
Reconceptualising State Capture - With a Case Study of South African Power Company Eskom

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Abstract

Traditional Western-centric conceptualisations of state capture are of limited analytical value in developing and transition countries where the legitimacy of legacy institutions is disputable. In these countries, state structures do not conform to the Weberian-rational ideal, and the distinctions between public and private interests, as well as the ideological and moral norms underlying such distinctions, are contested. This not only has implications for the development and advancement of theory, but also for the development of real world responses to the malady of state capture in such contexts. In the first half of this paper, we review research emerging from developing and transition countries that revisits and restates the theoretical and conceptual foundations of state capture. Emerging from this analysis, we offer a conceptualisation that hinges on organisational structure, *modus operandi*, immediate aim, and relation to the constitutional state. We propose that state capture is a *political-economic project* whereby *public and private actors collude* in establishing *clandestine networks* that *cluster around state institutions* in order to *accumulate unchecked power, subverting the constitutional state and social contract* by operating outside of the realm of public accountability. In the second half of this paper, the analytical and practical value of this conceptualisation is tested through by exploring the case of an extensive state capture network operating across the South African state, most conspicuously at state owned companies. Our case study focuses in on one of these companies, the public power utility Eskom, which provides an especially relevant testing ground for the usability of the proposed conceptualisation. Over the past year, a parliamentary oversight committee has undertaken a public inquiry into state capture at the company, bolstered by the daring work and contributions of other constitutional bodies, civil society, and the media. The evidence and testimony made publically available through this process offers a rare insight into the workings of state capture – specifically around the distinctive organisational structure, *modus operandi*, immediate aim, and relation to the constitutional state. What's more, the operationalisation of the term state capture has been critical to those who have rallied to expose and confront the scourge of corruption and the disruption of sound governance that has exposed the country to untenable financial and economic risk. Through the case study, we are thus able to demonstrate the utility of the proposed conceptualisation not only for theoretical application, but also for real world responses to the phenomenon in developing country contexts. This paper adds to a recent wave of literature from the global South that is reshaping the discourse on corruption and driving locally relevant and embedded anti-corruption strategies.

Introduction

Corruption within the state, or institutional corruption, has long been recognised as a challenge for developing and transition countries¹. Yet, from diagnosis, to prognosis and prescription, developed country or Western-centric tools of analysis have been dominant in the treatment of this complex condition. Largely interrogated implicit moral and ideological reference points, as well as underlying biases, assumptions, models, and interests, have been promulgated through theory development and application. This is evident in both the academic literature and in the so-called development practice. The latter comprises the work of multi-lateral and bi-lateral international aid, development finance institutions, and multinational organisations, by and for which much of the theoretical and empirical work is commissioned. Rooted in this work, the discourse on economic development often implies a simultaneous achievement of economic outcomes and a routing out of corrupt local practices in favour of something approximating a Weberian state, a line which does not speak to the complexity or multiple contingencies of varying development trajectories or to local context. That the context of corruption in developing countries has long been discounted and misunderstood is, in part, a reflection of the fact that much of the work on the topic has been located outside of the object (countries) of study – indeed, this is a common critique of development studies, in general (Brohman, 1995; Sachs, 1998).

More recently, the global South has begun to assert itself in the international development discourse, relocating theory development within the systems it seeks to understand and change. In particular, the normative model of the Weberian state and ‘growth-as-development’ mantra, first peddled by advocates of modernisation theory and then hegemonies of neo-liberalism, has been treated with greater care and scrutiny (Mudimbe, 1988; Gupta, 1995; Sen, 1999; Steinmetz, 1999; Hansen & Stepputat, 2001). As a result, the theoretical and conceptual foundations of this literature are being revisited, becoming deeper, more nuanced, and increasingly reflexive and reflective of the diverse realities and concerns in developing contexts (Khan, 2004, 2012). Alongside these developments, certain research methods, once out of favour for an ostensible overemphasis on the particular (and therefore more subjective) over the universal and objective, appear to have entered a renaissance and are demonstrating their value in testing and generating theory. Most notable among these methods are in-depth, qualitative case studies (Bennet & Elman, 2007; Gerring, 2011). Within the evolving field of corruption studies, there are a number of areas in which this methodological turn is generating noteworthy insights. The burgeoning work on state capture is prominent among these areas. In this paper, we seek to make a contribution in this line, through an in-depth case study of state capture in South Africa, as manifested (and then exposed and challenged) in the dominant state-owned power company, Eskom.

The primary contribution of developing country case-studies to the understanding of state capture is to challenge its basic accepted definition. State capture has traditionally been treated as a sub-set of corruption, defined from an institutionalist perspective as the *misuse of public office for private gain through influence over institution making* (Rose-Ackerman, 2008). Recent work has shown this to be a problematic starting point, especially in developing countries. In such contexts, it is imprudent to presume that existing institutions (and institution making processes) do or should reflect the ideal

¹ Understood as low or middle income countries that may be transitioning from authoritarian to more democratic institutions and from economies where central planning was prominent to those that are more market oriented.

Weberian legal-rational model; and that, as a logical extension, any perversion of these institutions would be inherently corrupt (Chipkin, 2013; Gupta, 1995). Furthermore, the moral overtones of state capture as the ‘corruption of state institutions’, which resonates with assumptions of institutional benevolence, quickly become discordant in contexts where processes of state (re)formation occur against the backdrop of, patently violent or unjust institutions, for example, the totalitarianism of the USSR or the colonial legacy in most Sub-Saharan African states. Any definition which presumes the moral legitimacy or benevolence of existing institutions cannot be applied consistently in countries in transition, where institutional transformation necessarily progresses over time. Similarly, definitions that presume that some universal distinction between public and private realms can be applied consistently in transition and developing countries, encounter problems when applied in such contexts. Whether in relation to the office, interests, or outcomes involved in corruption, a public/private dichotomy proves false in contexts where prevailing political ideology or culture makes no such distinction, where political actors are frequently also active in the private sector, or where the line between Weberian (impersonal bureaucratic) and traditional (family/community oriented) values has not been institutionalised or internalised (Hoadley & Hatti, 2016). Indeed, the prominence of “business-politicians and politician-businessmen” in the upper echelons of most, if not all, states should caution any definition of corruption or state capture that hinges on this dichotomy (Roy, 2017).

Deviating from this, a recent conceptual turn considers distinctive features of state capture with reference to organisational structure, modus operandi, immediate aim, and relation to the constitutional state. This approach is demonstrating its value in providing alternative definitions, which can more easily be used to understand and identify state capture in the context of transition and developing countries. For example, Fazekas & Tóth (2016) argue that a “distinct network structure in which corrupt actors cluster around parts of the state” is an essential feature of state capture, allowing the authors to develop an analytical framework that can then be applied empirically by “measuring state capture in government contracting based on the network structure of corrupt transactions and actors” (2016: 320 & 331). Drawing on a selection of theoretically oriented case studies² that put forward similarly oriented analyses, while also critically engaging the more traditional institutionalist perspective, we undertake to integrate and refine new insights into conceptualising state capture in the first part of this paper. Emerging from this conceptual analysis, we propose that state capture is a *political-economic project* whereby *public and private actors collude* in establishing *clandestine networks* that *cluster around state institutions* in order to *accumulate unchecked power, subverting the constitutional state and social contract* by operating outside of the realm of public accountability. Where the political-economic project of state capture is successful, state institutions, governance, and functions are re-purposed and re-engineered over time as the constitutional state is shifted away from the democratic to a more autocratic de facto and de jure system of power. In developing and transition countries, the frequent use of corrupt practices such as bribery, rent-seeking, collusion and coercion in the state capture process is often defended as a necessary means to challenging existing institutional structures which are broadly seen to be or portrayed as illegitimate – specifically as relates to inequality in socio-economic and political outcomes. Whether this is a universal feature is yet to be tested, but it is certainly one that speaks to the importance of context in understanding and addressing state capture and corruption in countries where institutional legitimacy

² Including: Slinko, Yakovlev & Zhuravskaya, 2005; Palidaukaitė & Ibenskas, 2007; Grizymala-Busse, 2007, 2008; Klimina, 2010; Markus, 2012; Bagashka, 2014; Chipkin, 2013; Innes, 2014, 2016; Menaldo, 2015; Fazekas & Tóth, 2016; Trantidis & Tsagkroni, 2017.

is uncertain and levels of inequality or poverty are high enough that economic outcomes are of greater concern than democratic governance.

