advance executive summary is based, was informed by expert meetings in Berlin (March 2017), Washington DC (April 2017) and New York (April 2018), and included participants from governments, civil society organizations, international financial institutions and other international organizations, academia, foundations and legal practice. OHCHR is grateful to all those who contributed¹ and to the Friedrich Ebert Foundation, InterAction and Foley Hoag LLP for hosting the consultation meetings.

The Heinrich Böll Foundation gratefully acknowledges the leading contributions of Motoko Aizawa (Consultant). The partner organizations would also like to recognize the extensive contributions of Nancy Alexander (hbs), Gustav Thiele (hbs), Brooke Guven (Columbia Center for Sustainable Investment), Larry Beeferman (Harvard University), Tafadzwa Pasipanodya (Foley Hoag LLP), Elisabeth Tuerk (UNCTAD), Mariana Silva Zuniga and Graham Watkins (Inter-American Development Bank), Helen Martin (World Bank) and Ursula Wynhoven (ITU).

¹ In compliance with internal policy, OHCHR does not attribute authorship of its publications to individuals.

INTRODUCTION

The Sustainable Development Goals (SDGs) and the 2030 Agenda for Sustainable Development embody a set of globally agreed priorities of vital importance to all countries, including sustainable, accessible, affordable and resilient quality infrastructure. Infrastructure financing needs have been estimated at US\$ 90 trillion between now and the year 2030, with an annual financing gap in developing countries of up to US\$ 1.5 trillion. To close this gap, the multilateral development banks (MDBs) are proposing to prioritize and maximize private finance, while G20 member countries are developing a roadmap for infrastructure as an asset class that would standardize infrastructure investment and attract institutional investors.

As countries hasten to plan and develop infrastructure, in some cases through massive regional infrastructure plans and mega-infrastructure projects, a number of questions arise: What kind of infrastructure is being developed and whose needs will it serve? Who may lose out in the process? How will it affect our development pathway? Is enough attention being given to the *environmental and human rights gaps*, in addition to the financing gap, in relation to mega-infrastructure project design, financing and investment decisions, bearing in mind countries' obligations under international human rights and environmental law?

The OHCHR-hbs publication *The Other Infrastructure Gap: Sustainability – Human Rights and Environmental Dimensions* analyses the potential gains from integrating human rights and environmental dimensions of sustainability explicitly within mega-infrastructure plans and projects, as well as the cost of failing to do so, drawing from mega-infrastructure project experience in the energy, transportation and water sectors. It examines two key aspects of infrastructure development in relative detail: the legal framework governing international investment, and the shifting landscape of infrastructure finance. The publication uses the terms “mega-infrastructure” and “infrastructure” interchangeably; however, unless indicated otherwise, the focus of analysis is on mega-infrastructure and the risks associated with the design, construction and financing of such projects.

Mega-Infrastructure: Opportunities and Challenges

Our need for infrastructure is pressing, yet deciding on the type and quality of infrastructure is fraught with difficulty and potential trade-offs. How can we select the right infrastructure project, enhance the opportunities of infrastructure, minimize the risks, avoid political gridlock, and ensure that infrastructure serves the public interest and purposes of the 2030 Agenda for Sustainable Development?

Regional infrastructure plans and mega-infrastructure projects seek to facilitate trade, economic growth and job creation through connectivity of goods, services and people. But these benefits do not always materialize, and the social and environmental dimensions frequently fail to receive sufficient care and attention. People without access to energy and water often continue to be neglected in mega-infrastructure planning and development. At the same time, alternative visions of low-carbon and inclusive infrastructure development are often overlooked. The OHCHR-hbs publication argues that each mega-infrastructure project presents an opportunity to systematically generate economic, environmental and social co-benefits, while managing environmental and human rights risks.

Regrettably, however, poor quality mega-infrastructure projects are commonplace. The reasons include:

- (i) the complicated political economy of infrastructure investment,
- (ii) flawed design and process decisions,
- (iii) difficulties in managing private sector participation,
- (iv) fragmented regulatory frameworks and standards, and
- (v) weak accountability mechanisms.

