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Corporate power and States' (in)action in response to the COVID-19 crisis

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The response to the latest financial and economic crisis that unfolded in 2008 had been rightly characterized as a massive wealth transfer, where profits were privatized for the benefit of big financial corporations while losses were socialized. States bailed out failing financial institutions with no strings attached. This led to undermining the benefits accrued by citizens and small and medium enterprises from the bailouts extended by governments. It also allowed financial corporations to continue risk-taking practices similar to those that led to the crisis in the first place.

Today, many voices caution that the response to the present compounded public health and economic crisis should not be a repeat of past mistakes, but should set us on a course towards transformations in economic, social and ecological governance. Such course correction requires a fundamental shift in the relation between States and corporations, and a demonstration of willingness by States to utilize policy, institutional and legal tools that could allow a balancing in the power relations between corporations and capital on one hand, and governments, labour and citizens on the other. This includes balancing the privileges offered to globalizing corporations with commensurate obligations. Without such proactive interventions by States, the current compounded crisis could potentially become another platform for big corporations to leverage their already entrenched economic and political powers, thus contributing to further deepening inequalities and injustices in the post-crisis period.

So far, there is no serious indication that such course correction is underway or possible. To the contrary, State responses seem either to privilege big financialized corporations or to remain inattentive to interventions needed to ensure that private profit-making does not trump broader social and economic priorities, including the well-being and right to life of the less-resourced.

This paper discusses three areas where such imbalances in State responses to the crisis are demonstrated, particularly in their dealing, or lack thereof, with corporations and corporate power. These include the design of the stimulus packages offered by developed countries to 'their' corporations, the vulnerabilities in global value chains due to irresponsible practices by multinational corporations, and the role of financialized pharmaceutical corporations in the quest towards a COVID-19 vaccine and therapeutics.

Third World Network (TWN) is an independent non-profit international research and advocacy organisation involved in bringing about a greater articulation of the needs, aspirations and rights of the peoples in the South and in promoting just, equitable and ecological development.

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Corporate entrenched powers and vulnerabilities pre the COVID-19 crisis

Since the 2008 financial crisis, the non-bank corporate sector has been increasingly accumulating debt, which amounted to more than $3 trillion during the first three quarters of 2019, making it one of the biggest chunks of global debt accumulated during that period.[1] In March 2020, *The Economist* reported corporate debt at $74 trillion.[2] Research by the United Nations Conference on Trade and Development (UNCTAD) explains that these unsustainable corporate debt burdens have been the result of highly leveraged corporate loans that had built up over the last decade of easy money and against a backdrop of heavily underregulated economies and deeply ingrained income inequalities.[3]

Before the COVID-19 pandemic, global debt had reached an all-time high of over 322% of gross domestic product (GDP) during the third quarter of 2019, amounting to $253 trillion.[4] Since the debt buildup began in 2010, the debt-to-GDP ratio in developing countries, including different forms of debt – consumer, business and government – had climbed 54 percentage points to 168%.[5] By the end of 2019, corporate debt in the developing economies had also reached a record high of more than $55 trillion.[6] In emerging markets, debt had risen more than twofold since 2010, to $72 trillion, driven mainly by a buildup in non-financial corporate debt.[7] This has been the result of increasing borrowing on international markets in order to benefit from lower interest rates.[8]

In the United States, corporate debt relative to assets before the COVID-19 crisis was the highest in 20 years. It had accumulated as a result of broad share buybacks driven by a push from corporations to boost their shareholder profits.[9] Such trends focused on short-term shareholder returns are not limited to the US, however. European companies had increasingly shifted focus to short-term corporate distributions and payouts for shareholders, which doubled over the last 15 years, in comparison to shrinking spending on innovation and research.[10] These trends tell the story of financialized corporations whose strategy is primarily focused on share value and not necessarily advancement in innovation, production, job generation and real growth.

Thus, before the COVID-19 crisis, the corporate sector looked a lot like the financial sector in the period preceding the 2008 crisis.[11] Much of the big corporate sector's vulnerabilities revealed by the current crisis emanates from risky decisions taken by these corporations in pursuit of fast accumulation of profits during the 'stable' time, enabled by lax or deregulatory approaches by States.

