

STATE OF POWER 2020

The Corporation



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STATE OF POWER 2020



Charming psychopaths

The modern corporation

An interview with Joel Bakan



In 2004, a powerful documentary film, 'The Corporation', caught the political imagination when it was released at the peak of the alternative globalisation struggles that emerged following the protests at the World Trade Organization (WTO) in Seattle. Based on a book of the same name, and using a witty and stylish mix of news clips, music and perceptive analysis, the film boldly challenged capitalism's single most important player, the corporation. The documentary won 26 awards, with even conservative commentators such as The Economist calling it '[a] surprisingly rational and coherent attack on capitalism's most important institution'. To launch our collection examining 'The Corporation', the Transnational Institute went back to the film and books' writer, Joel Bakan, a law professor at the University of British Columbia, to find out how he views the corporation today.

What is the corporation?

The corporation is a legal construct, indeed a legal fiction. It is not something created by God or by Nature, but rather a legally created and enforced set of relations designed to raise capital for industrialism's large projects. Its main function is to separate the owners of an enterprise from the enterprise itself. The latter is alchemically transformed into a 'person' that can bear legal rights and obligations, and therefore operate in the economy. The owners – shareholders – thus disappear as legally relevant, with the corporate 'person' itself (and sometimes its managers and directors) holding legal rights, and being liable when things go wrong.

It follows that shareholders' only risk is to lose money if their share value declines. They can't be sued for anything the corporation does. Moreover, to further sweeten the pot for their investing, the law imposes obligations on managers and directors to act only in shareholders' best – that is, financial – interests.

The genius of it all is that this highly pro-shareholder construction provided strong incentives for many people, particularly from the emerging middle class, to invest in capitalist enterprise. That was the corporation's main purpose – to generate the huge pools of capital needed to finance large enterprises, railways, factories, and so on, that industrialisation made possible. It was, in effect, a crowd-funding institution.

What has the corporation become?

The corporation's central institutional function – concentrating thousands, even millions, of investors' capital into one enterprise – also created the potential for enterprises to become very large and powerful. There were initially limitations on their power – caps on growth, restrictions on multi-sector involvement, competition laws, and so on – but over twentieth century these were weakened and eliminated. Now companies can merge, acquire, and get bigger and bigger, accumulating ever more power with little to constrain them. As a result, they become these vast concentrations of capital that dominate not only the economy, but also society and politics.

They are not democratic and are legally compelled to serve their shareholders' interests in everything they do. So, you have these huge and powerful institutions, compelled by their institutional characters to pursue self-interest regardless of the consequences, bent on avoiding or pushing out of the way anything that impedes their missions – such as regulations, taxes, and public provision – creating wealth for anonymous and unaccountable shareholders, and with no democratic accountability to the people (other than their shareholders) affected by their decisions and actions.

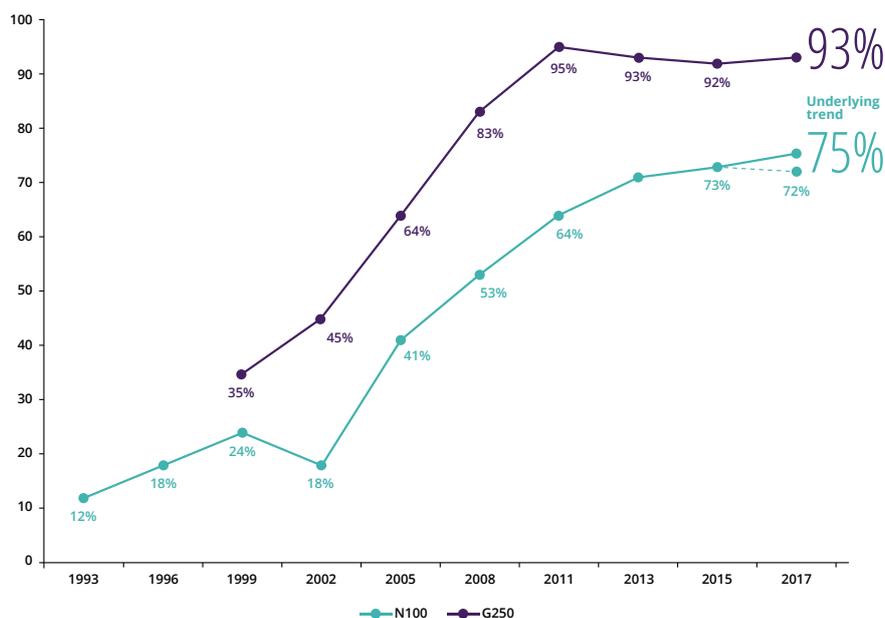
What has changed in the 15 years since you wrote *The Corporation*?

A few obvious things. Big tech didn't exist (at least not in the dominant way it does now) at the time of the first project. Climate change was a problem, but not yet the existential and immediate crisis we know it is today. The populist right was still on the fringes, globalisation was in full swing, and corporations – smarting from anti-globalisation struggles around the world, and worried about growing popular distrust and concerns about their expanding power – strategically changed their image and their game.

In terms of the latter, corporations began, around the time my first book and film came out, to make sweeping commitments to sustainability and social responsibility – to use less energy, reduce emissions, help the world's poor, save cities, and so on. Creative capitalism, inclusive capitalism, conscious capitalism, connected capitalism, social capitalism, green capitalism – these were the new kinds of buzzwords that came to the fore, reflecting a sense that corporate capitalism was being modified into a more socially and environmentally aware version.

The key idea, whatever rhetoric it was wrapped in, was that corporations had changed fundamentally, that while corporate social responsibility (CSR) and sustainability had previously been located on the fringes of corporate concerns – a bit of philanthropy here, some environmental measures there – now they became entrenched at the core of companies' ethos and operating principles.

Growth in global CR reporting rates since 1993



Base: 4,900 N100 companies and 250 G50 companies

Source: KPMG Survey of Corporate Responsibility Reporting 2017

Well, has it made any difference?

Yes, but not necessarily a positive one. The subtitle of my new book is *'Why "good" corporations are bad for democracy'* Let me explain. To begin with, despite all the fine rhetoric, the *new* corporation is fundamentally the same as the old one. Corporate law hasn't changed. The corporation's institutional make-up hasn't changed. What has changed is the discourse, and some of the behaviour. The new ethos is captured by the idea of 'doing well by doing good', finding synergy between making money and doing social and environmental good rather than presuming there's conflict.

So now corporations make a lot of noise about their aim being to do good, far less about the fact that they can only do as much good as will help them do well. The fact is, despite all the celebratory talk, corporations will not – indeed, cannot – sacrifice their own and their shareholders' interests to the cause of doing good. That presents a profound constraint in terms of what kinds and amounts of good they are likely to do – and effectively licenses them to do 'bad' when there's no business case for doing good.

The further problem – and this is the part about democracy – is that corporations are leveraging their new putative 'goodness' to support claims they no longer need to be regulated by government, because they can now self-regulate; and that they can also do a better job than governments in running public services, such as water, schools, transport, prisons, and so on.

Climate is an area where corporations have been particularly crafty. No longer can they plausibly deny climate change, so they don't. Instead, they say 'yes, it's happening, we acknowledge it, but we now care, we can take the lead and provide solutions, we don't need government regulation'.

Now, if you talk to scientists, they all say we needed to have adopted renewables yesterday to prevent cataclysmic scenarios, and that this will require massive state-led changes. If you talk to the fossil-fuel industry, they say something quite different, something consistent with their plans to profit as long as possible from carbon fuels. They say we have time, that we shouldn't and can't get to renewables any time soon, that natural gas and fracking are good alternatives, that it's all right that they continue to develop mega-projects to tap fossil-fuel reserves (including coal, like the Adani mine in Australia), that that they will take the lead on renewables. That we should trust them – not governments – to sort out climate.

This new strategy is probably even more dangerous than outright denial. By purporting to be the 'good guys' now, they more subtly obfuscate and obscure truths and intentions, wielding their influence with governments and at climate summits to ensure their carbon-fuel-based business models remain largely unimpeded.

In my first book, *the Corporation*, I argued that if corporations were really people, they would be by their behaviour and traits be considered psychopaths. Now, as they put on a false face, they have effectively become charming psychopaths.

...if corporations were really people, they would be by their behaviour and traits be considered psychopaths.

What difference has the rise of the digital giants made to the nature of the corporation?

When internet and artificial intelligence (AI) technologies are harnessed to the corporate compulsion to create profit, bad things can happen – and are happening. It's true, as tech advocates say, that innovation and disruption are the result. But neither is necessarily a good thing. For example, the innovations of big tech are disrupting the policing of monopolies.

For many tech players, monopoly is built into their business models. Facebook, for example, has to be the place everyone goes for social connection. Amazon needs to be the platform for all shoppers and retailers. Google, the search engine everyone uses. The value of these companies is based on being the one place where *everyone* goes. That gives them a monopoly on the two things that have value in the tech space – attention and data.

It also incentivises them to go beyond their sectors, to invade and dominate other sectors – such as Amazon entering cloud-based computing and pharmaceuticals, Facebook becoming a major news hub and increasingly central to how election campaigns are run, Google pushing into urban planning (through Sidewalk Labs). Current anti-monopoly laws and regulators are too weak (a result of deregulation) and politically unmotivated to keep up, which is what has allowed these companies to turn into behemoths that stifle competition and have undue influence on politics and society – in short, to disrupt democracy.

Another problem is that corporations are collecting ever more data, triangulating it, graphing our every move and emotion, especially as all the hardware in our lives becomes internet-connected (through the 'Internet of Things') and the software becomes more sophisticated at monitoring and predicting our behaviour. The problem is often thought about in terms of privacy – that our privacy is being invaded by the collection of all this data. But the real problem is control: how the data is likely to be used to control how we act, think, and feel in ways that are ultimately profitable to corporations.

The possibilities for employers controlling workers' every move are already evident in, for example, Amazon's micro-monitoring of warehouse workers' performance. Similarly, insurance companies are starting to monitor life insurance policy-holders' fitness and physiological data through wearable devices and so on.

And how does that affect democracy?

As corporations gain greater direct control over individuals through new technologies, it becomes more difficult – if not impossible – for democratic governments to regulate the relationship between corporations and private citizens. When an insurance company has direct control of individuals it insures – knowing their driving habits, or whether they are fit, and adjusting rates or denying pay-outs on these bases – it becomes difficult for democratic institutions – regulators and courts – to protect individuals' consumer rights. When a platform like Uber uses technology to effectively circumvent the employment relationship (a regulatory construct designed to protect workers from the much greater power of their employers) it becomes difficult to protect workers.

Democracy is also affected by the rise of misinformation, hate, and incendiary speech, which is magnified by the internet and social media. That too is connected to big-tech business models. A company like Facebook thrives by getting more people engaged more of the time. More is better – and questions about truth, or the public interest, or democracy are simply irrelevant.

More generally, the rise of right-wing authoritarianism, which is happening through democratic electoral processes, is in large part a reaction to 40 years of neoliberal policies that have destroyed jobs and social provision, and thus lives and communities. Those 40 years of policies were – and continue to be – spearheaded by large corporations, which used their resources to lobby, fund elections, move and threaten to move operations in response to regulation and proposed regulation, roll back and avoid taxes, and so on. Leaders of the ‘new’ corporation movement – the very companies claiming to care, to be socially responsible and sustainable – have been at the forefront of these campaigns. None of them has said, ‘social and environmental values are important, so let’s have more regulation and taxes to protect them’. Quite the contrary.

Corporations are now leveraging their supposed new persona to push back democracy, by claiming, as noted above, that they can regulate themselves in lieu of legal measures, and that they should be put in charge of social provision in place of public authorities. It’s quite the two-step. They campaign to eviscerate governments’ capacity to deal with social and environmental issues, and then step in to say that they can do the work government has been rendered, through their efforts, unable to do. The result is less government and more corporations in our lives and societies – meaning less democracy overall.

How have civil society and social movements responded to the rise of the corporation?

The last 20 years have seen a remarkable rise of organised and effective movements to push back against corporate power and the threat it poses to democracy – more than 200 cities around the world have rejected water privatisation by re-municipalising previously privatised systems; indigenous peoples have won battles against extractive industries and for recognition of land rights and self-determination; the ‘movement of the squares’ swept through cities around the world in 2011 and included the Occupy movement; progressive politicians have won victories in cities like Barcelona and Paris in Europe, New York, Jackson, Seattle and Tucson in the United States, and Vancouver in Canada – along with many others.

In the United States, there was Bernie Sanders, an open socialist, making (in 2016, and again in 2020) a play for the presidency, and the thousands of progressive election campaigns he helped inspire, many successful – like Alexandria Ocasio-Cortez (AOC) and other progressive representatives. And then there’s the new energy and urgency of surging activism around the world, mass movements demanding action on climate change, extractive industry projects, indigenous rights, against racism.

It’s all very positive and inspiring.

We have to be wary, however, of corporations’ attempts to co-opt this wave of resistance. They are certainly trying, working hard to make us to believe that they are the true change-makers; that our best path to a better world is to buy their ‘green’ products, support their social and environmental initiatives, follow their advice on recycling, reducing, and so on. Companies and their CEOs take stands on various issues, and they increasingly form partnerships with non-government organisations (NGOs) like the World Wildlife Fund (WWF) Save the Children (SCF), Conservation International and inter-governmental organisations such as the various entities of the United Nations. No doubt some good may come from all this,

We have to be wary, however, of corporations’ attempts to co-opt this wave of resistance.

but it's important to recognise that the same companies allying with NGOs, and taking up a stance on racism, immigration, or discrimination against LGBTQ (Lesbian, Gay, Bisexual, Queer and Transgender) people are also lobbying hard to reduce government oversight, push back taxation, expand markets, cut social provision, and so on.

Is there a place for the corporation in the future?

I think there is a place for a financing vehicle for large projects that require large pools of capital, which is essentially what the corporation is. But it has to be understood as a tool, as a means, not an end in itself. The corporation was created by government for that purpose, as a financing tool. Its virtue in incentivising investment – its legal mandate to create wealth without constraint – is also its greatest danger. Because of that, it *must* be regulated, and it shouldn't be used to deliver inherently social goods, and certainly not to help govern society. It is completely ill-equipped to do those things, being fundamentally self-interested and lacking democratic accountability to anyone but its shareholders.

We should also be thinking about using other kinds of economic organisations to create goods and services, such as cooperatives, or public institutions with public-interest mandates. There is no evidence to support, and much to contradict, that that the ideal institution is always, or even usually or sometimes, the large for-profit corporation. Rather, corporations are best thought of as we might think about, say, a lawn mower. It has its uses. It's very good at cutting the lawn. But you don't want to use it to cut your hair or vacuum your living-room rug.

All of which may be an argument for shifting away from capitalism to some other kind of system – such as those imagined by democratic socialism, or the commons movement or indigenous cosmologies – where social and ecological ends are prioritised rather than the accumulation of capital. Though something like that may be on the horizon, in the meantime we have to figure out how to rein in the dangerous tendencies of the corporations and capitalism we currently have, and to ensure they do not – as they may – turn out to be doomsday machines.

What about B-Corps or Benefit corporations? Are they a good step?¹

No. B-corps are not a solution and I have opposed them, including in my home province of British Columbia where the government took measures to recognise them. Typically, a B-corp is nothing more than a certification by a private company (such as B-Lab) that a corporation meets certain social and environmental standards. It's not needed for corporations that are not publicly traded, which already have leeway to subordinate financial to social and environmental goals if they so wish. And for publicly traded corporations, even if they become B-corps (which, so far, no major one has), they're still legally bound to prioritise shareholder value. A private certification doesn't change the law.

So what B-corps end up being are, in effect, a privatisation of regulation, a prop for the ideology that corporations, through market mechanisms and *private* oversight, can protect and promote public

We should also be thinking about using other kinds of economic organisations to create goods and services

interests. It's not about democratically promulgated rules to control corporations, nor about state-backed enforcement mechanisms for such rules. It's yet another velvet glove hiding the iron fist of neoliberalism.

A different approach is to reformulate the legal constitution of the corporation to include social and environmental goals as well as financial ones. Again, I don't favour this approach. One problem is that it will *never* subordinate financial goals to social and environmental ones – the latter will always be pursued only in ways that are compatible with the former. The second problem is that indeterminate judgements about whether social and environmental goals are met – which should be pursued, how and to what extent – are placed in the hands of managers rather than democratically accountable regulators. Third, the presence of this new kind of corporation would inevitably be leveraged, probably successfully, to push for more deregulation – the argument being that regulation is redundant when standards are baked into the corporation itself.

The problem is that the corporation's sole reason for existing within capitalism is to incentivise investment. That will always entail prioritising returns on investors' capital, rather than competing values fixed into the corporation's legal nature. The imperatives of corporations within capitalism will always be capitalist imperatives. We need to deal with the dangers of that dynamic democratically, through policies, laws, and regulation, rather than by tweaking the corporate form and effectively delegating regulatory functions to corporate managers and directors.

How do we get there?

I don't advocate revolution because I believe existing democratic structures, however corrupt, can be reclaimed and repurposed, reunited with grassroots movements and the genuine needs and voices of citizens. In the meantime, we need to do a lot of myth-busting to reveal the truth that corporations and markets can't deliver the social and environmental goods we need; that democracy and democratic institutions must be revived.

We need to work with and in our communities, schools, and unions, to educate and inspire each other. To work with, become part of, and help elect progressive political parties, join and form movements, promote solidarity while celebrating difference. We need to see ourselves as political actors, citizens, obliged to take part in and contribute to creating good and just societies. We need to accept that democratic governance is messy and uncertain, that it's as much about the process of participation as it is about the resulting policies, and that it can only flourish in social conditions that nurture empathy and solidarity among citizens.

Joel Bakan is a professor of law at the University of British Columbia, and an internationally renowned legal scholar and commentator. A former Rhodes Scholar and law clerk to Chief Justice Brian Dickson of the Supreme Court of Canada, Bakan has law degrees from Oxford, Dalhousie, and Harvard. As well as his critically acclaimed international hit, *The Corporation: The Pathological Pursuit of Profit and Power* (Free Press, 2004), his scholarly work includes *Just Words: Constitutional Rights and Social Wrongs* (University of Toronto Press, 1997) and *Childhood Under Siege: How Big Business Targets Children* (Penguin, 2011).



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STATE OF POWER 2020

The intelligent corporation

Data and the digital economy

Anita Gurumurthy and Nandini Chami



Four centuries after the East India Company set the trend for corporate resource extraction, most of the world is now in the grip of unbridled corporate power. But corporate power is on the cusp of achieving ‘quantum supremacy’² that social movements in the digital age need to understand in order to shift gears in their struggles. The quantum shift here comes from ‘network-data’ power; the ingredients that make up capitalism’s digital age recipe.

Contemporary capitalism is characterised by the accumulation of data-as-capital. Big Tech, as digital companies are collectively known, use the ‘platform’ business model, which leverages the combined force of Internet connectivity (Metcalf’s law, that a network’s value comes from the number of its connections) and algorithmic intelligence (what IBM refers to as Watson’s law, the competitive advantage accruing from out-learning everybody else through cognitive computing). The platform model provides a framework for interactions in the marketplace by connecting its many ‘nodes’ – consumers, advertisers, service providers, producers, suppliers and even objects – that comprise the platform ecosystem, constantly harvesting their data and using algorithms to optimise interactions among them as a means to maximise profit.

The platform model emerged as a business proposition in the early 2000s when Internet companies offering digital communication services began extracting user data from networked social interactions to generate valuable information for targeted advertising. The socialisation of the Internet and the increasingly online nature of economic transactions led to the globalisation of the platform model and its central dynamic of perpetually expanding data-based intelligence about the activities of a perennially growing user base. It is estimated that by 2025, over 30% of global economic activity will be

mediated by platform companies, an indication of the growing ‘platformisation’ of the real economy. In every economic sector, from agriculture to predictive manufacturing, retail commerce and even paid care work, the platform model is now an essential infrastructural layer. Amazon, for example, does not merely sell products, but is now essential to retail commerce, akin to what electricity was to the factories in the early twentieth century.

Control over data-based intelligence gives platform owners a unique vantage point – the power to shape the nature of interactions among member nodes. Practices such as Amazon’s segmenting and hyper-targeting of consumers through price manipulation, Uber’s panoptic disciplining of its partner drivers, and TripAdvisor’s popularity ranking algorithm of listed properties, restaurants and hotels are all examples of how such platforms mediate economic transactions. The accumulation of data that feeds algorithmic optimisation enables more intensified data extraction, in a self-propelling cycle that culminates in the platform’s totalising control of entire economic ecosystems.

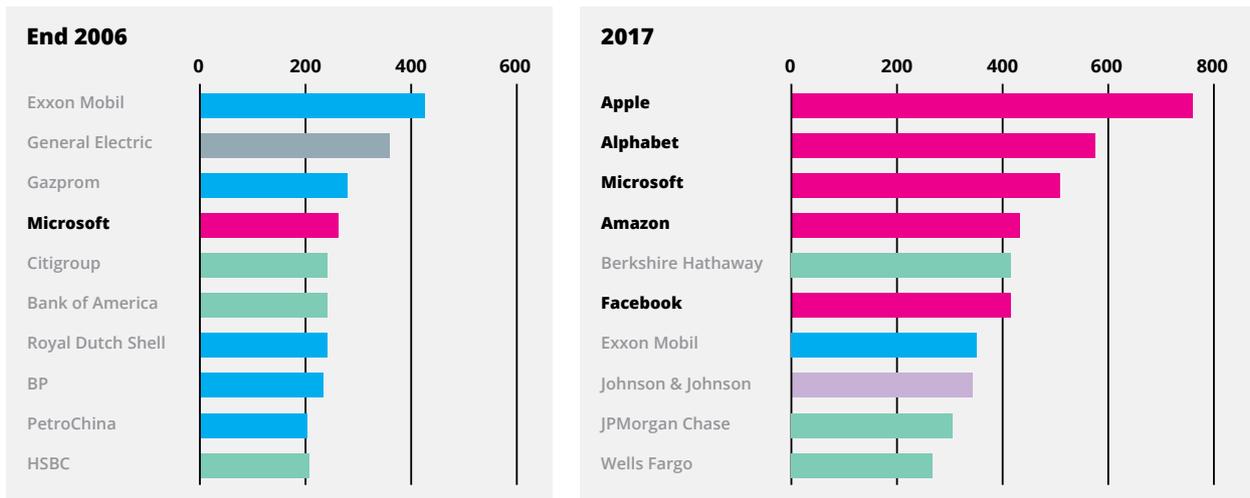
The intelligence advantage may thus be characterised as an ‘intelligence premium’, rather like the ‘innovation premium’ enjoyed by the first-mover firms in the pre-digital era. In the quest to acquire and retain this ‘intelligence premium’, platforms assert de facto ownership rights over their members’ data, steadily squeezing out the competition and eventually achieving vertical and horizontal integration.

The accumulation of data... culminates in the platform’s totalising control of entire economic ecosystems.

Amazon for instance, is no longer an online book store, and was perhaps never intended to be. With intimate knowledge about how the market works, Amazon is a market leader in anticipatory logistics ('Fulfilled by Amazon'³) and business analytics (AWS⁴). Not only has it displaced traditional container-freight stations in port cities, it has begun to look increasingly like a shipping company! The dynamics of an intelligence economy have led to large swathes of economic activity being controlled by a handful of platform monopolies.

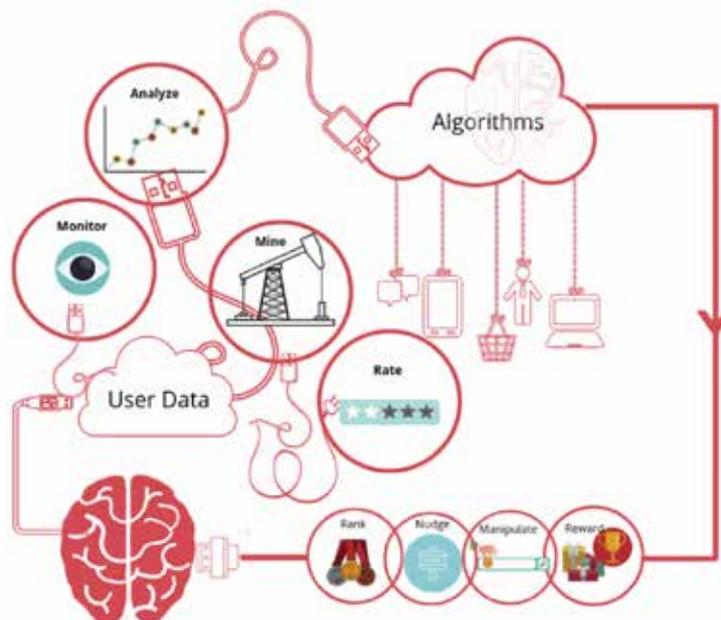
World's largest listed corporations by market capitalisation (in billion dollar)

SECTOR ■ Energy ■ Financials ■ Health care ■ Industrials ■ IT



Studies suggest that in a matter of a couple of decades, platform monopolies have overtaken oil, automobile and financial corporations in market capitalisation. Today, platform-based business models account for seven of the world's top eight companies ranked by market capitalisation. The *pan*-global platform corporation, with its DNA of data-based intelligence, has replaced the *trans*-national industrial corporation as the Leviathan of our times.

Enter, the intelligent corporation



The 'Intelligent Corporation' in diagrammatic form. Source: ITForChange

As the dominant form of economic organisation in the capitalist world order, the corporation has always wielded power, not just in the market but also in political and socio-cultural realms. The rise of the 'intelligent corporation' defined by the political economy of data capital has produced qualitative shifts in the exercise of corporate power, including the following.

(a) From dominating the market to becoming the market. Like its predecessor, the intelligent corporation also aims at complete market domination. In platform-based capitalism, local business models based on intimate contextual knowledge are completely displaced by the data-based intermediation of marketplace and social transactions. It is by eliminating these disparate pockets of capital accumulation that platform owners maximise their profits. For example, the contextual knowledge of neighbourhoods that determined competitive advantage and the distribution of returns for traditional taxis is rendered meaningless when Uber, the ride-hailing corporation with its algorithms for intelligent routing, enters the picture. The intricate knowledge of local agrarian conditions and intuition about local markets no longer matters in the aggregation led by farming-as-a-service platforms.

The intelligent corporation also goes a step further, moving beyond 'dominating the market' to 'becoming the market'. Integrating across business lines, these companies both operate a platform (that is, run the marketplace and its rules) and promote their own goods and services on it. This places them in direct competition with the businesses that use their infrastructure, and creates a conflict of interest. For example, Amazon uses its product marketplace data to consolidate its private labels, launching high-demand products at prices that undercut third-party sellers. It is also known to use its AWS data to guide decisions about which start-ups to invest in, which to acquire and which to simply wipe out. Similarly, Google has manipulated search results to prioritise its own services. In India, ride-hailing platforms Uber and Ola have been reported to prioritise the cabs that they own or have leased over those of partner drivers; food-delivery platforms have been accused of unfairly discriminating against partner restaurants in order to prioritise their own 'Cloud Kitchens'. As Lina Khan, who specialises in US competition law, has observed, in addition to the traditional risks of discrimination and lock-in recognised in the legal scholarship on the governance of essential utilities, businesses dependent on platform infrastructure also face that of appropriation. This is because the platform owner can harvest data-based intelligence about their business practices and deploy it against them.

In this new strategy for acquiring market power, long-term market monopolisation is privileged over the ability to break-even in the short run. The ecosystem that a platform seeks to capture has room only for one winner with the wherewithal to forgo immediate profits and invest in business integration (through aggressive acquisition) and systematic data-layer development. Other competitors are destined to fall by the wayside. This business ethos is in perfect sync with the high risk-high return mantra of venture funding in which only a minority of investments pay off. The reliance on venture funding and the delays in going to an initial public offering (IPO) has produced a crop of daredevil unicorns – 'multibillion-dollar tech companies that share the attributes of enormous valuation and unapologetically outlaw founders'. As Derek Thompson, staff writer at *The Atlantic*, wryly put it, '*If you wake up on a Casper mattress, work out with a Peloton before breakfast, Uber to your desk at a WeWork, order DoorDash for lunch, take a Lyft home, and get dinner through Postmates, you've interacted with seven companies that will collectively lose nearly \$14 billion this year*'. The spectacular crash and burn of WeWork in its IPO may be a sign of things to come, but the race to beat the competition is only intensifying.