To make matters worse, in addition to the problem of poor quality infrastructure, there is also the risk that no infrastructure will be built at all. In this challenging context, a robust national planning process informed by parliamentary debate and broad-based consultation can help to inform and frame difficult choices, improve project design and confidence in the planned infrastructure, and ensure that people's rights are prioritized over other competing interests. Effective and accessible grievance redress mechanisms are needed to anticipate and resolve conflicts and grievances from policy-making and project decisions and actions. With these and other human rights prerequisites in place, and with proactive due diligence and management of risks, countries may more confidently make the necessary trade-offs



Aerial view of highway interchange in cityscape (© Chris Sattlberger – Blend/Aurora Photos)

while avoiding gridlocks and delays, and make more sustainable progress toward the SDGs.

While numerous initiatives on sustainable infrastructure are presently underway, no universal set of standards is applied and enforced across all mega-infrastructure plans and projects. National laws in these areas are frequently incomplete and are not always consistent with international law. MDBs generally have disclosure, environmental and social safeguard policies, as well as accountability mechanisms, but these do not extend to the increasingly important private sources of long-term finance. One noteworthy initiative for improving the governance of infrastructure is the Ise-Shima Principles for Promoting Quality Infrastructure Investment, agreed at the Japanese G7 Summit in May 2016. The G20's leadership in quality infrastructure may offer an opportunity to consolidate the many fragmented initiatives on this topic and address some or all dimensions of quality infrastructure under the Addis Ababa Action Agenda ("sustainable, accessible, affordable and resilient quality infrastructure").

The Role of the Human Rights Framework

Human rights are a globally agreed and universally applicable legal and ethical framework protecting essential freedoms and the minimum requirements of a dignified life. All countries have ratified at least one of the nine core United Nations human rights treaties, along with the International Labour Organization's core conventions. Most countries have ratified several of these instruments, supplemented by domestic constitutional human rights protections and laws. This international human rights framework, together with international environmental law, are essential components of sustainability, and are relevant to infrastructure decision making, investment and finance.

The international human rights framework provides a set of minimum standards governing the quality and inclusiveness of services and helps to delineate the allocation of risk between infrastructure investors, States and communities. Given their fundamental nature, human rights should be prioritized over other rights and interests protected in international investment agreements, national investment and procurement (including public-private partnership, or PPP) laws, and project contracts. While States are the primary duty-bearers under international law, international and regional organizations, investors and businesses should respect human rights and put in place due diligence processes through which human rights risks can be identified, managed, reported on, and remediated effectively.

Respecting and investing in human rights is intrinsically important, but it is also smart economics. Early attention to human rights risks in infrastructure projects can help to avoid social conflict and costly delays and overruns, improve project decision making, design and benefits, and facilitate the social license to operate. It has been estimated that workforce gender discrimination alone costs the global economy US\$ 1.6 trillion annually. Similarly, respecting civil and political rights, ensuring universal access to water and sanitation, and promoting equality can have significant positive growth impacts. In these and other respects discussed in the OHCHR-hbs publication, the human rights framework provides guidelines as well as guardrails for infrastructure policy-making, reducing the arbitrariness of decision making, and strengthening incentives for better performance and more inclusive and sustainable development.

Inequality is one of the most persistent human rights challenges of our time. One of the central purposes of human rights law, and the accountability mechanisms built around it, is to fight discrimination and promote equality. However, too many mega-infrastructure projects work in the opposite direction, leaving



*Students drink fresh and clean water at a drinking fountain in School #2 in Artashat, Armenia.
(CC BY-NC-ND 2.0 Asian Development Bank – flickr)*

vulnerable segments of the society underserved or unserved, perpetuating exclusion, and exacerbating inequalities between population groups. The human rights framework helps us to understand inequality as a function of conflicting power relations, with a focus on disparities caused by discrimination. Human rights law directs our attention to the root causes of exclusion and requires legislative, budgetary, administrative and other measures to remove access barriers, with the ultimate aim of achieving substantive (de facto) equality.