Recent events in South Africa, particularly since the publication of a report by the Office of the Public Protector, "*State of Capture*", in 2016, provides an urgent challenge to traditional definitions of state capture. The South African case has two characteristics that are central to the analysis and definitional endeavour undertaken here. The first is that the country's institutional landscape is still grappling with the legacy of its centuries long colonial history, as well as, from 1948 to 1994, the Apartheid regime, both of which defined and continue to define formal and informal institutions. As the country has transitioned to democracy, in the period following 1994, it provides an important testing ground for debates around the form and function of the state in political and economic transitions. The role of state owned companies – specifically in infrastructure and social service provision – is a pivotal point in this debate, as it is in the field of corruption studies. The second important feature of this case is that South Africa is understood, in local judicial, legislative and other processes, as just now emerging from the devastation of a far-reaching state capture project, which was can be traced back to the election of former President Jacob Zuma in 2009.

Within South Africa's state capture case, the market-dominant state-owned power company Eskom has been exposed as being a critical centre of operation, which provides a useful starting point from which a far-reaching project emanating from the presidency under former President, Jacob Zuma, can be charted. In the second half of this paper, we trace events at Eskom in a way that allows the identification of distinct networks of corrupt actors with both clandestine and more formal 'official' assemblages, clustering around parts of the state, while concurrently accumulating and concentrating power through and from the state. Eskom functioned as a strong attractor for these networks, as it has a considerable annual budget – by far the largest of all South African state-owned companies – much of which is directed toward the (highly centralised) procurement of products and services from private companies. As a market-dominant public utility, Eskom has within its organisation and value chain (including large mining interests), a concentration of power and resources which are critical to the country's developmental project and the management of which has had to contend with the Apartheid legacy of unequal wealth and power distribution in overt ways. The analysis will show how state capture network radiating outward from the President's office has pursued control over Eskom, using a variety of legal and illegal mechanism and subverting the constitution in ways that have brought the Constitutional Court into the heart of the local anti-state capture counter-movement on more than one occasion.

The South African case – specifically as relates to Eskom – offers a rare opportunity to apply and test conceptual developments vis-a-vi state capture, where the term has been put to work within a vibrant local public discourse on corruption that spans the public and private sectors, broader civil society, as well as more academic analyses. While it is impossible to escape a quasi-objective 'outsider' position in analysing corruption, insights from the *in situ* operationalisation of the term, 'state capture', by local civil society and in political and legal processes can support the further conceptual development of a term that is relevant in such contexts. The very fact that the term 'state capture' has been so efficacious in local processes, in exposing and turning the tide against the powerful networks of actors subverting critical state institutions in pursuit of widespread, systematic looting, makes South Africa a potentially important case.

Part 1: Conceptual Development

State Capture as a Subspecies of Corruption – A Critical Review of Concepts and Precepts

If corruption is understood as the “misuse of public office for private gain” – the most widely used definition (World Bank, 1997; Treisman, 2000; Jain, 2001, Bardhan & Moorherjee, 2006; Olken, 2007; Rose-Ackerman, 2008), then state capture and administrative/bureaucratic corruption can and have been defined as the primary subsets of *how public office can be misused*. Though the literature often defends a hard distinction between state capture and administrative corruption, the definitions provided for these terms are far from settled. Nevertheless, there is some consensus at the most basic level – *state capture involves influence over institution making and reforms*, while *administrative corruption involves the intentional distortion of existing institutional arrangements* (Pradhan et al, 2000; Tudoroiu, 2015). In both cases, it is assumed that corrupt actions are geared toward securing illicit gains in an untransparent manner for the benefit of select interests. This is a useful starting point, but faces a number of problems.

The first is a conceptual problem and concerns the distinction between state capture and administrative corruption. While administrative corruption may not indicate state capture, state capture almost invariably involves administrative corruption – most obviously in the use of bribes (including various forms of reciprocation or ‘quid pro quo’ deals) to gain influence, votes, or access to the information or power of public office. Some attempt to seek out a distinction in the systemic reach of such arrangements, where administrative corruption is seen to more often than not involve individual opportunistic action for individual benefit, while state capture would involve the strategic actions of organised interests with the goal of (re)shaping institutions to their benefit (Pradhan et al, 2000). However, such a distinction may fall away in reality – especially in the earlier, muddier stages of state capture or in cases where administrative capture is systemic but disorganised, or in later stages where systematic re-purposing of institutions and governance may facilitate more administrative corruption, even by those not originally or obviously connected to state capture elites and organised networks.

A second, more fundamental problem relates to the moral connotation of corruption. This introduces an uncomfortable layer of subjectivity that, if accepted, makes it almost impossible to define corruption as a universal term (Khan, 1996; 2004). For administrative corruption, this can – to some extent - be overcome by an appeal to the legality of an action in the relevant jurisdiction, where the misuse or abuse of public office is understood to be illegal or, at the very least, irregular. Of course, this raises higher order questions about the political and social legitimacy of existing institutions and the extent to which these institutions actually serve developmental aims. The distinction between the law, such as it is, and justice, toward which end the law is understood, necessarily changes over time and through different developmental stages. It is undeniable that many public servants in low and middle income countries thus face a sort of robin-hood dilemma, in which an arguably illegitimate allocation of resources may serve to legitimise (at least to a specific group of stakeholders) the establishment of (illegal) alternative redistributive mechanisms to correct the present state of affairs (Chipkin, 2013).

The moral problem runs much deeper for our understanding of state capture. By its very definition, state capture involves a process whereby the “rules of the game” are reshaped and (ultimately) “new

rules” are institutionalised through new policy, legislation, regulation, codes and standards. However, there exists the possibility that new designations of ‘legality’ may be used as a mechanism to specifically enable corrupt actions. State capture, and corruption more generally, while related to questions of legality and illegality, thus cannot be reduced to the a legal/illegal binary (Kaufmann & Vicente, 2005). If the “new rules” benefit different interests, on what basis might one decide that they are better or worse than the previous rules? The problem of finding a tenable way of making an enduring distinction between corrupt and non-corrupt action may extend to the “rules of the game” themselves. By way of explanation, the policy, legislation, regulation, codes and standards that might be used to clear up ambiguity in identifying corrupt actions, may themselves be challenged by their own moral ambiguity which might only be clarified with reference to some other external – possibly ephemeral – moral standard or code. The challenge of finding an enduringly defensible reference point for identifying corruption is both particularly difficult and specifically pertinent for transition countries. In these countries, the institutional legacies of (often) authoritarian regimes continue to distribute wealth, information and power in what might be considered to be morally corrupt ways, without challenge from the law. Following the logic in the above definition of state capture, it is unclear where corrupt state capture stops and legitimate state (re)formation begins.

A third problem is found in the assumption that corruption – both state capture and administrative corruption – is motivated by the private interests of public officials and that these are most often material. Through country case studies, it has become clear that, “instead of simply assuming what private and public interests are, we have to consider how they are defined locally” (Chipkin, 2013: 213). Among the key insights offered by literature emerging from transition and developing economies, one critically important lesson would be that corruption is often motivated by an actor’s or group of actors’ commitment to furthering social or public interests – for example, using the proceeds of corruption to fund election campaigns or to increase public sector employment or to effect policy changes with a view to disrupting existing patterns of unequal ownership of property. While involved individuals may benefit from a particular political party being elected to office or public sector jobs or policy changes, it would be difficult to maintain that these actors are motivated solely by private interests. Critically, these forms of corruption are often about effecting political and economic transformation (i.e. about the distribution of power and resources in society) (Khan, 2004; Chipkin, 2013). Indeed, in many contexts one can hardly make sense of corruption without understanding deeper social cleavages, encompassing rifts in political culture, ideology, and historical worldview (Chipkin, 2013; Hoadley & Hatti, 2016). This not only underscores the moral problem of defining state capture, but it also disrupts the distinction between the subsets of state capture and administrative capture – by illuminating overlapping motivation by and organisation according to wider social interests and political rewards.