The intelligent corporation goes a step further, moving beyond 'dominating the market' to 'becoming the market'

(b) From cheap labour to freedom from labour. In the capitalist economy, the key contradiction is between capital and labour. Capital is in a perennial quest for freedom from labour through labour-substituting technological advances and territories to shift production to reduce labour costs. In the intelligence economy, capital seems to have come very close to realising its primordial pursuit.

Using 360° surveillance, the intelligent corporation creates a self-optimising ecosystem, manipulating each node, expanding its captive network, accumulating data capital, and entrenching its dominance. It is able to achieve a global operational footprint with few assets and a minuscule employee base. Think Uber. Uber drivers are not considered to be employees in most places where the company runs its business. With a god's eye view of the city and its roads, the customers and the driver, Uber takes over city transport, often without owning a single taxi. Passing off the liability to the driver, who must take a high-interest loan to acquire a vehicle to become Uber's coveted 'partner', the corporation extracts from the driver more than just labour time.

The overall demand for labour seems to be shrinking in the intelligence economy. As *The Economist* highlights, 'in 1990, the top three car manufacturers in Detroit had between them revenues of \$250 billion, a market capitalisation of \$36 billion and 1.2 m employees. In 2014, the top three companies in Silicon Valley had revenues of \$247 billion and a market capitalisation of over \$1 trillion, but just 137,000 employees'.

In on-demand and micro-work⁵, the platform business model and its attendant algorithms, create perpetual competition among individual workers, fragmenting them and preventing them from collectively organising or unionising for their rights. In traditional labour-intensive manufacturing and services sectors, data capital is slowly but surely effecting far-reaching transformation.

Projections show that automation based on artificial intelligence (AI) will eventually displace labour. It is estimated that over 40 per cent of the global workforce will lose their jobs in AI-led disruption of manufacturing over the next 15–25 years. A limited number of high-paying jobs may open up for individuals with advanced skills in the development of data and AI technologies. But most of the labour force will end up in low-paid, personalised service work. For countries in the Global South, the challenge will be especially pernicious. As rising wages erode the comparative advantage of labour in these economies, the shift to AI technology is likely to trigger a re-shoring trend, whereby factories are relocated to richer countries that offer more sophisticated infrastructural support for deployment of AI systems.

According to the World Bank, over two-thirds of the workforce in developing countries are likely to lose jobs. It is not clear how these changes will shift gender-based segmentation and gender hierarchies in labour markets. However, going by current trends, women seem to be the first to lose their jobs in this transition, with a reversal of both pay and status gains.

(c) From accumulation by dispossession to planetary-scale time-space enclosure. Capturing previously non-commodified time and place has always been a central strategy of capitalist expansion. In the intelligence economy, we are witnessing a new phase of such 'primitive accumulation' – through 'data dispossession'. The expropriation of data from everyday social exchanges through the platform

business model is comparable to the expropriation of natural resources for capitalist production in a previous age. The pervasive data extraction by platform companies has transformed data-mined social interaction into a factor of production, just as invaluable a resource as land for the creation of goods and services. The centralisation of wealth and power today, derives from an unprecedented quality and scale of dispossession.

The dynamic of data dispossession is self-propelling. It is now well understood that platforms aggressively pursue a strategy of locking-in users, offering instant gratification in exchange for data and making it costly for them to leave a platform. The Chinese 'super-platforms' WeChat and Meituan-Dianping combine news, entertainment, restaurant reviews, food delivery and ride-hailing, along with cross-cutting applications such as payment systems and digital wallets, demonstrating a 'stickiness' that is almost addictive.

Relentless data mining not only transforms social interactions through their commodification. 'Smart' network-data ecosystems go a step further. They create the brain that allows the end-to-end capture of the entire production process. Alibaba's blockchain based dairy connects producers in New Zealand to consumers in Beijing, creating a seamless supply chain. Similarly, Alibaba's ET Agricultural Brain entrenches corporatised farming cultures in Asia, acquiring farm lands and remote controlling farm-based activities through AI technologies for real time monitoring. Capital is thus able to straddle the dimensions of time and space, to create a new marketised framework for agricultural value chains with potentially adverse long term consequences. As GRAIN, an organisation working to support small farmers and bio-diversity, observes such farm-to-fork cross border consolidation by Big Tech not only enfeebles traditional livelihoods, but could also edge out local agricultural economies in Asia.

When participation in the platform on the platform owner's terms becomes de facto the only choice for economic actors, data extractivism is normalised. Similar to the predatory practices of historical colonialism, the platform tactics of the intelligent corporation function as a neo-colonial project. The difference is that this time around, rather than European companies, the US and Chinese platform companies are in the driving seat.

Facebook Zero, under the guise of providing subsidised Internet connection to marginalised groups, has essentially focused on opening up untapped data markets in the Global South. The electronic World Trade Platform, an Alibaba initiative, is in reality an effort to mine intelligence about previously unexplored markets in African countries by building digital and data capacities of small and medium enterprises (SMEs). The Digifarm platform being piloted in Kenya by the leading telecom operator, Safaricom (launched by Vodafone), is in effect an attempt to enclose valuable data about agricultural practices and credit behaviour of smallholder farm households in order to build financial services around its mobile money system 'M-PESA'.

A profoundly unsustainable exploitation of the natural world accompanies the rapid inroads of the intelligent corporation. Take the case of the vast ecological footprint of the online food-delivery sector. According to a 2018 study published in the science journal *Resources, Conservation and Recycling*, door-to-door fast-food delivery in China accounted for a nearly eightfold jump in packaging waste in just two years, from 0.2 million tonnes (2015) to 1.5 million tonnes (2017). This has coincided with the

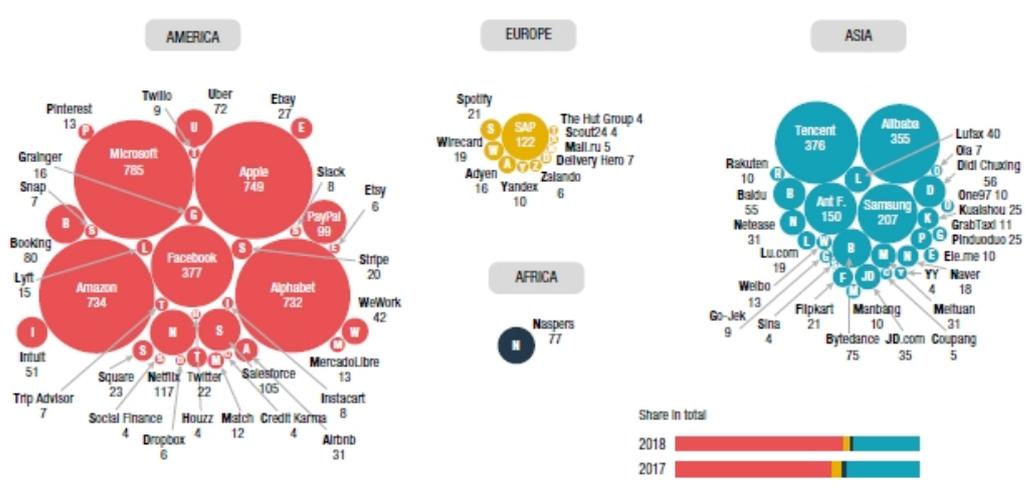
The ecosystem that a platform seeks to capture has room only for one winner

exponential growth of the sector in the country, where the number of customers using food-delivery platforms has gone up from zero in 2009 (when the first delivery app (Ele.me) appeared) to 406 million by the end of 2018! The intelligence economy is a veritable resource guzzler whose network data devices are expected to be consuming about one-fifth of global electricity by 2030 just to keep going.

The loss of self-determination for individuals and communities in these new intelligence-based modes of production reflects an asymmetry in power that was previously impossible. This is the route through which the brand-new corporation colonises bodies and nature, takes control of production and social reproduction, and intensifies accumulation on a global scale.

Just as imperialist capital accumulation impoverishes the colonies, the territories from which data is extracted by Chinese and US global platform companies find themselves locked into the low-value parts of the new economic order. As the 2019 edition of UNCTAD's Digital Economy Report highlights, in the market capitalisation value of the world's 70 largest digital platforms, those in the United States and China have a combined share of 90 per cent, compared to a mere 1 per cent in Africa and Latin America.

Figure I.17. Geographical distribution of the main global platforms in the world, 2018 (Market capitalization in billions of dollars)



Source: Holger Schmidt (<https://www.netzoeconom.de/vortragse/#tab-id-1>).

(d) The 'deep corporate' and the death of the social contract. It is no secret that in the digital era, the deep state has had a makeover. Edward Snowden's revelations and witness testimonies from China's Uighur-dominated Xinjiang have exposed the dark workings of the contemporary military-industrial complex, the unholy nexus between Big Tech and the state. Trade justice activists have constantly pointed to the 'hidden hand' of Silicon Valley and Chinese corporations using their governments to bat for their interests, reducing policy decisions to executive fiats for entrenching their power.

But what is only recently coming to light is the rise of the 'deep corporate' – the extension of the 'Kraken'-like tentacles of intelligent corporations into the heart of public life. The subsuming of social life by platform capitalism has distorted the political space thanks to the echo chambers of the automated public sphere. The contagion of mispropaganda and informational warfare in political campaigning

has become impossible to contain in a public sphere determined by algorithmic filters. In this scenario, deliberative democracy itself is under the threat of extinction.

Public-private partnerships (PPPs) in digitised welfare systems pose a serious threat to the social contract. In 2012, the South Africa Social Security Agency entered into a partnership with a company developing digital payments solutions to manage its welfare distribution. Exploiting its access to the banking details of welfare recipients, the company started making unauthorised deductions from beneficiary accounts towards loans and financial services of its sister concerns. The state found itself severely constrained in taking punitive action against the company, which threatened to walk away with the entire database if the contract was terminated! The social credit system being developed by China in partnership with eight tech companies takes the 'corporatisation' of governance to a whole new level. Access to benefits and citizens' guaranteed rights are now predicated on behavioural scoring on the basis of online purchase history, financial transactions, and social media connections on the partnering platforms. With the archetypal 'good consumer' becoming the deserving citizen, citizenship is thus dislocated from political claims. The 'deep corporate' acquires the formal authority to mediate the social contract.

Living with the intelligent corporation

We are living through a phase in capitalism that is marked by extreme market concentration, unprecedented inequality in wealth and the declining share of labour in global income; a state of affairs that has led even the IMF to express caution. It is no coincidence that this period of intensified economic injustice has coincided with the rise of platform capitalism and its real-world vehicle, the intelligent corporation.

What does living with the intelligent corporation mean?

First, as this essay has shown, what is new about this phase of capitalism that has spawned the intelligence economy is a deeply qualitative shift. Datafication and data capital transform the way capitalist 'accumulation by dispossession' happens. 'Intelligencification' makes plausible a planetary-scale colonisation and commodification of everyday life by the new corporation in ways previously impossible. Both nature and caring bodies are trapped in a planetary enclosure insofar as everything and everybody can be turned into data.

Second, 'intelligencification' feeds off and emboldens the financialisation apparatus that runs the neoliberal economy. Through the perverse confluence of data and finance, the intelligent corporation universalises and naturalises its authority, destroying the marketplace of things and ideas.

Third, through data extractivism, the intelligent corporation ravages sociality, taking the ideological project of neoliberalism all the way to the expropriation of the political. This is a deep take-over, an 'ontological encroachment' of human subjectivity.

Where does all this leave us?

As UNCTAD has highlighted (pp VI), the pace of concentration of market power is extremely worrying. Consider this: Amazon's profits-to-sales ratio increased from 10 per cent in 2005 to 23 per cent in 2015, while that of Alibaba increased in just four years from 10 per cent in 2011 to 32 per cent in 2015.

Policy-makers across the world are struggling to reform their legacy laws to rein in the intelligent corporation. Even the domestic governments of powerful US and Chinese platform corporations are

struggling to contain their excesses. The US Federal Trade Commission (FTC) is currently investigating Amazon and Facebook for abuse of market dominance while the US Justice Department is probing Google. The state of California is facing massive resistance from Uber and Lyft to its new regulation for labour rights of 'gig' workers, with the two companies currently leading a USD 60 billion ballot initiative to extricate themselves from employer's liability. In November 2019, the state administration for market regulation in China had to hold a meeting with Alibaba and other online retail platforms about their strong-arming of third-party vendors, in violation of existing regulations to curb anti-competitive conduct.

In countries where the domestic platform economy is fledgling/nascent, the situation is even worse. Often, the legal-institutional frameworks for governing corporate platforms are completely absent. For instance, Nigeria does not offer adequate legal protection to SMEs and consumers in its emerging digital commerce market. Similarly, platform workers in domestic work in the Philippines, tourism in Indonesia, and transport in South Africa are not covered under existing labour laws (pp 75).

Critics of the industrial transnational corporation (TNC) have long shown how the de-territorialisation and de-nationalisation of their business operations creates a crisis of corporate governance. The virtual or online and global nature of the intelligent corporation has exacerbated this problem. The loopholes of pre-digital taxation laws based on a physical presence in a given country have been effectively exploited by platform companies to escape tax liability, through profit shifting to low-tax jurisdictions. Similarly, when faced with liability for unfair market practices in overseas markets, it is very easy for platform companies to shift liability to their parent company outside the jurisdiction. For instance, Uber in South Africa resorted to the defence that its partner drivers were employees of the parent company headquartered in the Netherlands and not the South African subsidiary, in order to evade its liabilities under existing labour laws. The lack of binding international regulations governing cross-border data flows has also aided rampant data extractivism, similar to the gap in global rule-setting on TNCs' human rights obligations.

The enormous political clout of intelligent corporations has reached deadly proportions for democracy and politics. In the United States, for instance, when Amazon was looking for a site to house its new headquarters, city governments went into a tizzy, kowtowing desperately in the bidding process, as they wagered their hopes on Amazon HQ2 reviving their moribund local economies. One city even offered Jeff Bezos a permanent mayorship!

The intelligent corporation has had even greater success in casting the invisible net of discursive power to distract detractors than the industrial corporation. This is partly because of the persuasive power of the Californian ideology that espoused personal liberty and economic freedom (freedom from regulation), placing a blind faith in the Internet's inherent democratic potential. Silicon Valley founders and CEOs have projected themselves as anarchic defenders of individual liberties, carrying techno-libertarian values into the development space through philanthro-capitalism and advocating a brazen techno-solutionism to solve what essentially are socio-structural problems. They have also succeeded in promoting the development fiction of 'entrepreneurialism' as a new age hack to inadequate public policies. Even the Chinese tech companies, with a different genealogy of a state-backed, hyper-nationalistic capitalism, have deployed a pared-down version of the neoliberal economic vision in their appeals to global audiences. For instance, in his plenary intervention at the 2018 World Trade Organization (WTO) Public Forum, Jack Ma, founder of the Alibaba group and the e-World Trade Platform initiative, observed that leveraging the digital opportunity for small businesses, women, and young people, especially those in

developing countries, was about fewer rules and freer digital trade. While capitalism's inroads into development philanthropy is by no means new, Big Tech's global giving brings an ideological prowess that takes the depoliticisation of development to new levels.

More recently, in the wake of malpractice lawsuits brought against Big Tech by their own employees, exposes about founding CEOs who have enjoyed a godly status, and public disenchantment with multiple revelations of clandestine data mining and algorithmic gaming, the early sheen seems to be wearing off. Alphabet (Google's parent company) can no longer use its 'Do the right thing' motto without irony. Facebook has been forced to switch to the 'too big to fail' defence from the 'protector and defender of the freedoms of the global community' line. Alibaba may not be able to proclaim its commitment to SME development in Africa for much longer. The façade has crumbled. And this rupture in the discursive hegemony of the intelligent corporation in which we are currently situated is the right moment to mount a collective challenge.

So, resist we must, so that the wealth of data and of networks can be appropriated and used to create a just and humane society. This means taking the intelligent corporation by the horns, and forging a movement that is able to grapple with the ethical-political boundaries of digital intelligence.

Taming the Leviathan and reclaiming the planet

Given the enormous economic and political clout of the modern corporation in the age of data, unshackling people and the planet from corporate power is an urgent task. Struggles against the extreme unfairness of the global trade and intellectual property regime by transnational social movements have shown the necessary connection between the agenda for development justice and the dismantling of corporate power. Building alliances among movements has become a vital strategy in halting TNCs' inexorable plunder. The trade justice movement against corporate globalisation, the environment movement's quest for sustainable development, feminist struggles to reclaim the body and the sphere of social reproduction from capital, and workers' struggle against the intensified squeeze on labour and the dismantling of social protection in neoliberal globalisation are inspiring examples in this regard. Transnational civil society has painstakingly built alliances and solidarities across these movements to expose corporate excess, bringing pressure on the UN for a global binding treaty on TNCs' human rights obligations in the face of near-insurmountable odds.

In the digital age, as corporate power assumes indomitable proportions – with tech CEOs carving out data dominions that they rule over – current frameworks of power analysis and action may not go very far. A concerted and coherent strategy is urgently needed in order to enable a more equitable distribution of the gains of data-based intelligence. The Digital Justice Manifesto released in November 2019 by the Just Net Coalition – through a process of strategic and sustained dialogue between digital rights, trade justice, feminist, environmental, labour, and human rights groups and activists – outlines such a roadmap. As the Manifesto underlines, we need immediate action along three broad fronts to reclaim digital power from the intelligent corporation:

The enormous political clout of intelligent corporations has reached deadly proportions for democracy and politics.

(a) wresting back ownership of our personal and collective data and intelligence by instituting an economic rights framework for data resources.

(b) governing critical platform infrastructures as public utilities.

(c) enforcing a local-to-global governance model for digital and data infrastructure that supports local economies and democratic self-determination of collectivities, preventing the enclosure of entire market and social ecosystems by a centralised intelligence. In other words, the governance of tech infrastructure must enable the flourishing of disparate local economies and make room for multiple platform models to function (co-operatives, social enterprises, public etc.) challenging the totalising impetus of global intelligence capitalism.

Neoliberal globalisation and financialisation have led to profoundly unequal societies. The impunity of the TNC has been central to this dynamic. Social movements have placed several creative proposals to counter this: mandating charter renewal every five years overturning the principle of corporations' perpetual legal existence; taxing stock trade on the basis of the holding period⁶ to contain excessive financial speculation; placing a cap on the individual assets of founders/CEOs and so on. 'Intelligencification' demands a new frontier for resistance. The power of the intelligent corporation must be contained through tactics small and big in political and cultural realms. A new wisdom about the governance of data must be explored for a truly emancipatory future for all.



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STATE OF POWER 2020



Beyond 'China, Inc.'

Understanding Chinese companies

Lee Jones



In November 2011, in the smouldering wreckage of Tripoli at the end of Libya's civil war, a Western journalist found documents showing that three Chinese state-owned companies had agreed to smuggle weapons to the embattled Gadhafi regime. This violated a United Nations arms embargo, ostensibly supported by the Chinese government, which had also authorised NATO intervention to avert a feared genocide. China's Ministry of Foreign Affairs (MFA) claimed the government had been unaware of the deal, and that the arms had never been delivered. But Libya's rebels insisted that 'these guns arrived and were used against our people', ruining Beijing's efforts to cultivate closer ties with them in order to safeguard oil and construction contracts. China's efforts to persuade the world it is a 'responsible great power', willing to play by global rules, suffered yet another setback.

Similar, now commonplace, stories raise the question of how to understand Chinese companies, many of which have become major global players. One interpretation is that, because China is tightly controlled by an authoritarian regime, these companies must be directed by their political masters. They are deliberately deployed to grab resources, extend Chinese influence, and steal foreign technology. This outlook fuels worries about Chinese nuclear companies' involvement in power-plant development; Huawei's participation in 5G network-building; and Chinese infrastructure firms' role in Beijing's 'Belt and Road Initiative' (BRI), which is often seen as a geopolitical 'grand strategy', designed to ensnare developing countries in a 'debt trap'.

The other, perhaps more disturbing, interpretation – and in fact far closer to the truth – is that Chinese companies operating overseas are often very poorly controlled. Although Chinese leaders could, in theory, direct state-owned enterprises (SOEs) for political purposes, in practice, they adopt an arms-length, regulatory approach, permitting these companies to pursue their own profits, not China's 'national interest'. Many government agencies typically have little or no idea what companies – even major SOEs – are doing, until scandals emerge. So, it is entirely plausible that the MFA really was unaware that Chinese arms companies were trading with Gadhafi. They are frequently caught out by diplomatic crises triggered by corporate malpractice, and forced to clean up the mess.

Rather than imagining a monolithic 'China, Inc.', using corporate power to achieve geopolitical domination, we must unpack the Chinese party-state in order to understand the complex actors and interests at work and ultimately to improve Chinese companies' global conduct.

Chinese corporations today

Many Chinese firms are now powerful global actors, particularly in strategic sectors like extractive industries, telecommunications, hydropower and infrastructure development, and increasingly, in financial services and hi-tech industries.

One commonplace interpretation of Chinese companies is that they are deliberately deployed to grab resources, extend Chinese influence, and steal foreign technology.

In 2000, when Beijing launched its official ‘going out’ policy, Chinese outbound foreign direct investment (COFDI) was just \$2.3 billion. In 2018/19, it was \$129.8 billion, taking the total stock from \$27.8 billion to \$1.94 trillion.⁷ Today, of the Fortune 500 list of the world’s largest companies, 119 are Chinese, just behind the United States’ 121 (see Table 1).⁸ Although most became large because they are highly protected cartels in the world’s largest domestic market, many have long outgrown this cocoon, acquiring a major global presence.

Table 1: Chinese companies in the Fortune 500

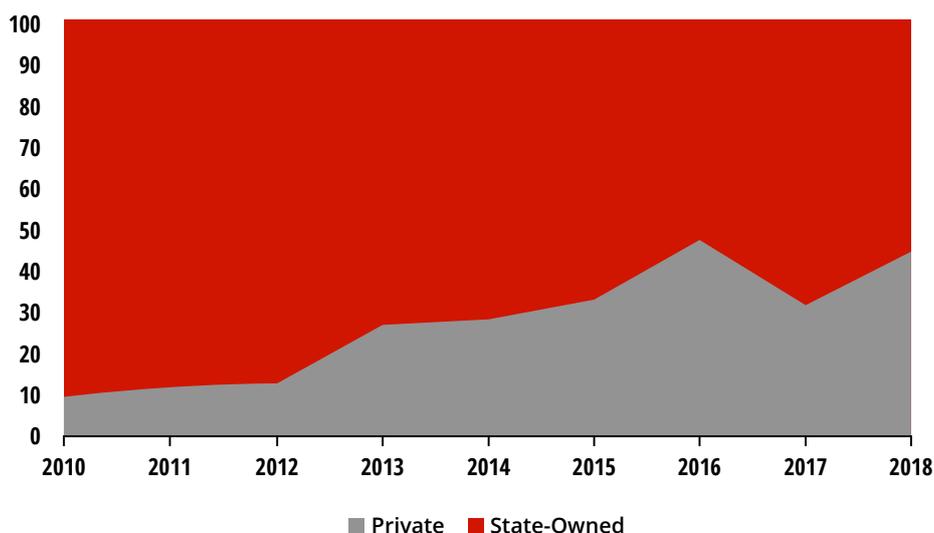
No. of Chinese Firms by Rank		Main Sectors and Illustrative Examples with Position
1–10	3	Petrochemicals (Sinopec #2); energy (State Grid #5)
11–30	3	Construction (China State Construction Engineering #21); financial services (ICBC #26)
31–50	4	Financial services (China Construction Bank #31); manufacturing (SAIC Motor #39)
51–100	13	Financial services (China Life Insurance #51); construction (China Railway Engineering #55); telecommunications (Huawei #61); petrochemicals (China National Offshore Oil #63); manufacturing (Dongfeng Motor #82)
101–250	40	Telecommunications (China Post #101); energy (China Southern Power Grid #111); extractive industries (China Minmetals #112); financial services (People’s Insurance Co. #121); manufacturing (Lenovo #212); commerce (COFCO #134); retail (JD.com #139; Alibaba #182); aerospace and defence (Norinco #140); petrochemicals (ChemChina #144); steel (China Baowu Steel #149); technology (Tencent #237); shipbuilding (China Shipbuilding Industry #243)
251–500	56	Mining (Jiangxi Copper #358); manufacturing of capital and consumer goods (Jardine Matheson #280; CRRC #359; Haier Smart Home #448; Xiaomi #468); petrochemicals (Shaanxi Yanchang Petroleum #263); Shipping (COSCO #279); aerospace and defence (China Aerospace Science & Industry #322); retail (Suning.com #333); wholesale (XMXYG #338); energy (State Power Investment #362); financial services (AIA #388); construction (Anhui Conch #441).

Beyond these headline-grabbing giants, however, Chinese enterprises are remarkably diverse. Some are tiny, family-owned ventures; others are state-owned conglomerates employing hundreds of thousands, and with subsidiaries listed on foreign stock exchanges.

China’s Company Law mandates corporate structures similar to those in the West. Decisions are ultimately made by annual shareholders’ meetings, which appoint the board of directors and a smaller supervisory board. The directors appoint company managers, though typically the chair is involved in day-to-day management. Supervisory boards, a third of whose members must be company employees, are relatively weak, with power largely vested in the directors. The major difference with Western corporate governance is the presence of Chinese Communist Party (CCP) branches in all SOEs and most large private firms.

Chinese companies are mainly categorised as either private or state-owned, though in practice they are not as distinct as is often imagined. China’s largest companies – including those operating internationally – are predominantly state-owned: 82 of the 119 Chinese firms in the Global Fortune 500 are SOEs. The largest private firm, Huawei, ranks 61st globally, behind 15 SOEs. Measured by number or output, however, most Chinese companies are private. Private firms generated about two-thirds of China’s gross domestic product (GDP) and 80 per cent of economic growth by 2000,⁹ and 44 per cent of COFDI in 2018 (see Figure 1).

Figure 1: Share of Chinese Outbound Investment by Enterprise Type¹⁰



That said, distinguishing private and state-owned firms is often difficult. Many firms, particularly smaller ones, are purely private, raising capital and selecting investments like any other capitalist enterprise, accounting for about 25 per cent of COFDI in 2016. Moreover, many limited liability companies (LLCs), which comprised 43.2 per cent of COFDI, involve a mixture of private and public shareholders, with SOEs sometimes enjoying controlling stakes.¹¹ SOEs own an estimated quarter of private firms, including subsidiaries listed on foreign stock markets; likewise, many SOEs have private shareholders.¹²

It is also unlikely that any private enterprise could have become a giant like Huawei, Alibaba or Xiaomi without party-state patronage. Huawei, for example, claims to be 99 per cent employee-owned, yet ownership is formally vested in a trade union committee, and all labour organisations are ultimately under CCP control. Moreover, employee shareholding is stringently regulated, and Huawei has long operated in a sector that was, until recently, technically off-limits to private firms. Such flagrant law-breaking strongly suggests party-state sanction. Court documents also show that Huawei issued share certificates to state-owned telecommunications firms in Shenzhen, and the political economist Yasheng Huang claims it is 'widely held knowledge that Huawei has backing from the Chinese military. It is inconceivable that a politically naïve private entrepreneur could have gone as far as this firm has'.¹³ Moreover, all companies ultimately have a constitutional obligation to cooperate with the state, and under Chairman Xi Jinping the CCP has sought to strengthen its presence within private firms – though, in practice, the branch officials are typically corporate managers. For instance, Huawei's chairman is a party member, and its CEO is the company's CCP branch secretary.