Besides the State's inaction that enabled such risky and unsustainable accumulation of debts, the liberalization and deregulation adopted by States through international trade and investment rules have been facilitating the accumulation of immense bargaining power by these corporations, and thus by capital in relation to labour. This allowed corporations to repress wages and working conditions in both developed and developing countries.[12] It put big business on a detachment course from productive activities and value-added investments, as it increasingly came to rely on and be driven by a financialized strategy.[13]

UNCTAD had documented how the world's largest corporations increasingly extract profits from the economy and achieve huge gains without a proportionate contribution towards adding decent jobs, innovative advancement or societal returns.[14] Moreover, the International Monetary Fund (IMF)'s research pointed out the rise of market power concentration driven by "corporate giants", what have been called "superstar" companies in all broad economic sectors, including in information and communication technology.[15] This concentration in market power exhibits a negative relation with investment, innovation and labour shares, noted the IMF's research, "implying that the labour share of income declines in industries where market power rises".[16] This characterization by the IMF is in line with what UNCTAD calls the "winner takes most" distributional ethos of a hyperglobalized world order where big corporations look very much like a crocodile with corporate profits devouring the labour share of income.[17]

Research shows that these big corporations are capturing increasingly high market shares, allowing them to use their market position to earn excess profits.[18] Thus, concentration of market power and the increasing financialization of big corporations have driven a widening wedge between big corporations and the rest of the corporate sector[19] comprising small and medium enterprises.

Furthermore, a special set of exclusive privileges have been offered to highly endowed asset holders and corporations when investing abroad, in the form of an investor-State dispute settlement (ISDS) mechanism. Such mechanisms, incorporated into most international investment agreements, allow foreign investors to challenge legitimate non-discriminatory governmental action taken in the public interest.[20] Civil society groups have documented how investment lawyers and law firms have advised their corporate clients on the use of ISDS to challenge measures taken by governments around the world in response to the COVID-19 crisis and related economic fallout.[21]

While corporations had benefited from State actions and inaction in order to extract profits and accumulate economic and political power,[22] today many rush to the doorsteps of their governments requesting support that is claimed to be necessary for their survival.

Stimulus packages show no serious intention to stimulate a course correction

The anatomy and terms of the stimulus packages and other measures launched by many developed economies to save companies tell us a lot about the nature of the interactions between States, corporations and rights holders, including workers and citizens. They also shed light on whether the choices adopted to get out of this crisis will lead us towards the economic, social and ecological transformations that many are calling for.

Stimulus packages include a combination of financial injections to stabilize banking and corporate balance sheets in addition to government spending in the form of purchases of goods and services and extended unemployment benefits and cash transfers to households. However, the latter are often just a fraction of the packages adopted.[23]

This is most clear in the United States, where under the Coronavirus Aid, Relief, and Economic Security Act (also known as the CARES Act), the largest share of the package consisted of loans to business. The CARES Act encompassed the largest economic stimulus bill in modern history, more than doubling the one passed in 2009 during the financial crisis.[24] It amounted to $2.2 trillion, out of which only $193 billion went to spending on goods and services, an estimated $111 billion to additional unemployment benefits and $275 billion to cash transfers. Around a quarter of the total package, or $500 billion, was dedicated to big businesses. These transfers if not repaid will need to be restructured into equity, resulting in the government owning an increasing share of corporate America.[25]

This money is transferred with few conditions from the side of the State, and these conditions do vary between big and smaller businesses. While there are some restrictions related to share buybacks during the term of the loan plus one year, payments of dividends and limits on executive compensation at the 2019 levels, no employee protections are included,[26] such as requirements to give workers paid sick leave or guarantees that companies do not lay off workers. In addition, the US Treasury Secretary is given the powers to waive any of the conditions on big corporations if deemed necessary to “protect the interests of the federal government.”[27] All the borrowing that the corporations will be able to secure on top of the government’s contribution will also be free from any restrictions.[28] In comparison, restrictions attached to the money going to small and medium-sized businesses included restraints on paying out dividends and buying back stock, outsourcing or moving jobs offshore, in addition to requirements to honour collective-bargaining agreements.[29]