In addition to the unclear distinction between public and private interests, distinguishing and focusing on public officials – as distinct from private actors – rarely holds, or is strictly applied, in the literature (Khan, 2004). This is in large part due to the centralised and overlapping nature of political and economic interests and actors in transition and developing countries – although proponents of elite theory provide a compelling argument that such is the case in all states (Hunter, 1953; Wright Mills, 1956). The distinction between (but inclusion of both) public and private spheres is especially relevant for any conceptualisation of state capture, which typically involves special relationships between *public and private* sector actors. Indeed, private sector actors often play key roles in state capture, acting as brokers, clients, or patrons of various state capture strategies and methods (rent-seeking,

tax evasion, money laundering, etc.). Khan makes a forceful argument that “any corrupt transaction is a type of ‘exchange’ and therefore has two components” or, in other words, it is relational and involves more than just the public-sector actor (2004: 7).

A classic example of some of these problems, can be made in exploring the phenomenon of rent-seeking – a concept that is distinct from corruption though the phenomenon often involves or may constitute corruption (Aidt, 2016). A standard definition of rent-seeking is “the quest for privileged benefits from government” (such as a license to participate in a government regulated industry or the award of a government contract) (Aidt, 2016). As relates to the first problem, rent-seeking can involve administrative forms of corruption (bribery) or those more easily loaded onto conceptualisations of state capture (coerced policy change) - or both or neither (competitive lobbying). As relates to the second, the legality of various rent-seeking behaviours depends to a large extent on existing institutional rules, while it is near impossible to establish the morality of these behaviours in specific or general contexts – a characteristic exemplified by the lobbying powers of tobacco and oil industries. Thirdly, rent-seeking is often employed – whether legally or illegally – in campaign funding transactions or the award of public contracts with explicit or hidden localisation elements. Finally, while rent-seeking involves private and public actors, it often plays out in the cross over of actors from public-to-private or private-to-public roles, such as the election of prominent business people to political office who, once in office, might support the rent-seeking activities of certain groups. How then can we determine if rent-seeking is corrupt or involves corruption or, more specifically, constitutes state capture? In the following section, we consider an alternative approach to conceptualisation of state capture – which may better identify the features of state capture and relation to development and governance outcomes.

State Capture in the Wild - A Taxonomy of State Capture in Developing & Transition Countries

Grappling with some of the conceptual problems discussed above, it seems that a big part of the challenge associated with conceptualising state capture, begins with corruption, which, many have argued, is an essentially contested concept (Wickberg, 2018). We thus propose a different, but complementary, angle: a discussion of potentially distinctive features - as well as necessary but not sufficient components – of state capture, drawn from recent theoretically oriented case study work, specifically from transition and developing countries (such as: Slinko, Yakovlev & Zhuravskaya, 2005; Paliduskaitė & Ibenskas, 2007; Grzymala-Busse, 2007; 2008; Klimina, 2010; Markus, 2012; Bagashka, 2014; Chipkin, 2013 ; Innes, 2014, 2016; Menaldo, 2015; Fazekas & Tóth, 2016; Trantidis & Tsagkroni, 2017). On the one hand, this allows for a more reflective discussion of some of the moral dilemmas that one encounters when studying state capture in these contexts, aware of the problems with (Western-centric) conceptions of corruption. On the other hand, it allows for an inductive approach to conceptualisation, where we consider definitions based in real-world examples, instead of normative models. Based on this approach, there are some distinctive features emerging in the literature.

Fazekas & Tóth begin their paper ‘From Corruption to State Capture: A New Analytical Framework with Empirical Applications from Hungary’ with the bold assertion that the essence of state capture “lies in a *distinct network structure* in which *corrupt* actors *cluster* around parts of the state allowing them to *act collectively* in pursuance of their private goals to the detriment of the public good” (2016: 320). In other words, state capture is a “group phenomenon” (Grzymala-Busse, 2007, 2008; Fazekas

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& Tóth, 2016: 320). This is echoed in ‘Clientelism and corruption: Institutional adaptation of state capture strategies in view of resource scarcity in Greece’, wherein Trantidis and Tsagkroni posit that state capture involves “*collusion*” where “*groups conspire* to gain access to the distributional and regulatory powers of the state with the explicit aim to extract selective (personal) benefits” (2017: 264). Now, some of the red flags raised in the previous section apply here too. What sets corrupt actors apart from others? What distinguishes private interests? Who is/can be responsible for deciding what is in the public good and by which mechanisms are these parties empowered to do so? Nevertheless, the emphasis on the *network structure of state capture* reflects what we see in various case studies – where actors within and outside of the state *collude* in influencing certain processes over time (Wedel, 2003; Innes, 2014; Bagashka, 2014; Trantidis & Tsagkroni, 2017). The membership and operations of the network are necessarily clandestine, though some elements may strategically be made visible. In some cases, propagandistic tools – ideological campaigns, public media shows, or business fronts – provide a facade of openness when necessary or provide the means through which the state capture network recruits members and rallies support for broader policy changes, but are in no-way reflective of the true nature of a state capture network.

The empirical observation that state capture necessitates, and is thus defined by, *collusion* and *conspiracy* does not contradict more traditional (normative) institutionalist definitions. On the one hand, the complexity of various state functions – from policy-making and legislating, to regulation and oversight, or procurement, tax collection, service provision, and licensing – means that they cannot be housed in a single individual. Instead, “political and technocratic actors necessarily codetermine” various decisions, rules, and their implementation (Fazekas & Tóth, 2016: 321). On the other hand, securing and managing the spoils of state capture – which are not exclusively material, but invariably include material benefits – requires skills and resources typically not found in the state, and thus need to be managed with the help of actors outside of the state, including deal brokers. That the *capture* of any or multiple state institutions requires a covert network of actors inside and outside of the state is thus logical.

Following from this, the power that such a network would have to have in order to make the capture of state functions and institutions possible, necessarily depends on its ability to influence, pay-off, or appoint network members into positions of power (Tsebelis, 1995, 1999; Gerring & Thacker, 2004; Tavits, 2007; Gehlbach and Malesky, 2010; Bagashka, 2014). Veto-player theory is typically concerned with policy-making and legislation, where veto players (both individuals with special powers, such as a President, and institutions with special powers or dominance – such as a constitutional court or a majority ruling political party) can *block* the adoption of any new piece of legislation or policy (Tsebelis, 1995, 1999, 2005). However, the notion can easily be extended to players that can, unilaterally or in partnership with only a few others, *pass* new legislation, policy, or rules. Meanwhile, the scope could be extended further to cover other state functions and processes – such as licensing or procurement – and related agents of the state – such as state owned companies or law enforcement. Accepting these extensions, state capture networks are most likely to target veto-points and cluster where there are fewer veto-players that would need to be captured – making the subversion or repurposing of governance easier. In general, the risk of state capture is higher where decision-making power is centralised – whether in an individual institution or the structure of the political and economic system more generally (Bagashka, 2014). The level at which state capture typically occurs leads some to argue that it is an elite phenomenon – where elites conspire to extract rents *from* or *through* the state (Grzymala-Busse, 2007, 2008). While we do not argue against this supposition, we note at least two

obvious exceptions. The first considers cases where state capture is a means to establishing new elites, where actors that were previously excluded or, finding themselves on the periphery, collude to challenge or usurp incumbent elites (Grzymala-Busse, 2007, 2008). The second concerns cases where the state is captured by more diffuse and representative interest groups, such as a dominant political party which, over time, becomes enmeshed with the state at every level (Chipkin, 2013; Grzymala-Busse, 2007, 2008).

This brings us to the question of means and motivation. Unlike some of the definitions provided above, we do not assume that the state (before state capture) is an ahistorical paragon of public interest nor do we assume that it is an archetype of the Weberian legal-rational model. Instead, we consider the literature on political settlements (and complementary frameworks found in new institutional economics³), according to which the state – and its constituent institutions – are continually shaped by, and to the benefit of, powerful interests (Khan, 2010). What’s more, we concede that informal institutions remain determinative to the functioning and (re)formation of state institutions, especially in transition and developing countries. That being said, state capture cannot be reduced to efforts of a coordinated network, to shape state institutions to the benefit of the interests represented in or by said network. This is more and less what all interest groups do, all the time, including political parties, business and professional associations, labour unions and civil society organisations, or lobbyists and public interest groups that are largely considered to be legitimate. There must be something about the *how* and the *why* that defines state capture.