This does not, however, imply a crudely monolithic party-state control of business, even for SOEs. Rather, corporate and party-state power have become intertwined. Thanks to privatisation, bureaucrats have become business people, while entrepreneurs have been drawn into the party-state. By 2018, a fifth of seats in China's national legislature and consultative committee were allocated to business people, of whom 153 were designated 'super-rich', enjoying a combined wealth of \$650 billion.¹⁴ Chairman Xi's family's assets reportedly total \$1bn,¹⁵ while former premier Wen Jiabao's top \$2.7bn.¹⁶ This is mirrored, at a smaller scale, among sub-national governments, which enjoy substantial autonomy to interpret Beijing's policies. Sinologists characterise this as the rule of 'red capitalists', 'bureau-preneurs', or 'cadre-capitalists'. It implies not simply party control over business, but the intrusion of capitalist logics into

the party-state itself, resulting in vicious competition, rampant corruption, and even 'local mafia states' under predatory provincial bosses.¹⁷

This shift towards money-making is reflected in the management of SOEs. Beijing has privatised most small and medium SOEs, and merged the rest, and now owns just 97 mega-conglomerates, largely in 'strategic' sectors. The vast majority – some 110,000 – are owned by sub-national administrations; their share of SOEs' outbound investment rose from 13 per cent in 2006 to nearly 90 per cent by 2016.¹⁸ Crucially, SOEs have also been 'corporatised', becoming for-profit entities under arm's length supervision. Ownership is now vested in State-owned Assets Supervision and Administration Commissions (SASAC) at various levels, whose primary mission is – like any private shareholder – to maximise the value of its investment. SASACs appoint SOE chairs and directors and, although these are typically career CCP apparatchiks, their pay and career progression are evaluated against economic targets. SASACs have no expertise or capacity to make detailed business decisions, which are left to company officials whose main incentive is to make money. SASACs typically intervene only when SOE conduct threatens to undermine the value of state assets.

Thus, although it is technically true that no SOE boss could refuse a direct order from Chairman Xi, in practice, this is not how SOEs operate, since they are primarily for-profit companies. Far from simply following government orders, SOEs frequently extract considerable state support to pursue their own corporate agendas, often ignoring Chinese laws and regulations. Some SOE chairs, notably in the oil sector, still retain a bureaucratic rank equivalent to vice-minister, enabling them to defy all but the most senior leaders' instructions, and giving them ready access to policy-makers. All SOEs – and favoured private firms – enjoy privileged access to credit, and can often secure policy concessions, permits and licenses by claiming that their corporate schemes are essential to implement the latest CCP initiative. This can create the impression that SOEs are slavishly implementing government edicts, when in reality they are exploiting top leaders' slogans to pursue their own interests.

Xi's BRI exemplifies this, being less a top-down grand strategy than a wish-list populated by provinces' and companies' existing projects, which have exploited this ill-defined 'one belt, one road' slogan to kick-start stalled projects and grab new sources of financing.¹⁹ Indeed, far from being directed by strategists in Beijing, Chinese development financing has long been driven by SOE lobbying to gain lucrative tied-aid projects, developed alongside would-be recipients. Conversely, when projects are not in SOEs' corporate interests, they can resist injunctions even from the most senior party-state leaders. For example, as part of the BRI, the Chinese government has repeatedly committed its nuclear companies to build power plants in Eastern Europe, but these firms' demands for high rates of return has blocked substantive progress.²⁰

SOEs' capacity to tap the state to fuel their corporate expansion is clearest with respect to their privileged access to finance, particularly from the policy banks (China Development Bank and the Export-Import Bank), but also commercial banks, illicit local government financing vehicles, and shadow banking institutions. Because SOEs are state-backed, lenders typically assume that loans will eventually be repaid. Coupled with a standing injunction to maintain economic growth, and powerful politico-business

It is unlikely that any private enterprise could have become a giant like Huawei, Alibaba or Xiaomi without party-state patronage

networks, this generates enormous moral hazard. Despite generating only a quarter of China's GDP, SOEs hold 60 per cent of corporate debt, owing \$12.5 trillion by 2014, when China's total corporate debt exceeded that of the US at 163 per cent of GDP.²¹

This capital is often poorly spent. The ambition of SOEs and their political backers, coupled with easy access to capital, has fuelled irrational investment, generating vast surplus capacity domestically – over 30 per cent in many heavy industries – and loss-making investments overseas. In 2006, China's Ministry of Commerce (MOFCOM) reported that only half of China's foreign investments were profitable.²² Despite efforts to improve due diligence, by 2014, China's overseas assets, now totalling US\$6.4tr, were still yielding a net loss.²³

Where are Chinese companies investing and why?

These figures suggest that, far from being tools of a cunning, imperialist strategy, many Chinese companies are actually rather bad at foreign investment. Poor returns may partly reflect a longer-term approach than that taken by Western firms. But the deeper causes lie in Chinese firms' inexperience, the crowded nature of secure, profitable markets and – as we shall see later – weak regulation.

Chinese firms are new to international markets, and even the most experienced have operated outside China only since the 1990s. Moreover, with the best opportunities already taken by companies from more advanced capitalist states, Chinese firms have often been pushed into riskier territories. This, rather than geopolitical strategy, explains why Chinese oil companies, for example, frequent so-called 'rogue states' like Iran, Myanmar and Sudan, with Beijing forced to partner with them to facilitate SOEs' outward expansion.

The destinations of COFDI also underscore that Chinese firms are primarily profit-seeking, rather than being directed politically. Contrary to widespread belief that Chinese firms primarily target Asia and Africa as part of a global 'resource grab', COFDI is actually concentrated in advanced economies, where risks are lower and profits more assured, and is increasingly diversifying away from energy and mining (see Figures 2 and 3). Moreover, five years into BRI, just 13 per cent of COFDI goes to the 56 states officially designated 'BRI countries'.²⁴ Chinese firms are reluctant to invest where they do not anticipate making profits, even when China's top leader urges them to do so.

Figure 2: Destinations of Chinese outbound foreign direct investment²⁵

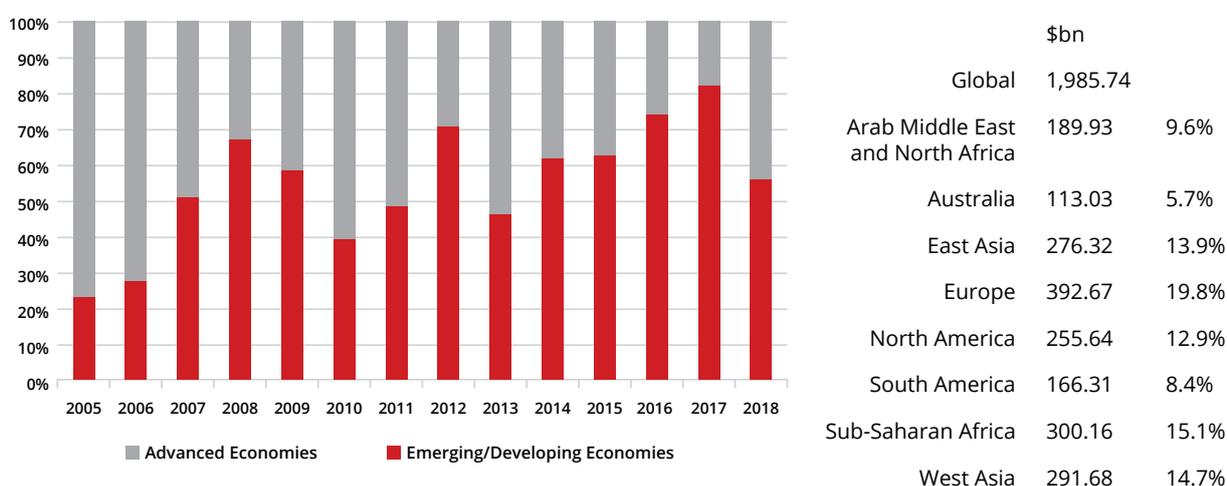
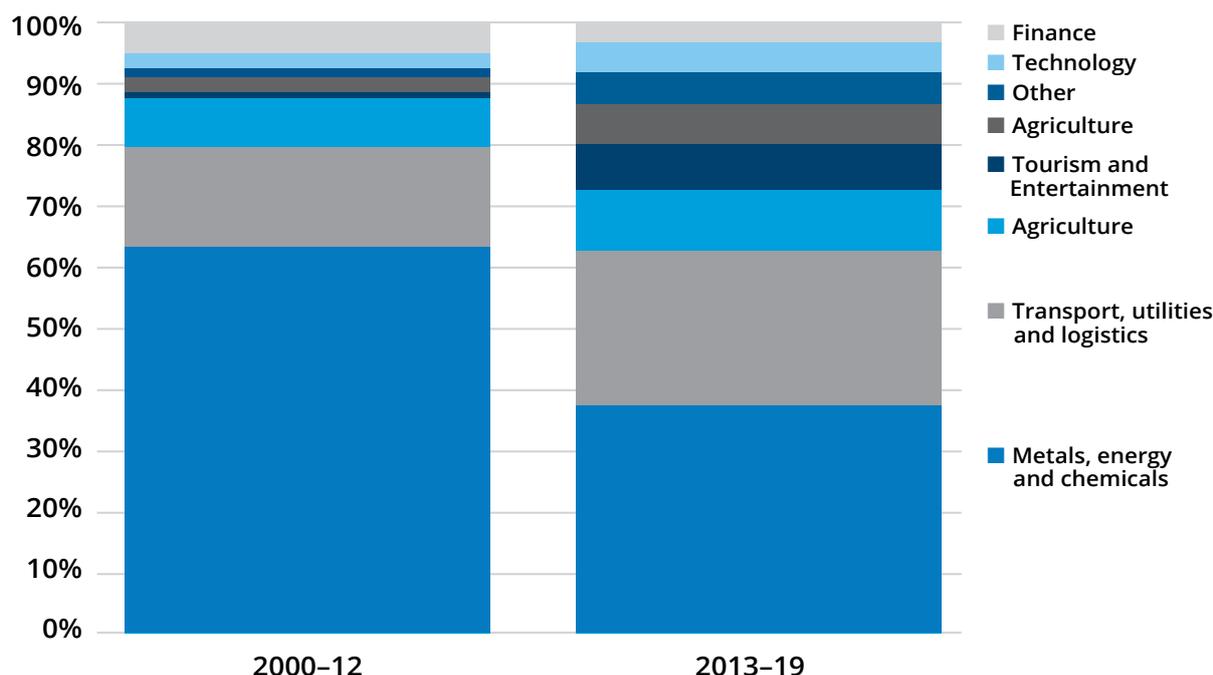
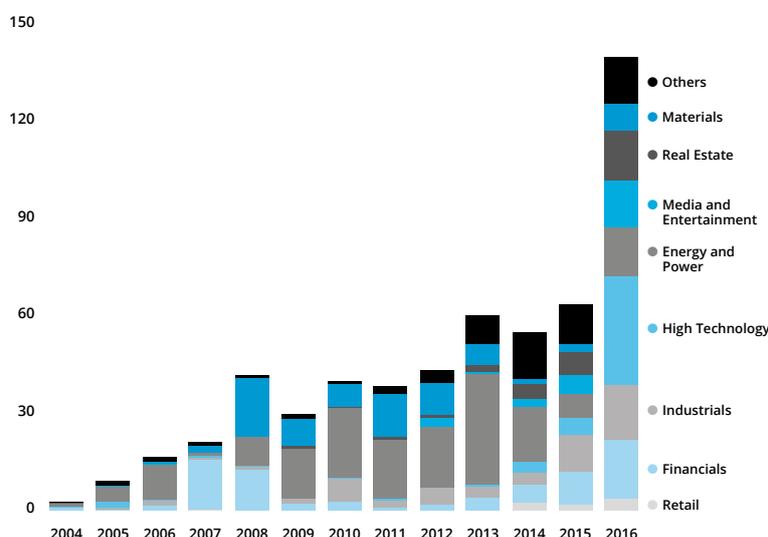


Figure 3: Chinese outbound foreign direct investment by sector²⁶



This general pattern is mirrored in the growth in Chinese mergers and acquisitions (M&As). Increasingly, Chinese firms are becoming major shareholders in foreign companies, which often facilitates quicker profits, or access to markets and technology, than starting from scratch. Sometimes, foreign firms become wholly-owned subsidiaries of Chinese enterprises, but often Chinese capital is combined with foreign investment, producing mixed ownership. For China's overseas M&As in 2018, 61 per cent of financing came from overseas.²⁷ Moreover, despite frequent assertions that Chinese overseas investment is all about resource-grabbing in the Global South, energy and mining M&As actually fell from two-thirds from 2005 to 2013 to a fifth by 2016 (see Figure 4), while in the first three quarters of 2018, the value of M&As in Europe (\$60.8 billion) and North America (\$8.4 billion) vastly exceeded the combined total for Latin America, Africa, Asia and Oceania (\$37.7 billion).²⁸ Chinese firms are increasingly targeting high-tech companies, to acquire foreign technologies and shift to higher value-added activity.

Figure 4: Aggregate value of Chinese M&As (billions of dollars)²⁹



China's shaky regulatory system

CCP control over business is also compromised by China's fragmented governance system. Contrary to widespread belief that China is a tightly controlled totalitarian regime, Sinologists have long documented the emergence of 'fragmented authoritarianism'. Endless reforms have dispersed power and authority horizontally, across multiple ministries, commissions, agencies and party offices, and vertically, to China's sub-national governments. This complex governance regime, in practice, grants wide latitude to for-profit companies. Although regulations have more recently tightened in response to frequent overseas scandals – leading to inter-state crises – governance remains weak, particularly given China's massive global footprint.

The main agencies responsible for regulating Chinese firms operating overseas are listed in Table 2. Notably, foreign policy institutions, like the MFA and the CCP's Foreign Affairs Commission, have no power over companies. Authority is dispersed widely and deeply, with little practical coordination. For example, China's energy sector is overseen by 11 ministerial-level agencies which, along with powerful SOEs, have repeatedly resisted the creation of a super-regulator capable of imposing order.

Table 2: Agencies regulating Chinese overseas enterprises

Agency	Role
National Development Reform Commission (NDRC)	Drafts general economic plans and policy guidance. Must approve large-scale investments (over \$100m/ over \$300 million in resources sector) and all infrastructure-related projects.
MOFCOM	Primarily responsible for regulating overseas Chinese firms. Must approve outward investment by non-financial firms, and monitor post-investment activities.
Subnational governments	Supervise locally owned SOEs. May interpret national guidelines to suit local conditions/ issue own regulations that conform with national law. Sub-national bureaux of NDRC and MOFCOM must approve smaller-scale investments.
People's Bank of China (PBC)	Must approve financial firms' outward investment, alongside the NDRC.
SAFE	Monitors post-investment activities with MOFCOM where foreign exchange reserves are involved in financing projects.
SASAC	Supervises centrally owned SOEs, including overseas investment practices. Sub-national counterparts oversee locally owned SOEs.
Functional ministries	Seek to regulate activity in their particular domain, e.g. State Administration of Forestry issues regulations for logging companies operating overseas.
Policy, state-owned and private banks and sovereign wealth funds	Regulate debt-funded projects (see Table 3).
CCP Central Commission for Discipline Inspection (CCDI)	Investigates breaches of party discipline, e.g. corruption allegations.
Industry associations	Issue voluntary guidelines in particular sectors.

Furthermore, Chinese regulations are typically exceedingly vague and exhortatory, presented as 'suggestions', 'guidelines' and 'opinions' rather than detailed laws. They also sit alongside general directives to promote rapid growth and international expansion, and political initiatives like increasing energy security, building the 'belt and road', and bolstering China's global standing.

Power and authority in China are dispersed horizontally across multiple ministries, commissions, agencies and party offices, and vertically, to China's sub-national governments.

Companies then decide how to balance such contradictory priorities. In practice, they typically pursue their own corporate agenda, appealing to those party-state edicts that best support their interests, which provides political cover if things go wrong. Major malfeasance or serious foreign backlash will always risk punishment. However, because regulatory frameworks are so confused, and SOE bosses are judged primarily on economic criteria, they often escape serious punishment, even following major scandals.

For example, in 2011, relations between China and Myanmar were plunged into crisis by Myanmar's suspension of the Myitsone hydropower dam, part of a \$20 billion, eight-dam project under SOE China Power International. Notwithstanding many faults on Myanmar's side, CPI had also violated many Chinese and Burmese rules, contributing to a popular backlash and, arguably, to the resumption of armed conflict in Myanmar's Kachin state. However, only two senior managers were pushed aside following CCDI inspections.³⁰ Court proceedings show that even fabulously corrupt SOE managers are rarely punished even for *domestic* violations, while junior officials are often scapegoated.³¹ Indeed, only after the Myitsone scandal were SOE bosses made personally liable for legal and regulatory violations.

Despite efforts to tighten discipline under Xi, non-compliance remains rife. State Council data show that, despite legal requirements, in 2017, half of Chinese companies in BRI countries were neglecting social impact assessments, a third were not conducting environmental impact assessments (EIAs), and ignorance of local regulations was widespread.³² The deployment of CCDI units to some overseas projects in 2019 also suggests serious problems.

Difficulties in improving companies' behaviour reflects the dominance of 'cadre-capitalist' interests and the associated weaknesses of many regulatory apparatuses. The CCDI's recent forays aside, only MOFCOM has personnel stationed permanently in the economic offices of Chinese embassies. Their primary role is to support Chinese businesses' overseas expansion, and they typically triumph in struggles with local MFA personnel. Other ministries, regulators and financiers have no presence on the ground, forcing them to rely on companies' own statements, or whistleblowing by foreign governments or civil society. This creates wide scope for misguided investments and corporate malfeasance.

The decentralisation of corporate control and supervision compounds these problems. For example, in 2013, a major diplomatic crisis erupted between China and Ghana, sparked by the actions of small mining companies backed by officials in Guangxi province's Shanglin county. To deal with the exhaustion of local gold reserves, Shanglin supported over 33,000 gold miners to relocate to Ghana, where they engaged in illegal and environmentally and socially devastating practices, eliciting major local opposition. Confronted by Ghanaian protests, Guangxi officials tried to protect the miners, causing the crisis to spiral into a serious inter-state dispute.³³

Such blowback – starting in African countries in the mid-2000s – spurred Chinese regulators to issue increasingly tighter guidance (see Table 3), but guidelines typically remain vague, hard to police, and well below international best practices (see Table 4), with continued over-reliance on host-state regulations. This remains a huge challenge in many developing economies, particularly in many resource-rich countries hosting the riskiest Chinese projects.

Table 3: Tightening Chinese regulations

Year	Measure
2006	CDB becomes China's first bank to accede to United Nations' Global Compact, a voluntary CSR framework. State Council issues <i>Nine Principles on Overseas Investment</i> , requiring companies to comply with local laws, bid transparently for contracts, protect local workers' rights and the environment, and implement CSR.
2007	PBC's Banking Regulatory Commission issues <i>Green Credit Policy and Guidelines</i> , requiring Environmental and Social Impact Assessments (ESIAs) with loan applications and instructing banks to supervise clients' performance. Emphasises compliance with host-country, not international, standards. ExIm Bank updates its 2004 <i>Guidelines for ESIA of Loan Projects</i> and issues its <i>Environmental Policy</i> , requiring ESIA for loans and regular reviews throughout project implementation.
2008	ExIm Bank issues <i>Guidelines for ESIA</i> , requiring ESIA with loan applications, to include labour issues, land acquisition and migrant protection, and regular reporting from borrowers. ExIm Bank may inspect projects.
2009	MOFCOM and Ministry of Forestry issue <i>Guidebook of Sustainable Operations and Exploration of Overseas Forests by Chinese Enterprises</i> .
2010	State Forestry Administration issues <i>Guide on Sustainable Overseas Forests Management and Utilization by Chinese Enterprises</i> . MOFCOM, Ministry of Environmental Protection (MEP) and the Global Environmental Institute issue <i>Environmental Protection Policies on Chinese Investment Overseas</i> . Policy banks develop implementing guidance. CDB issues <i>EIA Framework for Small Business Loans Projects</i> , referring to the World Bank's EIA policy and related Chinese rules.
2012	PBC issues updated <i>Green Credit Guidelines</i> , requiring banks to ensure that borrowers observe international norms in addition to host-country laws when investing abroad.
2013	MOFCOM and MEP issue <i>Guidelines for Environmental Protection in Foreign Investment and Cooperation</i> . MOFCOM issues <i>Regulations of Behaviour in Competition Abroad in the Area of International Investment and Cooperation</i> .
2017	NDRC issues <i>Measures for the Administration of Overseas Investment of Enterprises</i> . Ministry of Finance issues <i>Measures for the Financial Management of Overseas Investments by SOEs</i> .

Table 4: Chinese versus international lending conditions³⁴

Requirement	Multilateral lenders			Chinese lenders/ regulators		
	World Bank	IFC	IDB	MOFCOM	CDB	ExIm Bank
Ex-Ante EIAs	✓	✓	✓	✓	✓	✓
Project review of EIAs	✓	✓	✓		✓	✓
Industry-specific social and environmental standards	✓	✓				
Compliance with host-country environmental regulations	✓		✓	✓	✓	✓
Compliance with international environmental regulations	✓					
Public consultations with affected communities	✓	✓	✓	✓		✓
Grievance mechanism	✓	✓				
Independent monitoring and review	✓	✓				
Establishing covenants linked to compliance	✓	✓	✓			✓
Ex-post EIAs					✓	✓

SOEs have also been urged to better manage investment risks and to respect local sensitivities, with many now developing corporate social responsibility (CSR) programmes. Again, there is tremendous diversity: some companies, particularly the more experienced, have developed detailed internal policies and CSR programmes; others have barely begun, and there is widespread variation even within sectors.³⁵ Moreover, reflecting their inexperience, including in negotiating with *domestic* civil society, most Chinese companies still view CSR as involving compensatory charity, rather than participatory approaches to project development. In Myanmar, for instance, one NGO director describes Chinese CSR as ‘charity/bribes’ to encourage local headmen or monks ‘to tell the villagers to shut up’.³⁶

Inexperienced and poorly regulated firms being forced into risky markets makes for a toxic brew, especially if national governments lack the will or capacity to regulate foreign investors properly. Little wonder, then, that Chinese companies are frequently implicated in socially and environmentally irresponsible practices, including land-grabbing and forced displacement, often in league with the local security forces tasked with facilitating their projects.

Implications for activists, foreign governments and donors

There are good reasons to be wary of Chinese investment – but not those trumpeted by Western policy-makers or the mainstream media, which tend to depict Chinese companies as being strategically directed from Beijing, as tentacles of an increasingly powerful ‘rising power’. In reality, Chinese companies – even those under direct state control – enjoy considerable autonomy, are weakly controlled and regulated, and are primarily motivated by economic and corporate rather than political imperatives. They often behave in ways that undermine official Chinese foreign policy goals, as examples from Ghana, Libya and Myanmar show.

The truly pressing problems with Chinese investment are those common to all capitalist enterprises: their interest is in extracting profit, not human needs or the environment, while regulatory frameworks – whether in China or in host states – are skewed towards protecting corporate interests, and are too weak to counter their destructive effects. Beijing may talk of ‘win-win cooperation’ and ‘cooperation for mutual benefit’, in an attempt to distinguish China from Western powers. But Chinese companies are no better than Western firms, and indeed their behaviour is often considerably worse. China is not an imperial power, deliberately pursuing ‘debt-trap diplomacy’. But it is ruled by a fractious and predatory cadre–capitalist class, whose interests may align with ruling elites in other countries but are frequently at odds with those of Chinese workers, and those affected by Chinese companies’ overseas investments.

In seeking to address this challenge, activists, governments and donors must avoid resorting to ‘China-bashing’, which lets local collaborators and non-Chinese corporate actors off the hook. Exploiting ‘Sinophobia’ may generate support for campaigns against misbehaving Chinese firms in host countries, but often stirs racist sentiment and deflects criticism, neglecting to hold local government officials accountable, and distracting attention from similar practices by non-Chinese enterprises.³⁷

Host-state regulation is crucial. Despite improvements, Chinese regulations remain relatively lax, relying on respect for host-state rules, while Chinese development financing is heavily recipient-driven. Governments receiving Chinese investment and projects must therefore bargain hard and strictly regulate Chinese businesses. They cannot rely on Beijing to do it for them. Yet such governments often

face contradictory pressures, not least from powerful interests standing to benefit from lucrative deals with China. Activists must therefore pressure these governments to resist, and not allow criticism to be deflected through nationalistic attacks on China. Donor agencies could also enhance host governments' capacity to assess the viability of proposed projects, negotiate contracts, and develop and enforce appropriate regulations – for all foreign investors, not merely Chinese companies, whose malfeasances are hardly unique.

Nationalistic attacks on 'China' also neglect its internal diversity, ignoring attempts by some political leaders, regulators and business leaders to improve corporate behaviour and close down potential avenues of influence.

Many agencies are tasked with ensuring Chinese companies behave well, while burgeoning regulation indicates growing recognition of, and determination to address, such problems, if only to safeguard China's 'soft power'.

Inclusive Development International's (IDI) handbook, *Safeguarding People and the Environment in Chinese Investments*, provides a comprehensive outline of regulators and regulations that activists can use in seeking to improve Chinese companies' conduct.³⁸ Engaging Chinese regulators and companies is far from easy. Chinese elites tend to share a worldview where 'sacrifices' are necessary for 'development', which is presented as a panacea for all social and political ills, and local opposition is often attributed to the US, or meddling Western NGOs.³⁹

Nonetheless, there are some success stories. The NGO International Rivers, for example, reports positive engagement from some hydropower companies in response to a benchmarking project that exposed the gap between national and company policies and on-the-ground behaviour.⁴⁰ The Chinese NGO, Global Environmental Institute, also managed to convince forestry regulators to tighten regulations after exposing disbelieving officials to the devastating impact of Chinese logging companies in Myanmar.⁴¹ Moreover, IDI's 'follow-the-money' approach helps activists to broaden their campaigning activities by targeting upstream financiers and downstream consumers, many of which are outside China, but can exert influence over China's increasingly internationally networked enterprises.

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On 24 April 2013, the eight-storey Rana Plaza building in Dhaka collapsed, killing 1,129 people, most of them female textile factory workers producing garments for international fashion brands.⁴² The building had been designed for shops and offices, not to hold the five factories that operated there. Its improper use caused the building to deteriorate rapidly, and the risk of collapse was clear before the disaster. Despite the workers' protests, however, the factory managers refused to halt production, with the connivance of the municipal government.

As in many other cases, the factories' main clients were transnational corporations (TNCs). The factories in Bangladesh form part of their supply chains, and those operating in the Rana Plaza building were producing clothes for well-known brands such as Benetton, El Corte Inglés, Loblaw, Primark, and Walmart. Their parent companies publicly proclaimed a commitment to ensure that their suppliers respect workers' health and safety standards. But that did nothing to prevent the building from collapsing, nor did it guarantee any sanctions or punishments for the individuals or companies that benefited from the profits derived from lowering labour and safety standards.

The case of the Rana Plaza is one of many that reveals the reality of TNCs and human rights: first, TNCs frequently violate human rights through the business activities that take place all along their global production chains; and second the vast majority of these violations have ended either in impunity or, in the best-case scenario, with compensation negotiated out of court, which lets the guilty parties off the hook.

This reality has been affirmed by the Office of the United Nations High Commissioner for Human Rights (UNHCHR) in a 2016 report:

Human rights impacts caused by business activities give rise to causes of action in many jurisdictions, yet private claims often fail to proceed to judgment and, where a legal remedy is obtained, it frequently does not meet the international standard of 'adequate, effective and prompt reparation for harm suffered'.⁴³

The report summarises the difficulties facing the victims of human rights violations: 'fragmented, poorly designed or incomplete legal regimes; lack of legal development; lack of awareness of the scope and operation of regimes; structural complexities within business enterprises; problems in gaining access to sufficient funding for private law claims; and a lack of enforcement'. It states that: 'Those problems have all contributed to a system of domestic law remedies that is "patchy, unpredictable, often ineffective and fragile"'. Along similar lines, in her 2015 report on contemporary forms of slavery,⁴⁴ the Special Rapporteur expressed concern that these are occurring in global supply chains.