Thus far, the United States’ interventions seem to be geared towards setting the stock market on the road towards recovery while leaving behind the majority of workers and their families who will be left worse off. It has already been reported that US companies are denying workers unemployment benefits, shutting down their healthcare and laying off workers.[30] At the same time, the US Federal Reserve’s interventions have sent US stocks surging.[31] The decoupling of Wall Street, as a representation of the financialized economy, from the real economy is stark. Stocks, including the S&P 500 index, have rallied at a time when more than 20 million Americans were cut from payrolls and household names in the retail sector filed for bankruptcy.[32] The Federal Reserve’s announcement of unlimited buying of treasuries and mortgage-backed securities helped stabilize debt markets, allowing big companies like Coca-Cola, Disney and Apple to access needed financing. Meanwhile, small and medium-sized companies were left unable to face the shock and had shed millions of jobs since the beginning of the crisis. Many of these businesses have reported immense complexities in accessing funds made available through the stimulus packages.

Reflecting on these discrepancies, the UN Special Rapporteur on extreme poverty and human rights has said that the US "could use its significant wealth to resolve many of these issues, but a response that favours corporate interests and entrenches inequality will be catastrophic".[33]

On the other side of the Atlantic, member States of the European Union have been split over offering bailouts to corporations registered in offshore tax havens.[34] While the resistance to bailing out tax dodgers has been welcomed by tax justice campaigners, many are worried that the definition of a tax haven is too narrow, excluding fiscal paradises within the EU itself.[35] Furthermore, trade unions and civil society groups have called for directing all public stimulus investments towards accelerating the transition to a just, resilient and sustainable economy,[36] including attaching strict climate and environmental conditions to State aid, loans, subsidies and other direct and indirect bailout support to companies, that would be monitored and enforced by the EU.[37]

Global value chains used to export part of the economic crisis burdens

Amidst the multiple dimensions of the current crisis, corporations in industrialized economies, heading major global value chains, are attempting to export part of the burdens of the crisis down the value chain.

Much has been written about the breakdown in global supply chains during the current crisis, and the challenges of managing supply chain risk and disruption, especially emanating from over-dependency on certain markets. However, much less has been said about the strains and burdens exported to the lower end of the value chain, where the most vulnerable entities reside. These are often suppliers in developing countries employing thousands who, without these jobs, are left on the brink of the poverty line if not below it. These are constituencies who rarely earn enough to accumulate savings, which means that without their jobs, their families' access to food and education would be jeopardized.

It has been reported that suppliers in the garment industry value chains have been facing mounting challenges as a result of unreasonable demands from big clients, mainly corporations in the United States and the United Kingdom. These include cancellations of orders and contracts for goods that are ready or are in the manufacturing phase. They also include requests for discounts on outstanding payments and for goods in transit, and extensions on previously agreed payment terms that could reach up to 120 days.[38] For example, since the coronavirus pandemic took hold, "more than half of Bangladesh suppliers have had the bulk of their in-process, or already completed, production cancelled",[39] despite the contractual obligations underpinning these orders. Many of the corporate clients utilise "*force majeure* clauses" to justify their violations.

In several developing countries, the garment manufacturing industry is a major employer, particularly among women. For example, the sector accounts for more than half of all manufacturing jobs in Bangladesh and 60% in Cambodia. Overall, the International Labour Organization estimates that there are 450 million people working in global supply chains across multiple sectors including the car industry, garment manufacturing, jewelry and food, among others. This is in addition to the untold numbers working in domestic supply chains. The latter are also significantly impacted as a result of decisions taken by multinational corporations, especially those that shape the practices of their subsidiary companies in developing countries.

These pressures on the lower end of the global value chains come from big corporations that are probably accessing support from stimulus packages offered by their governments. Such behaviour from large companies in industrialized economies is tantamount to exporting part of the burden of the economic crisis down the value chain to entities that do not have the access to liquidity and government subsidies enjoyed in the United States and European countries. In effect, these trends reflect an upholding by big corporations of their commitment to primacy of shareholder value at the expense of workers whose sweat enabled the profits accruing to those at the top of the value chain.

