

Taming the Intelligent Corporation

Why the data paradigm necessitates a re-think of Responsible Business Conduct Obligations of MNEs

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1. Introduction

In 2020, the OECD initiated a stocktaking of its Guidelines for Multinational Enterprises (MNEs) with the intent to overhaul them and make them fit for purpose in a world of shifting equations between business, planet and society, with new risks for human rights and the environment, and unprecedented challenges for employment and industrial relations.¹ The OECD Guidelines, first developed in 1976 and updated for the fifth time in 2011, seek to provide an enforceable, government-backed international standard for responsible and sustainable business conduct.² Signatory state parties to these guidelines are required to set up appropriate national level institutional mechanisms to address complaints of human rights and labour rights violations, environmental crimes, and abuses of economic and political power by any MNE operating in their domestic market and domiciled MNEs in their transnational operations across extended value chains.³

Considering that global negotiations on the UN Binding Treaty on Transnational Corporations and human rights are currently at an impasse,⁴ the ongoing reform of the OECD Guidelines (2011), adopted by 50 countries representing two-thirds of global trade,⁵ assumes strategic significance, providing an important strand of hope for progressive civil society to galvanise action to save people and planet. The adequacy of the Guidelines in the context of 21st century digital capitalism is however critical to unpack.

Digital capitalism is characterised by the rise and rise of a unique business model: the platform firm 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)⁶ to build a new infrastructural basis for production, market exchange and a host of socio-economic interactions. Platforms are infrastructures for interaction that optimise connections between human beings and objects in a networked environment. Capitalist platform firms continuously mine data about the transactions among the various nodes on the platform ecosystems they control, garnering data-based insight and deploying algorithms to capitalise on such interactions.

The platform model first 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

¹ <https://mneguidelines.oecd.org/stocktaking-report-on-the-oecd-guidelines-for-multinational-enterprises.pdf>

² <https://www.oecd.org/daf/inv/mne/oecdguidelinesformultinationalenterprises.htm>

³ <https://www.oecdwatch.org/wp-content/uploads/sites/8/2021/06/OECD-Watch-Get-Fit-Closing-gaps-in-the-OECD-Guidelines-to-make-them-fit-for-purpose-1.pdf>

⁴ <https://www.stopcorporateimpunity.org/press-release-disappointment-in-the-global-campaign-at-the-presentation-of-the-report-at-the-un-on-the-latest-developments-on-the-binding-treaty-on-transnationals-and-human-rights/>

⁵ See footnote 1

⁶ <https://www.afr.com/technology/watson-s-law-ibm-ceo-ginni-rometty-labels-new-era-of-exponential-learning-20180321-h0xqtl>

of economic transactions led to the globalisation of the platform model. Today, the platform model underpins almost every economic sector – from predictive manufacturing to precision agriculture services, multi-sided e-commerce marketplaces, and labour intermediation, as well as the public sphere, state-citizen interactions and nearly all of social life.

Despite the downturn in tech stocks in the first half of 2022 and the drying up of venture capital for tech start-ups, it is evident that the fundamentals of the platform business model are going strong.⁷ UNCTAD's World Investment Report (2022) found that over the past five years, the sales of the top 100 digital MNEs – a category spanning Internet platforms, e-commerce companies, content service providers and digital solution providers in different sectors – grew five times faster than the top 100 traditional MNEs, with the pandemic providing a huge boost.⁸

What is clear is that the platform paradigm effects a deep-seated change in the nature of the animal that the corporation is, presenting new questions for the future of society and economy. With its data-based intelligence and totalising planetary control, the pan-global platform corporation as the Leviathan of our times has displaced the trans-national industrial corporation. It would therefore augur well for civil society to grasp fully the impacts of its business conduct to be able to demand the kind of accountability fit for our shared human futures.

2. Decoding the Intelligent Corporation and its Market Power

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 opens up new risks in relation to malpractices and rights-violations in global business operations, as discussed below.