Another report prepared for the Office of the UNHCHR by Dr Jennifer Zerk,⁴⁵ details 22 cases of gross human rights abuses committed by corporations. These include, for example, the case of Blackwater, which was accused under the Alien Tort Statute of acting negligently and failing to apply due diligence in the screening and training of its employees, some of whom committed murder and war crimes in Iraq in 2007. None of the cases that are now closed ended with a judgment finding any corporation guilty of having committed a violation of human rights. A high percentage ended with the victims accepting an out-of-court settlement.

Rana Plaza is a case in point. The Rana Plaza Coordination Committee set up in October 2013, chaired by the International Labour Organization (ILO) and including representatives of the government, unions, the clothing companies involved, and non-government organizations (NGOs) undertook to determine the losses that should be covered, and ensure that adequate assistance was provided to victims and their families to present claims for compensation. In January 2014, the ILO established the Rana Plaza Donor Trust Fund and a year later announced that it had raised \$30 million required to pay compensation to the more than 2,800 victims who had made claims. Financial compensation was the sole remedy offered. The guilty parties remain unpunished, and the victims have not even received full and adequate compensation.

We are therefore facing an *angulo muerto* (legal dead end),⁴⁶ whereby national and international law not only fails victims and allows the TNCs to go scot free, but even encourages human rights violations within certain large transnational businesses.

This impunity derives both from the nature and strategies of these businesses and from their increasingly close – or, as de Sousa Santos puts it, ‘promiscuous’ – relationship with the state.⁴⁷

Appalling in itself, this impunity is simply the most striking facet of the many different components of the complex and problematic relationship between TNCs, human rights and democracy. It is important, however, not to approach the issue solely from the angle of analysing what their production strategies imply for human rights, but also to examine the role of international law forged by TNCs to protect their investments, the phenomenon of state capture, and the way corporations have established and maintained the ‘market authoritarianism’ that enables such corporate violations to occur.

Corporate structures and strategies

The Portuguese scholar, Boaventura de Sousa Santos, argues that we are living through a phase of ‘disorganised capitalism’, characterised by the collapse of many previously common forms of organisation. The principle of ‘free markets’ has reached such unprecedented intensity that it is colonising the state and the community.⁴⁸ The role and functions of the state are being reorganised as a consequence of the close relationship (or capture) between political and economic power, the market authoritarianism exercised by the International Financial Institutions (IFIs), the exorbitant power of TNCs and the growing concentration of wealth.

De Sousa Santos describes how these factors have diluted the sovereignty and powers of the state, particularly its capacity to respect, promote and protect human rights. Cutting back the functions of the state is facilitated by two main factors: first, the very structure of TNCs allows them to elude and evade the power of any given the state to apply sanctions beyond the reach of its own jurisdiction; second, because the TNCs’ capacity to move production - seeking the lowest standards of human rights protection in the broadest sense- forces states, especially the weakest, in a permanent race to the bottom as they compete to attract foreign investment. If we add corporate capture, the state’s inability to respect, promote and protect human rights is a foregone conclusion.

To understand this process, we need to examine the history and emergence of TNCs. These ‘new’ players, many of which date back many years, were initially referred to as ‘multinational corporations’. From the 1970s, they began to be called ‘transnational corporations’- which is more appropriate because multinational suggests a merging of capital from several countries when in reality these businesses

are usually a single entity that conducts its business in several countries but is usually owned by capital based in one country.⁴⁹

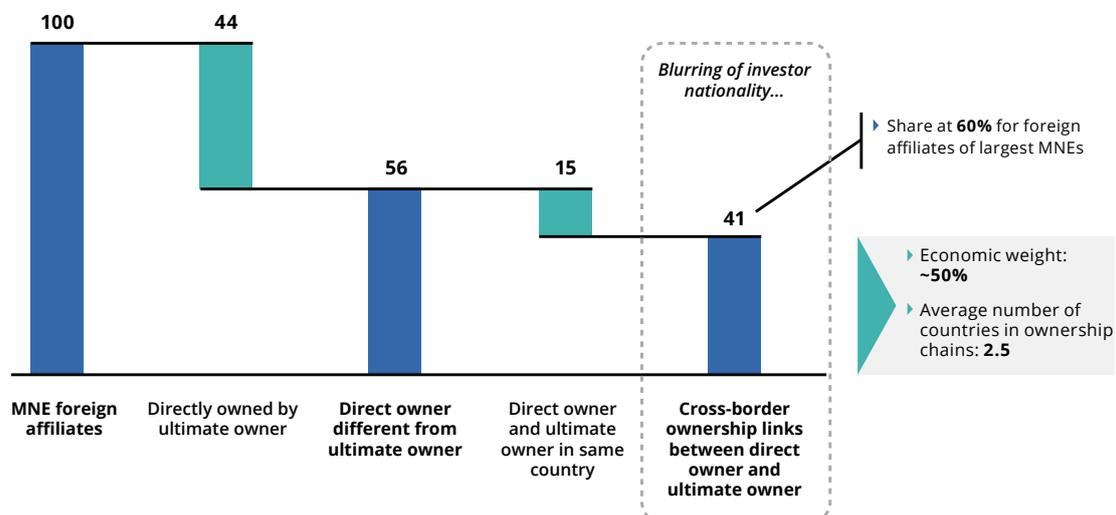
DETERRITORIALISATION

While capital remains concentrated, production has become decentralised and delocalised. TNCs are thus able to locate the various production stages in different factories or workplaces, often spread across different countries. They have few links to the local territory, life or market and choose locations due to the local incentives offered by jurisdictions and communities that compete with each other.⁵⁰

The way TNCs work in different countries is through supply chains. This may take the form of foreign direct investment (FDI) by multinational enterprises (MNEs) in wholly owned subsidiaries or in joint ventures in which the MNE has direct responsibility for the employment relationship. It may also include the increasingly predominant model of international sourcing whereby the TNCs contracts or subcontracts suppliers and firms for specific goods, inputs and services.

We are looking at large, flexible, mobile businesses that engage intensively in subcontracting and outsourcing throughout their supply chains, taking advantage of differences in labour conditions to use the strategy of *dumping* of social, environmental, and human rights in general – to reduce social or environmental costs and thus increase their profits. In this model, production structured along lengthy supply chains⁵¹ displaces downwards costs, risks, obligations and responsibilities, while concentrating the main benefits in the parent company.

In most cases production is outsourced to a large number of small and medium enterprises (SMEs), usually located in free trade zones (FTZs) or export processing zones (EPZs). The parent or brand companies manage ‘non-productive’ activities such as research, innovation, marketing and logistics.⁵² These offshoring and decentralisation strategies, the direction of which is clearly North–South but is beginning to spread horizontally, are clearly reflected in the Transnationality Index of the United Nations Conference on Trade and Development (UNCTAD).⁵³ This shows that on average, the world’s top 100 MNCs each have more than 500 affiliates based across over 50 countries. They have seven tiers in their ownership structure (in other words ownership links to affiliates could potentially cross six borders), and include 20 holding companies owning affiliates across multiple jurisdictions, with almost 70 entities in offshore investment funds (see figure 1).



Source: UNCTAD analysis of complex ownership of TNCs based on Orbis data, November 2015

In poorer countries, there is a clear relationship between the degree of participation in these decentralised, outsourced production structures and the increased presence of FDI. And to attract that investment and participation in global supply chains, poorer countries offer a range of incentives, including reducing the standards of human rights protection.

SOCIAL AND ENVIRONMENTAL DUMPING

As part of their de-territorialising strategy, TNCs also seek to evade established regulatory frameworks and legal jurisdictions governing labour, environmental, fiscal and other matters, as well as the mechanisms to guarantee rights, which are still developed at the national level. This strategy frees TNCs from national legislation, because the rights enshrined in the country where its parent company is domiciled do not apply, and at the same time it can avoid the obligations that may arise from the activities of trade unions, specially collective agreements. This allows the corporation, for example, to free its decisions, especially those concerning workers' rights, from oversight by trade unions and reduces their power.^{54,55} It also enables them to evade the liabilities that might be incurred by companies situated at other stage of their supply chains with regard to human rights and the environment.

All these practices come under the broad and somewhat vague concept of *dumping*, usually categorised as social⁵⁶ or fiscal, but also applicable both to the environment and to human rights.

Corporate capture of the state

These dumping strategies go hand in hand with a 'promiscuous relationship between the state and businesses', also known as 'corporate capture'. Oxfam International describes this as 'the exercise of abusive influence by an elite, for its own interests and priorities and in detriment to the common interest, over the cycle of public policies and state entities [or others that are regional or international in scope], with potential effects on [economic, political or social] inequality and the correct exercise of democracy'.⁵⁷

As examples of capture, Oxfam International cites the tax privileges given to Honduran companies between 1990 and 2016, and also in the Dominican Republic, which offers companies the most tax incentives in the Caribbean region. These tax incentives aimed at attracting FDI are rampant across Latin America and the Caribbean and undermine the ability of the governments offering them to collect and redistribute corporate tax revenue.

Another clear example of capture is in Ecuador. When Lenín Moreno took power in 2017, he brought representatives from the Chamber of Commerce and large export firms into ministerial portfolios such as the economy and finance, foreign trade and labour. Some of the regulations since approved show a clear determination to defend major corporate interests. These include overturning a tax aimed at preventing land speculation, reducing debts owed by employers to the Ecuadorian Social Security Institute, fewer workplace inspections, and new labour laws to facilitate temporary contracts and flexible working hours.⁵⁸ In the process, Ecuador lost revenue equivalent to 1.2% of gross domestic product (GDP) in 2019, or \$1.31 billion, increased income poverty from 21% in December 2017 to 25% today, and the Gini coefficient rose from 0.462 in June 2017 to 0.478 in June 2019, indicating an increase in inequality.

When governments are captured by – or complicit in – the competition to attract FDI, this quickly becomes a race to the bottom,⁵⁹ meaning a gradual and widespread reduction in standards on rights and their protection.

Lex Mercatoria: corporate capture as a neoliberal strategy

The structure of corporations and their offshoring strategies, combined with corporate capture, has allowed the rise of a global legal order known as *Lex Mercatoria*. According to a widely accepted definition, first developed in the world of social movements and later adopted in critical science, *Lex Mercatoria* can be defined as a new global economic and legal order that comprises a broad set of norms in international law, along with an extensive web of national legislation, aimed primarily at promoting trade and protecting the interests of foreign investors.⁶⁰ Pistor describes this as a global normative framework that allows transnational capital to constantly choose the national laws that benefit it.⁶¹

This global normative framework was consolidated during the so-called ‘Washington Consensus’, implemented in Latin America in the 1980s using guidelines laid down by the International Monetary Fund (IMF), although its origins date back to the 1970s during the civilian–military dictatorships in the Southern Cone countries.⁶² It then spread to the European Union (EU) through what can now be called the ‘Brussels Consensus’, implemented at the height of the so-called ‘euro crisis’.

This new ‘global law’ has several facets. First, it includes the norms we have just mentioned: the guidelines, adjustment policies and conditional loans from the IFIs and their rules on state development.

Second, it includes trade and investment agreements, such as lowering tariffs, the gradual liberalisation of services, opening up markets to new products (agro-toxins, for example), the downward harmonisation of regulatory standards and giving foreign investors extraordinary privileges in claims against the state.⁶³ These have been integral to the mega-regional free trade agreements (FTAs), such as the Trans-Pacific Partnership (TPP), the ultimately unsuccessful Transatlantic Trade and Investment Partnership (TTIP), the trade agreement between Canada and the EU (CETA), and all the others recently negotiated by the EU. They not only succeed in changing domestic legislation in favour of corporations, but also have a ‘chilling effect’ (even when not passed) as countries fear to promote policies that might deter FDI or prompt legal actions (through investor-state dispute (ISDS) mechanisms).

In many ways, trade and investment agreements serve as a ‘padlock’, armour-plating corporations to prevent possible future privatisation and business regulations. In fact, governments that dared to do so in the ‘post-neoliberal cycle’ in Latin America (2000–2015) were subjected to a total of 267 ISDS claims by foreign investors, equivalent to 28% of all known claims worldwide to date. Argentina, Venezuela and Mexico came in first, third and sixth place in the global list of countries with the highest number of such claims,⁶⁴ of which several are related to human rights and environmental issues⁶⁵, or the Chevron-Ecuador case.⁶⁶

Lex Mercatoria continues to expand its reach. While the political influence of IMF is regaining importance, especially in Latin America, trade and investment agreements have continued to grow, impacting and shaping the policies of most countries. Since 2015, the EU has finalised and adopted trade agreements with Ecuador, Canada and Japan, the Economic Partnership Agreement (EPA) with the Southern African

Development Community (SADC), provisional EPAs with Ghana and Côte d'Ivoire, and the Deep and Comprehensive Free Trade Agreement (DCFTA) with Ukraine. If the agreement between the EU and Mercosur – for which a political agreement was reached in June 2019 – is concluded, 41% of the trade in goods between the EU and the rest of the world will be covered by these trade agreements.

Market authoritarianism and popular protest

A term that encapsulates the key defining features of *Lex Mercatoria* is “market authoritarianism” – implacable and difficult to grasp, dictated by a diffuse supra-sovereign state, and able to impose its will through legal and political mechanisms tailored to its interests. This form of authoritarianism has dramatically shaped contemporary global societies, their democratic orientation and human rights. But it has also confronted legal strategies against corporate impunity, popular resistance against trade and investment agreements as well as against IMF policies and demands for alternatives throughout the world.

Starting with national-level proposals, an outstanding example of legal strategies deployed against the impunity of TNCs is the *Loi sur le devoir de vigilance des sociétés-mères et sociétés donneuses d'ordre*, adopted by the French National Assembly on 21 February 2017.⁶⁷ At the international level, the most important legal fight is the so called ‘Binding Treaty’ process. While the process builds on long-term struggles, it was officially launched on 26 June 2014 with the adoption in the United Nations Human Rights Council of Resolution 26/9, which established ‘an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights; whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises’.⁶⁸

Beyond legal paths of resistance to the imposition of *Lex Mercatoria*, there are also many popular forms of protest against it, growing everywhere during the last decade, from ‘Occupy Wall Street’, Spain’s 15M (2011), the ‘Arab Spring’ (2012–2013) the *gilets jaunes* in France (2018 onwards) to the recent popular resistance movements in Argentina (2017), Ecuador or Chile (2019).

The latest protests in Latin America are the perfect example as they emerged at a time when the IMF had returned to the region, with almost unchanged policy guidelines, following a change in the political cycle that brought to power governments such as those headed by Macri (Argentina), Temer/Bolsonaro (Brazil) and Moreno (Ecuador).⁶⁹

Returning to the case of Ecuador, a direct connection can be traced between the IMF’s demands, its agreement with the government of Lenín Moreno, and popular protest. Despite extensive repression, the government was eventually forced by the mobilisations of social movements, mostly the indigenous movement, to back down.

Ecuador’s example underlines the incompatibility of today’s neoliberalism with the wellbeing of the population as a whole, and with democracy itself. It suggests that the social and environmental dispossession demanded by the mechanisms to defend corporate interests can no longer be implemented by democratic means, nor withstand popular will, whether direct (elections) or mediated (parliaments). Ecuador’s experience – and that of many others – shows the potential for popular activism to obtain victory and a reconfiguration of forces in defence of human rights against market authoritarianism (against the imposition of the *Lex Mercatoria*).

Thus, as Nancy Fraser correctly points out, the growing popular resistance movements not only demonstrate the incompatibility between neoliberalism and democracy but also show that people are aware of it.⁷⁰ Here it is essential to recall that the IFIs' proposals (particularly its structural adjustment policies) are not subject to public approval, and in many cases do not even have to be validated by the legislative branch. This means that they are left to the discretion of the executive, which shrugs off the political cost by resorting to an alleged inability to resist the demands of economic adjustment, despite angry social rejection and conflicts which cannot be contained via democratic means.

Governments committed to the IMF line therefore need to use force to impose the economic and social measures demanded by market authoritarianism, either by means of *lawfare* measures against political adversaries or by directly repressing protests with police and military crackdowns. So – and this is the terrible reality – it seems clear that the premises of neoliberalism can be implemented only through authoritarianism and violent containment of the popular will. Thus, making 'market authoritarianism' effective can be achieved only at the cost of strangling democracy and silencing the voice of the people through the use of state-endorsed force.

The future is uncertain. Attempts to impose *Lex Mercatoria* will continue but there will also be social victories along the way, along with the increasingly widespread conviction that we are facing a profound and epoch-making alternative: 'democracy or markets'.



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STATE OF POWER 2020

Corporations as private sovereign powers

The case of Total

Alain Deneault



Having studied, written on and engaged in public discussion about transnational corporations (TNCs), I have reached the conclusion that we are not collectively equipped to think about the kind of power that they represent, the silent way they exercise their specific form of sovereignty and the numerous mechanisms that allow them to circumvent the law wherever they operate.

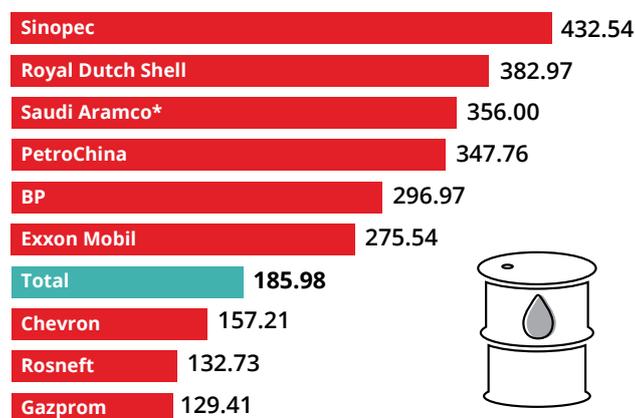
To illustrate this, I will focus on just one corporation – Total – as a textbook case, and show what it is capable of globally, rather than piecing together several examples that could be accused of being selectively chosen just to satisfy our research needs. Total is a corporate group headquartered in France, with operations in 130 countries, 100,000 employees and ‘collaborators’, and a daily production of the equivalent of 2.8 million barrels of oil. In 2018, Total reported net profits of \$13.6 billion.

This energy giant, the world’s fifth-largest oil company and which has been around for almost a century, merits attention in view of the fact that it has been the subject of very little analysis, despite its shocking track record in human rights, the environment, public health and business ethics. For instance, communities in Myanmar say they were forced to work on the construction of a gas pipeline⁷¹. Dictatorships in Gabon and Congo-Brazzaville have received the corporation’s support for decades.⁷² It has openly used Bermuda as a tax haven to avoid paying taxes in France.⁷³ And that is not to mention its polluting oil-exploration activities in northern Canada⁷⁴ or the markets that it obtained following bombardments in Libya,⁷⁵ to name just a few examples.

We begin by defining TNCs, disproving the image of Total as ‘a French oil company’, as is commonly believed. Each of these terms – ‘a’, ‘French’, ‘oil’ and ‘company’ – is misleading.

The Biggest Oil and Gas Companies in the World

World’s largest oil and gas companies by revenue in 2019 (in billion U.S. dollars)



*2018. Sources: Reuters, Statista, 2018

'A'

First, by definition, transnational groups are not 'a' or 'one' company and do not formally constitute one legal entity, but hundreds of them – including its various subsidiaries, trusts, holdings, foundations, specialised firms and private banks. These structures are legally autonomous, bound only by the laws of the jurisdiction in which they were created, but are in fact part of the networks that form transnational groups. They bill and even provide loans to each other. Total has nothing in common with a local corner shop: it comprises 1,046 consolidated companies controlled by its board of directors on behalf of a common shareholder base. If we were to imagine Total as an octopus the size of the Earth, the numerous states where its tentacles lie legislate only on what the tentacles within their territory do there; they are treated in isolation, as if they were not legally governed by the same brain or anything other than themselves. Total's subsidiaries in Algeria, Bermuda, Bolivia, Myanmar, Qatar, the UK and the US have no official ties to the parent company based in La Défense in Paris, even though it coordinates their operations. Only one law on the 'duty of care' passed in 2013 by the French National Assembly enforces the links of solidarity between them in cases where fundamental rights have been violated.⁷⁶ In the rest of the world, through its subsidiaries, Total uses its full weight to influence each individual state where it establishes them, whereas none of these states is able to legislate at the global level, which is where the group is expanding its empire. Each subsidiary is anchored in its respective territory as a local actor,⁷⁷ while bowing to financial interests. In the global economy, Total finds all the flexibility it needs to escape the combined power of all legislation and all jurisdictions. It is at this level that, with full control over access to wealth, the subsidiary joins forces with other TNCs and can effectively dominate states.

'French'

As for the word 'French', only 28% of Total is now French-owned. France no longer has any direct ownership, and institutional investors own 72% of the corporation worldwide. In a series of waves of privatisation adopted by the Chirac, Balladur and Jospin administrations between 1986 and 1998, France got rid of its shares in *Compagnie française des pétroles* (CFP, owner of the 'Total' trademark) and in *Société nationale Elf Aquitaine* (trustee of the 'Elf' brand). After intense negotiations, these companies merged with PetroFina at the turn of the millennium to form Total as we know it today. Chinese political authorities and the government of Qatar have since become shareholders, as have families who act as governors in their countries, such as the Frère family in Belgium or the Desmarais in Canada, for example. The latter held a seat on Total's board of directors from 2001 to 2017. Today, US-based BlackRock is the majority shareholder of Total.⁷⁸

Total's main shareholders are from the US, the UK and elsewhere. To date, the corporation has issued 2.6 billion shares that are not held by reference shareholders.⁷⁹ In 2017, it dished out €6.1 billion in dividends to satisfy the beast⁸⁰ and adopted the goal of increasing the rate from 5% to 6% per year, up from the previous 3%.⁸¹ It earned €11.4 billion in profits in 2018. Since Total has no shareholder ties with France, its 'French' side amounts basically to its communications strategy. Back in 2015, the *Énergies & environnement* website announced that '[i]n 2012, 65% of its capital invested in refining and petrochemicals was concentrated in Europe, but the French oil company wants to reverse the trend by increasing the share of this capital in Asia and the Middle East to 70% by 2017'.⁸² The corporation has invested enormously in megastructures, such as the one in Jubail in Saudi Arabia: investments of close to \$10 billion guarantee Total 400,000 barrels of oil per day.⁸³ Social and tax obligations are less strict

in Saudi Arabia than in France. The corporation reduced the number of refineries in the city's territory from eight to five – six including petrochemical sites. These are now generally either making a loss or their installations have been turned into niche entities.

'Oil'

Total, the 'oil company', is reducing its focus on oil and petrochemicals and turning to diversification as a means to establish a place for itself in the sectors that will be favoured once it and its peers have depleted the last available oil deposits. Total clearly plans to exploit its deposits to the very last drop. In 2017, it acquired assets in prospecting and exploitation and shares in two plants from the Brazilian Petrobras corporation for a total of \$2.2 billion.⁸⁴ In addition to those it already exploits in Gonfreville-l'Orcher (France), Anvers (Belgium), Jubail (Saudi Arabia), Port Arthur (USA) and Ras Laffan (Qatar), Total acquired an integrated refining and petrochemical platform in South Korea in 2017.⁸⁵ At the time, it owned stakes in another 19 refineries worldwide, and continues to exploit the highly polluting tar sands in Canada.⁸⁶

By the 2040s, 35% of Total's energy is expected to be produced from oil, 50% from gas and 15% from low-carbon energy sources such as biomass, solar power and storage.⁸⁷ If global warming does not get the better of humanity after we have burned all the available fuel, Total anticipates having already redirected its distinguished customers towards its new energy markets. Just as the chemical corporations BASF, Bayer, and Monsanto are quickly establishing themselves as the leading firms in the organic farming sector,⁸⁸ Total is regaining control of the markets that compete with oil and working to turn its depletion into the market of the future. The 'Gas, Renewables & Power' subsidiary is now Total's fourth main business segment. Before its creation, management had plans for Exploration & Production (EP), Refining & Chemicals (RC) and Marketing & Services (MS).⁸⁹ The Gas, Renewables & Power segment spearheads Total's ambitions in low-carbon businesses by expanding in downstream gas and renewable energies as well as in energy efficiency businesses', it declared in its unique style.

Having tactically recognised its responsibility for global warming as an oil corporation, Total is now undergoing metamorphosis to make the gullible believe that 'natural gas', which it also exploits, is a solution.⁹⁰ The group's CEO is even advocating for the establishment of a reference carbon price that integrates the costs of CO₂ emissions so that the price of coal serves as a foil for the gas sector.⁹¹ However, opting to produce less oil in the long term and extract more shale gas instead is like choosing to pollute the atmosphere less (if we conveniently ignore the thorny issue of the methane that is released⁹²) to risk destroying groundwater sources instead. Total uses the hazardous technique of hydraulic fracturing or 'fracking'⁹³ in Australia, Denmark, and the UK⁹⁴ and is aggressively arriving in or returning to the US,⁹⁵ Argentina⁹⁶ or Algeria⁹⁷ to extract gas buried in rocks by causing underground tremors and whirlpools that potentially threaten the entire groundwater system – that is, when it is not launching deep-water gas prospecting and drilling projects such as those in Cyprus,⁹⁸ Iran⁹⁹ or Greece.¹⁰⁰ Total is also developing its shale-gas operations to target the markets for electricity and natural gas. For a while, it could rely on the support of Jean-Louis Borloo, the former French environment minister, who later became a 'super-lobbyist for electricity in Africa', as *Le Monde* newspaper put it.¹⁰¹ Borloo attempted to pave the way for relations in Africa among development fund directors, African leaders and French corporations such as Bolloré, Dassault, EDF, Total and Veolia that support the development of a vast continental electricity market.

By embarking on similar deep-water oil and gas projects, Total continues to push extraction from the ocean floor to new limits all around the world.¹⁰² This does not, however, stop Total from advocating a clean economy, as it also produces solar panels. It became the world leader of solar energy after it acquired the US-based SunPower corporation in 2011 and then Saft in 2016 and it dominates the energy-storage sector.¹⁰³ This would make it a green company if we were to ignore – as it tries to do – the heavy metals that this industry requires.¹⁰⁴ Total also carries out research in the energy-harvesting sector with the support of the Norwegian government.¹⁰⁵ This new practice relies on the use of solvents that are capable of absorbing CO₂ under certain conditions and its underground storage.¹⁰⁶ Total's efforts in this area are entirely self-serving, positioning itself 'pre-competitively' to respond to a technological demand that is anticipated from China.

Total is also drawn to agrofuels despite the threat they represent to food sovereignty, particularly in the Global South. It imports massive amounts of palm oil from South-East Asia to its French facility in La Mède – it needs 450,000 tonnes to produce approximately 500,000 tonnes of agrofuels per year¹⁰⁷ – even though this operation is costly in terms of production, transport and processing, and thus, energy. Very little recycled oil will be included in their composition. As the CGT (French General Confederation of Labour) delegate Fabien Cros wrote on Total's website, 'All of this has a much bigger carbon footprint than if diesel were used directly! In sum, to produce this so-called green energy, we will pollute the rest of the world'.¹⁰⁸ Satellite states in the Françafrique framework, such as Gabon, are following suit, with a plan to gradually convert farmland to the agrofuels economy,¹⁰⁹ rather than adopting agricultural policies to promote their own food sovereignty.

As the growth-based economic order must in no circumstances be stopped, Total is seeking to diversify it. There are several examples of this in 2019 alone. In addition to developing pipelines, lubricants, plastics and other petrochemical products, the corporation is involved in the battery and wood-pellets sector, and has also penetrated the hydrogen sector. Despite the high cost of the chemical reaction needed to produce this energy, there is already lobbying for its promotion. Thus, to the gasoline sold through Total's vast global network of retail service stations, we can now add natural gas and roadside charging stations for electric vehicles.¹¹⁰

Total is busy not only producing these energy sources, but also trading them. It invests in structures designed to develop complex ways of selling these goods and has made some advances in the US and Japan. In 2017, its subsidiary Total Marine Fuels Global Solutions positioned itself to sell massive amounts of marine fuel produced from liquified natural gas in Singapore. In 2016, it acquired the Belgium firm Lampiris, which buys 78% of the electricity that it itself sells. It returned to France in 2018 with Direct Energy. It also plans to invest directly in its competitors' funds such as Shell's subsidiary in Nigeria or in Saudi Aramco in Saudi Arabia. Furthermore, it has invested in the Internet of Things and cutting-edge computer research.¹¹¹ The corporation cannot claim that its operations are zero risk when it is developing a drone that is meant to 'assess the extent of accidental pollution'.¹¹²

'Company'

Given the scale and level of diversity of Total (and its peers), it is no longer a 'company' in the sense of a meeting of duly identified business associates, nor an 'enterprise' understood as a structure engaged in a particular sector. Rather, it has become a *power*, a sovereign authority that sets itself apart from states and dominates and manipulates them to achieve its own self-serving goals.