First, as to the ‘*how*’, the literature points out that state capture can take many forms, involve diverse strategies, and utilises various methods (Grzymala-Busse, 2007, 2008; Trantidis & Tsagkroni, 2017). State capture may involve the strengthening of certain institutions – most often the state security apparatus, revenue services, and legal oversight institutions – even as the independence of such institutions is reduced, as they become beholden to network actors carefully placed in veto-positions (Grzymala-Busse, 2007, 2008). Institutions may also be established to support rent-extraction – special tax mechanisms or procurement rules – and, in some cases, rent distribution – social grants, credit extension, government jobs, or transfers of land and property (Grzymala-Busse, 2007, 2008). Grzymala-Busse identifies four archetypal strategies – *clientelism*, *exploitation*, *state-party fusion*, and *predation* – though she notes that they are “compatible with each other to an extent” (2007, 645). Variation between these strategies depends on the extent of rent-sharing and competition permitted by the state capture networks (or, in her definition, incumbent elites) and, “reflects strategic calculations influenced by existing organizational endowments, the costs of buying support, and the trade-off between costs and the probability of exit from office” (Grzymala-Busse, 2007 as cited in Trantidis & Tsagkroni, 2017). Typically, state capture involves the progressive repurposing of governance through the quiet invasion of governance structures (eg. the political executive, the boards of state-owned companies, or state security institutions) in such a way that agents of state capture are positioned to disperse government benefits to select groups, though the deals are ultimately negotiated and managed by brokers who allow state capture agents to ‘keep their hands clean’. This symbiotic relationship between agents in veto or other powerful positions and the brokers that manage the deals and illicit financial flows is central to the sustainability of state capture.

³ Such as, Acemoglu & Robinson’s “extractive” vs “inclusive institutions” (2012) or North et al.’s “open” and “limited access orders” (2007, 2010).

These variables, however, do not hold constant at every level of government or in every institutional arena (policy-making, procurement, credit extension, etc.) (Ichino, 2006; Grzymala-Busse, 2007, 2008). Different strategies may be deployed in different sectors. The relationships between actors involved in state capture are also diverse, encompassing but not limited to patronage, bribery, clientelism, and coercion. There is also no hard-and-fast rule on the locus of power between different groups in the network – whether “it is business capturing the state, or the other way around, or both at the same time” (Menaldo, 2015; Fazekas and Tóth, 2016: 322). In its most extreme form, when the state capture network extends across national and subnational (regional and local) government, various sectors and state institutions, and seeps into the various constitutional bodies that are meant to check power, a shadow state may come to possess the constitutional state and can use it and its powers at will (SCR, 2017). In more emergent or limited manifestations, state capture networks may target only one or a few areas – for example the mineral resources sector or a single municipality. Typically, areas of interest are those that are both lucrative and vulnerable. Vulnerability refers to the structural conditions that allow for control and capture, such as centralised power structures and low transparency. These vulnerabilities may be more deeply entrenched in areas that are minimally competitive, such as state owned and/or monopolistic/oligopolistic companies. In cases where state capture involves targeting such lucrative and vulnerable institutions, the network of state capture in its full systemic realisation may emerge over time, appearing at first as discrete corruption acts. The ‘how’ of state capture is thus a moving target and can change over time. However, this in itself emerges as distinctive - the willingness to use any and all means possible - whether formal or informal, legal or illegal, corrupt or principled, coercive or persuasive - to gain access to the power of the state, but to never be beholden to it. This is not to say that every actor within the network would be equally willing. However, it is most likely a feature of those who establish and/or quickly rise through the ranks of clustered state capture networks, who ultimately find their way into the veto-player positions, and manage “the symbiotic relationship between the constitutional and shadow state” (SCR, 2017).

As to the ‘why’, it is not immediately clear whether the ‘goal’ of state capture can be reduced to the pursuit of ‘private’ benefits and outcomes that are in conflict with the ‘public good’. Although common, there is some question as to the usefulness of an appeal to such a distinction (Chipkin, 2013; Fazekas & Tóth, 2016: 320). As noted earlier, collective understanding of the proper form and function of the state in transition or developing countries, specifically as relates to the ‘public good’ and ‘private interests’, may be undergoing necessary contestation (eg. post-soviet transition countries or post-apartheid South Africa). While this increases the ideational space open for political reforms and institutional innovation, it also creates opportunities for political entrepreneurs with ambitions for state capture. For this reason, state capture can often have an ideological face – a group of actors conspiring to position their actions as being in the ‘public interest’. Because those involved in state capture often justify their action by appealing to some higher end, a teleological definition that centres on conceptions of the ‘public good’ and ‘private interest’ (as if they are mutually exclusive) can be inimical to a more useful and rigorous understanding (and identification) of state capture. Nevertheless, it is useful to acknowledge that actors active in state capture will likely be motivated (at least in part) by the promise of power, protection, status, access, and material gain. The latter – (illicit) material gain – is certainly a common feature of state capture, related to the economic dimension of the phenomenon. However, we are not convinced that it is distinctive.

Instead, we argue that it would be more prudent – and arguably more useful for those grappling with the risk or progression of state capture in transition and developing contexts – to seek out a definition

in the immediate and observable aim of any state capture network: the *accumulation of unchecked power*. To quote George Orwell, “[p]ower is not a means; it is an end. One does not establish a dictatorship in order to safeguard a revolution; one makes the revolution in order to establish the dictatorship ... [t]he object of power is power” (Orwell, 1949). Following this line, the concept of state capture only becomes useful when it is used to make sense of repeated (sometimes financial) transactions and a non-linear progression of events whereby *power* - and its various sources, most prominently that of state institutions - *is accumulated or harnessed* by a network of actors operating outside of the bounds of the constitutional state. While state capture networks invariably use this power to extract material and other benefits from the state, they use it for other purposes as well - such as suppressing political opposition, altering power dynamics between social groups or securing geopolitical alliances – suggesting that the accumulation of power *is* distinctive. By design, the accumulation and exercise of such power does not need to contend with pressures of public accountability, transparency, or legitimacy and it is not bound or tempered by a constitution – unlike that of the state. Through this process, the state is functionally hollowed out, becoming a host for the state capture network – a potential incubator for a more authoritarian state. State capture can thus be understood as a political-economic project, concerned with power and resources, whereby various functions of the state are repurposed or reengineered so as to redirect *power* and *resources* to the state capture network. In this way, the aim of state capture transcends the individual or any ‘act’ of state capture. Indeed, while institutionalist definitions might suggest that a single act could constitute state capture, this is not widely reflected in the cases study literature⁴. It is difficult to conceive of state capture as limited to a single event involving just two actors, such as a once-off bribe to a top politician on a matter relating to policy or legislation, or a payoff to the person responsible for deciding the outcome of a tender – this would surely be a case of (potentially grand) political corruption.

Having thus considered distinctive features relating to the organisational structure, modus operandi, and immediate aim, we can return to the question put aside at the beginning of this section – the question of corruption. What is it that makes state capture a form of corruption, as opposed to a regime change or institutional reform? On the one hand, the process of state capture is often defined as corrupt because of the frequent use of corrupt methods - such as bribery, non-competitive and untransparent rent-seeking, political and administrative corruption, collusion, and coercion - or the self-interest of involved actors who seek to capture institutions for private benefit. On the other, it has often been described as corrupt because of the possibly deleterious implications of state capture for the public good. However, we propose that it is the systematic erosion of accountability, made more insidious by the often attendant appeals to social justice or transformation, between state capture networks and the rest of society that is its definitive source of corruption. Understood in this way, state capture is *essentially corrupt* because it seeks to cheat the social contract, however that contract may manifest in any given country, and however it is reflected in the constitution. State capture may have the appearance a type of state (re)formation but, whatever the institutionalised functions and systems of justice which define the state in question, the state capture network seeks above all else to be beyond the reach of the law, accountable only unto itself, free to loot or oppress or extend patronage and favour.