Climate change is also a global human rights threat and a driver of inequality. According to the former United Nations High Commissioner for Human Rights, Zeid Ra'ad Al Hussein "a continually warming world will be a graveyard for entire ecosystems, entire peoples – and potentially even entire nations". Climate change is inherently discriminatory in that it disproportionately affects those who are least responsible for carbon emissions, and who are also least able to adapt. The human rights framework takes these circumstances into account and recognizes that a safe, clean, healthy and sustainable environment is necessary for the full enjoyment of human rights. The 2015 Paris Climate Agreement includes an explicit reference to human rights obligations. Almost all countries have ratified the Paris Agreement, the United Nations Framework Convention on Climate Change, and other environmental agreements relevant to infrastructure development, financing and investment policy.

Micro-, Meso- and Macro-Level Human Rights Impacts

To illustrate the complex interplay between mega-infrastructure projects and human rights and the environment, the OHCHR-hbs publication classifies potential negative impacts into three levels: micro-, meso- and macro-levels. This taxonomy helps signal to decision-makers the wide-ranging and multi-level human rights and environmental impacts that infrastructure projects can bring about, and that impacts may extend well beyond the (mostly) micro-level impacts dealt with by MDBs' safeguard policies. It also underscores the fact that impacts that are not readily identified as human rights impacts, and those that may seem diffuse or abstract may nonetheless have explicit human rights underpinnings and accountability consequences.

At the micro-level, infrastructure projects can be associated with human rights impacts on communities, workers and the environment. The most serious problems often originate from acquisition of or access to land, rights of way and resources, resulting in denial of land and resource tenure, relocation, forced eviction and loss of adequate standard of living and livelihoods. Impacts on land may also cause biodiversity loss. Although physical impacts of this kind typically peak during construction and level off during operation, health, safety and security problems can persist for workers and communities, along with threats to biodiversity, natural resources and the climate. Sexual violence, intimidation of and reprisals against human rights defenders, and violence by security forces are among the other common human rights impacts. Decommissioning of projects may also generate serious negative human rights impacts if not properly planned with adequate financial provisioning.

At the meso-level, access to and affordability of certain social services, including water, are explicitly protected by human rights law; yet potential consumers of infrastructure services are often denied physical or economic (affordable) access to infrastructure. Frequent or exorbitant rate increases or denial of service due to inability to pay may violate human rights law. Generally, the private sector lacks incentives to enhance affordability of services, and regulatory reforms to enable private sector participation can cut off vulnerable individuals and communities from informal services.

At the macro-level, the actions and omissions of States and other duty-bearers can affect taxpayers and the general population in various negative ways. Examples include poor design, process and planning decisions, the failure to carry out environmental and human rights impact assessment at the project, cumulative, trans-boundary and strategic levels, as well as fiscal and financial mismanagement, which may waste public resources and lead to fiscal burdens, over-indebtedness,



A woman installing solar panels on the roof in Bhutan. (CC BY-NC-ND 2.0 Asian Development Bank – flickr)

austerity and withdrawal of public services. Procurement decisions may also trigger significant human rights and environmental concerns in the supply chain.

A number of procedural and substantive human rights are of fundamental importance across all three levels of impact. These include rights related to transparency, participation and accountability, the right to freedom of thought, opinion, assembly and association, the rights to access information and participate in public affairs and the right to a remedy. The latter (procedural) rights are also fundamental principles of international environmental law. In addition, indigenous peoples have a right to free, prior and informed consent (FPIC) for proposed projects.

Legal Frameworks Governing Infrastructure Investment

The impact of infrastructure investment on the lives and livelihoods of host country populations depends not only on project design and implementation decisions, but also financing and investment decisions, and the allocation of rights and duties between investors, contracting authorities and the host country population or segments of it.

The regulatory environment for cross-border infrastructure investment can be analysed at three levels:

- (i) international investment agreements (IIAs) as a branch of international law,
- (ii) national law, and
- (iii) State-investor contracts.