A new form of sovereignty is developing. Total now has their say on and meddle in everything.

Being a power rather than a simple company requires knowing how to take advantage of all situations – when, that is, the situation is not under its control in the first place. This diversity of activities and the fact that the company controls a multitude of aspects in the energy sector – prospecting, exploitation, transport, refining, processing, storage, distribution, trade, and so on – enables it to profit from each and every situation. Even though the price of oil dropped by 17% in 2016, the corporation still earned profits of at least \$8.29 billion. Johann Corric of *Le Revenu* observed that ‘The group’s accounts continue to be kept afloat by its downstream activities (refining, petrochemicals) and by a cost reduction plan implemented ahead of schedule. It exceeded its target of 2.4 billion dollars in savings for 2016 by 400 million dollars’.¹¹³ Total has made reducing production costs a priority, which results in miserable wages, demanding working conditions, different treatment for local craftspeople and expatriates – these methods obviously please only the firm’s most powerful stakeholders: the Fitch credit-rating agency explicitly compensated Total for its strict management policies by stabilising the group’s rating at ‘AA-’.¹¹⁴

Those nostalgic for state sovereignty are reluctant to consider the disturbing scope of these new power relations. Theoretically, as the guardian of the legitimate use of violence and the exclusive power to legislate, only the state should be in a position to assert its prerogatives over any private companies and foreign entities operating in its territory. However, a new form of sovereignty is developing. Representatives of Total, its marketing industry and its tentacular PR services now have their say on and meddle in everything. Total’s CEO Patrick Pouyanné, like his predecessor Christophe de Margerie, is involved in everything: the issue of the Syrian refugees, the trade embargo imposed on Russia, academic research, the revival of local industries, financial or technical support for small businesses, the fight against diabetes, museum exhibitions, the restoration of historical monuments and rejecting all social movements. Recognised by states as a sovereign power itself, Total signed a declaration of support for the Paris Agreement at COP21 in which it pledges to work to keep global warming at the 2°C mark – even though in private, Pouyanné spoke about a significant increase of 3°C to 3.5°C.¹¹⁵

Ideology of power

Our interest in using Total as a case study also stems from the fact that its representatives have become particularly vocal. Successive CEOs and various representatives do not hesitate to comment on their activities and even on current political affairs, giving us an insight into their fundamental ideology. In doing so, they inform the public of the ideological means they use to justify, in their own eyes, their authority. They present themselves in the long term as resolutely sovereign.

We analyse three types of sources:

1. Total’s documents and public statements, as well as the publications of its historians and other intellectuals, which allow us to confirm by its own admission a whole series of facts.
2. Specific legal documents that, depending on their status, provide evidence on specific matters.
3. Critical and incriminating documents making claims to which the corporation’s directors have often responded.

We identify three constants in the corporation's official discourse.

First constant: the presumption of legality

Whatever the form, Total's representatives always insist on the legal nature of its operations. Whether dealing with its historical collaboration with the Apartheid regime in South Africa,¹¹⁶ the consultations that leave Latin American indigenous peoples frustrated¹¹⁷, the influence peddling observed in Iraq or Iran in the late 1990s¹¹⁸, the devastation of the Niger Delta region¹¹⁹ or the access to Algerian wealth enabled by odious debts, its rhetoric can be summed up as: *we respect the law, we operate within the law, what we do is legal and as long as it is not prohibited (or sanctioned), it is permitted*. These are the key phrases the group's representatives use. We took these claims seriously, so our work was not so much a critique of Total's actions as an analysis of a system that allows so many actions to seem legal. We then asked ourselves about the very meaning of the phrase 'it is legal' in the various contexts in which it is used. We also examined how the corporation itself sometimes helps in drafting the legal frameworks that allow such actions to be considered legal.

Second constant: let bygones be bygones

When a journalist asked former CEO Christophe de Margerie about the suspicious commissions Total paid the Iranian regime in return for the concessions that it was awarded in the 1990s, he responded, 'It's good that you are starting to ask questions about dates because we can also talk about the Saint-Barthélemy massacre' – which took place in 1572.¹²⁰ The firm's representatives suggest that the historical slate should be wiped clean, perhaps in part to clear their conscience. For them, Total's collaboration with the Apartheid regime is no longer up for discussion, even if its own documents boast that it has been in South Africa since 1954.¹²¹ The TNCs discourse tends to minimise the past to favour only the present or a projected future. However, a firm's capital, especially when it is colossal, is also its memoir, recording its actions in specific historical contexts. Capital is clearly crucial for any corporation, enabling it to take out loans, build partnerships, raise its share value on the stock market and invest in new projects in order to constantly expand it. Minimising the past prevents the public from understanding how capital is accumulated – the very capital that now gives the group the means to launch multiple initiatives, reminding us of the saying, *'the past guarantees the future'*.

Third constant: don't do politics

In issues involving Total in France and abroad, its representatives insist on saying that they *do not do politics*, then to add, *only geopolitics*. Together with other private-sector firms of the same magnitude, the corporation manages to shape much of the global industrial and financial order through a series of imperatives making it difficult for states to clearly exercise their sovereignty. Whether in the chapter on procurement, pricing, diplomacy, lawsuits filed with ad hoc tribunals to 'settle trade disputes with states', lobbying and the establishment of power relations in regard to investment plans, everything is done to stifle debate on how liberal globalisation operates. This is what led the current CEO, Patrick Pouyanné, to say that the left-right divide is obsolete and elections now merely endorse the neoliberal order that his group and several others helped to establish. Moreover, since Total is active in all phases of the chain of exploration, exploitation, processing and distribution of energy assets, it can often avoid influencing the broader economic context, contenting itself with taking advantage of the stage of the chain favoured by the state of affairs at the time.

Conclusion

All these considerations led Total's CEO to present himself as a sovereign ruler. After Patrick Pouyanné's tête-à-tête with Vladimir Putin, which received all the pomp usually reserved for heads of state, he was quoted as saying, *'Even if Total is a private company, it is the biggest French company and, in a way, it represents the country itself.'*¹²²

Over and above this outrageous declaration, provoking not even a reaction on the part of the French president, the authority that corporate directors claim for themselves is supranational and specifically business-related. It is this power that now calls for further analyses and greater public awareness.

We need to treat Total not just as a large energy corporation, but rather as a private, multi- and transnational, private, sovereign power that serves the interests of a highly diversified shareholder base and intervenes in innumerable political, cultural, social, financial, industrial and academic issues.

This article is an abridged version of Alain Deneault's book (In French), De quoi Total est-elle la somme ? Multinationales et perversion du droit, éditions rue de l'Échiquier et Écosociété (2017). Full references can be found in the book.



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STATE OF POWER 2020



The financialised firm

How finance fuels and transforms today's corporation

Myriam Vander Stichele



An increasing number of businesses have become emblems of corporate crimes and violations—Bayer for toxic agrochemicals, Exxon for obstructionism on climate issues, Uber for its drivers' working conditions.

A wide range of corporations, however, rarely receive public attention let alone become the target of public anger. Without them, however, corporations that are known for their abusive practices could not operate in the way they do. They include the law firms that plead for their impunity, the marketing firms that promote unhealthy products, the tech companies that help covertly target clients, the lobby firms that corrupt democratic spaces and manipulate public opinion, the auditors and tax consultants that advise on tax dodging. These corporate servants take no responsibility for their clients' socially and environmentally abusive practices—and there are no sanctions for doing so, thus creating a chain of impunity. Yet where would Bayer be without Bank of America/Merrill Lynch and Credit Suisse, which helped finance its take-over of Monsanto?¹²³ Where would Uber be with its practice of bending national laws without the support of legal firms like Covington & Burling? Like the corporations for whom they provide services, many of these are also now globalised and transnational conglomerates, extracting huge profits.

This essay will focus on one sector that has done more than any other to drive abusive corporate behaviour and impunity: the financial industry. Its various players have not just provided services, they have also made it easier for corporations to ignore social and environmental responsibility and reshaped the corporation—resulting in the financialisation of the whole economy.

Loans that allow abusive behaviour

Lending is the most basic service the financial industry provides to corporations as a whole or for particular corporate activities. Banks that lend to large corporations tend to specialise in particular sectors in order to optimise their services and risk assessments and so offer attractive interest rates to their clients. A system of revolving credit allows corporations to borrow over a period of time without further bank assessments. Big corporations can obtain hundreds of millions or billions of dollars through a syndicated loan by an ad hoc consortium of large banks (a syndicate), each lending a slice of the loan after one or more 'lead arrangers' have made an assessment of the corporation or project.¹²⁴ In the case of the Dakota Access pipeline, for example, Citibank led a consortium of 17 international banks to provide a \$ 2.5 billion syndicated loan.¹²⁵ This is one of many examples of how banks' risk assessments do not properly take climate, environmental and human rights into account.

The banks have responded by issuing policies and guidelines, but without making any significant changes in practice.

The research and campaign group BankTrack has investigated and exposed the banks that lend to large polluting and carbon-intensive corporations or projects. The banks have responded by issuing policies and guidelines, but without making any significant changes in practice. Since the 2015 Paris climate accord, for example, global banks' lending to the fossil-fuel industry has increased every year,¹²⁶ pumping \$1.9 trillion of new money into the development of fossil fuels, even to the dirtiest kind of energy extraction.¹²⁷ Similarly, years of campaigning by Friends of the Earth (FoE) in the Netherlands to stop decade-long lending to destructive palm-oil companies pushed

the Dutch banks to develop a lending policy on palm oil, but did not stop them lending. Banks have even sold off risky loans by repackaging them and transferring them to investors, allowing the loan to continue with little risk to the bank but more risk for the financial system ('securitisation'—a cause of the 2008 financial crisis).

Banks started to globalise in order to provide services to their corporate clients that expanded abroad. Now they advise on how to find business partners in third countries, or how to export or import. They provide trade credit to importers and guarantees of payment to the related exporters, without which international trade would come to a halt—as became clear when banks stopped financing trade when the financial crisis blew up in 2008. Banks develop a complex mix of financial instruments to help finance large trade deals, including using the traded produce as collateral.

Not just serving corporations but actively increasing their power

Large banks are not only serving their corporate clients, but also seek opportunities for one corporation to merge with and acquire with another—because the bigger the company, the more loans and financial services it will require. It is no secret that banks favour loans to supermarkets rather than to a corner shop because the business opportunities are far greater. Investment bankers are therefore crucial players in building giant corporations and corporate concentration in most sectors of the economy. They develop financial merger and acquisition (M&A) plans involving loans and shares, benefits for the top management and cuts in costs— and, importantly, huge fees for the investment bank (see Box 1). The planned cost-cutting often results in staff redundancies in overlapping activities and proposals on how to use, or abuse, greater purchasing power to push down suppliers' prices—setting a downward income spiral through the supply chain. Investment bankers, however, still cash in high bonuses and are proud of their M&A deals, even when these subsequently fail.

Box 1. Big deals for ever bigger pharma

While many people around the world cannot afford costly drugs and have no access to health insurance, large pharmaceutical corporations have no issues with finance, including for expensive M&A deals. For instance, Celgene obtained US\$ 74 billion to acquire Bristol-Myers Squibb.¹²⁸ The five investment banks providing advice (including Morgan Stanley, JP Morgan Chase, and Citigroup) received US\$304 million in fees. The banks that provided a US\$ 33.5 billion loan received US\$ 547 million in interest payments.¹²⁹ These costs will be repaid by increasing the price of drugs, regardless of the impact on people's health. Such deals allowed the five largest US banks to make profits of US\$ 111 billion in 2018, 24% more than in 2017.¹³⁰ Rising drug prices goes against the global commitment of the United Nations Sustainable Development Goal 3, target 8 to achieve 'access to safe, effective, quality and affordable essential medicines and vaccines for all'. Yet the banks that undermine this are never deemed responsible or liable.

The financing of huge M&A deals leads to a vicious circle of bigger banks and bigger corporations. The public outcry against 'too-big-to-fail' banks that needed to be bailed out with taxpayers' money has not resulted in splitting the banks, since a proposed EU law was aborted. This was not just a result of bank lobbying. Big multinationals also lobbied against restructuring the major banks, arguing they needed them to finance their complex deals.

Fewer corporate giants mean more profits for rich investors who in turn demand ever greater profits. Corporate concentration in a context of weakened competition anti-trust laws —thanks to lobbying—lead to less bargaining power for workers and suppliers, and higher prices for consumers. Even the International Monetary Fund (IMF) warns that ‘with higher market power, the share of firms’ revenue going to workers decreases, while the share of revenue going to profits increases’.¹³¹

Fewer corporate giants mean more profits for rich investors who in turn demand ever greater profits.

Creating the shareholder bonanza and reshaping corporate investment

Beyond loans, perhaps the most critical financing role the banks play is in creating parallel financing structures. Investment banks provide various services that allow large corporations to be financed by issuing shares or corporate bonds, called underwriting. First, they advise the corporation on how to become more profitable and attractive to shareholders and bond holders, for example by advising tax-dodging strategies channelled through the bank’s offshore subsidiaries or branches. The banks then analyse the prospects and risks to the corporations’ profitability—or in the case of new technology companies, how interested investors might be in buying and trading the shares, even if there will be no profits for years, as was the case for Amazon and Uber. They get credit-rating agencies (see below) to give investment grades. The banks collate their analysis in a prospectus, with no legal obligation to assess the corporation’s social or environmental impacts unless these might threaten its profitability.

For instance, Uber’s prospectus mentioned the risks that its independent drivers could be legally entitled to be paid as employees, but made no mention of how it might increase pollution¹³² in cities by replacing public transport. Second, the banks ensure the listing of the shares and bonds on a stock exchange or off exchange. Third, once the banks have valued the new shares, they buy the shares and take a risk of non-selling while organising ‘road shows’ to promote the shares among investors. This underwriting of risks is usually shared among a number of large banks. In the initial share issuance¹³³ and underwriting of Uber, for example, 29 banks were involved, 11 of which were also involved in the earlier issuance of shares by Lyft, Uber’s competitor. Some of the top banks were Morgan Stanley and Goldman Sachs, others include Barclays Capital, Bank of America Merrill Lynch, Citigroup Global Markets Corporations and Deutsche Bank Securities.¹³⁴

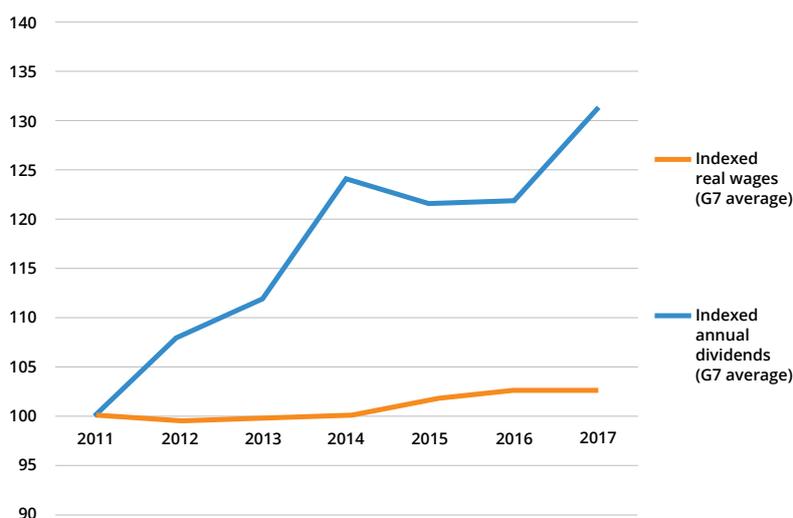
Share issuance allows corporations to diversify funding from loans or bonds that need to be repaid. Underwriting banks receive huge fees for issuance of new shares, and do not have to set aside costly capital reserves for loans. The underwriters of the Uber share issuance received fees of \$106.2 million.¹³⁵ Campaigners are beginning to place the spotlight on banks involved in share issuance. News in 2019 that Saudi Arabian oil company, Saudi Aramco, was moving ahead with offering shares led to a coalition of environmental groups warning investors of the dangers of facilitating capital for the world’s largest corporate emitter of CO² as well as supporting a regime with an appalling human rights record.¹³⁶ As Western investors became lukewarm, investment banks decided to focus on selling the shares to investors in the Gulf region, themselves oil producers, rather than withdrawing from the issuance altogether.¹³⁷ Saudi Aramco was able to cash in a record \$29.4 billion by mid-January 2020 claiming it will diversify away from oil.

Investment banks and others serve shareholding investors by analysing the profitability of listed corporations. These financial analysts are very instrumental in putting high and constant pressure on company managers to increase profitability, amongst others by comparing them with companies in the same sector. Investment banks also facilitate share trading on the stock market but there might be a conflict of interest if they are involved in underwriting those shares. They help avoiding the dropping of share prices in case of large sell-offs by dividing up the sales of large chunks of shares on their non-public trading platforms, known as ‘dark pools’.

It is estimated that trading on dark pools accounted for approximately 40% of all US stock trades in early 2017 compared with an estimated 16% in 2010.¹³⁸ High-value shares offer corporations continued access to financing and opportunities to undertake M&A deals, bolstered by the growing practice of corporations of buying back their shares.

In fact, top managers’ pay with shares options is a further incentive to prioritise high share value and buying back shares over innovative investment or employment. The relentless pressure for high returns to shareholders—the institutional investors, the extremely wealthy and the top managers—has been a big part of the increasing wage gap.

Figure 1: Rising returns to wealthy shareholders and stagnant wages in G7 countries, 2011 to 2017



Source: Oxfam International (2019) *The G7's Deadly Sins: How the G7 is fuelling the inequality crisis*, 22 August.

In the US, almost \$7 trillion¹³⁹ went to shareholders as dividend payments and shareholder buy-backs while workers’ income hardly rose, fuelling inequality and also depressing workers’ purchasing power.

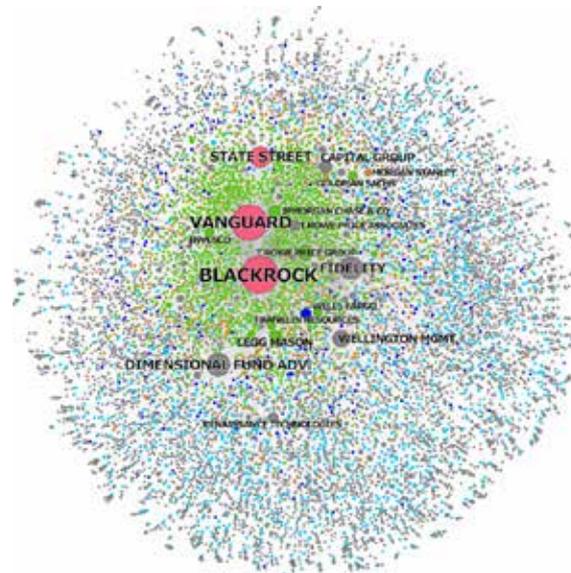
This primacy of shareholder value had a significant impact on corporate strategy. At the start of the 1980s, 50% of profits were reinvested in the corporation, but by 2018 this had fallen to 7%.

Concentrating power in the financial sector

The growth of shareholding and corporate bonds issued by ever larger corporations has been supported by financial concentration in the hands of the trillion-dollar investment fund industry. New financial giants have emerged, dominated by BlackRock (the largest global investment management company with US\$ 7 trillion in assets under management¹⁴⁰), Pimco (specialised in bond investment management

with US\$ 1.9 trillion under management¹⁴¹), Vanguard (the second largest global investment fund manager with \$5.6 trillion in assets under management)¹⁴² and Amundi (a top European asset manager with € 1.56 trillion assets under management).¹⁴³ They now hold shares and/or bonds in almost every company in the world.

Figure 2: Network of ownership by the Big Three in listed US firms.



Source: Fichtner, Heemskerk & Garcia-Bernardo (2017)

A study of US companies showed that the three top investment fund managers —BlackRock, Vanguard and State Street—are the largest single shareholder in almost 90% of the top 500 firms worldwide listed in the S&P index, including Apple, Coca-Cola, ExxonMobil, General Electric and Microsoft.¹⁴⁴

Since most other investors spread risks by holding less than 1% of a company's shares, the three dominant investment fund managers—each holding up to 3% to 8% and together up to 17.6% of these companies' shares—now have the most influential voting power at the corporations' annual assemblies or in their direct engagement with top management. Their influence does not, however, translate into pressure for corporations to adopt goals other than maximising profits.

The enormous expansion of the investment fund industry over the last decade, its interconnectedness with corporations, and the growing amounts of bad corporate loans, could easily end up in a new financial and broader crisis. The consolidation of power by the major investment funds undermines competition among corporations in the same sector, because funds are dominant shareholders of competing conglomerates, which entices them to support similar corporate strategies.¹⁴⁵ Moreover, the funds are increasingly following an index, valued according to stock-market price based on buying and selling of shares and profitability, with little assessment of corporate behaviour on the ground.

The investment fund industry's demands for more corporate bonds to create funds, is behind a new corporate bond bubble that is likely to burst, having reached \$ 10.17 trillion in 2018.¹⁴⁶ Too much money from (institutional) investors is seeking high returns and corporations are keen to cash in, including those with little or no profitability ('junk bonds'). The riskier the business, the higher the interest rates that attract investors. Once the economy slows down and these so-called 'zombie corporations' start to default on their loans or bonds, investors might sell off massively. The interconnectedness and ripple effect, including the growing bad loans, could easily end up in a new financial and broader crisis.

Side-lining society and the environment

The concentrated investment industry has created even wider distance between the ultimate financier, i.e. the investor who is putting money into the investment funds, and the impact of corporate operations on society and the environment.

Investment fund managers buy shares and/or bonds from hundreds of corporations to be part of one 'fund', and follow this process to create hundreds of such funds, which are then offered to investors. The sheer number of corporations included in one fund makes it too costly, according to fund managers, to scrutinise the on-the-ground impact of each the investee corporations. The funds only publicise a few of the corporations included in a fund, making it difficult to scrutinise all of them by the ultimate financiers. Moreover, the large investment fund managers outsource their voting rights to proxy corporations, such as ISS¹⁴⁷ and Glass Lewis,¹⁴⁸ which prioritise voting in support of management and profit-making strategies that result in the highest value for shareholders and against resolutions for more responsible behaviour.¹⁴⁹

As a result, they have long allowed corporations to ignore the interests of workers and communities and concerns about climate change.¹⁵⁰ BlackRock's CEO may have written an open letter in 2018 telling corporations that they have to show 'a positive contribution to society' but only in January 2020 did he wrote a, widely publicized, letter to CEOs announcing initiatives mostly for better (allowing) scrutinizing climate and sustainability risks of the companies BlackRock chooses to invest in. Behind closed doors, however, BlackRock has argued and lobbied against EU laws that provide clear definitions of green investments and oblige the disclosure of social and environmental risks or impacts of its funds.

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A Dutch Bank, ING, which sells these investment funds to individual customers, even advertises that they can sleep while the bank manages their money (see Figure 3). The information focuses only on how much profit their investment funds are making. Yet studies show that in the case of Dutch banks, the investment funds offered to their clients were financing abusive palm-oil companies.¹⁵³

Figure 3: Screenshot of ING investment services website (2019)

Beginnen met beleggen

Tips voor een goede start

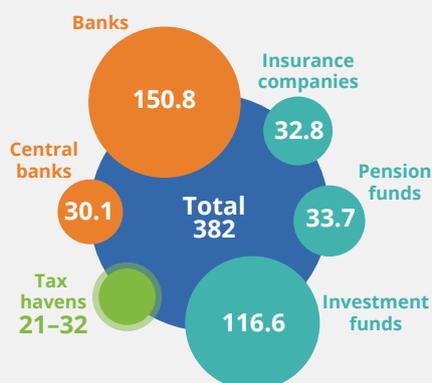


Translation: Begin with investing – Tips for a good start. Source: ING

Recently, environmental campaigners have started to confront investment funds' responsibility for financing destructive practices. Friends of the Earth (US), for example, has attacked BlackRock, for investing billions in corporations that contribute to climate change, environmental destruction and violations of human rights, such as oil and gas corporations, mining corporations and palm-oil corporations.

Box 2: Other key financial players that provide services to corporations

Global financial assets for 2017 in trillion US\$



Sources: FSB, Tax Justice Network

The decision-making and cost of financing corporations crucially depends on **credit-rating agencies**, which assess the profitability of corporations. Their ratings determine lending and investment decisions, and are globally sought and feared. They are paid by the corporation they analyse—a conflict of interest that can result in pressure to exaggerate its value. The agencies' ratings are not currently legally obliged to assess social and environmental impacts—unless these might threaten the corporation's profitability.

Stock exchanges admit trading a company's shares, and are themselves for-profit corporations. Stock exchanges set rules on how the listed corporations have to publish their prospectuses and annual reports.

The growing privatised pension funds have been part of the push to high shareholder value given that they invest in company shares and expect up to 7% return, with no responsibility for the consequences. BlackRock lobbied successfully for the EU to introduce a pan-European personal pension fund scheme that will raise the demand for more corporate shares and bonds.

Insurance companies protect corporations not only against damage and theft, they also provide insurance to companies' management executives for any wrongdoing and potential legal costs. Without insurance and re-insurance companies, no infrastructure project can go ahead. In order to keep down the price of insurance premiums, insurance companies invest in bonds, in real estate, securitised mortgages and to a lesser extent in shares and some complex financial instruments, thus fuelling financialisation of housing and companies.

Perhaps the most predatory players in the financial industry are the **hedge funds and private equity funds (PE)**, which have received little attention from campaigners or employees because they disclose scarcely any information, are based in secrecy-bound jurisdictions and tax havens, and are barely subject to EU or US regulation. **PE funds** defend their role as providing finance and improving the management of a company, but only take over companies that can offer high short-term financial returns, while shifting the take-over debt onto the company. This results in job losses and less investment in the company itself. In the Netherlands, PE funds have taken over subsidised private kindergartens and homes for elderly, leading to job losses and poor care.

Hedge funds are run by private asset managers earning high fees for providing high short-term returns with money from very rich investors, including private pension funds, multiplied by risky loans. They use supercomputers and algorithms to develop risky speculative strategies with shares, bonds, derivatives, real estate, etc. They are often the majority of the daily traders on stock exchanges, and can even speculate to reduce share prices and make a profit out of it ('short selling').

Source: M. Vander Stichele, *The threats lurking in the financial sector*, SOMO briefing, April 2019, <https://www.somo.nl/which-threats-are-lurking-in-the-financial-sector/>

Financialisation of energy and food

The financial industry has also encouraged corporations to embrace increasingly complex financial instruments as a way to safeguard their profitability but which has had a knock-on effect on the wider economy and society. So, for example, in order to support large corporations in avoiding risks of financial loss or price variations ('hedging'), investment banks developed derivatives (also known as swaps, futures/forwards, options), which are contracts that determine prices based on bets of prices in the future. Derivatives' contracts are still mostly traded off exchanges ('over the counter', OTC) away from the public eye, and have doubled in value since the financial crisis, with up to \$640 trillion notional amounts outstanding.¹⁵⁴ These can go dangerously wrong as the financial crises demonstrated and have consequently been called 'financial weapons of mass destruction'.

The most traded derivative is related to interest rates, sold as an insurance against raising interest rates. Banks have been accused of not explaining that these 'swaps' also can lead to corporations, municipalities and even farmers to being forced to pay the banks when the interest rate does not raise but goes down—which it did dramatically following the financial crisis. In the Netherlands, the banks even imposed such swaps on small and medium enterprises (SMEs) that took out loans: no swap, no loan, even though SMEs knew little about the potential risks and ended up paying a very high price.¹⁵⁵ In other words, bank services may end up serving the bank more than its corporate clients, which have to pay up.