A. Abuse of labour rights and competition through data power

Digital platform companies stifle competition and entrench their market dominance by directly competing with third party sellers that depend on them. Coupling their platform marketplace related services with their own commercial products or services, platform behemoths abuse their market power through vertically integrated supply chains.⁹ With competition laws still playing catch-up in this new scenario, smaller, local suppliers and contractors typically find it hard to survive. Amazon, for example, is currently facing an anti-trust investigation in the European Union for abuse of its dual position as both marketplace operator and retailer, accused of using data it has collected about the activities of independent sellers on its platforms to unfairly create products that

⁷ <https://www.retailbankerinternational.com/analysis/is-the-tech-bubble-about-to-burst/>

⁸ <https://worldinvestmentreport.unctad.org/world-investment-report-2022/chapter-1---global-investment-trends-and-prospects/#mnes-diverge>

⁹ <https://columbialawreview.org/content/the-separation-of-platforms-and-commerce/>

outcompete them.¹⁰ Media investigations reveal that the company has also engaged in similar practices in the Indian e-commerce market.¹¹

Similarly, on-demand work platforms engage in ruthless and autocratic algorithmic workforce control practices, rigging the market and undermining worker rights. The Indonesian multi-service platform Gojek, backed by both US and Chinese Big Tech companies, algorithmically penalises its delivery workers for even small mistakes such as delivering a package to the wrong address or taking time off for sickness, lowering their ratings and making it difficult for them to get gigs.¹² The ride-matching algorithm of the Colombian on-demand platform Rappi, in which Japan's Softbank is a major stakeholder, discriminates against its delivery workers in Bogota if they exercise their right to refuse a ride, and forces them to compulsorily exercise the 'auto-accept ride' option in order to obtain adequate work assignments during the day.¹³ Netherlands-headquartered ride-hailing platform, Uber, has been successfully challenged by workers in the EU judicial system for its illegal 'robo-firings' – dismissal on the basis of purely automated decision-making, in violation of the General Data Protection Regulation.¹⁴

The competition and employment and industrial relations chapters of the OECD Guidelines need an overhaul so that they can effectively address these emerging forms of abuse of data power for anti-competitive and unethical labour management practices.

B. Regulatory evasion in virtualised business operations

Digital MNEs take advantage of their virtualised business operations to evade regulatory oversight in a range of areas, using both legal and shadowy business tactics. Setting up headquarters and declaring profits in low tax jurisdictions, digital MNEs easily evade tax obligations. The State of Tax Justice 2021 found that OECD countries are responsible for an overwhelming 92 per cent of the US\$171 billion the world loses to offshore wealth tax evasion every year – just over US\$157 billion a year.¹⁵ However, the OECD/G20 process that aimed to address base erosion and profit shifting (BEPS) practices of multinational enterprises, with particular attention to the specific challenges of digitalisation, has failed to deliver on its mandate.

The two-pillar solution that was announced in July 2021 attempts to introduce a global common minimum tax and make it obligatory for transnational corporations to compulsorily declare a proportion of their profits in countries where they make a significant percentage of their sales. Unfortunately, the proposed common minimum tax rate of 15% is far lower than the tax rates applied by most developing countries, which means that

¹⁰ <https://www.theverge.com/2022/7/14/23195091/amazon-settlement-eu-antitrust-investigation-third-party-sellers-data>

¹¹ <https://www.reuters.com/investigates/special-report/amazon-india-rigging/>

¹² <https://www.inventiva.co.in/trends/how-gig-workers-are-defying-algorithms/>

¹³ <https://columbialawreview.org/content/the-separation-of-platforms-and-commerce/>

¹⁴ <https://techcrunch.com/2021/04/14/uber-hit-with-default-robo-firing-ruling-after-another-eu-labor-rights-gdpr-challenge/>

¹⁵ https://taxjustice.net/wp-content/uploads/2021/11/State_of_Tax_Justice_Report_2021_ENGLISH.pdf

these countries risk the loss of essential revenues due to transnational capital flight unless they revise their current taxation slabs. Similarly, the proportion of profits for which the right to tax has been shifted from the place of residence of the company to sales jurisdictions is much lower than the 30-50% of residual profits (profits beyond 10% of global revenue) that developing countries have been demanding.¹⁶ Considering that many lead platform firms find ways to declare a profit margin of zero, the solution that is proposed is deeply unsatisfactory.¹⁷ The taxation chapter of the OECD Guidelines needs an overhaul to account for these concerns, and the OECD/G20 process on BEPS challenges must be revisited to plug these gaps.

Not only do digital MNEs circumvent national laws with impunity, profiteering from virtualisation and regulatory obsolescence, they also engage in underhand tactics to evade legal scrutiny and accountability. The Uber Files expose in July 2022 revealed how the company has used a ‘kill switch’ protocol during raids on their offices in at least six countries, cutting off access to the company servers to prevent authorities from obtaining evidence.¹⁸ The OECD Guidelines must take due cognizance of such malpractices, appropriately framing penalties for deliberate flouting of local laws and transparency and accountability obligations.