⁴ Such as: Slinko, Yakovlev & Zhuravskaya, 2005; Palidaukaitė & Ibenskas, 2007; Grzymala-Busse, 2007, 2008; Klimina, 2010; Markus, 2012; Bagashka, 2014; Chipkin, 2013; Innes, 2014, 2016; Menaldo, 2015; Fazekas & Tóth, 2016; Trantidis & Tsagkroni, 2017.

Bringing this analysis to a close, we propose that state capture is a *political-economic project* whereby *public and private actors collude* in establishing *clandestine networks* that *cluster* around *state institutions* in order to *accumulate unchecked power*, *subverting the constitutional state* and *social contract* by operating outside of the realm of public accountability. We believe that this definition supports and is supported by the literature which treats state capture as corruption, but that it takes it further by demonstrating the nature of this corruption and fleshing out what makes state capture distinctive – and thus identifiable and combatable – in all contexts, including developing and transition countries where traditional definitions do not always hold water. In order to demonstrate this, we spend the second half of this paper applying this conceptualisation to the case of state capture in South Africa as manifest at the market-dominant state-owned power company, Eskom, while demonstrating how public institutions, civil society, and the media have combatted state capture through operationalising elements of this definition to “connect the dots” and effectively launch a strategic counter offensive.

Part 2: Case Study

South Africa - State of Capture

In November 2016, South Africa’s former Public Protector⁵ Thuli Madonsela released the *State of Capture* report. Despite various attempts by former President Jacob Zuma’s⁶ legal team to interdict its publication ahead of the end of her term of office⁷, it was made public almost immediately. At the heart of the report is a line of questioning and evidence relating to allegations pertaining to the Zuma and Gupta families’, as well as their associates’, involvement in:

- the appointment and removal of state ministers and board members at state owned companies (specifically Eskom, but including Transnet, Denel, PRASA and SAA),
- various conflicts of interest and information sharing to the benefit of Zuma-Gupta aligned interests,
- the special treatment of the Zuma and Gupta families and associates to the prejudice of other parties, and,
- incidents of bribery, fraud, and corruption.

In addition to the allegations of the complainants, this investigation responded to allegations levelled in the media that the “relationship between the President and the Gupta family had evolved into “state capture” underpinned by the Gupta family having power to influence the appointment of Cabinet Ministers and Directors in Boards of SOEs and leveraging those relationships to get preferential treatment in state contracts, access to state provided business finance and in the award of business licenses” (Public Protector of South Africa, 2016: 5).

⁵ The Public Protector is one of six independent state institutions set up by the South African Constitution to support and defend democracy. These institutions are independent of the government, subject only to South Africa’s Constitution and the law, and report annually to Parliament.

⁶ Jacob Zuma held the office of President of the Republic of South Africa from May 2009 until February 2018.

⁷ The Public Protector’s term is limited to 7 years. Thuli Madonsela was appointed by President Zuma in October 2009 and left office in October 2016.

While the term ‘state capture’ had already gained currency in the South African media – used to characterise the complex and untransparent relationships between the former president, his family, and his supporters within the ruling ANC party, and the prominent Gupta family, their businesses, and associates – the line of evidence presented in *State of Capture* gave new meaning and weight to the concept. ‘State capture’ was named word of the year in 2017 in South Africa and numerous inquiries were established to investigate allegations of state capture across spheres and levels of government – most of which are still in process today. These inquiries include: a Judicial Commission of Inquiry into allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State; a Commission of Inquiry into the South African Revenue Services (SARS); and four separate inquiries into state capture undertaken by the following parliamentary portfolio committees: Public Enterprises, Home Affairs, Mineral Resources, and Transport.

By far the most advanced, in large part due to the evidence presented in *State of Capture*, the Parliamentary Portfolio Committee on Public Enterprises’ inquiry into allegations of state capture at Eskom (Eskom Inquiry) has already reached completion⁸ and its final report is expected to be released imminently. For this reason, the study presented here will focus on state capture at Eskom, beginning with an overview of events (based primarily on the evidence and testimony heard at the Eskom Inquiry), following which the definition advanced in part one of the paper is explored in relation to the presented case.

The Case of State Capture at Eskom

It is perhaps unsurprising that Eskom was a primary target of state capture in South Africa. Eskom is one of the largest power utilities in the world, with a history stretching back 95-years, operating in the fifth most energy intensive economy globally. As the market-dominant, state-owned company, Eskom generates more than 90 per cent of South Africa’s electricity, controls the entire national high voltage transmission grid, and distributes around half of electricity directly to consumers, with the remainder going to municipalities. Eskom’s assets are valued at R710 billion and its capital expenditure programme amounts to around R350 billion over the next five years. With annual revenues nearly three times that of Transnet⁹ and six times that of South African Airways, Eskom is by far the largest state-owned company (SOC) in South Africa. Furthermore, the state-owned company is inextricably intertwined with the political economy of the country, which has been described as exhibiting a minerals-energy complex (MEC), with close interdependent relationships having evolved over decades between elites with vested interests in primary energy, energy intensive industry, the power utility, and the state (Fine & Rustomjee, 1997). Indeed, the relationship between energy and minerals industries has been central to projects of state building and elite formation, especially during the Apartheid period. Despite the origin of its form and functions, Eskom survived the transition to democracy, and policy aimed at unbundling and sector reform, more or less unchanged. Its survival has perpetuated the Apartheid state’s legacy of low transparency and accountability in the energy sector, including the workings of coal and nuclear energy deals and plans. This resistance to reform reflects the enduring historical power of vested interests both within and outside of the state, as well as the vehicle Eskom that has provided for new elites seeking to establish and consolidate relations of

⁸ The Eskom Inquiry was conducted from the 17th of October 2017 and continued through to the end of March 2018.

⁹ State Owned South African Rail, Port, and Pipeline Company.

power under the new democratic dispensation. Eskom continues to expand from its centre. Following the 2008 supply crisis, Eskom has been scaling up generation and building some of the largest coal power stations in the world – Medupi and Kusile – each 4800 MW in capacity, and has recently completed the 1332 MW Ingula pumped storage facility. The late commissioning of these power stations contributed to severe load-shedding in recent years, which has been detrimental to economic growth. In addition, these power stations have cost more than double their original budgets. There were more than 40 construction contracts for each power station, none of which were in the public domain, with allegations of inflated prices and corruption.

Over a decade of investigative journalism, and now, the Eskom Inquiry, has resulted in a body of evidence showing widespread corruption in the management of Eskom's operating expenditure which totals around R140 billion per annum (excluding finance costs, depreciation and taxes). The operating budget includes maintenance, refurbishment, staffing costs, consulting and service contracts, but the largest component is for primary energy purchases, and, in particular, coal contracts. The largest expense attracted the most blatant corruption, notably in the form of over-priced coal contracts, the squeezing out of incumbent coal majors, and the questionable acquisition of coal mines by the Gupta family, demonstrably financed by Eskom. Average coal costs are now close to R400 per ton, up from R190 per ton in 2011. Corruption has also allegedly led to the inflation of diesel fuel costs for Eskom's peaker plants, used during load-shedding years. Burgeoning costs across the board, arguably propelled by illicit rent-seeking and corruption, have resulted in electricity tariffs increasing by more than 400% over the past decade, all while electricity services have deteriorated. In addition to the direct and indirect impacts of electricity price inflation and unreliable electricity supply on the economy, decreasing investor confidence in South Africa, and in Eskom, specifically, means that Eskom now struggles to secure funding year on year. While the institution's financial crisis grows ever more serious, it is also evident that the parasitic state capture network displaced expertise, institutional values and culture, and governance, all critical to South Africa's developmental aims. Though the past six months have seen a rolling back of the top cadres of state capture in the executive and governance structures of the utility, it is unclear if Eskom can or should survive in its current form – which is not only vulnerable to the type of capture and corruption that has been laid bare, but also no longer makes sense in the fast-changing energy sector landscape where technological breakthroughs are paving the way for a more democratic energy future.

In this section, an overview of the progression of state capture at Eskom is presented. Through the linear tracing of events, it will become clear how the state capture network first infiltrated Eskom and then established a centre of control at the utility. It will be shown how veto positions were captured, policies and procedures were circumvented and later reformed, all contributing to an undermining governance. The aim and result was control over the distribution of power and resources through Eskom to a wider network of beneficiaries. The consequence has been a hollowing of the utility, to the extent that it is now failing to fulfil its mandate: to provide electricity in an efficient and sustainable manner to grow the economy and improve the quality of life of the people of South Africa. Evidence of this failure includes the R19 billion in irregular expenditure exposed in the 2017/2018 financial report, increasing costs of primary energy and electricity, growing supply insecurity, and the risk of Eskom's financial unsustainability to the national fiscus. Despite this, those involved have yet to be held to account.