What we are witnessing during the COVID-19 crisis is part of the continuous story of fragilities and vulnerabilities in the lives of those who depend on jobs at the lower end of global value chains. These pressures that multinational companies have been exerting through squeezing down on the lower end of the supply chain have often been reflected in multiple pressures on the economic conditions of developing countries, including through factory closures, unpaid workers and clampdown on government tax revenue, which itself means less investment in public systems and support to local workers and the local industry.[40] In the current crisis, they will be reflected in a spike in unemployment and consequently poverty across many developing countries. Where jobs are retained and operations are still ongoing, these pressures could mean that manufacturers will not be in a position to provide needed gear to protect the health of their workers or organize the workplace in accordance with needed safety measures.

These situations show that private ordering is not enough to guarantee rights in such a context where power imbalances are entrenched. Indeed, it reveals the hollowness of the "responsible sourcing" narrative and voluntary commitments to human rights due diligence that we often hear of and read about in corporate reports. The imbalances and pressures we witness are enabled by contracts that lack required guarantees, particularly those pertaining to full respect of workers' rights. Even where companies are abusing the *force majeure* clauses in contracts, their contractual counterparts (i.e., the suppliers in developing countries) will probably not be in a position to pursue legal action in quest of their rights.

These situations are also the result of lack of action by the home States of multinational corporations in regard to clarifying the obligations of their companies when operating abroad through subsidiaries or through contractual arrangements with suppliers. States do have existing obligations under international human rights law to regulate the conduct of their businesses when operating domestically or abroad.[41] Furthermore, the responsibilities of business in regard to respecting human rights including labour rights and undertaking human rights due diligence throughout their chain of operations have been solidified by the UN Guiding Principles on Business and Human Rights. These principles have received the consensus of the international community. However, there has been a lack of active interventions by States to develop their domestic legal framework in a way that reflects this global consensus and clarifies the obligations of companies when conducting business domestically or internationally, including through global value chains. Discussions pertaining to an international legally binding instrument on business and human rights have been championed by a number of developing countries at the UN.[42] Such a treaty, if agreed, could potentially clarify States' obligations to enact domestic regulations with extraterritorial reach in order to regulate the conduct of their national businesses when investing and operating abroad.

Global value chains, as a dominant form of capitalism today, have been a vehicle for entrenching concentration of economic resources and power in the hands of multinational corporations. Today, these chains might become another avenue for exporting part of the economic crisis to developing countries, thus deepening inequalities, whereby impoverished workers are left to lift part of the burden off the shoulders of multinational companies.

Financialized corporate strategies could undermine fair and equitable access to COVID-19 vaccine and therapeutics

Public money has been central to the research and development going into the search for a COVID-19 vaccine and therapeutics. Beneficiaries from these public contributions include major multinational pharmaceutical corporations.[43] For example, on 16 March, the European Commission approved a financial support package of 80 million euros to CureVac, a Germany-based biotech company, to develop and produce a vaccine. Another pharmaceutical multinational, Moderna, is getting $483 million from the US government's Biomedical Advanced Research and Development Authority to develop a vaccine.[44] Similarly, Gilead received about $70 million from the US National Institutes of Health to run clinical trials on the drug remdesivir as a potential treatment for COVID-19,[45] and AstraZeneca said it secured $1 billion in funding from the US health department.[46]

Corporations benefiting from these public monies are already seeing returns in the form of higher stock value. For example, as a result of the announcement pertaining to the US government's contribution to Moderna, the company's shares blasted off around 13.7%, recording a 52-week high leading it to surge up to 136% during 2020.

Such public contributions that enable and underpin the pharmaceutical industry's innovation and manufacturing are not specific to the COVID-19 crisis period. A 2018 study[47] found that all 210 drugs approved in the US between 2010 and 2016 benefitted from publicly funded research, either directly or indirectly.[48]

At the same time, pharmaceutical corporations have been increasingly driven by financialized strategies that care less about innovation and value addition to global public health and instead focus on maximization of shareholder value. These financialized corporations have primarily allocated profits for buybacks of their own corporate stock for the purpose of manipulatively boosting their stock prices and consequently serving their primary purpose of "maximizing shareholder value". For example, between 2006 and 2015, 18 drug companies listed on the S&P 500 index in January 2016, and publicly listed from 2006 through 2015, distributed 99% of their profits to shareholders over the decade, 50% as buybacks and 49% as dividends.[49] These include some of the major corporations taking part in the search for a COVID-19 vaccine and medications, such as Johnson & Johnson, Gilead and Pfizer.[50]