Human rights risks exist at each level. This three-level regime disproportionately benefits investors, allowing them to take almost any dispute with a host State directly to an international tribunal, with potentially damaging consequences for environmental and human rights protection.

IIAs typically offer investors lucrative inducements, guarantees and commitments by governments to “freeze” fiscal, environmental, social and other relevant laws (known as “stabilization”) in order to protect investments over the potentially long life of a major infrastructure project. IIAs have yet to impose meaningful responsibility on investors or offer recourse to people adversely affected by an investor's conduct. Furthermore, investors can take disputes with host governments to be settled by tribunals outside the host country, side-stepping the domestic legal framework. This system of Investor-State dispute settlement (ISDS) has been abused by investors to a point where it is seen by many as being beyond repair.

A recurring criticism of this system is that it impedes the State's right to regulate. From a human rights perspective, the State's *right* to regulate is also a *duty* to undertake legislative (and other) measures to realize rights. This right and duty can be compromised when investors challenge a State's regulatory actions in ISDS proceedings. Other human rights harms include the possibility of large arbitral awards seriously undermining States' fiscal space and ability to realize economic and social rights. Moreover, perverse incentives within the investment law regime and ISDS system may inadvertently trigger repression, victimization and criminalization of environmental and human rights defenders. States are starting to integrate human rights and environmental law into the adjudication of investment disputes. However, it will be difficult to generate a coherent



Pipeline construction and foundation work is undertaken for a gas plant and oil terminal in Russia.
(© Peter Blakely – Redux/laif)

jurisprudence within such a chaotic system. Clearly, fundamental reforms are needed, yet most IIA reform proposals advanced so far leave structural shortcomings and underlying asymmetries of power untouched.

National investment laws are not likely to afford individuals with legal protection or recourse for adverse impacts from the activities of investors. Such protection usually comes (if at all) from other sources of domestic law, such as human rights, health and safety, labour, environmental protection, anti-discrimination, administrative and disclosure laws. But rights protection is under pressure from two directions: On the one hand, IIAs or stabilization clauses in State-investor contracts may constrain host States from enacting such laws. On the other hand, national investment (or PPP or sector) laws can favor investors while creating pressures or incentives to dilute or remove safeguards for human rights and the environment.

State-investor contracts can also be a source of human rights harms. Stabilization clauses, for example, can freeze the host State's ability to enact new laws that protect the public. In addition, such contracts typically do not acknowledge the environmental and human rights obligations of parties and their potential to enhance the positive benefits of investment. Policy-makers wishing to promote model contracts to increase the flow of private investment in infrastructure should be aware of these shortcomings.

Infrastructure Finance: The Shifting Landscape

Expectations about the potential for private finance to help bridge the infrastructure financing gap are rising. The MDBs are proposing to maximize and prioritize private finance, while the G20 is pushing for a new roadmap toward infrastructure as an asset class that would standardize infrastructure investment. At the center of global attention are institutional investors – pension funds, insurance companies and sovereign wealth funds – with up to US\$ 70 trillion of assets. Although these institutional investors have very little exposure to infrastructure outside developed countries at this time, diverting just a small percentage of their assets may be enough to meet the infrastructure needs of emerging markets. However, when seeking to attract institutional investors, we should not overlook the sustainability gap, and in particular the potential negative environmental and human rights consequences of private finance flowing into infrastructure.

Over the years, as finance became globalized and began to dominate other sectors of the economy, it changed the way in which infrastructure services are financed and delivered. During the last three decades, private finance has begun to replace public provision of economic and social infrastructure in numerous countries and cities, thereby changing infrastructure from a physical and productive asset into a financial asset with an income stream. Infrastructure (despite its heterogenous nature) is also being developed into an asset class (which implies a high degree of homogeneity among the assets concerned) to facilitate investment. Complex financial products in infrastructure are already available, allowing easy trading. But this is a risky business. The corporate entities that receive investment are usually one or more steps removed from the underlying infrastructure assets, making it unclear (even to insiders) which underlying assets are being financed, which entity owns them, and who bears what risks. Standardized investment structures for infrastructure may conceal underlying problems and inadvertently generate negative human rights and environmental impacts. There is a need for a clearer, shared understanding of the potentially negative human rights impacts that may arise through standardizing infrastructure investments as an asset class.