2010 – 2014: Decision-making positions are captured in Eskom and relevant ministries

Before the scourge of state capture, Eskom had established relatively high levels of technocratic expertise, capacity, and competence. In the years after the democratic transition, this was exemplified in the calibre of the boards (which included CEOs of international utilities) and executives they were able to attract. This endured at least into the mid-2000s, alongside relative stability in the Department of Public Enterprises and the Department of Minerals and Energy. However, following the election of Jacob Zuma to the office of President, political interest increased in board and executive appointments at SOCs in general, and at Eskom and Transnet, in particular. Then Minister of Public Enterprises, Barbara Hogan, resisted this emerging undue influence, which likely accounted for her dismissal only 18 months after appointment.

Former President Zuma's appointment of Malusi Gigaba as Minister of Public Enterprises in November 2010 is seen to be a decisive action, which put state capture into motion at South African state owned companies. During the Eskom Inquiry, it was revealed that Minister Gigaba took up the mantle of an activist shareholder representative, in contrast to his predecessors, working through the boards he appointed and in his own capacity to shape, and subvert, policy, planning, strategic direction, and oversight at SOCs. While this was in line with developmental state agenda being advanced by government during this time, it was often inconsistent with policies governing SOC mandates. For example, Eskom's decisions often departed from the Department of Energy's explicit aims. Minister Gigaba implemented unprecedented governance changes at SOCs, which then impacted on management and operations.

From the get-go, Gigaba appeared to have an antagonistic and unproductive relationship with the Eskom executive and standing members of the board – intervening in procurement and management in a manner in which no other minister before him had. For example, just months into the position, Gigaba refused to sign off on the award of a R4 billion tender for the replacement of six steam generators at Koeberg Nuclear Power Plant. Though the tender had already been through rigorous technical review, ratified by the executive and approved by the board, Gigaba inexplicably refused to ratify the decision that the bulk of the contract be awarded to Westinghouse. Instead, Gigaba insisted that the multi-year procurement process be initiated from scratch, needlessly disrupting Koeberg's strategic, risk managed maintenance plan.

Scarcely more than 6-months in the post, Gigaba then replaced all but two non-executive directors in June 2011, effectively wiping out the institutional memory of the board in a single move. Gigaba did the same at other SOCs around this time, inserting several associates of the Gupta family - with whom he has interacted on personal and private business issues - into the boards at Eskom, Transnet, Denel. Gigaba reportedly warned the new Eskom board not to trust the executive staff at Eskom, rupturing lines of accountability critical to proper governance and alienating the expertise that members of the executive brought to the table (most with twenty plus years' experience in Eskom).

Gigaba's interventions were often done under the pretext of the need for transformation. When it came to advancing government policy, Eskom chairperson Zola Tsotsi testified that "one of the strongest mandates that the Minister [Malusi Gigaba] had articulated to the board had been Black Economic Empowerment (BEE)". During the Eskom Inquiry, two examples of this mandate being put into action in questionable ways were identified. The first relates to the appointment of Eskom's auditors, in which Minister Gigaba took a direct interest. Eskom has historically had three auditors on rotation. During Minister Gigaba's tenure, Eskom moved from this rotation model to work with a single auditor, SizweNtsalubaGobodo (SNG), while other SOCs turned to work with other black-owned

firms, including SNG and Nkonki. This decision risked exposing auditors to unwarranted pressures, as the SOC contracts could easily account for the bulk of their income – making them vulnerableⁱ to the influence of decision-makers at SOCs, especially those with special relationships with the Gupta network. The second example relates to Minister Gigaba’s insistence that coal supply contracts to Eskom must be provided by miners with 50%+1 (fifty percent plus one) black ownership by 2018/19. Yet, there is no clear policy or legislative basis for this policy and, more significantly, it is not clear that the implementation of the 50+1% rule has been applied uniformly, transparently, or in a manner supportive of equitable transformation in the sector. Instead, it seems that this has been used to advance certain interests, sometimes through deals involving fraud and corruption. This has been to the disadvantage of other companies, including legitimate BEE miners, and increased primary energy costs, for which South Africans ultimately have had to pay the price.

These and other goings on at Eskom during Minister Gigaba’s tenure contributed to the fracturing of governance, where board members were allowed to interfere in the business of management, usurping the roles of respected group executives and undermining the tenets of good governance in legislation, protocols, and regulations. Members of the executive and management were progressively intimidated and sidelined if they refused to sign off on irregular processes or otherwise challenged the new leadership. From 2013 onward, Eskom began to haemorrhage executives and senior staff, many of whom were suspended on trumped up charges (without proof) and refused fair disciplinary proceedings or any real opportunity to return. Finally, after years of maltreatment and threats, Brian Dames stepped down as Chief Executive (CE) in March 2014, replaced in an acting capacity by board member, Collin Matjila. Evidence presented during the Eskom Inquiry revealed how Matjila’s appointment was a coordinated effort on the part of members of the state capture network – perhaps the first overt instance of the Gupta-Zuma families’ direct interference in the appointment of Eskom’s executiveⁱⁱ. After four years as Minister of Public Enterprises, Gigaba was then moved to Home Affairs, which is being investigated under a separate inquiry process.

2014: Minister Brown and Acting Chief Executive Close Irregular Deals

While it was Gigaba who appointed Matjila to the board and then ushered him in as acting CEⁱⁱⁱ, it was Gigaba’s successor, Minister Lynne Brown, that gave Matjila the latitude he needed to close many of the deals that had been set up over the preceding years. These deals included a R 43 million breakfast deal with TNA media^{iv}, whose (indirect) shareholders included President Zuma’s son, Duduzane, and members of the Gupta family, which Matjila signed without the appropriate approvals and against the advice of Eskom executives and legal counsel. When the board later initiated a forensic audit of the TNA deal, which found it to be irregular and recommended that Matjila be removed and advised that the Minister could press criminal charges, no action was taken. Similar deals were struck at other state-owned companies and institutions, allowing TNA to work as a propaganda machine for the Gupta-Zuma network.

Matjila was also able to close the R4 billion Koeberg steam generator tender in his time as acting CE, awarding the bulk of the tender to Areva despite the fact that Westinghouse had again been selected in multiple technical reviews as the better provider. Furthermore, Brown’s PFMA approval of the deal was unusual – hinging on a rush meeting with a board member, Neo Lasela, and Eskom Executive, Matshela Koko. The Supreme Court of Appeal (SCA) found the decision unlawful in terms of the Promotion of Administrative Justice Act 3 of 2000, but this ruling was overshadowed by the

Constitutional Court's ruling that the appeal had involved an issue of locus standi on the behalf of the complainant.

The last tender issue that Matjila had a special interest in, according to the evidence presented at the Eskom Inquiry, relates to an IT service provider contract. In 2013, the then CIO, Sal Laher, had identified an opportunity to save Eskom R1 billion^v by internalizing core IT functions. Faced with losing its Eskom business, valued at around half a billion rand a year, evidence made available during the Inquiry suggests that T-Systems made a deal with a Gupta middle-man, Salim Essa - who set up a meeting with Matjila shortly after he was appointed. In exchange, Essa allegedly handed over a list of company names (companies owned by associates of the Guptas and Essa) that T-Systems agreed to sub-contract work to. While Matjila was acting CE, the tender process inexplicably ground to a halt and T-Systems' contract was eventually extended at the end of 2014.