Furthermore, the interests of senior executives of such financialized pharmaceutical corporations, who make decisions on pricing and licensing policies, are well intertwined with those of shareholders. This is the result of the model of stock-based compensation that rewards these executives for increases in their companies' stock prices.[51] The higher the stock prices go, the bigger their compensation packages will be. Executive compensation is not structured to reward the success of the pharmaceutical company in generating new medicines at affordable prices, and thus generating societal added value of a collective nature, but is pegged to private profit.

Representatives of the pharmaceutical industry have already voiced opposition to steps towards lifting the potential barriers to access to a COVID-19 vaccine and therapeutics emanating from the intellectual property regime established under the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and other trade agreements. Thomas Cueni, Director General of the International Federation of Pharmaceutical Manufacturers and Associations, has argued against the utilization of flexibilities built into the TRIPS Agreement and available for countries as part of their rights under this treaty.[52] He proposed a "light touch coordination mechanism", implying that States' legal interventions through the use of TRIPS flexibilities or other ways of taking regulatory steps pertaining to access to COVID-19 medicines and vaccines will be unwelcomed by the pharmaceutical industry.[53]

In this context, and without effective governmental intervention, the actual access to a COVID-19 vaccine and therapeutics could be potentially undermined by such financialized corporate strategies. In such a scenario, patents will give these corporations control over the pricing, manufacturing and distribution of most of these innovations. Economist Joseph Stiglitz and his co-authors have pointed out that "commercial pharmaceutical companies have for decades been privatizing and locking up the knowledge commons by extending control over life-saving drugs through unwarranted, frivolous, or secondary patents, and by lobbying against the approval and production of generics."[54] It has been repeatedly pointed out that the experience of previous pandemics shows that unless deliberate steps are taken by States, universal access will not be possible[55] and the most vulnerable will be left out. In the absence of effective State intervention, more lives will be lost, particularly in developing countries.

Civil society groups have stressed that equitable access will be compromised without addressing the obstacles faced by developing and least developed countries,[56] stressing the importance of ensuring that intellectual property rights do not affect or hinder efforts to curb the COVID-19 outbreak. Doctors Without Borders has called for "no patents or profiteering on drugs, tests or vaccines" for COVID-19.[57] Governments have agreed a resolution at the 73rd World Health Assembly, held on 18-19 May, in which they called for equitable access to and fair distribution of all essential health technologies and products to combat the virus.[58]

Yet, governments have not provided answers regarding the interventions and legal tools they will utilize in order to ensure fair and equitable access to a future vaccine and medications for treating COVID-19. While the focus is on sharing data and knowledge that would enable rapid research and development of medicines and vaccines, there is no clarity yet on mechanisms for access to the outcomes, and ensuring fair and equitable benefit sharing.[59] Without effective preemptive interventions by governments to collectively address intellectual property and other potential barriers to access, profit strategies by pharmaceutical companies could yet again prove incompatible with public health and could hijack the quest towards containing the pandemic and related economic crisis.

If serving public health and the broader public good is the collective objective pursued by the international community, then States should secure guarantees from pharmaceutical companies geared towards ensuring availability and affordability of any resulting vaccines and therapeutics to all in need worldwide, including in developing and least developed countries. Corporations receiving public funds ought to be prepared to guarantee the necessary technology transfer arrangements to manufacturers worldwide in order to rapidly scale up access.

Furthermore, States ought to utilize intergovernmental mechanisms and legal tools available through multilateral platforms such as the World Health Organization and the WTO to ensure effective cooperation and lifting of barriers emanating from intellectual property. Otherwise, governments could in effect be funding a corporate model based on profiteering from the crisis. We could potentially face a scenario where saving lives could be undermined by the financialized corporate models and strategies of pharmaceutical corporations.[60]

Conclusion: States should not enable profiteering from the crisis at the expense of individual and collective rights

The potential for a course correction on the economic, social and ecological fronts depends in big part on whether States are ready to utilize the policy, institutional and legal tools available to them in order to curb corporate power and profiteering and align private profit making with the broader public good.