In the case of commodity derivatives, their trading on and off commodity exchanges significantly determine prices of key commodities like oil, gas, minerals, wheat, and also products like coffee and cocoa. These markets have many financial players, setting up the infrastructure for the trading, designing the derivatives contracts, providing analysis, and facilitating the trade for hedging and speculation.

In theory, commodity derivatives guarantee a certain price and delivery date for selling by producers and buying by processors of energy or food commodities. Yet the supply and demand of contracts on commodity exchanges determine the price partly based on bets about future production and partly on the role of speculators, which does not relate to production costs. Nor do those who trade derivatives have any obligation or responsibility to take into account how these commodities are produced or consumed. It is no wonder, therefore, that increasing carbon emissions have not stopped trading in fossil-fuel energy derivatives or ensured that farmers are properly remunerated. In July 2019, 16 NGOs wrote to the London Metal Exchange to expose its dismal 'responsible sourcing' policy.¹⁵⁶

A post-2008 campaign in the EU challenged commodity price speculation after huge price spikes caused hunger riots from 2006 to 2008. It won partial legislative victories in 2014, but by the end of 2019, however, the EU law was under threat of being rolled back.¹⁵⁷ Large oil- and gas- producing and trading corporations, such as Shell, have increasingly engaged in speculative trading. The question is whether this allows them to manipulate fossil-fuel prices so that renewables become less financially attractive.

Financialisation of corporations

The pressure for high profitability has not just ignored environmental and social issues, but has also critically changed the very nature of business models. It has led corporations investing their profits, or even the money from shares and bond issuance or loans, in the financial markets and offshore, rather

than in their long-term future, e.g. innovation research for a just transition, or paying taxes and increasing the salaries of lower-paid staff—which might help limit growing inequality. The big tech companies, for instance, have invested an estimated \$1 trillion offshore, half of it in corporate bonds, while borrowing close to \$ 110 billion at lower interest rates.¹⁵⁸

Some corporations have even moved into providing their own financial and investment services. Supermarkets like Tesco and Carrefour,¹⁵⁹ for example, offer various banking and insurance services, commodity traders such as Cargill provide credit and derivatives services to farmers, and car manufacturers' financial subsidiaries provide credit, insurance and leasing services.¹⁶⁰ Evidently, these financial services facilitate the purchase of new products or services, sometimes with unexpected costs to consumers.¹⁶¹ Some companies are increasingly getting their profits from financial activities.

The tech giants have also initiated financial services and invested in fintech. Amazon has amongst others invested in Greenlight Financial, which allows children to have debit cards with parents controlling their online spending through an app.¹⁶² The latest corporate financialisation initiative is Facebook's proposal to issue a digital currency, the Libra, managed by a separate corporate body and using blockchain technology. These IT companies' goal might not be the financial services as such, but the data they can obtain about their customers' purchases and transactions.

The doom scenario

Corporations that can readily obtain financing—bolstered by and dependent on loans, blinkered share values on stock exchanges, favourable credit ratings, and protected by insurance companies and derivatives—have little incentive to undertake a swift transition and stop abusive social and environmental practices even if campaigns expose them. Rather, increased share and bond holding intensifies the pressure on corporations to raise short-term revenues from exploiting their value chains. The overriding pressure can be seen in the case of Unilever, whose CEO Paul Polman started some more sustainable production initiatives and even did away with short-term quarterly financial reports. However, once Kraft Heinz made a hostile take-over bid, Unilever quickly returned to putting shareholder value first, including borrowing money to buy back shares and embarking on a new cost-cutting programme.¹⁶³

The dangers of the financial industry's lack of responsibility for assessing social and environmental impacts, and its pressure on corporate short-termism, are now starkly exposed by the climate crisis.

Since 2015, a group of central bankers in the Network of Greening the Financial System have warned that carbon mispricing and climate change could result in financial instability or crisis. Climate disaster will cause, for instance, droughts that reduce agricultural production and storms that destroy commercial real estate and homes; at the same time the need for a swift reduction in the use of fossil fuels and related regulations will affect the production of many industries. This will result in unpaid loans, falling prices of shares and bonds, massive withdrawal from investment funds with shares in fossil-fuel based industries, and extreme price volatility of mispriced derivatives. This would affect everyone, even small savers or pension funds. Some supervisors include such a doom-laden scenario in 'carbon stress testing'.

The financial industry lobby, however, has been stopping necessary change—and even opposing EU laws to disclose whether or not they are assessing the negative climate, environmental and social impacts of the corporations in which they are investing. The industry prefers to adhere to voluntary initiatives such

as the United Nations Environment Programme (UNEP) Principles on Responsible Banking or the Task Force on Climate-related Financial Disclosure (TCFD) but, as BankTrack has noted, banks that signed the 2003 Equator Principles,¹⁶⁴ still refuse to disclose damaging projects they are financing—arguing that this is to protect their clients’ confidentiality. Slowly, some shareholding investors predict the future devaluation of fossil fuel-assets and are pressing corporations to take action against climate change while new EU laws incentivises them to do so.

New options for effective campaigns

The financial industry has successfully used complex structures and well-resourced lobbyists to remain unaccountable for its impact on people and the planet. Reforms made following the financial crisis have not stopped it from servicing corporations with abusive practices and further financialising the economy and society.

Civil society organisations (CSOs) have had some success in campaigning against the financial industry’s services to such abusive corporations and projects. The industry’s continued wide range of financing instruments, however, has allowed corporations to ignore campaigns and undercut myriad voluntary initiatives.¹⁶⁵ This points to the need for sanctionable, legally binding measures on, and the prohibition of, many financial players and instruments in the financing and shareholder value chain. Public anger against growing inequality and climate change could lead to legislators and regulator’ willingness to take bolder action, or electing more radical politicians who can implement alternative financing systems.

One key priority for reform is tackling structural problems such as too-big-to-fail banks and the rapidly expanding but under-regulated investment industry. Why should they be allowed to be so large and make collective profits of hundreds of billions without any obligation to finance a just transition?

Weak competition policy regulations¹⁶⁶ as well as neoliberal trade and investment agreements allow these financial giants to expand and help corporations to become ever larger and more concentrated, taking no social and environmental responsibility. The financial sector needs to be radically reviewed in order to serve society through smaller banks and financial services that are democratically accountable. There are at least six urgent reforms:

1. Change laws so that the banking sector is made smaller and diversified, and investment funds are strictly regulated and reduced, and hedge funds eliminated.
2. Create a public rating agency or require private rating agencies to investigate abusive practices and harmful impacts on environmental or social sustainability by the corporations they rate.
3. Impose penalties on investment banks that issue shares or corporate bonds of abusive and destructive corporations.
4. Regulate stock exchanges to require prospectuses or reports to disclose the social and environmental impacts of listed companies, and prohibit listing of corporations with a record of bad practice.

Tackling the financial stronghold will be a key step in stopping corporations with abusive and destructive operations.

5. Stop unsustainable energy and food commodity prices being set by derivatives trading and speculation, basing them instead on sustainable production costs.
6. Prohibit 'socially useless' activities such as high frequency trading and algorithm-based trading, lending/borrowing of securities to speculate, asset stripping of companies by private equity funds, and lending to hedge funds that practice speculative extractive financial instruments.

Experience has shown that achieving meaningful binding laws depends on a prolonged and major fight in the corridors of power against a hugely powerful financial lobby. Even after achieving a legislative victory, campaigning and advocacy need to prevent the financial lobby from manipulating the regulator's technical standards and thus de facto defanging the laws. Importantly, the campaigns should demand that supervisors and regulators have a legal mandate and resources to enforce strict financial regulations, support alternatives and are accountable to the public.

Regulatory change will not happen without stopping the financial industry's efforts to weaken or prevent legislation and regulations. The #ChangeFinance campaign managed to secure pledges by 576 European Parliament candidates to distance themselves from the financial lobby.¹⁶⁷ There have been follow-up actions but there needs to be more publicity on the negative impacts if the financial industry gets its way. This should allow more space for citizens' voices to highlight many existing or proposed alternatives. Proposed regulatory reforms include developing a diverse financial sector to finance a just transition. Responsible cooperatives, ethical banks and democratically governed public banks should become attractive alternatives for citizens and companies alike.

The financial industry has become more a master than a servant, extracting value from corporations at any price. Tackling its stronghold will be a key step in stopping corporations with abusive and destructive operations, and should be part of untangling of chain of irresponsible service industries so as to speed up the transition to sustainable and equitable societies.



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Touching a nerve

A peoples' campaign at the United Nations challenges corporate rule

Brid Brennan and Gonzalo Berrón



Since 2015, there has been an annual negotiation at the United Nations' Palais des Nations in Geneva that touches the very nerve centre of corporate capitalism. This event stems from the June 2014 United Nations Human Rights Council (UNHRC) Resolution 29/6 that set up a working group to elaborate a legally binding instrument to regulate corporations.¹⁶⁸ It was a historic initiative as it demonstrated that corporate rule – which many still see as unquestionable – can be challenged and confronted. It is, unsurprisingly, a negotiation that has been contested every step of the way, revealing the often conflicting – but sometimes coinciding – interests among the three major actors: states, corporations¹⁶⁹ and the affected communities, social movements and civil society organisations (CSOs).

This trajectory sees the convergence of diverse paths. For states – assuming a new historic responsibility to put a Binding Treaty in place that addresses the acknowledged gap in human rights law, the architecture of corporate power and impunity, and access to justice. For corporations, the repeated defence of the status quo – legitimising corporate violations of human rights and profits before peoples' rights. And for affected communities and social movements – persistent resistance, building law from below and sustaining pressure on the governments.

Addressing systemic corporate impunity

Ever since transnational corporations (TNCs) became major global actors, affected communities, factory workers and social movements have resisted this corporate economic model. By 2000, communities and workers worldwide had protested against TNC crimes – including such iconic cases as the Union Carbide pesticide plant's poisonous gas leak in Bhopal in 1984; Shell's ruptured pipeline in Bodo Nigeria (2008–2009); Chevron/Texaco's dumping of crude oil in Ecuador (1964–1992); European Corporations' (Fossil Fuels/Energy, Agriculture & Manufacturing) blocking of significant reductions in CO₂ emissions; and British Petroleum's (BP) Deep Water Horizon explosion (April 2010) in the Gulf of Mexico.

While the resistance of affected communities has been a constant challenge to the operations of TNCs and their human rights violations, it was the joint convening of the Permanent People's Tribunal (PPT) Session by the Hemispheric Social Alliance (HSA) and the Enlazando Alternativas¹⁷⁰ on European Corporations in Latin America (2004–2010) that kick-started a new process of bringing the different movements together and developing a shared analysis of the corporate violations of human rights. In the process of sharing experiences of 46 cases in three sessions, they not only pointed to the specific corporate violations of human rights but also identified their systemic character.

The verdicts identified an 'architecture of impunity', generated by different trade and investment agreements and the global institutions of the World Trade Organization (WTO), the International Monetary Fund (IMF) and the World Bank, that legitimised and prioritised protections and privileges to corporations over the human rights of communities and workers. This notably includes the Investor to State Dispute System (ISDS) whereby TNCs can unilaterally sue states for actions that affect their profits. The PPT Judgement in Madrid in May 2010 concluded that the human rights of people in Latin America and Europe faced an impenetrable wall of impunity and denial of justice in relation to TNCs' operations. It noted that Global Corporate Rule had become entrenched – privileging profits above peoples' rights and the protection of the planet.

The PPT Judgement was a watershed in the movement towards an international binding regulatory framework for TNCs' operations, calling for the United Nations Human Rights Council to draw up a

compulsory code of conduct for TNCs and for affected communities and social movements to develop a mandatory legal framework in the context of international law – envisaged as ‘one of the first steps on the path to creating a different world order’.¹⁷¹

The Global Campaign to Reclaim Peoples Sovereignty, Dismantle Corporate Power and Stop Impunity (Global Campaign) was established in 2012¹⁷² following extensive consultation on how to develop a strategy addressing corporate impunity. It also initiated the development of a Peoples Treaty on Transnational Corporations. The campaign had two main pillars – a judicial pillar preparing detailed proposals for a binding international regulatory framework for TNCs and an alternatives pillar advocating a more people-centred economy that would reclaim democracy and peoples’ sovereignty.¹⁷³

Box 1: Attempts in the United Nations to tackle TNCs (1970–2013)

1970s: First discussions on holding TNCs to account as they become increasingly powerful international actors. Calls from countries in the Global South for a new international economic order (NIEO) in which corporate and imperial power is constrained.

1972: Chilean President Allende, in a speech to the UN General Assembly said ‘corporations are interfering in the fundamental political, economic and military decisions of the states’ even though their activities ‘are not controlled by, nor are they accountable to any parliament or any other institution representative of the collective interest.’ The following year Allende was killed in Pinochet’s military-led coup.

1974: UN sets up a *Commission on Transnational Corporations* and the United Nations Centre on Transnational Corporations (UNCTC), following the recommendations of the then UN Eminent Persons Group.

1980s: Globalisation and the dominance of ‘free market’ approaches lead to sustained opposition to the UNCTC, most notably from the US government and corporate lobbies (International Chamber of Commerce (ICC) and International Organization of Employers (IOE). Proposed code of conduct for TNCs is dropped.

1993/1994: UNCTC dismantled, although elements of its work were absorbed into the United Nations Conference on Trade and Development (UNCTAD).

2000: UN Secretary General Kofi Anan launches the Global Compact – a voluntary partnership between the UN and TNCs, which legitimises a Corporate Social Responsibility (CSR) non-binding regulatory regime for TNCs in relation to human rights.

2003: Attempt by the UN Sub-Commission for the Promotion and Protection of Human Rights to reintroduce the issue of binding regulation of TNCs fiercely opposed by the ICC and IOE.

2005: UN Human Rights Commission, ignoring the work of the UN Sub-Commission, adopts Resolution 2005/69, asking the UN Secretary General (Kofi Annan) to appoint a special representative to address TNCs’ impacts on human rights. Annan appoints Professor John Ruggie, who develops the United Nations Guiding Principles (UNGPs) – a voluntary reference framework with no legal obligations.

2011: United Nations Guiding Principles on Business and Human Rights (UNGPs) adopted by the UNHRC along with mandates for a new working group on human rights and TNCs and other business enterprises, and a Forum on Business and Human Rights.

Overcoming the voluntary approach

By 2012, decades of attempts to regulate TNCs at the international level had been defeated (see Box 1). The main initial challenge was to overcome the international consensus in favour of a voluntary-led approach to corporate violations of human rights, which were embodied in the UNGPs developed by Professor John Ruggie and promoted as the mechanism for advancing human rights in relation to corporate violations and abuse. These were formally adopted at the UN in 2011 and claimed as the upper limit of human rights protection. However, the track record of TNCs' operations on the ground and the denial of justice to those affected by them gave little reason to expect anything different as a result of the UNGPs. Communities dealing with the devastating operations of TNCs insisted that self-regulation was not enough and demanded that only binding regulation could address the glaring gap in international human rights law in relation to TNCs.¹⁷⁴

Communities dealing with the devastating operations of TNCs insisted that self-regulation was not enough.

While Ruggie, and particularly governments in the North, continued to insist that the UNGPs were the only deal in town, some governments in the South continued to call for binding regulation. Kept alive by the local resistance on the ground, this demand resurfaced in September 2013 when Ecuador and South Africa (supported by at least 85 governments) submitted a joint Statement to the 24th Regular Session of the UNHRC indicating their intention to re-open the agenda of a legally binding regulatory framework for TNCs.¹⁷⁵

Box 2: The UNGPs have failed to stop corporate impunity

Since 2011, affected communities and movements have repeatedly noted the inability of voluntary codes to address corporate violations of human rights and damage to ecosystems, particularly (but not exclusively) in the Global South. Analysis of the 101 world's largest corporations in sectors known to pose a threat to human rights confirms this failure to implement the UNGPs:

- 40% of TNCs could not certify the application of due diligence measures on human rights.
- Virtually none could prove that they met the commitment to pay living wages in their own operations or in their supply chains.
- In 70% of the cases studied, TNCs in the textile and agribusiness sectors had no measures in place to ensure respect for women's rights in their own operations or in those of their suppliers.
- Less than 10% of companies had some policy of protecting human rights defenders.
- 50% of companies in the textile and agribusiness sectors failed to meet their commitments to prevent child labour in supply chains.

Source: Corporate Human Rights Benchmark (2018)

www.corporatebenchmark.org/sites/default/files/documents/CHRBKeyFindings2018.pdf

Converging forces at the UNHRC in June 2014

Ecuador and South Africa's move was immediately backed by organisations of the Global Campaign, which voiced strong support.¹⁷⁶ Soon afterwards, the Treaty Alliance was launched when members of the Global Campaign joined with several other human rights networks and organisations in Geneva

to set up a broad coalition to work for a Binding Treaty.¹⁷⁷ The result was the historic vote in support of Resolution 26/9, which established an Open Ended Inter-Governmental Working Group (OEIGWG) 'on transnational corporations and other business enterprises with respect to human rights; whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises...'¹⁷⁸

The Resolution was carried by a small majority at the UNHRC – supported by governments of the Global South and opposed by each EU member state in the UNHRC as well as by states in which major TNCs are based – such as Japan, the Republic of South Korea and the United States. The vote thus made clear the geopolitical struggle that would mark every step of the way in the Binding Treaty process.¹⁷⁹

Box 3:

In 2015, civil society engagement in support of the Binding Treaty was further expanded with the setting up of the *Feminists for a Binding Treaty*. This network mobilises women and highlights gender perspectives in the advocacy for the Binding Treaty.

They focus on three key proposals: **(1)** mandatory gender impact assessments of business activities; **(2)** gender-sensitive justice and remedy mechanisms; and **(3)** ensuring respect, protection and an enabling environment for women human rights defenders.

Binding Treaty process – a site of constant contestation

Since its launch in 2014, the UNHRC process has revealed the conflicts of interest and contradictions by the three main protagonists: states, TNCs and civil society. This has seen TNCs ally with governments, predominantly from countries that host the largest corporations, while social movements ally with some supportive governments from the Global South and mobilise pressure on governments of the Global North to participate actively in the process.

TNCs assert their interests and influence through their associations and as 'civil society' organisations with ECOSOC status at the UNHRC, where they are represented through the ICC and the IOE, which is also represented in the tripartite International Labour Organization (ILO).

Both organisations present their perspectives in the panels and conferences of the OEIGWG meetings, and also take the floor during the sessions and submit written positions in the formal process.¹⁸⁰ They have consistently claimed that the proposed treaty will have a negative impact on investment in developing countries – a position also reflected by pro-corporate lawyers and academics at the UNHRC. There has been a longstanding debate on why the ICC and IOE are classified as CSOs with ECOSOC status, especially given their conflict of interest with an agenda focused on human rights and corporate accountability. By comparison, the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC) excludes tobacco corporations in the bodies implementing the FCTC¹⁸¹ as a result of campaigns exposing the corporate funding of so-called 'independent' research.

In tandem with their direct interventions, TNCs present themselves as models of 'good practice' in relation to human rights at the Annual Forum on Business and Human Rights¹⁸² at the UNHRC in Geneva. The

aim of this event is to show that voluntary self-regulation works and that binding treaty obligations are an unnecessary burden, which is belied by its members' practices. The Brazilian mining company Vale, for instance, attended several Annual Forums, despite its disregard for safety standards resulting in two dam collapses – releasing millions of tonnes of toxic waste and mud from mining operations at Mariana (November 2015) and Brumadinho (January 2019) in the state of Minas Gerais.¹⁸³ It is estimated that hundreds of people died as a result - its poisoning of rivers and land makes it one of Brazil's worst environmental disasters.

The influence and success of corporate lobby is evident in the way the discourse is echoed by the US, EU member states and other Northern states – with the backing of states from other regions, particularly the current right-wing governments in Chile, Colombia and Guatemala. Their shared discourse, approach and tactics towards the Binding Treaty process is to do everything possible either to block it or render it meaningless.

Even if the full implications of corporate capture at the UN remain obscure, many concerns have been raised on how this plays out in relation to the UN mechanisms on human rights. For instance, the agreement between Microsoft and the High Commissioner for Human Rights in 2015¹⁸⁴ in which Microsoft committed \$5 million to develop technology to “better predict, analyze and respond to critical human rights situations,” was seen as a classic case of a non-transparent corporate donation. Coming as it did in the first year of the OEIGWG process – a highly sensitive time in relations between TNCs and affected communities – the absence of full disclosure on its purpose was questioned.

The obstructive tactics of the corporations–states nexus range from rhetorical to procedural and political. The rhetorical approach has been most evident in the introduction of the Global Compact and the UNGPs. The adoption of the UNGPs in 2011 has been treated as a basis for rejecting other approaches until these have been properly implemented. They are also claimed to be more ‘legitimate’ since they were adopted by consensus whereas a binding treaty will require a voting process. It is also asserted that they are more legitimate than a process led by states that have their own shortcomings in respecting human rights.

One key discursive battle concerns the scope of a potential treaty, with the EU pushing from the beginning to include ‘all business enterprises’. At first sight, this looks reasonable: many states and CSOs believe that the treaty provisions should also be applied to small and medium enterprises (SMEs). That said, SMEs are covered under national legislation, whereas there is a major legal gap in international law that legitimates and protects the impunity of TNCs. Because of strong legal protection of their ‘rights and privileges’ through Trade and Investment Agreements, their mobility, vast economic power and increasing political influence, TNCs continue to operate with impunity. The major asymmetry of power and structure between TNCs and SMEs requires a different approach. This concern has been frequently raised by Southern states that have no national flagship TNCs and whose economies are mainly led by SMEs that are subject to domestic laws and which – unlike ‘mobile’ TNCs – cannot escape accountability. For this reason, many interpret the EU's position as a tactic to derail the process.

At the procedural level, the most serious challenge has been to the position of the OEIGWG chair and the body's function as a state-led process. The EU in particular has also strongly argued for the chair to be occupied by an ‘expert’, similar to the UNGP process. The EU delegation has also tried other diversionary tactics, such as delaying sessions by threatening not to adopt the plan of work or complaining about the lack of adequate consultation in drafting the texts.

At the political level, there has been explicit pressure applied on developing countries. Calls to embassies and meetings have been reported informally, including threats of cuts in investments or aid. Similarly, in 2015 at the 5th Committee of the UNGA (which approves the UN budget each December), EU member states threatened to block the approval of the budget for the functioning of the OEIGWG. The rapid mobilisation and response of the G77 countries and the pressure of CSOs helped protect this essential budget allocation for 2016.

In the OEIGWG sessions, the European External Action Service (EEAS) – which represents the EU at the UNHRC – has repeatedly asserted a common EU position, ignoring several European Parliament (EP) Resolutions that have been far more supportive of a binding treaty. For example, the 2018 EP Resolution ‘warmly welcomes in this context the work initiated in the United Nations through the OEIGWG to create a binding UN instrument on transnational corporations and other business enterprises with respect to human rights, and considers this to be a necessary step forward in the promotion and protection of human rights’.¹⁸⁵ Members of the EP (MEPs) together with some MPs from the South set up the Global Interparliamentarian Network (GIN), now comprising over 300 members.¹⁸⁶ Its representatives have participated in all Sessions of the OEIGWG process and have co-organised side events.

Against the efforts of the corporations and their allied states, social movements and some Southern governments have mobilised actively to maintain momentum. CSOs submitted dozens of written proposals and opinions during all four sessions, and made many interventions from the floor linking specific situations with the need for a binding treaty and proposing specific changes to the official texts. They have also consistently engaged with representatives of supportive Southern countries and the OEIGWG chair in advocacy meetings and Side Events. Recently, a group of interested countries and organisations from the Global Campaign have begun a series of informal ‘policy dialogues’ to explore common positions and strategies towards achieving a meaningful treaty.

The process has been continuously energised by resistance struggles on the ground – whether against oil and gas extraction and contamination, land and ocean grabs, mega dam collapses, poisoning of water and land, forest fires, or the fall-out from the textile and pharma industries. Each experience showed the urgent need for an international instrument to protect the rights of affected peoples and direct victims. Meanwhile, the denial of justice in longstanding cases such as Union Carbide, Chevron, and also in the more recent cases of Rana Plaza, Lonmin and Vale, demonstrate that the existing system is not working.

Gaining traction in each OEIGWG Session

The result of this mobilisation has been that the process has moved forward despite countless attempts to derail it – not simply holding its ground, but gaining traction with 90–100 states participating in the 2018 and 2019 Sessions. By the third Session (2017) the initial Elements of a Treaty began to be discussed. A Zero Draft led the talks at the fourth Session (2018) and a Revised First Draft was thoroughly discussed during the fifth Session (14–18 October 2019). The programme of work covered all 22 articles – in a constructive dynamic that heard many substantive contributions from more than 30 states, as well as parliamentarians, experts, affected communities and civil society.

The 22 articles of the Revised First Draft include a basic set of framework provisions – several with potential to facilitate access to justice. The text proposes more effective mechanisms for mutual legal assistance among states as well as international cooperation, and a proposal that could open up new possibilities

The debate is no longer about whether there is a need for such a Treaty.

of 'extra territorial obligations' – that is, states' obligations in relation to crimes committed by their TNCs in another state's jurisdiction. There is also reference to the 'legal liability' of enterprises although the proposal is unclear about whether this refers to administrative or civil liability. In terms of prevention, the text mainly relies on the idea of 'due diligence' – in vogue since the adoption of the UNGPs.

France has recently passed a 'duty-of-vigilance' law, although its impact has yet to be seen. In October 2019, an important test case was launched against Total, the formerly French oil company, for violating the rights of communities in its operations in Uganda.¹⁸⁷

Likewise, the Revised First Draft's provisions on the rights of victims could be the basis for further development, especially if it is extended to include a broader definition of 'affected communities or people', as the Movement of People Affected by Dams (MAB) in Brazil proposed from the outset.

A Conference of State Parties and a Treaty Body have been proposed to follow the adoption, implementation and improvement of the Treaty. These are standard UN procedures and are often useful, but to date have been used mainly to denounce states and not to enforce Treaty provisions in relation to TNCs.

Nevertheless, the conclusion of the 5th Session means that the debate is no longer about whether there is a need for such a Treaty and legally binding instrument that addresses TNCs' evident impunity and decisively opens the door to justice for affected communities. For the first time, states and all other actors have to position themselves, study and explain the basis of their proposals based on content and address some hard questions. How do we define the obligations of states and of TNCs? What mechanisms and instruments are needed to enforce the Treaty? How do we define TNCs and the implications for 'all other businesses'? What role should the state play in implementing the Treaty? And what are the rights of victims and affected communities to obtain justice?

The Achilles' heel in the Draft Treaty

From the perspective of affected communities and social movements, the main controversial articles appear in the first three sections of the Revised Draft. The first relates to the definition of TNCs and their supply chains and related 'contractual relationships'; the second is the extension of the scope of the treaty to 'all business enterprises'; and the third is the reiteration of the state-centred approach to responding to human rights violations – each of could be an Achilles' heel in this 2019 draft.

The state-centred approach implicitly negates the idea that TNCs have direct obligations and responsibilities related to human rights at international level. This has been a central demand of the Global Campaign¹⁸⁸ as it would mean that an affected community or person could have recourse to international jurisdiction regarding violations derived from the operation of TNCs. In this scenario, a dedicated International Court could, for instance, make a judgement against Chevron in the case of the Ecuadorian Indigenous People (UDAPT) and the contamination of their region by the oil company's operations.

This proposal is still strongly contested by TNCs and some states and, even if many see it as a necessary evolution of human rights in a globalised world, others feel it threatens well established human rights doctrine. The latter defines the state as the only entity with obligations in the current international human rights framework – which is why many argue that only states – the duty bearers – 'violate' human rights.

The international human rights regime may not yet be ready for the major changes demanded by a meaningful Binding Treaty on TNCs and so may explore other alternatives –for instance, stronger extra-territorial obligations, or inter-jurisdictional cooperation. Although these are important measures that would shift the status quo, they would not respond to the positions advanced by affected communities.