By the time a new CE, Tshediso Matona, was appointed in October 2014, the damage had already been done. Matona testified that when he was appointed Eskom CE, replacing Matjila, "there was a state of infighting within the board [...] over procurement matters". Matona referred specifically to the TNA deal, which had "ripped the board apart", the "bitter fights" about the Koeberg steam generator tender, and the T-Systems issue. Meanwhile, then CFO, Tsholofelo Molefe, testified to the fact that some board members were struggling to deal with these issues because the Minister was unavailable to meet them, specifically in relation to the results of the forensic investigation into the TNA deal. Two of these board members (Bejabulile Luthili and Yasmin Masithela) chose to resign, disturbed by the implications of the Minister's unwillingness to deal with such a critical issue. Molefe also recounted how, when auditors SNG identified the deal as a reportable irregularity, chairperson Tsotsi and at least one other board member, Chwayita Mabude, tried to prevent the deal being reported in the financial statements which were due to be released at the start of December 2014, ahead of a critical bond-raising period. In Molefe's opinion, Tsotsi was under mounting "pressure from people on the outside" and the Minister did not seem to be interested in addressing the irregular deals or supporting those board members that were trying to remedy the actions of Matjila.

When Brown then replaced all but two non-executive members of the board on 10 December 2014, it was Tsotsi and Mabude who stayed on. What little institutional memory the board had gained since Gigaba's overhaul just three-and-a-half years earlier was again decimated. Compared to the select few Gupta associated directors in Minister Gigaba's board, Brown's "consisted predominantly of individuals with direct and indirect business or personal relations with Mr D Zuma, the Gupta family, and their related associates, including Mr Essa", according to former Public Protector^{vi}. While the circumstances surround the appointment of this board remain unclear, it has been reported that Salim Essa had been involved in putting together a list of candidates – a list which looked very similar if not the same to the board that was appointed. When called before the Committee, the Minister was unable to account for the appointment process or outcome.

Neither the Minister or the new board pursued the matter of the Koeberg steam generators further, despite the findings of the SCA, representations made by members of parliament, and outcry in the press. No action was taken against Matjila either - even the findings of the forensic investigation were inexplicably disregarded and the R 43 million breakfast deal lasted through to 2017. TNA Media not only drew significant financial support from SOCs and Government through such sponsorship deals but it also provided a public 'news' platform^{vii} that the shareholders, the Guptas and Zumas, could control. Lastly, the T-Systems contract was extended and the internalization of core IT services

deferred. Meanwhile, the financial standing of the utility deteriorated under load shedding conditions – creating the crisis that would allow Minister Brown and her new board to take radical, interventionist decisions at Eskom in 2015.

2015: The Three Phase Zuma-Gupta Coup of the Eskom Executive

The 2014/2015 coup of Eskom governance was a turning point in the state capture strategy. Following the first phase, Minister Brown's appointment of the new Gupta board in December 2014, the initiation of an inquiry into Eskom provided the distorted rationale for phase two, which involved the suspension of four more executives, then CE Matona, CFO Molefe, Dan Marokane, and Matshela Koko, and led to the resignation of board Chairperson Tsotsi in March 2015. In phase three, Minister Brown would make secondments from Transnet – where the Gupta network had already netted billions through colluding with the likes of Regiments Capital and McKinsey on unprecedented procurement deals.

The groundwork for phase two^{viii} seems to have been laid in mid-February, when Brown called Chairperson Tsotsi to a meeting where she admonished him for 'interfering' in management issues and warned him that if he continued, she "would have to find someone else to do [his] job". The very same day, Tsotsi was approached by Tony Gupta who said to him: "Chairperson, you are not helping us with anything. We are the ones who put you in the position you are in; we are the ones who can take you out". Former CFO Molefe's estimation that Tsotsi was contending with mounting external pressure was certainly correct. Tsotsi reported that in previous interactions with the Guptas, they had used their relationship with former President Zuma as leverage – he knew that their threats were credible. A few days later, President Zuma called Tsotsi on 25 February 2015. In this call, Tsotsi was informed that the Eskom board meeting scheduled for the following day would be cancelled. Tsotsi was later called by the Deputy Director General who informed him that the Minister had asked that the meeting be cancelled. In his testimony, Tsotsi noted that he was especially troubled by this last minute cancellation not only because of the highly unusual manner in which the messages had been relayed, but also because he realized that without the new board's first proper meeting with the Minister, its committees were effectively operating without a mandate^{ix}.

Just over a week later, President Zuma unofficially requested that an independent inquiry into Eskom be undertaken. According to evidence presented during the Eskom Inquiry, this request was relayed at a highly unusual private meeting organized and convened by Dudu Myeni, then chairperson of the South African Airways (SAA) board, on Sunday 8 March 2015 at Zuma's Durban residence. At the meeting, Tsotsi was informed that a number of top executives would need to be suspended for the duration of the inquiry, which would last three months. Despite the fact that the President does not, in his capacity, represent the shareholder representative and is not in a position to give instructions to the board or chairman, Tsotsi engaged the board on the matter the following day. The board, however, was wary^x and decided that the establishment of the inquiry had to be formalized by the shareholder either in writing or at a formal meeting, and resolved to engage with the Minister of Public Enterprises.

At the same time that Zuma was orchestrating the inquiry and suspensions of the executives, Gupta Lieutenant, Salim Essa, was holding private meetings – a number of which were arranged by Matshela Koko – with Eskom senior staff, informing them of the immanent suspensions and offering acting positions to those with whom they met. There is no legitimate reason why Essa or Koko would have

been aware of the suspensions and neither were in any position to be choosing who would step in for those who would be suspended.

On 11 March 2015, the board met with the Minister of Public Enterprises. According to the meeting minutes^{xi}, Brown “stated that she [had] no right to instruct the board on any matter regarding the conduct of Eskom’s business [and that the meeting was] an informal one” but then went on to say that “it [was] the wish of the DPE that there should be a forensic inquiry so that there is proper information around the main issues which affect the business of Eskom” noting that it was “an unusual appeal from a shareholder”. During the meeting with the Minister, it was confirmed that “the executives who are responsible for areas which will be the focus of the investigation must step aside for the duration of the inquiry in order not to impede it”. After meeting with the Minister, the board resolved that the inquiry would be instituted. The four executives were immediately issued with suspension notices.

This decision shocked the country and led investment agencies to re-evaluate Eskom’s status, with S&P downgrading Eskom to junk status only a week later. In the midst of a financial crisis and supply-side crisis, the events leading up to the initiation of the inquiry and the suspension of the executives were unfathomably reckless. In the wake of these devastating actions, the board then initiated a disciplinary process^{xii} against Tsotsi with the intention of removing him as chairperson and elected Ben Ngubane as chairman on 19 March 2015. A cloak and dagger process, the only board member that questioned the board’s scapegoating of Tsotsi, Norman Baloyi, resigned shortly after Tsotsi did.

On 17 April 2015, Minister Brown seconded Brian Molefe from Transnet and appointed him acting CE. Koko was then reinstated as Group Executive for Technology and Commercial in July 2015, while the other suspended executives were offered severance packages even though they had not been found guilty of any wrongdoing – a careless loss of critical skills at a particularly demanding time. In August 2015, Brown then seconded Anoj Singh from Transnet and appointed him acting CFO, bringing the coup full circle. Meanwhile, the inquiry that had been used to justify the unprecedented overhaul of governance at Eskom had been closed just seven weeks after it began. The board asked Dentons (the law firm that had conducted the investigation) to remove the names of any implicated individuals and companies in finalising their report, as well as any information that they had not yet corroborated, and resolved to destroy all copies of the original draft. The final report^{xiii} then went to the Minister but was kept from the public and parliament.

2015-2016: Eskom is captured and the spoils begin to flow to Zuma-Gupta Network

While Gigaba’s board and executive might have included individuals willing to interfere in select procurement processes and follow orders which came from outside of Eskom, others had rallied against unethical and illegal actions where they came to light. With Minister Brown’s appointment of a new board in 2014 and executives in 2015, the balance of power seems to have shifted. This required the extraordinary intervention of former President Zuma, but it certainly paid off. From 2015 onward, Eskom started to bend over backwards to award contracts, some worth billions, to companies owned by or associated with the Gupta and Zuma families.

The most notorious of these, Trillian and Tegeta, were achieved through the establishment of command and control governance at Eskom, which was coordinated by a shadow network of actors sitting in the DPE and the Eskom board, executive, and management. Through the Eskom Inquiry, it became patently clear that the communication of orders was increasingly transmitted through this unofficial network while formal governance structures were undermined. Official documentation

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from this time, reviewed through the Inquiry, often did not have the requisite signatures or were incomplete – allowing the executives or board members making or signing off on proposals that were either irregular or clearly out of line with the spirit of relevant legislation some scope for plausible deniability.