For those purposes, the State's role cannot be merely as a rescuer and facilitator of corporate activities whatever these activities are and whatever impact they have on society. If so, States would be enabling a corporate culture focused on shareholder profit, including profiteering from the current crisis, at the expense of individual and collective rights.

In such a scenario, we will be facing a repeat of the privatization of profits and socializing of losses witnessed in the wake of the 2008 financial crisis. While corporate asset prices and profits will rise, thus driving higher incomes and concentration of wealth at the top, the rest of society will suffer from high unemployment and potential wide adoption of austerity measures. This will be a world where corporate power is further entrenched while workers and rights holders are further disempowered.

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39 Mark Anner, "Abandoned? The Impact of COVID-19 on Workers and Businesses at the Bottom of Global Garment Supply Chains", Center for Global Workers' Rights, Pennsylvania University (March 2020). The report states that 45.8% of suppliers in Bangladesh report that "a lot" to "most" of their nearly completed or entirely completed orders have been cancelled by their buyers; 5.9% had all of these orders cancelled.

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50 Jaimy Lee, "These 23 companies are working on coronavirus treatments or vaccines – here's where things stand" (6 May 2020), available at: https://www.marketwatch.com/story/these-nine-companies-are-working-on-coronavirus-treatments-or-vaccines-heres-where-things-stand-2020-03-06. See also Vaxmap (vaxmap.org).

51 See Lazonick et al., op. cit.

52 Elaine Ruth Fletcher, "Pharma Under the Microscope in the COVID-19 Crisis" (19 May 2020), available at: https://healthpolicy-watch.org/pharma-under-the-microscope-in-the-covid-19-crisis/

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54 Joe Stiglitz, Arjun Jayadev and Achal Prabhala, "Patents vs. the Pandemic" (April 2020).

[55] For example: the experience with the H5N1 outbreak when wealthy nations negotiated advance orders of vaccine to the detriment of developing countries. See: Sangeeta Shashikant and Edward Hammond, "WHO: Where is fair and equitable benefit sharing of medical products?", TWN Info Service on Intellectual Property, Health and UN Sustainable Development (24 April 2020). See also: Ellen 't Hoen, "A Vaccine for All? Not If These Companies and Countries Have Their Way" (16 April 2020). The author points out that "recent company behaviour feeds into the growing concern that businesses may seek to profit from the pandemic to the detriment of access to COVID-19 technologies. Roche initially refused to share the formula and technical specifications hospital pharmacists needed to make the lysis buffer used in the company's testing machines in the Netherlands … Gilead applied for seven years of orphan drug exclusivity for its COVID-19 candidate drug remdesivir, a regulatory incentive for the development of medicines for rare diseases … The U.S. Food and Drug Administration granted the exclusivity 12 days after the World Health Organization declared the COVID-19 outbreak a pandemic. The move was met with strong criticism by civil society, and Gilead has since rescinded the orphan drug status".

[56] See: Civil society call made on 24 April to the UN Secretary-General and WHO Director-General to operationalize fair and equitable benefit sharing of medical products when the ACT Accelerator was launched, available at: https://twn.my/announcement/CSOLetter-Access%20to%20Treatment%20Developing%20and%20Least%20Developed%20Countries.pdf . A similar call by 61 organizations, coordinated by Health Action International (HAI) and the European Alliance for Responsible R&D and Affordable Medicines, was directed to the European Commission and Parliament; available at: https://medicinesalliance.eu/wp-content/uploads/2020/03/COVID-19-RD-public-investments-March.pdf

[57] See: https://www.doctorswithoutborders.org/what-we-do/news-stories/news/msf-pharma-no-profiteering-coronavirus-pandemic

[58] See: "WHO: Health Assembly adopts resolution on the global response to COVID-19" [extract from an article first published in *SUNS*, No. 9125 (26 May 2020)], TWN Info Service on Health, IP and UN Sustainable Development, available at: http://www.twn.my

[59] Stiglitz et al., op. cit.

[60] See: Lazonick et al., op. cit.