The current text does not include other substantive elements that have also been advocated by the Global Campaign ¹⁸⁹, and in official submissions: among them the clear supremacy of human rights over trade and investment agreements; the centrality of the rights of affected communities – including clear mechanisms for consultation, risk assessments and impacts, as well as for research and investigation of situations that could potentially involve violations before they happen; a stronger gender perspective; and extended penal liability of the company and its subsidiaries, including those responsible for decision-making and overall corporate management and policy.

Navigating the challenges ahead

In almost 50 years of international attempts to end TNC violations of human rights and environmental standards, this is the first time that affected peoples and civil society constituencies from six continents are actively engaged and in significant numbers. This participation has been constant and growing since 2013, when the first joint statement by the Global Campaign was released. This marks a significant step forward from earlier important processes in the area of binding regulations on TNCs.

Not even the UNHRC Peasants’ Rights Declaration process and debates generated the same traction and participation as the OEIGWG has achieved in the past five years. Committed states are still too few, while powerful forces are working to derail and block the process. But five years on, as the negotiations have resisted being undermined, ever more states, parliamentarians, experts, scholars – and of course, leaders and activists of affected communities, social movements and civil society – are engaging in the process. Recently, even Professor Ruggie recognised this at a Finnish government conference where he criticised the EU for not taking a supportive position on the binding treaty, which he said ‘is inevitable and desirable’.

The process to establish a Binding Treaty on TNCs has gained momentum against all the odds and already changed minds – busting the myth that TNCs are ‘untouchable’ and helping to dismantle corporate power in the current phase of capitalism. This is already a significant victory, moving into terrain beyond the self-regulation and UNGPs previously proposed by Ruggie. It moves us towards the central demand of affected communities, one that rejects corporate rule. Whatever the eventual outcome, this joint effort of states and affected communities has articulated a key issue, the answer to which will define the coming decades for humanity and the planet. We are at the edge of a new epoch where new and radical transformation will be necessary to address the intensifying contradictions within the economy, politics and our relations with nature. This Binding Treaty initiative is integral to a needed transformation and part of those ongoing struggles. The question is whether it will finally generate the convergence of forces and political will to address it.

The process to establish a Binding Treaty on TNCs has already busted the myth that TNCs are ‘untouchable’



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Gonzalo Berrón, TNI Associate Fellow, has played a leading role in coordinating Latin American movements resisting corporate “Free Trade Agreements.” He has been an integral part of ongoing discussions with civil society and progressive governments on building alternative just regional trade and financial architecture in Latin America.

STATE OF POWER 2020



The end of the corporation?

Marjorie Kelly



Imagine your town is crisscrossed by giant trains that travel insanely fast, because the train owners pay their drivers based on speed. The town establishes speed limits, installs flashing lights, brings out police to keep pedestrians off the tracks. Inevitably, the trains continue to crash into people and cars, causing injury and death. How does the town council respond? By repairing crossings and fences.

This is how society now attempts to regulate corporate behaviour. We wrap regulations around massive corporations, leaving their profit-maximising mandate in the driving seat. When corporations crash through intricately wrought regulations – think mega-banks in 2008 nearly crashing the entire global economy – our response is to repair the regulatory fences.

It's time to make the profit-maximising, shareholder-controlled corporation obsolete. In the perilous moment we face, with the crises of the climate emergency and spiralling inequality, the time is up on corporations acting as though serving financial shareholders is their highest duty.

That much has been conceded, at least rhetorically, even by CEOs of the largest US corporations, in an August 2019 Business Roundtable statement. The membership group indicated it realised the need to serve a broader set of stakeholders as the new corporate purpose. Similarly, at the January 2019 gathering of the financial elite at the World Economic Forum in Davos, a key topic was loss of faith with the economic status quo. Axios called it 'a reckoning for capitalism'.¹⁹⁰

Missing from these conversations, however, is the more threatening truth that what must shift is *ownership*. As long as the structural forces of current corporate ownership remain in place – where only shareholders vote for the board, where shareholders are predominantly the wealthy, where companies define success as a rising share price and pay executives handsomely for achieving it – there is no amount of rhetoric or external regulation that can turn companies away from their existing mandate: to create more wealth for the wealthy, with all possible speed.

What must change is the structural design and ownership of the corporation itself. We need to envisage and create an entirely new concept of the company – a just firm – designed from the inside out for a new mandate: to serve broad wellbeing and the public good. The just firm is the only kind that should ultimately be permitted to exist. The time is coming when society must end the corporation as we know it.

What must change is the structural design and ownership of the corporation itself.

This task may seem today unimaginable. The top ten US corporations alone—including Apple, Exxon Mobil, General Motors and Walmart – have revenues of \$2.18 trillion and employ 3.6 million people. By comparison, the US government's total revenue in 2015 was just \$3.1 trillion and total employment (excluding uniformed military) 2.7 million.¹⁹¹ In other words, ten corporations combined are two-thirds as large as the world's most powerful government. Globally, in 2011 the Swiss Federal Institute of Technology in Zurich found that just 737 massive corporations control 80 per cent of business revenues.

These corporations are, in turn, owned by the few – with the wealthiest 10 per cent in the US holding 84 per cent of shares in publicly traded companies. The elite's concentrated ownership of assets keeps corporations in their current orbit, locking the broader system into the extractive practices that lead to increasing inequality and ecological destruction.

Lights out, lights on

By contrast, democratic and just forms of company ownership are by their nature more likely to provide broad public benefits. Consider, for example, the recent debacle with Pacific Gas & Electric in California (PG&E), the investor-owned company whose poorly maintained and outdated equipment ignited wildfires in 2017 and 2018, including the catastrophic Camp Fire that killed 85 people and destroyed the town of Paradise. In the 2019 fire season, PG&E responded by shutting down power for weeks in fire-prone areas, leaving millions literally in the dark.¹⁹²

The lights stayed on, however, in regions served by the community-owned Sacramento Municipal Utility District: the inelegantly nicknamed SMUD. This utility – broadly in public ownership, with a mission to serve its customers, not extract maximum profits from them – is widely acknowledged to offer a cheaper, more reliable service than its corporate neighbour.¹⁹³ Indeed, in recent years several neighbouring jurisdictions served by PG&E have attempted to join SMUD (moves often blocked by PG&E). Some observers say it's unfair to contrast SMUD and PG&E because the latter serves areas more prone to fire. Yet, SMUD also serves some fire-prone regions, where it has invested in transmission towers designed to withstand high winds, and these haven't experienced problems.¹⁹⁴ Moreover, according to the *Sacramento Bee*, many other smaller publicly and cooperatively owned utilities serving areas at high risk of fire maintained reliable service even as PG&E areas went dark.

The difference is ownership design. It is financially focused ownership and control that is behind PG&E's negligent practices. PG&E went for a decade without inspecting the power line – close to 100 years old, running through a heavily wooded area – which broke and sparked the Camp Fire.¹⁹⁵ Why would such a massive firm, with 2018 revenues of \$17 billion, neglect basic line maintenance? Because it was focused on something else. It was following the prime mandate: maximise share price. Instead of spending to keep communities safe, PG&E served shareholders by spending billions to buy back its own stock over a decade, to artificially inflate share price.¹⁹⁶ That share price eventually evaporated, plummeting between 2017 and 2019 from a lofty \$70 to below \$10.¹⁹⁷ What PG&E spent those billions on turned out to be thin air.

The connection between ownership design and corporate behaviour is often lost on the public. But it's not lost on activists and progressive policymakers in Northern California. The City of San Francisco, California Governor Gavin Newsom, and a coalition of city and county officials, have been jostling to take over PG&E as the company is in bankruptcy. The governor has threatened a public takeover, while 110 city and county officials jointly proposed turning the utility into a customer-owned cooperative. Representing that group, the Mayor of San José, Sam Liccardo, said the group's framework would create a 'viable customer-owned PG&E that will be transparent, accountable, and equitable'.¹⁹⁸ Their aim, in short, is to create a just firm.

The difference is ownership design. PG&E was focused on maximising share price and SMUD has a primary mission to serve its customers.

A new paradigm

If our civilisation is to live safely within planetary boundaries, with an economy that allows us all to flourish, more democratic economic decision-making processes will be needed. At the epicentre of this shift are new kinds of company ownership. Ownership is the original system condition of an economy.

Every economy is defined by its dominant form of ownership – in the agrarian age, ownership of land by the monarchy and landed aristocracy; in the industrial age, ownership of railways and factories by the robber barons; in communism, ownership by the state; and in today's financialised economy, asset ownership by the financial elite. If we are to move successfully from a disaster-prone economic landscape to one of potentially broad wellbeing, creating a new dominant enterprise paradigm will be among the core shifts needed. Without changing how corporations are owned – by whom, and towards what ends – other forms of change may be impossible, and are unlikely to succeed.

A just firm can be defined simply. It is a firm where the public good is in the driving seat, where ownership has evolved to become broadly held, and where companies have matured beyond the primitive norm of maximum financial gain for the few to embody a new norm of service to the many.

Today's dominant company ownership design – the investor-controlled, profit-maximising firm – represents a monoculture of design. Its flagship form is the publicly traded company. While there are fewer of these iconic firms – the number of US companies listed on stock exchanges dropped by half between 1996 and 2012¹⁹⁹ – the profit-maximising principle tends to remain the same with large private firms like Koch Industries and Cargill, or with companies like private equity firms. Public or private, the capital-controlled firm occupies the commanding heights of the capitalist economy.

Control by capital is what pulls companies away from the living mission for which they exist, as in the PG&E debacle. The purpose of economies is to meet human needs. When companies instead exist simply to spin off gains for capital, society is in peril. As John Maynard Keynes observed, 'Speculators may do no harm as bubbles on a steady stream of enterprise. But the position is serious when enterprise becomes a bubble on a whirlpool of speculation'. The entire society can become, in Keynes' terms, 'a by-product of the activities of a casino'. This is where we find ourselves today, in an economy of the 1 per cent, by the 1 per cent, for the 1 per cent.

An economy of, by, and for the people requires a new archetype of enterprise. In contrast to the monoculture of the capital-controlled firm, a new archetype can be glimpsed in a rich diversity of designs – including cooperatives, employee-owned companies, community banks, credit unions, social enterprises, state-owned banks, community- and state-owned companies, and other models. In these, ownership and control are not in the hands of the casino, but of people, with a natural interest in healthy communities and ecosystems.

Such enterprises are harbingers of an emerging archetypal model, which can become the North Star as we approach the day we can tackle the larger challenge of redesigning large corporations. Today's diverse models show that the architecture of ownership defines business purpose and largely determines whether firms operate in ways conducive to the common good, or heedless of it.

As I wrote in *Owning Our Future*, there is a simple pattern language that describes different elements of ownership design, with five core elements: purpose, membership, internal governance, capital, and networks. Externally, over and around this is the firm's relationship to government. Internally, enterprise design empowers ethical leadership, or extractive leadership intent on amassing untold individual wealth.

Capital ownership features absentee ownership and rapid speculative trading, geared to maximum wealth extraction. The networks of this archetype are stock markets and global financial trading, disconnected from the impacts on workers, communities, and the biosphere. The stance towards government is attempted dominance through lobbying, and escape from regulation however possible.

The emerging generation of enterprises are designed to create the conditions for life to flourish. They feature membership in the living hands of employees, communities, and civic leaders connected to the real economy of jobs, homes, and families. Such companies are led by a social and ecological mission, embodied in internal governance where stakeholder voices are heeded. These companies still require capital, but as their partner, not their master. Ethical networks support these companies, like the worldwide networks of cooperatives and impact investors. Most of these companies are profit making, but they're not profit maximising. They seek to balance profit with mission. In relationship to government, they do not infringe on the right of natural persons to govern themselves, nor infringe on other universal human rights.²⁰⁰

The many variants of an emerging archetype

What this archetype looks like in the real world can be seen in existing global models. We see new company purpose, for example, in the *B Corporation*, where firms embrace a legal commitment to the public good. Across 60 nations, there are 2,655 B Corporations, certified by the non-profit B Lab. There are 5,400 similar *benefit corporations* embracing a public purpose through incorporation statutes across 34 US states, including firms like Kickstarter, Patagonia, and King Arthur Flour.²⁰¹ While the benefit/B corporation model has its flaws – it focuses on purpose but not ownership or governance, and also lacks robust enforcement mechanisms – it represents a significant step in cultural recognition that it is possible to run successful companies with public benefit as the core aim. Some criticize B Corporations as wholly private, rather than governmental, but this is generally how powerful new social directions emerge, as with organic standards and LEED (Leadership in Energy and Environmental Design) green building standards, both of which began as private sector innovation before seeing policy uptake.

Also embodying clear public purpose are *social enterprises*, like those created to hire the hard-to-employ. Tech Dump in Minneapolis, for example, trains ex-prisoners in electronics recycling. Social enterprises, often owned by non-profits, use business methods to tackle social problems. The Social Enterprise Alliance has more than 900 members in 42 US states.²⁰² Social entrepreneurship is taught at business schools including Oxford, Harvard, and Yale.

The *social economy* – a related but broader concept, including cooperatives – is substantial in Canada, particularly Quebec, which has more than 7,000 collective businesses with annual revenue of more than \$40 billion.²⁰³

The power of internal governance, combined with broad-based ownership, is at work at the John Lewis Partnership (JLP), which, despite recent financial difficulties related to economic conditions in the retail sector, remains the UK's largest department store chain with sales of over £11.7bn and a workforce of 81,500. This firm is wholly owned by its employees or, as JLP calls them, partners. The firm's stated purpose is to serve the happiness of its partners, who exercise voice through a democratic governance structure of elected councils, committees and forums.²⁰⁴

We might note the contrast here with capital-controlled firms, where only shareholders – capital owners – are considered members. Employees in traditional firms are not members. They are disfranchised and dispossessed, with no claim on profits they help create, and no voice in governance, gaining power only through union membership. But in an employee-owned firm like the JLP, employees are not conceptually outside the firm. They *are* the firm.

Employee ownership is today advancing in the US, the UK and elsewhere. Were it to grow substantially, workers would begin to occupy the commanding heights of the economy.

The oldest and largest body of alternative firms is the *cooperative sector* – businesses owned by the people they serve – which includes depositor-owned credit unions; agricultural cooperatives like Sunkist, Ocean Spray, and Land O’ Lakes; and consumer cooperatives like REI. Worldwide, cooperatives have more than 1 billion members, and combined revenues of \$3 trillion.²⁰⁵ The largest worker cooperative organization is the Mondragon Corporation of Spain, a worker-owned federation including 98 worker-owned cooperatives, 80,000 workers and €12 billion in revenue. It sells products worldwide and has its own bank, university, business incubators, and social welfare agency.²⁰⁶

In the farmer-owned cooperative Organic Valley – a Wisconsin firm with a revenue of \$1 billion – the owner-members are its 1,650 suppliers, the farmers who produce the organic milk, cheese, and eggs the company distributes. Organic Valley combines ownership in human hands with a living purpose: to save the family farm. Because this firm sells only organic products, restoring and protecting the ecosystem is also integral. As the company helps new farmer-members through the rigorous process of going organic, company growth translates into expanding restoration of watersheds and soils.

The vital model of *public ownership* has begun to re-emerge globally as a viable strategy after the 2008 financial crisis. Beginning in Latin America, there has been a global movement to reclaim community ownership of water systems after the disastrous failure of many investor-owned water ventures. This movement has reclaimed public ownership of water in at least 235 cases in 37 countries, benefitting 100 million people.²⁰⁷ Our future as a species depends on our ability to restore our relationship to water, land, and other generative resources of nature. The architecture of ownership is key.

Equally vital to our future is who owns the banking system, which is a kind of utility providing a public good, hence often appropriate for public ownership. *State-owned banks* play significant roles in China, Germany, India and several Latin American countries. The European Union (EU) has more than 200 public and semi-public banks, with another 80-plus funding agencies, comprising 20 per cent of all bank assets. Germany’s 413 publicly owned municipal savings banks, Sparkassen, hold more than €1.1 trillion in assets. As *The Economist* noted, these banks came through the global financial crisis ‘with barely a scratch’.²⁰⁸ Their ownership design kept them in service to the public, free from the demands of speculators that pulled other banks into misbehaviour that nearly sank the global economy.

It adds up to a force bigger than almost anyone knows. Our society is at a point of breakdown, yet also in a time of deep innovation and redesign. These alternative ownership models have much to teach us about what might come next – how their design lessons can be applied to the larger challenge of the modern corporation.

Beyond regulation to institutional design

With the planet at the brink, millions living in economic anxiety, and the radical right everywhere on the rise, it’s apparent that old ways of regulating capitalism are no longer sufficient. The tools of the past are a start, but are inadequate to confront the problems of corporations today.

Take anti-trust. It’s a tool that can, potentially, address the critical issue of size (although in recent decades, anti-trust strategies have been defanged by corporate capture and lobbying), yet even at it

best, anti-trust doesn't address the key issue of purpose. Can and should companies be permitted to pursue profit maximisation for shareholders as their prime purpose? This is a threatening aspect of their activity that breaking them apart or preventing mergers and acquisitions (M&A) fails to address. Nor do other approaches, like minimum wage and maximum hours regulations, touch the core purpose, which leaves corporations to simply find ways around those rules – sending jobs overseas, for example, or turning full-time jobs into contract labour.

Many of the approaches used in regulation today – including minimum wages, unions, old-style securities regulation, and social safety nets – harken back to the 1930s. Of course, we still need these, and they must be strengthened. But in contemporary turbo-charged, globalised, financialised capitalism, deploying only these tools is like erecting a speed limit sign in front of a hurtling train. The common good must become part of the DNA of economic institutions and practices. If we can achieve such a transformation, it will mean community and workers' economic wellbeing will no longer be dependent on the legislative or presidential whims of a particular hour, but will be supported by an enduring shift in the underlying architecture of economic power – the design of ownership and control.

Systems science tells us that human social systems are not structured simply by rules and regulations but are self-organised around values, around what we instinctively care about. The core value of the current system can be distilled to the problem of *capital bias*: a favouritism towards finance and wealth-holders woven invisibly throughout the system, in values, culture, and institutions. Capital interests are often advanced by policy – as with lower taxes on capital gains than on labour income, or bailouts for big banks but not for ordinary homeowners. Yet capital bias lies more deeply in basic economic architectures and norms, in institutions and capital ownership. The central problem is profit maximisation through financial extraction. This is what society has long attempted to dance around, through technical regulatory fixes.

Changing this core bias means going to the central question at the heart of political economy – the question of the ownership and control over productive capital. We need to move over time to a new kind of efficient, and politically and ecologically sustainable economic system – a moral and democratic political economy, designed for the wellbeing of us all. Central to this evolution is bringing to an end the profit-maximising, investor-controlled corporation.

A failure of imagination

Even on its own terms, the contemporary capital-centric economy is beginning to show itself to be unsustainable. It's a system programmed for its own implosion. The International Monetary Fund (IMF) has warned of 'storm clouds' gathering for the next financial crisis; billionaire investor Paul Tudor Jones has highlighted a 'global debt bubble'; and fund manager Jim Rogers has predicted a financial crash that will be the biggest in his 76 years. The financial community is talking of the 'everything bubble' – the unsustainable runup in the value of stocks, real estate, and other assets – with the *New York Times* asking, 'what might prove the pinprick?'²⁰⁹ After the last crash, the *Wall Street Journal* declared, 'the Wall Street we have known for decades has ceased to exist'. Next time, might this actually prove true?

The common good must become part of the DNA of economic institutions and practices.

A decade on, what's different is that young people are rising up in ways not seen since the 1960s, and radical policy ideas are on the table as never before. We may be approaching tipping points where major historical change heaves into view. It's an apt time to be mindful of two key tools progressives possess: legitimacy and imagination. Once a system loses legitimacy, no matter how strong it seems, it will ultimately fall. Think of apartheid in South Africa. Think Harvey Weinstein and other powerful men versus the #MeToo movement. Think of the monarchies that dominated the globe for millennia, before the mischief of democracy.

The capitalist system has already lost vast legitimacy. This process can deepen, as we help others to see how and why the system is failing the vast majority. A key step is helping people understand a truth that cultural historian Edward Said articulated, that the fundamental tool of empire is turning natives into outsiders in their own land. What is lost, he continued, 'is recoverable at first only through the imagination'.²¹⁰

What often holds a dying political-economic system in place is a failure of this kind of imagination. But today's leading thinkers and activists are piercing the seeming invincibility with audacious proposals and approaches. For example, the UK government still holds control of Royal Bank of Scotland (RBS), which taxpayers bailed out in 2008 to the tune of £45 billion. The New Economics Foundation (NEF) in the UK has proposed bringing RBS entirely into public ownership, breaking it into a network of 130 local banks. In the US, my colleague at The Democracy Collaborative, Thomas Hanna, has similarly proposed that in the next financial crisis, policy-makers consider converting failed banks to permanent public ownership. This is a way to de-financialise our economy, break up large concentrations of capital, and provide necessary funding for priorities such as green energy.²¹¹ If such ideas strike some as outlandish today, they can become eminently practical in a crisis.

Sector strategies

The Green New Deal – which calls for a ten-year mobilisation to meet 100 per cent of power needs through clean, renewable, and zero-emission energy sources – is another avenue for moving next-generation enterprise models forward. The Sunset Park Solar project in New York City is the kind of initiative a Green New Deal could finance across the US. Uprose, a Latinx organisation, partnered with the state agency NYC Economic Development Corporation and others to install community-owned solar power on the Brooklyn Army Terminal. It will provide 200 low-income residents with electricity that is less expensive and more resilient in the face of climate-related grid disruption.

Community-run energy projects like this could be advanced by a new federal agency proposed by my colleagues Gar Alperovitz and Johanna Bozuwa. They have outlined a proposal for the creation of a Community Ownership of Power Administration (COPA), akin to President Franklin Roosevelt's Rural Electrification Administration, which brought electric power to the 90 per cent of rural areas that previously lacked it. A new COPA at the national level could deploy financing and capacity-building to build community-run energy utilities.²¹²

In both the UK and the US, the commitment to a community-controlled and just renewable energy system is gaining momentum. Recent years have seen a surge of utility takeover campaigns – including the Switched On London campaign, and the #NationalizeGrid campaign against National Grid, a UK for-profit company operating in both New England and in the UK. The UK Labour Party took this vision further with its proposed full takeover of the Big Six energy utilities. Though Labour failed disastrously

in 2019 – in large part because of Brexit – the problem was not the unpopularity of other key economic policies like public ownership. For example, in a 2017 poll, the UK free-market think tank Legatum Institute found 83 per cent supported public ownership of water, and 77 per cent supported public ownership of gas and electricity.²¹³

Another sector where next-generation enterprises are needed is health care – particularly the pharmaceutical sector, where skyrocketing prices, recurring shortages, post-market safety issues, and increasing financialisation are all natural outcomes of firms designed for maximising profit. My colleague Dana Brown has proposed developing a public pharmaceutical sector for the US, as a systemic approach that supersedes the need for piecemeal reforms that could later be rescinded. Such a design would include a national public research and development (R&D) institute developing essential medicines; state and local public manufacturers; and regional public wholesale distributors. Profits would be returned to public balance sheets, and could be invested upstream in social determinants of health, such as local economic development.²¹⁴

The idea of a ‘public option’ in the pharmaceutical industry has been endorsed by Senators Elizabeth Warren and Bernie Sanders. And in the UK, the Labour Party ‘Medicines for the Many’ proposal called for overriding patents when necessary for the public health, and for publicly owned drug manufacturing at scale. (Admittedly, this is not a policy that will fly under Boris Johnson.)

Advancing model by model

In addition to sector strategies, next-generation enterprises can be advanced model by model – as with employee ownership, the one most ready for scale. In Italy, for example, workers whose workplaces are being closed have a first right of refusal to join co-workers and purchase the firm, under the country’s ‘Marcora’ legislation. A similar right has been proposed in the UK by the Labour Party, and in the US by Bernie Sanders. As the baby-boom generation reaches retirement age, 2.34 million businesses owned by boomer entrepreneurs will come on the U.S. market in the next ten years – an event being called the ‘silver tsunami’. If more of these firms can be sold to workers, it could bend the curve of history, helping to create a major democratic ownership revolution.

New kinds of models that don’t yet exist will also be needed – particularly in the technology sector. There is a movement for worker-owned platform cooperatives, as alternatives to billionaire-owned high-tech firms. A former Microsoft executive has suggested a model of ‘end user equity’, in which users get equity in firms like Facebook, since user data adds value. One start-up called Driver’s Seat supports ride-hail drivers in aggregating and capturing value from their data, rather than seeing that value extracted by firms like Uber.

A full-on approach to creating a new model of accountable enterprise has been proposed in Elizabeth Warren’s Accountable Capitalism Act, which would require US firms with revenue of more than \$1 billion to obtain new federal charters (corporations are today chartered at the state level), with broader fiduciary duties, creating a new mandate to serve not just shareholders but also employees and the community; the legislation also proposes 40 per cent of board seats for employees.

In these many kinds of approaches, we can see how a new paradigm of the just firm could be advanced model by model, sector by sector, crisis by crisis. By helping firms be sold to employees, rather than absorbed by competitors, we can begin to stop the conveyor belt that feeds massive corporate size.

Similarly, if companies are broken up by anti-trust, the new firms could be mandated to become worker owned. We can act opportunistically, as with PG&E or bank bailouts, taking advantage of bankruptcies and crises to move firms into permanent public or community ownership. Sectors where the moral case for public ownership is strong – like health care or water – can be targeted for mobilisation. Banks can be reconceptualised powerfully as public utilities, as in the already growing movement in the US and UK for more city-owned, state-owned, and cooperative banks. Ultimately, the day will come when all large corporations must be subject to redesign. We can lay the groundwork for that day through approaches that advance cultural acceptance – such as amplifying the voices of progressive business leaders at successful firms that have broad-based, mission-led ownership, making the business case for a new kind of moral and just firm.

Academic innovation

In all of this, social and environmental movements have leading roles to play. Also vital are theorists and legal scholars, who are needed to advance academic theories of the just firm. The necessary kind of legal frameworks are suggested by an observation Franklin Roosevelt made – that private enterprise ‘has become a kind of private government, a power unto itself.’²¹⁵ Massive corporations are not in any real sense private, like a household or a family, nor are they democratic governments, like cities, states, and nations. They are a third entity, a governing power that has never been democratised, and still functions with the archaic, aristocratic worldview where the rights of wealth trump other human rights.

The word ‘corporation’ appears nowhere in the US Constitution. Corporations did not emerge in anything like today’s form until the industrial era. What concerned the founding fathers was protecting individuals against abuses of the king. As Hofstra University law professor Daniel Greenwood observed, that mindset led to a great divide in the law between public and private: limitations on government on one side, protection of individual liberties on the other. When corporations later arose, they placed themselves on the private side of this divide, posing as private persons, possessing liberties that require protection from government over-reaching its proper scope.²¹⁶ When we recognise that massive corporations are private governments, it’s clear that the people and our elected bodies need protection from the over-reach of these anti-democratic entities, which must appropriately be reorganised in the public interest.

Reconceptualising the firm, redesigning it, displacing the corporation as we now know it – this is a task as massive as the elimination of carbon emissions. Both are equally necessary. The difference is that while the climate challenge is conceptually far more advanced and widely embraced as essential, the task of redesigning the corporation is barely recognised and remains vastly under-theorised.

If such a task seems impossible, we might remind ourselves that fundamental transformation is historically as common as grass. There is only one future scenario that’s utterly impossible – continuation of the status quo.

The work begins simply with seeing – recognising that ownership design matters, that it lies at the root of today’s crises. We don’t yet possess a shared clarity that deepening problems are not accidental or the result of policy but are the predictable outcomes of the basic organisation of the extractive economy. Still less do progressives share a positive alternative economic vision of what might replace capitalism. Instead, our minds fixate on dystopia. Indeed, it is true that lights out in California is the smallest taste of what is to come, if we go through the coming devastation with giant corporations in control, intent solely on short-term earnings. It’s time to begin together imagining a next generation of enterprise design.