The dominant influence of private finance may undermine the governance of infrastructure projects in ways that could impair the important role and functions of the State and impact negatively on the population at large. At an intermediate level, there may be negative impacts on service users, rate payers and beneficiaries of investment, such as workers participating in public pension funds. And there



*In Mforo village, Tanzania, a Solar Sister entrepreneur checks on her cows during the evening.
(© Joanna B. Pinneo – Aurora Photos/laiif)*

may be direct impacts on affected communities and individuals arising from inadequate transparency and weak social and environmental safeguards.

Whatever the world's legitimate infrastructure financing needs, private finance should not be seen as a panacea. Rather, we should understand that infrastructure finance is a shared responsibility of public and private actors. Public authorities should discharge their public governance responsibilities, which cannot be abrogated or delegated to private finance, while investors should accept that they are custodians of a public asset, and not mere private recipients of cash flow. This role requires a long-term outlook and active stewardship of investments, with responsibilities to ensure broad stakeholder engagement, robust and proactive disclosure of investments, the embedding of environmental and human rights considerations in investment and lending decisions, and monitoring and reporting. This approach should embrace both “doing no harm” (or risk management) and “doing good” (or enhancing the economic, environmental and social co-benefits).

Concluding Remarks and Recommendations

It is unclear how much of the “Billions to Trillions” infrastructure agenda will eventually be realized, and whether or how quickly infrastructure investment will migrate to more sustainable pathways. But this much is clear: without sustainable infrastructure, the objectives of the Addis Agenda, the 2030 Agenda and the 2015 Paris Agreement on Climate Change, and many internationally recognized human rights, will not be realized.

Infrastructure should promote economic growth, job creation, and economic, environmental and social co-benefits, yet too often the cost of infrastructure is shifted to those who can least bear it, thereby potentially exacerbating already widening inequalities in society. The parallel system of international investment agreements that disproportionately benefit investors and the increasing dominance of private finance contribute to this problem. If the present course is not corrected, there are real risks that regional infrastructure plans and financing strategies will generate perverse economic, human rights and environmental outcomes and unsustainable development.

The international community should recognize that infrastructure policies and actions can cause, contribute to, or facilitate multi-level negative environmental and human rights impacts. The sustainability gap in infrastructure should be acknowledged and addressed explicitly and systematically in global economic and financial decision-making.

Although institutional investors are being invited to participate in infrastructure financing, it is likely that additional private finance will only come in fits and starts. This means that implementation will likely be slow and sporadic. In theory, there is still time for most mega-infrastructure plans and projects to be reoriented toward environmental and human rights requirements and the objectives of inclusivity, resilience and sustainable development, provided that there is the political will to do so.

The OHCHR-hbs publication makes a number of recommendations for policy-makers, infrastructure decision makers and private-sector actors to counter the potential negative effects of infrastructure investment and finance, and maximize the benefits.

*Protest against deforestation:
Residents of Ta Tay Leu village take part
in a tree ordination ceremony on land
that was formerly primary forest,
Cardamom mountains, Cambodia*



1. Enhance information disclosure, consultation, participation, and accountability in infrastructure projects, including appropriate grievance redress mechanisms