C. Data extractivism and human rights violations

The Snowden revelations signalled a new turn in the military-industrial complex towards a surveillance compact between Big Tech and Big Brother that ushered in the unabashed deployment of digital technologies for illegitimate espionage and targetting of human rights defenders.¹⁹ National Contact Points (NCPs) in the EU tasked with furthering the effectiveness of the OECD Guidelines have not admitted complaints of human rights violations stemming from the sale of surveillance tech to foreign governments for use against human rights defenders. Some NCPs have erroneously held that human rights due diligence is not necessary if such technologies have been authorised for dual use,²⁰ refusing to go into the post-facto complaints arising from specific use cases.

A related issue is the export of data rights-violating business practices by digital MNEs to foreign jurisdictions with lower regulatory thresholds, akin to the outsourcing of environmentally polluting production practices in an earlier era. IT for Change’s research has found that digital corporations in femtech could easily get away with double standards for personal data protection – adhering to high standards in jurisdictions covered by the GDPR, and adopting a no-holds-barred approach to extract data of users in the Global South.²¹ In the future, as EU

¹⁶ <https://www.networkideas.org/news-analysis/2021/07/global-minimum-corporate-tax/>

¹⁷ [ibid](#)

¹⁸ <https://www.vanityfair.com/news/2022/07/uber-files-investigation-exposes-ride-sharing-giants-secret-political-influence-driver-exploitation>

¹⁹ A more recent example being the revelations about the widespread use of Pegasus surveillance spyware by government agencies on unsuspecting citizens. <https://www.cnet.com/tech/mobile/pegasus-spyware-and-citizen-surveillance-what-you-need-to-know/>

²⁰ <https://www.oecdwatch.org/wp-content/uploads/sites/8/2021/06/OECD-Watch-Get-Fit-Closing-gaps-in-the-OECD-Guidelines-to-make-them-fit-for-purpose-1.pdf>

²¹ <https://itforchange.net/sites/default/files/1620/FDJ-Issue-Paper-6-Data-Subjects-In-the-Femtech-Matrix-IT-for-Change.pdf>

tightens regulation of the data economy (through legislations such as the recently enacted Digital Markets Act and Digital Services Act and Artificial Intelligence regulation), such divergences can be expected in the global value chains of transnational digital corporations not just in relation to privacy rights but also other first and second generation rights. With no regulation to tackle the excesses of the automated public sphere, democracy and citizen interactions in developing countries are already held to hostage by the algorithms of social media platforms.²² While progressive developments such as the European Commission's draft Directive on working conditions in the platform economy augur well for workers in the EU, it is unclear how the rights of platform-dependent actors/workers from developing countries in transnational e-commerce supply chains will be safeguarded. This duality founded in a rapacious data colonialism divides the world into rights-bearing citizens of the Global North and ready subjects of the data market in the Global South without redress.

The expanding domain of intersections of human rights concerns with the business practices of digital MNEs calls for a committed approach in the OECD Guidelines to human rights globally. It is not enough to appeal to businesses to “promote Internet Freedom through respect of freedom of expression, assembly and association online”.

D. Planetary enclosure and threat to sustainable development

Data extractivist business models reduce life to nothing more than a source of ceaseless data flow for capital, fostering “extractive models of resource exploitation, the violation of human rights, cultural exclusion, and ecocide”.²³

The materiality underpinning the virtualised business practices of Big Tech is steeped in ecologically destructive practices that decimate the lives and worlds of the world’s most marginalised communities. A 2020 research report highlights how Alphabet Inc’s sourcing of 3TG minerals – tungsten, tantalum, and gold – from the Amazon fails to adhere to the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.²⁴ But such violations are swept out of sight by the greenwashing ploys – such as carbon-free energy pledges – of the Big Tech giants.²⁵

New developments in frontier data and AI technologies – most recently, blockchain-based crypto tokens – are being used to further a selective ‘green economy’ agenda that aids the colonisation of people and planet, only with a new veneer of environmental sensitivity rhetoric. Take the case of the Reducing Emissions from

²² In 2020, whistle blower Sophie Zhang highlighted how Facebook has failed to tackle political misinformation in smaller countries with less Western media coverage and prioritised markets such as the US and EU where such issues were likely to create more public opinion management woes for the company. See <https://cepr.net/election-interference-in-latin-america-a-growing-danger/>

