Accountability in sustainable development: Pipe dream or necessity for global transformation?

By:

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Corporations are increasingly playing a role in the realisation – or infringement – of socio-economic rights, the fulfilment of which States are primarily responsible for. The privatisation or creation of public-private partnerships in respect of education, health care, and the provision of water and sanitation has often resulted in human rights violations for which international accountability mechanisms are non-existent, while remedies in domestic jurisdictions remain the exception rather than the rule. In South Africa, a constitutional crisis was narrowly averted following the conclusion of an invalid contract between the State and a business entity for the provision of the constitutionally guaranteed, justiciable right to social assistance. In other instances, corporations do not purport to contribute to the realisation of socio-economic rights by exercising public powers, but instead directly prejudice the enjoyment of these rights

through their business operations. Extractive industries– and the resource curse still prevalent across Africa – are a case in point.

Much debate has focused on introducing accountability measures for private actors' violation of human rights, and in particular for powerful transnational corporations that often escape liability due to uncertainty regarding the extraterritorial application of rights and legal shields such as the notion of the corporate veil. However, the sustainable development agenda has necessitated a re-imagining of corporates' role in the financing and realisation of the Sustainable Development Goals (SDGs) and, indirectly, the realisation of the rights on which the goals are based.

Developing countries currently face an estimated annual SDG financing gap of $2.5 trillion. In Africa, where many economies are reliant on extractive operations, dramatic paradigm shifts will be necessary to attract investment that will promote sustainable development instead of impeding it. Indeed, the extractives sector is often dominated by transnational actors, with domestic jurisdictions appearing impotent in holding such corporations accountable for the violation of socio-economic rights such as those to water, health and land. However, if properly facilitated, foreign direct investment can contribute to the sustainable development and human rights agenda by creating jobs (thereby giving effect to the right to work), delivering socio-economic goods such as clean water and energy, as well as vital infrastructure, and giving expression to the SDG on gender equality and internationally accepted right to non-discrimination through progressive employment practices. Attracting investment for sustainable development can further help diversify African economies to move beyond the exploitation of natural resources.

Although explicitly based on human rights and often reflecting the language of human rights treaties such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), the sustainable development agenda may succumb to the same fate as the Millennial Development Goals given the persistent accountability deficit in its structures. Instead of creating mechanisms to ensure accountability in addition to monitoring, a follow-up and review approach was adopted. The provision for States' Voluntary National Review before the High-Level Political Forum on Sustainable Development

imposes no obligations on States for expedient implementation of the SDGs, and falls short of even a peer review mechanism such as the Universal Periodic Review.

The lack of accountability measures and even possibly sanctions for unacceptable progress in relation to the SDGs, coupled with the narrow scope for participation in the High-Level Political Forum, renders developing States' populace disempowered and disconnected from a global initiative that purportedly aims to 'leave no one behind'. Domestic institutions that may elicit accountability through monitoring SDG implementation, such as National Human Rights Institutions, enjoy no independent participation rights and are therefore at the mercy of States for inclusion in the process. Moreover, States are at liberty to commit themselves legally to the SDGs at the domestic level through justiciable socio-economic and other rights guarantees, or to pursue sustainable development whimsically without any liability for non-performance.

Attracting foreign investment while holding transnational corporations to account for any human rights transgressions is by no means an easy feat. It will require that a careful balance be struck between the interests of the host State and its people, and that of private actors expecting good risk-return ratios in pursuit of the bottom line. Although international mechanisms such as the United Nations Committee on Economic, Social and Cultural Rights have long endorsed accountability for transnational corporations, a zero draft international convention to regulate this issue has only recently been developed.

Given the proliferation of bilateral investment treaties (BITs) to attract foreign investment, the convention goes so far as to stipulate that State Parties should agree that 'all existing and future trade and investment agreements shall be interpreted in a way that is least restrictive on their ability to respect and ensure their obligations under this Convention, notwithstanding other conflicting rules of conflict resolution arising from customary international law or from existing trade and investment agreements'. This contentious convention in general, and provision in particular, may well deter States from acceding thereto lest investment flight follows.

A more viable option might be for Investor State Dispute Settlement

mechanismsto adopt a consistent and transparent approach to the resolution of disputes between States attempting to comply with their human rights obligations and transnational corporations that demand investor protection. In his illuminating work, Adeleke presents a sophisticated argument as to how this may be achieved. Adeleke proposes that in addition to ISDS mechanisms observing universal standards of participation and freedom of information, the global administrative law concept of deference be incorporated into arbitration fora's interpretative approach to BITs.

Deference to host States' international and domestic human rights obligations in not unprecedented in the ISDS milieu, although the confidentiality of many such proceedings impede the identification of consistent or principled patterns of resolution. In acknowledging that BITs should pay heed to both economic development and other fundamental freedoms, Adeleke urges the integration of international law rules to develop a consistent approach and principled standards of review that take into account notions of State sovereignty, public interest demands and the existence of binding obligations other than those due to investors. Adeleke's argument is convincing, and it is to be hoped that ISDS mechanisms, States and transnational corporations will take heed thereof in joining forces to achieve the common goal of global transformation that truly leaves no one behind.

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