- (i) Policy-makers should ensure that national laws and development finance institutions' public information policies aim for full, proactive disclosure of information in accessible languages and formats subject only to limited and well-defined exceptions where harm would be caused to a recognized interest, and that business confidentiality and national security considerations be interpreted restrictively, consistent with SDG 16.10 and global and regional human rights standards;
- (ii) States should guarantee, and all infrastructure decision-makers should ensure, active and meaningful participation of people, based on free and prior availability of project information in accessible languages and formats, as far upstream in the decision making process as practicable and throughout the project life cycle. Deliberate, targeted support should be given to ensure that the participation of women, indigenous peoples, persons with disabilities, minorities and others in infrastructure project design, implementation and policy-making is meaningful and effective;
- (iii) States should immediately eliminate any constraints to the freedoms of opinion, expression, association and assembly, in line with SDG 16.10, international law, and the recommendations of United Nations and regional human rights bodies;
- (iv) Development financing institutions and investor organizations should put policies in place to help protect individuals from intimidation and reprisals, and should provide regular public reports on the implementation of those policies;
- (v) States should ensure that State-investor contracts are disclosed publicly, subject only to limited exceptions based upon a compelling justification. Infrastructure decision-makers and private actors should proactively disclose State-investor contracts;
- (vi) Policy-makers should enact financial disclosure laws and establish information disclosure platforms in order to enhance transparency and traceability in infrastructure financing, including transparency of beneficial ownership of infrastructure assets and PPPs; and
- (vii) Effective judicial and non-judicial grievance mechanisms should be available to respond to grievances arising from micro-, meso- and macro-level impacts of infrastructure projects. The mechanisms should be aligned with the principles of grievance mechanisms in Principle 31 of the United Nations Guiding Principles on Business and Human Rights (UNGPs) ("legitimate, accessible, predictable, equitable, transparent, rights-respecting, and provide a source of continuous learning"), and non-judicial mechanisms should be based on engagement and dialogue.

2. Ensure project selection and design are consistent with the host country's national development plan and international human rights and environmental commitments

- (i) Infrastructure decision-makers should ensure that project selection and design is consistent with the country's governance process, national development plan, the SDGs and international human rights and environmental commitments, including its Nationally Determined Contributions (NDCs) and emission pathways consistent with the temperature targets of the Paris Agreement; and
- (ii) Decision-makers should base project selection and design decisions on quality preliminary studies, such as strategic impact assessment, regulatory impact assessment, and cost benefit analysis, referring to the international environmental and human rights framework as well as domestic law.

3. Integrate human rights criteria within universal standards for sustainable, accessible, affordable and resilient quality infrastructure

- (i) In collaboration with all stakeholder groups, policy-makers should help create a broad consensus on the criteria for “sustainable, accessible, affordable, and resilient quality infrastructure”, maximizing opportunities to realize the SDGs through infrastructure that promotes accessibility and affordability of services, transparency, social cohesion and inclusion, environmental protection and climate resilience, while respecting human rights; and
- (ii) Such criteria should include appropriate measures for decision-makers and private actors to address the situation of human rights and environmental defenders in infrastructure plans and projects.

4. Ensure that all relevant public and private actors involved in infrastructure carry out human rights due diligence (HRDD) to inform and improve decision making

- (i) Policy-makers should embed HRDD in the relevant public authorities' decision-making processes in relation to their activities on infrastructure development and finance, including activities related to international treaty-making, domestic legislation, and State-investor contracts;
- (ii) Policy-makers should require continuous and ongoing HRDD by private investors and operators throughout the life of the infrastructure project. Investors' initial HRDD should assess the human rights context of the host State, including the host State's environmental and human rights obligations, civil society space, and the human rights implications of the State-investor (and related) contracts;

- (iii) Policy-makers should ensure that development finance institutions integrate a requirement to respect international human rights and environmental law in their safeguard and sustainability policies, together with a requirement for HRDD in moderate and high-risk projects; and
- (iv) In all cases, HRDD should be consistent with the UNGPs, either free-standing or part of a comprehensive ESG due diligence, and should complement other assessments, such as environmental, climate, regional, strategic or other thematic assessments.