²³ Ricaurte, P. (2019). Data Epistemologies, the Coloniality of Power, and Resistance. *Television & New Media*, 20(4), 350-365. <https://doi.org/10.1177/1527476419831640>

²⁴ https://giswatch.org/sites/default/files/giswatch_2020_english_0.pdf

²⁵ <https://www.businessinsider.in/tech/news/google-aims-to-become-100-carbon-free-energy-by-2030-heres-how-its-planning-to-do-it/articleshow/90839401.cms>

Deforestation and Forest Degradation (REDD+) mechanism established in 2007 at the UN level. REDD+ is intended as a mechanism for high-emission countries and companies to pay rainforest-rich nations and communities for conservation of forests, thus “offsetting” carbon emissions in one location through the sequestration of carbon in another. However, the reliance on the market-based investment route for implementation has led to the emergence of a new ‘green grab’ around REDD+ – where publicly or communally owned forest lands in the South are transferred to private intermediaries who then deploy these resources in the global carbon sink market.²⁶ The introduction of crypto-token markets to facilitate the sale of REDD+ carbon offsets threatens to intensify this ongoing dispossession of the forest rights of indigenous communities.²⁷ Similar risks of loss of biodiversity resources have been raised in relation to the World Economic Forum’s Earth Bank of Codes that intends to provide a “blockchain-based register of the digital sequence information of all plants, animals, fungi and a large portion of all single-celled organisms on earth to enable the registration of global biological and bio-mimetic (copied from nature) intellectual property assets”.²⁸

Last but not the least, the takeover of the world’s food chains by digital MNEs destroys traditional livelihoods, edging out local agricultural economies in the Global South. Recent civil society fact-finding exercises reveal how the world’s largest asset management companies like Blackrock, Vanguard, State Street, Capital Group and Fidelity own 10–30% of shares of both top agri-food firms and e-retail and cloud services, with an eye on the future high frequency trading markets that will emerge in the sector, when large-scale aggregated food system data, combined with AI, provides real-time insights to drive end-to-end control of the food chain, commodity speculation, and deepening of fintech markets, with little regard for “labour, equity and ecological impact”.²⁹

Considering that a critical objective of the OECD Guidelines is to ensure that MNEs contribute to sustainable development outcomes in the countries they operate, these risks need immediate attention.

²⁶ <https://www.frontiersin.org/articles/10.3389/fbloc.2020.00022/full>

²⁷ For example, Infinite Earth’s Veridium Labs is a Hong Kong-based private company working in partnership with IBM and Stellar to set up a platform for selling REDD + carbon off-sets as crypto-tokens. The value of Veridium’s token, Verde is dependent on the platform’s ability to facilitate micro-payments of carbon credits produced mainly from Infinte Earth’s Rimba Raya forest in Central Kalimantan. Despite the coordinated appearance of such a vertically integrated consortium, there is no clear plan for facilitating the payments to local people who will be displaced by these conservation efforts <https://www.frontiersin.org/articles/10.3389/fbloc.2020.00022/full>

²⁸ <https://www.wrm.org.uy/bulletin-articles/blockchain-and-smart-contracts-capitals-latest-attempts-to-seize-life-on-earth>

²⁹ https://www.ipes-food.org/_img/upload/files/LongFoodMovementEN.pdf

3. Making Business Responsible : Why the Overhaul of the OECD Guidelines Is Not Enough

In its June 2021 analysis of the gaps that need to be closed in the 2011 version of the OECD Guidelines on MNEs, the civil society network, OECD Watch, has pointed out two critical areas for improvement. Firstly, that the Guidelines need to go beyond ‘Internet freedom’, and grapple with digitalisation in the entire gamut of human rights and sustainable development considerations that MNE due diligence processes must account for. Secondly, existing principles or commentary in the Human Rights, Employment and Industrial Relations, Environment, Consumer Interests, Competition, and Taxation chapters should be revised to address specific concerns about MNE actions to “identify, prevent or mitigate, and remedy”, the adverse implications of virtualised and datafied business operations of MNEs on human rights and sustainable development.

An overhaul of the OECD Guidelines to make them fit for the digital context does indeed present an opportunity to shape international soft law to rein in the pan-global intelligent corporation. With the backing of the United States, the headquarters of a significant number of the world’s most powerful transnational digital corporations, and the European Union, a global trend-setter in human rights based regulatory approach to digital markets, the Guidelines do hold the maneuvering potential for responsabilising business conduct.