Marjorie Kelly is executive vice president and senior fellow at The Democracy Collaborative. She is co-author of *The Making of a Democratic Economy*, and author of *Owning Our Future* and *The Divine Right of Capital*. Kelly was cofounder of the Tellus Institute project Corporation 20/20 which brought together 100 leaders to explore corporate ownership design for the public good. <https://www.corporation2020.org/>

STATE OF POWER 2020



Rethinking the corporation

An artist, an activist and a former international banker reflect on capitalism's preeminent institution





Nomi Prins worked in the upper echelons of the financial world as a managing director at Goldman Sachs and a senior managing director at Bear Stearns as well as a strategist at Lehman Brothers and an analyst at the Chase Manhattan Bank. During her time on Wall Street, she grew increasingly aware of and discouraged by the unethical practices that permeated the banking industry. In 2002, she left and has since become a journalist and writer and leading authority on financial and monetary systems



Tchenna Maso is a community lawyer and a member of the Movement of People Affected by Dams (MAB), a grassroots movement made up of affected communities leading struggles against mining operations and giant hydroelectric projects. She is also active in the farmers movement, La Via Campesina, that fights for peasant rights and the rights of landless people in Brazil.



Barnaby Francis, AKA Bill Posters, is an artist and activist whose work interrogates corporations and power relations that exist in public space and online. He has been involved in many subvertising projects, including one that replaced 600 corporate green-washing billboards in Paris in 2015 before the UN climate-summit with truth-telling posters. In June 2019, one of his and Daniel Howe's AI-synthesised 'deepfake' videos of Zuckerberg appearing to announce a new dystopian programme, Spectre, became a viral sensation, drawing attention to Facebook's power and its manipulation and commercialisation of people's data.

From your different personal experiences, what have you learnt about the nature of the corporation?

Nomi Prins: The general theme is that all major multinational companies are driven by the bottom line. This means maximising profits and minimising costs. This might seem obvious but it permeates everything they do, the taxes they avoid, risks they take, and what they do in communities. I worked in four major international banks, and from the inside, upper management simply doesn't care about how their activities impact the outside world.

For example, working at Bear Stearns in London in the 1990s, I was involved in a product that involved a major expansion of debt in emerging and corporate markets, looking at new ways to repackage and sell off or trade that debt, so that the bank could profit multiple times from a single bond. At the same time, activists with the Jubilee 2000 initiative, were campaigning on the streets, pointing to the dangers of these debts for needed investments in health, education and so on and looking to reduce the debt burden. But none of that mattered on a day to day basis within the banks.

Corporations are also very much driven by short-term profit gain and how to translate favourable quarterly and annual results into higher share prices. In the banking sector, and in most corporations, the higher up people are in the firm, the more likely they will receive part of their compensation in the form of shares, stocks, or options on an annual basis, so everyone cares most of all about what was made that year at the firm and how it impacted share prices.

Bill Posters: I think that the corporation is simply now a mutation of a kind of nation-state. A transnational hybrid nation-state, with no perceived borders yet similar levels of power and control. The only borders that contain the modern corporations are the frontiers that they are seeking to exploit. This logic is very much at the core of neo-colonial capital. It always needs new territories and materials to assimilate or homogenise via the never-ending process of capital absorption

Of course this notion of frontiers has heavy colonial and neocolonial signifiers, and has been extended by a neoliberal ideology, the financialisation of all things and systemic deregulation that removed many of the chains from corporations. What we are seeing in digital spaces are extensions and mutations of neoliberal ideology. There is a great quote in Shoshana Zuboff's book [The Age of Surveillance Capitalism] where the Google CEO talks of Google's business model as operating in new territories where the corporation can expand with unrestricted forms of 'permissionless innovation'.

This quote encapsulates so much about the logic of the modern corporation; corporations are not even asking for anything that states are in control of any more. They are simply taking. It's why Zuckerberg feels he doesn't even need to turn up to the UK or European parliaments, because in his world power doesn't operate there anymore. It's why Google has been shielded from serious, organised scrutiny at state level. The dependency of all users on their systems and products include not just billions of citizens but most nation state governments, their military-industrial, financial and surveillance infrastructures too.

In the past, there were more equal capacities of states and corporations; they were symbiotic in their relationship but power was more traditionally distributed by the nation state. We now have trillion dollar corporations with 90% market dominance, operating across physical and digital spaces that encompass the globe. So what we are seeing now are truly unprecedented levels of consolidations of corporate power.

Tchenna Maso: The biggest challenge as I have worked to challenge Vale and BHP is that there is no information over their financing or operations and no state control. So Vale is supposedly a Brazilian firm, but no-one outside the firm knows who all the investors are, how the corporation is structured through all their intermediaries, or all the work they are involved in. It's not just communities who don't know, government don't know, not even the investors know what they are invested in. Corporations have become financialised and increasingly impermeable to pressure. That is why they are so difficult to challenge.

Vale is emblematic. It was a state firm, sold in 1994 to international capital. It used to be known for having a good reputation and good pay for workers. It was sold cheaply to banks such as Bradesco and then increasingly sold onto international investors. By the early 2000s, it was completely financialised, so we don't even know their directors let alone how to contact them. It is predominantly owned by about 400 investors including pension funds in New York stock exchange.

As it became more financialised, it moved into new mining areas, outsourced lots of work to subsidiaries and made working conditions increasingly precarious. But it is a corporation without a clear public face.

What we are seeing now are truly unprecedented levels of consolidations of corporate power.

Why do corporations have so much power?

Nomi: They have money and position - and that money buys them access to people in power so they can always have a seat at the table with senators, presidents, foreign ministers from around the world and so forth. For many decades, that money-power, or corporate-political relationship has been the very fabric of industry and policy. Corporate and political leaders don't just meet formally, but also informally, living in the same neighbourhoods such as the Hampton's [near New York], going on holiday in the same places, visiting the same clubs, having the same circle of friends.

Money and power intersect at the top of society's food chain with the relationships between CEOs and political leaders, but also at lower levels, such as where lobbyists for example are constantly meeting with political aides, writing the policies - tax, regulatory, trade etc. - that bolster their power.

One good example is Jamie Dimon, now the current CEO of JPMorgan Chase. He has remained a leading banker through the past three political party changes at the top of US politics - from President George W. Bush to Barack Obama to Donald Trump - and has had relationships with all of them.

His bank was one of the long list of corporations that Trump noted during the signing ceremony of Phase One of the US-China trade deal in January 2020. JPMorgan Chase is also the firm managing Obama's personal financial asset management funds. Dimon may or may not differ ideologically to Trump, but his ultimate goal is to reduce scrutiny and regulation in order to keep profits and share prices high, so he will maintain relationships with anyone in power.

Tchenna: The way it has played out in Brazil is that in the past states ruled and corporations were subjects, but the capitalist model has concentrated power economically so corporations have now captured the state. The state has become managed by corporations, so Vale is now involved in governing Brazil. They don't just control government but also our public space, our thinking, our emotions, our social networks.

In the state of Minas Gerais, they finance 60% of the political representatives. They also have great relations with members of the Supreme Court and the judicial system. And municipalities without alternatives are forced to turn to them for funding. They also have limitless money for propaganda and have become one of the key sources of cultural funding such as concerts, arts. They even have their own culture programme.

And within the company and its workers, they also wield influence in many regions, selling an idea that they are a family. Given that the costs of its operations are normally felt in other regions of the country, their workers do not always see the costs and don't want to believe it either.

So while we do our best to expose the scandal of the Brumadinho disaster, Vale is spending millions to say everything is fine. And with a lack of critical education, a reduction in key community spaces such as unions or community organisations and with most folk having to work more than 8 hours a day for very little, we don't have the arena or resources to show an alternative.

They don't just control government but also our public space, our thinking, our emotions, our social networks.

Bill Posters: I think one key component is storytelling and the way innate human values were twisted to be subservient to capitalist ideals and imperatives. It takes us back the emergence of the PR industry, under the influence of figures such as Edward Bernays with his goal of linking ‘innate human needs and desires to inanimate objects’ by applying the psychoanalytic research of his uncle – Sigmund Freud – to commercial markets.

More recent research finds we are driven by both intrinsic and extrinsic values. Social scientists group human values into two broad (and slightly problematic) categories: Intrinsic values are broadly linked to benevolence, collective action and solidarity, and extrinsic values are based around status, wealth, power, perception of oneself in the eyes of others.

Corporations have become extremely specialised in exploiting extrinsic values and derive power from this. What psychologists have discovered is that when a particular value set is activated and primed, it diminishes others at the opposite end of the values spectrum. So in this sense, mass advertising is normalising and priming certain values that support power and capital. It’s why the advertising industry is worth hundreds of billions of dollars annually.

And these industries with their recent extensions into digital spaces and our psyches via micro-targeting (and soon neuro-targeting) are at the crux of what we face now and how our values and behaviours are being manipulated. How do we get out of this mess, until we normalise and make visible other values that embody and strengthen the social muscles that can bring about the societal and environmental revolutions that we need in order to avoid unparalleled catastrophe for all forms of life on earth.

And how does this power play out in the different corporate sectors you focus on?

Nomi Prins: Well, the banking sector has had a particularly strategic position given its control over large swaths of money that puts them at the centre of power, for historical reasons and because of the role it plays in issuing and distributing debt (including state bonds), its role in financing corporations through loans, IPOs and distributing shares, even its role in helping fund wars and private parts of defence and large-scale infrastructure projects.

So while there has been a shift of power recently to the tech sector, due to their accumulation of data, their growing assets and their social and media reach, banks still play a pivotal role in shaping the world.

Bill Posters: My main concern about the rise of big tech is that we are now seeing increasingly permissive forms of power, in which power sheds its negativity and presents as something entirely different, as freedom. It’s much more efficient as a form of power, because it presents itself as helping people and their lives, so people subordinate themselves to power relations without any external force or subjugation or visible violence. It doesn’t involve repressing or forbidding behaviour but rather on making people completely dependent on the corporation and in return ‘giving’ our behavioural data, and increasingly the entirety of human experience as part of the devil’s bargain.

I would call it ‘friendly totalitarianism’. It is insidious as the new totalitarians present themselves as friends to guide us and assist us in everyday aspects of the day to day via the renditioning of behavioural data – at scale – from billions of humans around the world.

It's important to look at this sector's emergence in the light of the consequences of 9/11. That led to the nation state imperative of 'All the data, all the time' (this is actually the British state surveillance agency GCHQ's motto). This created the norms and conditions that perpetuates the pervasive digital panopticon of today and the manic frenzy at the frontier a new gold rush – behavioural data. Corporations like Google, IBM, Amazon and Facebook took on what Yuval Noah Harari has called Dataism with 'all the hallmarks of a religious philosophy', where more data equates to more truth, replacing human liberalism as a guiding force of our age.

What impact does this concentration of corporate power have on communities and on democracy?

Tchenna: In Brazil, our entire society is deeply affected by corporations. Corporations in Brazil shape everything - labour rights, public politics, poverty, access to land, even violence against women. That is why MAB was created: to tackle the negative impacts of the privatisation of the electric sector, the increased role of private water firms such as Suez, and the building of dams by corporations. This struggle has brought us up against giant mining firms such as Brazilian firm Vale and British-Australian BHP. They not only consume huge amounts of energy, they have also been responsible for terrible environmental disasters, such as the collapse of two dams storing toxic waste water in Mariana (2015) and Brumadinho (2019) which killed 270 people and displaced more than a million people. Similarly in my work with La Via Campesino, we are up against corporations such as Bayer and Monsanto.

Bill Posters: I think the rise of the intertwined logics of dataism and surveillance capitalism takes us to another level, where corporations in the digital influence industry pose fundamental threats to our human rights. The right to privacy and a future tense are pretty much non-existent today. And history shows us you can't have democracy without these fundamental human rights.

Reflecting on Tchenna's experience in Brazil, I think it is also worth noting how the physical impacts of this neo-colonial expropriation intersects in the digital space. I am currently in Kampala, Uganda, where the government has recently installed 3000 facial recognition cameras which will both uphold the government's dictatorship and also serve its Chinese investors, who are using the biometric data of citizens – images of millions of black faces – to improve their facial recognition capacities and algorithms in China. It is in short, an example of algorithmic colonialism. Whether in Uganda or Brazil, these new digital surveillance architectures are increasingly used to subjugate, oppress and control citizens.

People in countries like Uganda and Brazil are thus on the sharp end of both traditional forms of power – violence on bodies and physical oppression – and a new type of violence in digital space. So not only are physical and material resources being mined and exploited, but also new 'raw materials' like human experience – location data, social mapping between activist communities – with even less knowledge about how the data is being used and what experiments are being done with it.

People are on the sharp end of both traditional forms of power - violence on bodies and physical oppression - and a new type of violence in digital space.

Nomi: In the US and elsewhere, one aspect of the impacts has been the corporate consolidation, or in banking speak, mergers and acquisitions, where smaller companies get gobbled up by the large ones. It is happening in many sectors such as energy and media, but certainly also in the banking sector. This consolidation trend has happened for decades, but was accelerated by the political response to the financial crisis.

In total, nearly \$22 billion worth of money was fabricated by the largest central banks, but rather than helping people refinance so they could keep their homes, the Federal Reserve provided cheap money to banks who didn't feel obligated to help their customers in a similar manner.

One thing they did was to buy up mid-sized banks that in turn bought up small banks. This meant that local communities suddenly had branches of mega banks in their midst instead of their local ones, that no longer cared about them, and money that would have stayed within the community was sucked out of the community.

Banks were given an 'out' of their financial stress from the crisis that they helped to create, and individuals weren't. Even now as we face a second wave of foreclosures that can still be traced to the crisis, people are not able to cheaply refinance loans to keep their homes.

Meanwhile banks are buying up banks to become bigger and as they grow economically, they also grow their power and influence at all levels – from local to national to international.

What is the relationship of corporations to society? How do they wield power culturally?

Nomi: I think that a lot of power and corporate relationships to society takes place in how news stories are picked up by mainstream media and social media. We hear much less about how corporations are gaining more power and paying less in taxes and how this leads to less money for small businesses, or less funding for various projects such as providing clean water, responding to fires, environment, wage growth, or creating jobs.

We currently have money sucked out of the system, where society is effectively subsidising companies that in turn circumvent and shape the system to their advantage to increase stock prices without providing additional value to society. And then the rest of society is left to pick up the tab, or lose benefits in the process.

Bill Posters: I am interested in the field of biopolitics, a term explored by Foucault who looked at how power operates through institutions via the discipline of bodies. If you look at digital surveillance and the digital panopticon, we see how this extends from the physical control of human bodies in the Victorian era to the human psyche today, where the goal is now to mine our behavioural data and rendition human experience at scale.

So corporations are now fascinated in data not only because of what they learn about us and our tendencies but because it also allows machines to infer what we are likely to do next as a result. Massive corporate investment is going into these new emerging markets – behavioural futures markets - with billions of subjects and no oversight at any level.

Google's mission goal is to get to what their CEO has called 'absolute certainty' in relation to our behaviours and the exchange for their clients – the advertisers. Think about that for a second, utilising human experience at scale, to rendition behavioural data on billions of humans, in order to infer – with eventual 'absolute certainty' – the likelihood we will buy this or that product, or click on this or that link, or take this or that route with our behaviours. As mentioned earlier this transgresses so many fundamental human rights. It is an Orwellian proposition but makes 1984 seem like chicken shit.

In the future, as there are mass migrations from equatorial regions for example, how do we stop these new architectures and technologies of power being exercised on the bodies of less privileged, non-white people who really need our solidarity in dealing with the worst of realities? These are serious questions that need to be addressed today.

What have been the best techniques or strategies for confronting corporate power and impunity?

Bill Posters: What I have tried to do in my own work is make network-based interventions that in a small but meaningful way subvert, disrupt and re-democratise power in public and digital spaces, that reveal the dangers of capitalism and unchecked corporate power.

The best interventions have been collaborative ones where the process is as important as the outputs. Encouraging participation in interventions can be immensely empowering for participants. You create the norms, conditions and values that you want to see more of in the world, even if it's only for short moments. As participants transgress, for example into advertising spaces, they see how power operates and feel their own power and agency in a fun, easy political way. There are also new norms and conditions you can create in creative processes that engage people to strengthen and re-prioritise our intrinsic values.

We experienced that in the ad-hacking campaign we organised prior to the UN COP21 climate summit in Paris in 2015 where we reclaimed 600 ad spaces in one day. We worked with 100 citizens over 6 weeks to prepare and implement ads to make visible the corporations responsible for the climate crisis and the links between advertising, consumerism and climate change. On the day of the action, armed police raided our main workshop, holding us at gunpoint for several hours. In the consternation afterwards, there was much debate about whether to continue and it was one of the young woman participants who inspired us all to go ahead anyway. The project wasn't ours any more.

In another project, Spectre, we have been subverting many of the technologies and methods used by the Digital Influence Industry. So we created an installation that used algorithms and visitor's personal data to reflect on psychometric profiling, gamification, 'deep fake' technologies; and micro-targeted advertising. As part of the installation, we released a series of our 'deep fake' videos of hacked celebrity 'Influencers' onto Instagram as a digital intervention. One involved Mark Zuckerberg announcing Spectre as a new Facebook programme. The Zuckerberg video went viral leading to global press coverage and unexpected – and contradictory – official responses from Facebook, Instagram and Youtube. The artworks thus became embroiled in a deeper, global conversation about the power of computational forms of propaganda and the lack of control the new tech companies have over their own surveillance architectures.

Tchenna: The most effective strategy is to organise communities and with that collective power to build effective alliances with media, other organisations, political deputies, the People's Defender (Defensoria Pública). This involves education on the corporation's role, what rights people and communities have under the constitution, what the state owes to them. It also involves education among the broader public, who know very little about how the concentration of power has not just led to terrible social and environmental abuses but also increases in prices.

The challenge is that while this can win small victories, it does not fundamentally challenge the power of the corporations. They have the capacity to appropriate the struggles and continue winning.

This is what has happened with the struggle for compensation for the Brumadinho and Mariana disasters for example. While eventually we secured compensation, the companies put many obstacles in the way and worse of all have taken control of the distribution of resources, which means that the affected families are now dependent on them and thus coopted and demobilised. Without a strong state, it was left to the company to deliver on its own obligations.

It's why it is critical to link our struggles with others at an international level, to work together and explore new forms of struggle against an architecture of impunity. The campaign for a Binding Treaty for example has been critical in bringing organisations together internationally and showing through our different experiences how states are not in the service of people. Even if the balance of forces is currently against us, the experience is pedagogic – it is building knowledge, relationships, articulations that will persevere.

Nomi: Raising awareness of how banks operate is important, because they are the cornerstone of financial and economic conditions. There have been campaigns to move money out of big banks, which is great but I think we need to go a step further by demonstrating how moving that money into new banks, sometimes online ones, with more social and environmental commitments is good personally and for society as a whole.

Another positive initiative has been the drive for a public bank in California. The activism drew on public banking models such as in Germany and North Dakota and was able to push an initiative onto the voting ballots, amidst strong opposition from the major banks. And now, a public bank has a green light to go ahead. That wouldn't have happened five years ago and it took a lot of dedicated work across many groups. I think the key is having a clear focus, and lobbying and advocating in local and state politics in a systematic strategic way to achieve change.

What do you think should be the future of the corporation?

Nomi: In general, the sheer size of corporations has to be tackled again and effectively. The big companies are just too big. Reducing and limiting their size would be the most direct way to reduce corporations' power, footprint, influence and money flows. We have monopoly rules on media, energy and banking, but they don't seem in practice to work or be upheld. Large companies continue to get bigger and smaller companies either disappear or are unable to compete at the same level.

Another avenue would be to provide incentives and financing to encourage smaller and more specialised companies that are autonomous yet work together, or what I would call the gig-corporate economy. I

know one company for example that has deliberately divided into three companies that are autonomous but collaborate. This is a more democratic way of restructuring corporations and could be the wave of the future.

Bill Posters: The corporation in its current forms has no future. The future of the corporation needs to be determined by the removal of all legal, cultural, political and moral systems of belief that allow the constant externalisation of the social and environmental costs of doing business on earth. Whilst we must acknowledge the benefits that some forms of capitalism have brought to some privileged populations, when your corporate lover becomes violent, abusive and a danger to your life and the lives of others, you must end the relationship quickly, and begin again afresh, taking best parts with you and consigning the rest to the fires of Victorian history.

The modern corporation must rapidly transition (in a matter of a decade) to more harmonious syntropic systems of organisation, energy and resource use. By 2030 the world's fate will be sealed. A new understanding of humanity's deep ecological relationship as part of nature - not superior to it - will define not just the future of the corporation, but of all life on earth. The stakes are this high now. For the corporation and indeed the human race, the choice is now a simple one: evolution or death.

**For the corporation
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Tchenna: I do not believe it is possible to have a good transnational corporation. The model doesn't work. All it does is concentrate power in fewer and fewer hands, and this is creating a crisis for our planet and for democracy and allowing a new wave of fascist leaders to come to power.

We have to look at alternatives. There are lots of different models that integrate autonomy, sovereignty and exchange for producing our food and other resources. Within MAB, we are working on alternative models. For example in our 'Veredas Sol e Lares' project in the very poor rural region of Vale do Jequitinhonha, we are working on a solar project to serve people displaced by a hydroelectric project who don't have their own access to energy.

Most of all, we must use our imagination to show that different paths to development are possible. It is not the end of history, we must fight to define our history and address the profound challenges ahead of us: the climate crisis, the possibility of a new war, social distraction, a crisis of democracy. We need a new politics of life.

STATE OF POWER 2020



Illustrating the corporation

State of Power illustrator
Anastasya Eliseeva



As an artist, there is little that compares to seeing the finished product coming together and reaching the public, especially when the content of the articles and the intention of the publication is so close to my own world view and what I'd like my work to portray.

I'm an artist, illustrator, animator and general creative who worked in various fields before settling in the media industry. I strive to use creativity as a form of activism and to further my desire for social change. I was lucky to join New Frame almost a year ago, which is a social justice media publication based in Johannesburg, South Africa. My daily work is varied - be it re-imagining histories of struggle, depicting scenes and people in current news, creating concepts to highlight current issues and hopefully inspiring hope. It's incredible work because of how much I learn, the people I interact with, and creating art with purpose.

It's through my work I got introduced to State of Power and TNI. It was both exciting and daunting as a challenge. I found the material fascinating but translating it into concepts without cliches or shallow imagery was challenging. But I liked the dynamic of vastly different concepts having to flow into each other and follow a visual theme. I tried to strike a balance between my usual messy arty style and a neater, more graphic way of showing concepts. I hope the messages of each article were carried across.

My most difficult illustration would have to be the Charming Psychopath - trying to combine the two words and sides of the corporation into an image which essentially represents the face at the epicenter of our times. I think I lacked the "charming" dimension and had to rework the image a few times. My favourite illustration is definitely 'The End of Corporation'. In most of my work I try to hide an element of hope, even if it's a small personal symbol. Creating the image of a better world makes me realise how much I too need hope of positive change in the world.

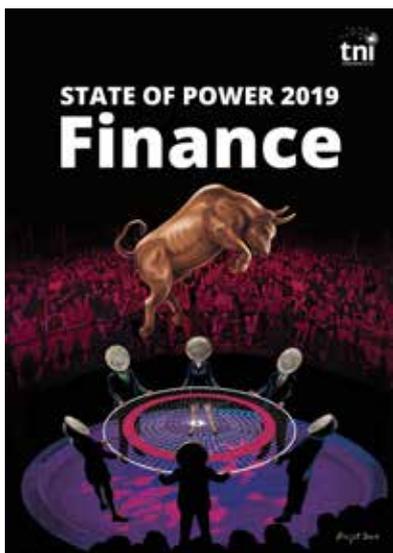
The web designer putting it together did the final magic. I'm very honoured to have my name on this year's State of Power.

State of Power

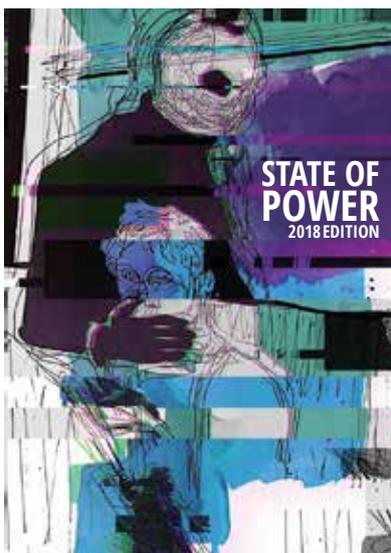
TNI's annual State of Power is an anthology on global power and resistance featuring powerful graphics and insightful essays by some of today's most influential social movement activists and researchers.

Current and past editions are available online at www.tni.org/topic/state-of-power

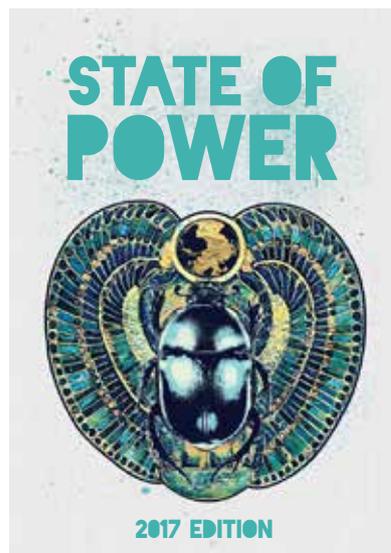
PREVIOUS EDITIONS, 2019–2014



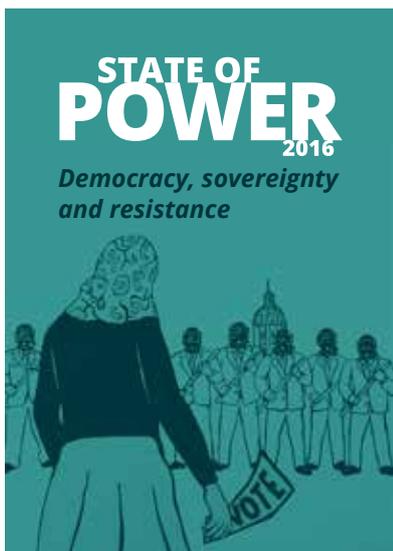
STATE OF POWER 2019
Finance



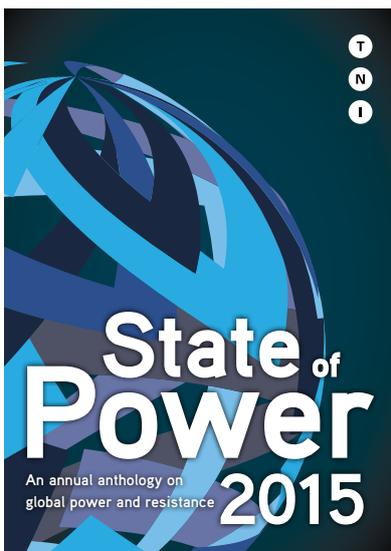
STATE OF POWER 2018
Counter-power



STATE OF POWER 2017
Culture and power



STATE OF POWER 2016
Democracy, sovereignty and resistance



STATE OF POWER 2015
Dimensions of power



STATE OF POWER 2014
Exposing the Davos Class

NOTES

- 1 Benefit Corporations (B-Corps) are corporations that include in their legally defined goals the objective of a positive impact on society, workers, the community and the environment in addition to profit.
- 2 Google recently announced that it has built a computer that has reached 'quantum supremacy', performing a computation in 200 seconds that would take the fastest super-computers about 10,000 years. The term has been adapted in this essay to describe Google's market power.
- 3 A bundle of services that Amazon offers third-party sellers who enlist on its platform to manage last-mile delivery logistics. See <https://services.amazon.com/fulfillment-by-amazon/benefits.html>
- 4 Amazon Web Services (AWS) provides on-demand cloud-based computing services to individuals, companies and even governments.
- 5 On-demand work refers to service work that requires a physical presence, but is mediated through platforms that facilitate just-in-time matching of demand and supply, such as Uber's taxi drivers, Task Rabbit errand runners, or Deliveroo food-delivery riders. Microwork refers to the process of breaking down a large project into a series of small tasks that can be performed online. Typically, microwork is auctioned over a crowdsourced marketplace to zero in on the cheapest freelance bid, e.g. Amazon Mechanical Turk.
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