5. Address the environmental and human rights risks associated with the investor protection regime comprised of international investment agreements, national investment laws and State-investor contracts

- (i) Policy-makers should ensure that investors' responsibility to respect human rights (without prejudice to, and in parallel with, the State's duty to respect, protect and fulfil human rights) is consistently included in new and amended IIAs. If investors do not comply with its obligations, treaty protection should be denied;
- (ii) Policy-makers should ensure coherence of domestic investment law with the international environmental and human rights framework. States should resist pressure to reform national laws to incentivize investment at the expense of human rights and environmental protection. States should strengthen national human rights and environmental laws in line with international legal requirements;
- (iii) Infrastructure decision-makers and private actors should ensure that State-investor contracts fairly balance the interests of investors and the State, and not include stabilization clauses. State-investor contractual models and contracts should maximize economic, environmental and social co-benefits of projects and explicitly, clearly and fairly allocate environmental, human rights and climate rights risk management responsibilities, taking into account States' obligations and the private actors' responsibilities under international human rights and environmental law; and
- (iv) Investors should take note of States' obligations under international human rights and environmental law, understand the human rights implications of State-investor (and related) contracts and draft appropriate human rights undertakings.

6. Address the environmental and human rights risks associated with the efforts to attract private investment in infrastructure

- (i) Policy-makers should promote investment in “sustainable, accessible, affordable and resilient quality infrastructure” and standardize responsible finance in infrastructure, consistent with the Addis Agenda, including the principles on blended finance that are applicable to PPPs;
- (ii) Policy-makers should ensure, through appropriate HRDD, that standardization of infrastructure investment and financing does not unwittingly replicate negative human rights and environmental impacts; and
- (iii) Private infrastructure investors should accept a long-term outlook and active stewardship of investments, with responsibilities for broad stakeholder engagement, robust and proactive disclosure of investments, HRDD and the embedding of environmental, social, governance and human rights considerations in decision making, monitoring and public reporting. Their approach should embrace both “doing no harm” (or risk management) and “doing good” (or enhancing the economic, environmental and social co-benefits) in infrastructure financing.

7. Integrate a gender perspective and address discrimination

- (i) A gender perspective should be integrated as early as possible within the conceptualization and design phases of all infrastructure projects, and should be closely monitored throughout the project cycle. A gender perspective should also be integrated within infrastructure financing and investment decision-making; and
- (ii) Policy-makers and infrastructure decision-makers should address the serious lack of data on the distributional impacts of mega-infrastructure projects on key population groups, consistent with the data-collection and disaggregation commitments in SDG 17. Special attention should be paid to the situation of women, children, persons with disabilities, minorities, indigenous peoples, migrants, internally displaced persons and inhabitants of informal settlements, those who are excluded from social or political life deliberately, and those experiencing discrimination on multiple grounds (for example, gender and ethnicity).

Executive Summary

The Other Infrastructure Gap: Sustainability Human Rights and Environmental Perspectives

Mega-infrastructure plans and financing and investment policies to promote private investments in the energy, transport and water sectors are on the rise. This publication provides recommendations to policy-makers and decision-makers on how human rights and environmental benefits can be maximized and risks avoided or mitigated, for the sake of sustainable development. The recommendations call on both the State, relevant international organizations and private actors to understand the potential human rights and environmental impacts of their planning, financing and investment actions through appropriate human rights due diligence.

Those supporting mega-infrastructure projects should anticipate and address the potential impacts upstream in the project cycle, through sound policy and prudent project selection that balances the needs of people and the environment, and the host State's duties, with investors' interests. Recognizing the sustainable development opportunities inherent in infrastructure projects, the publication also highlights the positive economic and social benefits of human rights and environmental risk avoidance and mitigation, and of prioritizing the rights of women, indigenous peoples and other population groups who may lack access to affordable infrastructure services.

Heinrich Böll Foundation: ISBN 978-3-86928-186-5

UN/OHCHR: HR/PUB/18/5/Add.1

OHCHR

Office of the United Nations
High Commissioner for Human Rights

Palais des Nations, CH-1211 Geneva 10, Switzerland
infodesk@ohchr.org www.ohchr.org

Heinrich-Böll-Stiftung

The Green Political Foundation

Schumannstraße 8, 10177 Berlin, Germany
+49 (0)30 285340 info@boell.de www.boell.de