However, there is one critical drawback. In the last amendment to the Guidelines in 2011, the focus on effective operationalisation of obligations across global value chains of MNEs was possible to be pegged back to a globally accepted, multilateral benchmark standard that exists at the UN level – the Guiding Principles on Business and Human Rights. Human rights are indeed abiding, but digitalisation complicates the normative and ethical basis of these rights. There is no global consensus yet around the multifarious implications of digitalisation on human rights and hence, the attendant baseline to benchmark the norms for responsible business conduct.

Instead, one is confronted with a gaping global democratic governance deficit with regard to the human rights ramifications of frontier digital, data and AI technologies in various spheres of social life. The UN Secretary General has initiated a rule-making process for “an open, free and secure digital future for all”, known by the moniker of the Global Digital Compact. The Compact is expected to be agreed at the Summit of the Future in September 2023 through a technology track involving all stakeholders: “governments, the United Nations system, the private sector (including tech companies), civil society, grass-roots organisations, academia, and individuals,” building on the proposals outlined in the UN SG’s Roadmap for Digital Cooperation, announced in 2020.³⁰ The Just Net Coalition, a global civil society network working on digital justice for the South, had sent an open letter to the UN SG, with endorsements from 170 civil society organisations, on how such ‘equal footing

³⁰ <https://www.un.org/techenvoy/global-digital-compact>

multistakeholderism’ – technology corporations having an equal say with governments and civil society at the policy table – in global digital rule-making risks producing an absurdist outcome of Big Tech determining the rules to govern itself!³¹

Amidst this absence of binding global rules at the UN level on the digital economy, the US and the EU are engaged in forum shopping, leveraging the WTO and plurilateral trade agreements to push for a ‘data flows with trust’ approach that guarantees the continued supremacy of their corporations in the world. In this hegemonic discourse, the imaginary of data sovereignty is reduced to the idea of unrestricted cross-border data flows with a common minimum standard of personal data protection guarantees. The legitimate public policy aims of developing countries in introducing controls on data outflows – for reasons of encouraging autonomous digital infrastructure development or flourishing local digital economies – are not acknowledged at all.

The dynamic of data colonisation also means that regulatory norms for business conduct will invariably get exported through instruments such as the OECD. This will inhibit possibilities for home-grown national governance approaches for the digital economy, more appropriate for contexts in the developing South. For instance, the Chinese approach to algorithmic profiling in digital services markets is seen to be much more demanding on corporations than the EU’s.³² Closed door lobbying in the final stages of the formulation of the EU Digital Services Act saw Big Tech giants such as Google and Spotify successfully water down the proposed ban on behavioural advertising.³³ Regardless of the relative merits of these two cases, countries of the South must have the policy space to contemplate the future of their digital economy. However, in the real politik of international politics, plurilateral rule-making processes led by the OECD cannot accommodate the needs and interests of countries outside the bloc.

What this discussion demonstrates is that progressive civil society organisations invested in furthering responsible business conduct in the epoch of digital capitalism must not stop with the low hanging fruit of OECD Guidelines reform. We must equally embrace the imperative to address the global digital governance deficit in multilateral rulemaking – putting the spotlight on the state-corporate nexus in digital policymaking. The need for a new human rights-based global digital constitutionalism cannot be overemphasised. A deeply deliberative and consultative process involving multiple constituencies representing the most marginalised groups must form the basis of a reinvigorated UN based, multi-lateral institutional system for global digital governance. A grassroots advocacy campaign for a people’s digital compact is an immediate priority to unsettle the dominant, corporate-led discourses of ‘digital cooperation’ and the ‘common agenda. The context of digital sociality – vexatious no

³¹ <https://justnetcoalition.org/big-tech-governing-big-tech.pdf>

³² https://vidhilegalpolicy.in/wp-content/uploads/2021/10/CM_LVI_41_091021_Jai_Vipra-1.pdf

³³ <https://corporateeurope.org/en/2022/04/big-techs-last-minute-attempt-tame-eu-tech-rules> <https://www.article19.org/resources/digital-services-act-big-tech-accountable/>

doubt – also provides the immense promise of coordinated action through alliances - South-South and North-South – to bell the intelligent corporation and unleash just ideas of digitality.