One of the most galling examples can be found in the appointment of Molefe as CE, his subsequent resignation, reappointment, and an unheard of R 30 million early pension pay-out after just 18 months at Eskom. During the Eskom Inquiry, this issue was investigated tirelessly, revealing the extent to which official lines of communication had been commandeered, only to be replaced by disingenuous processes and possibly fraudulent documentation. Contrary to the findings of an inter-ministerial committee^{xiv} established by former President Zuma in June 2017, the North Gauteng High Court ruled in January 2018 that the early retirement agreement was a “deliberate scheme devised by Eskom with the involvement of Mr Molefe”. What’s more, the Court found that Minister Brown and Eskom “acted irrationally in ignoring the damning allegations in the Public Protector’s Report” that had precipitated Molefe’s resignation.

The cases of Trillian and Tegeta similarly demonstrate how Eskom, under the leadership of Minister Brown, and the board and executives that she appointed, acted against the interests of the company and the country in order to direct private benefits to the Gupta and Zuma families, and their associates.

Tegeta Exploration and Resources Pty Ltd (Tegeta)

Evidence presented during the Eskom Inquiry revealed that the Gupta network had been attempting to secure coal contracts with Eskom since at least since 2010. These early attempts, which included proposals from Gupta associated Arctos Trading and Gupta-owned Idwala Coal, were rebuffed due to their failure to meet various technical and environmental standards. While former CE Dames and former Divisional Executive and Head of Primary Energy, Kiren Maharaj, maintained a hard line on these standards despite external pressure to award contracts to these companies, with the coup of Eskom governance carried out over 2014 and 2015, the goal posts seem to have shifted.

In May 2014, following former CE Dames’ resignation, Goldridge – on behalf of Tegeta^{xv} - approached Eskom with a proposal to supply coal from Brakfontein and Vierfontein. After Maharaj refused to support the proposal, Koko suspended her in July 2014^{xvi}. When Tegeta then submitted an official (unsolicited) proposal to supply coal to Eskom in September 2014, the Primary Energy Team seemed slightly more amenable without Maharaj’s presence – but still noted a number of technical and environmental issues which had to be addressed, including around the suitability of Brakfontein’s coal and Tegeta’s apparent flouting of the National Environmental Management Act’s (NEMA) water use regulations. But Eskom soon became laxer when it came to Tegeta, awarding contracts for coal which had previously been deemed unsuitable at any of Eskom’s power stations and failing to ensure that Tegeta honoured various environmental regulations, including the requirements set out in the water use license they secured in December 2014.

In January 2015, Eskom entered into negotiations with Tegeta and on 10 March 2015, around the same time when the inquiry was being launched and executives suspended, a 5-year coal supply agreement (CSA) was signed, whereby Tegeta would supply 65,000 tons of coal per month to Majuba Power Station at a rate of R277 per ton (a price higher than any other coal suppliers to Majuba – specifically that of Leeuwpaan which is owned by Exxaro^{xvii}) effective 1 April 2015. Soon after, the CSA was upgraded to 100,000 tons per month and a 10-year duration. Then, in June 2015, Eskom approved

Tegeta's request increase supply to 200,000 tons per month. As a result of these amendments, Tegeta's monthly revenue from Eskom more than doubled from ~R 15 million in April 2015 to ~R 35 million in July 2015. Meanwhile, more cost-effective mines were effectively sidelined. Tegeta was not 50+1% black-owned when the CSA was signed and their 2015 and 2016 BEE certificates, which declare Tegeta an exempted micro enterprise (with income < R5 million and <R 10 million, respectively) appear to be fraudulent. In addition to the preferential treatment afforded to Tegeta in negotiating and amending their CSA, evidence^{xviii} made available through the Inquiry suggests that Koko – and others at Eskom – protected Tegeta from remonstrations when it emerged that they were supplying out of specification coal to Majuba Power Station.

The Brakfontein CSA^{xix} might cost Eskom up to R 3.8 billion over 10 years, which is not a lot considering how much Eskom spends on coal annually. But this number does not capture the opportunity cost of supporting a legitimate coal miner or procuring coal at a lower price through a competitive process or through extending agreements with existing suppliers, nor does it account for the cost of sub-par coal supply to Majuba – some of which has to be rejected, some of which can be used but to the detriment of the long-run efficiency of the power plant. However, the true cost of this CSA might have little to do with the contract itself – but the fact that it led to Tegeta's acquisition of Optimum Coal Holdings (OCH), which likely would not have been possible without the breakthrough CSA or the income from the Brakfontein mine.

It is now beyond doubt that Tegeta's acquisition of Optimum Coal Holdings^{xx} hinged on a number of highly questionable actions on the part of Eskom - including: the termination of a negotiation and settlement process with OCM in June 2015; the levying of an inflated R2.17 billion fine against OCM in July 2015; the provision of a R1.6 billion guarantee to Tegeta in December 2015; the awarding of lucrative coal contracts to Tegeta between January and April 2016; and, a never-before-seen coal prepayment to Tegeta amounting to R659 million rand in April 2016 – orchestrated by select individuals at Eskom, working with others at the Department of Mineral Resources and Tegeta, evidently part of and loyal to the Gupta-Zuma network.

Commencing at the time of Molefe's secondment from Transnet, OCH's majority shareholder Glencore suffered undue pressure and prejudicial treatment by Eskom and other state entities, including the Department of Mineral Resources. The negotiation of an amendment to their CSA and concurrent settlement process^{xxi} was abruptly terminated by Molefe in June 2015, after which a backdated fine^{xxii} was imposed in the amount of R 2.17 billion for failing to meet the quality specifications set out in the CSA between 1 March 2012 and 31 May 2015. This forced OCM and OCH to be entered into voluntary business rescue on 31 July 2015. Evidence was provided which confirmed that the R2.17 billion fine levied against OCM was hugely inflated^{xxiii}, and should have rather been in the range of R70 million (according to an independent assessment conveyed in a National Treasury report) up to R 722 million, as calculated by former Company Secretary Suzanne Daniels. In addition to the unusual circumstances under which the fine was imposed and the fact that it was hugely inflated, a number of other occurrences during the OCM/OCH sale negotiations seem to indicate that these actions were part of an offensive launched by individuals at Eskom and the Ministry of Mineral Resources to ensure that Tegeta was the only feasible buyer of OCH.

While Eskom's refused to renegotiate the CSA with OCM even after OCM and OCH were placed under voluntary business rescue, despite coal supply risks^{xxiv}, Eskom also failed to provide the required support to other parties interested in the purchase of OCM – including BEE accredited Pembani

Development Trust. Meanwhile, the Department of Mineral Resources issued mine stoppage notices at Glencore mines^{xxv} in November 2015, during the period when OCM's sale was being negotiated, forcing the sale. Lastly, at a meeting on 24 November 2015, Koko informed representatives of OCM and Oakbay that Eskom would not support the sale of OCM alone, but would only support the sale of OCH (of which OCM was part). This decision, while commercially defensible, was clearly in Tegeta's favour and highly unusual on the part of Eskom. It also seems to have had little bearing on the price offered. In the first week of December 2015, Tegeta made an offer^{xxvi} to purchase OCH shares for R 2.1 billion, around the same price it had offered in June for OCM alone, which Glencore accepted in principle. Yet, Tegeta still needed further support from Eskom and a host of fast-tracked approvals from other state bodies to close the deal.

First up, Tegeta needed to prove that it would be able to afford the proposed purchase price of R 2.1 billion. On 8 December 2015, CFO Singh and Koko made a submission to the board ('independently' verified by Gupta tainted Regiments Capital) which requested that they, along with CE Molefe, be authorized "to negotiate and conclude a prepurchase of coal agreement with the proposed owners of OCM" quantified at R 1.68 billion. A prepurchase of coal is in no way 'business as usual' at Eskom yet the board approved the submission the very next day, on 9 December 2015. On behalf of Eskom, Singh then signed an "Agreement Regarding the Prepurchase of Coal from Optimum Coal (Pty) Ltd" with Tegeta CEO, Ravindra Nath on 10 December 2015^{xxvii}, without securing or even seeking out the PFMA approvals required from the board, Minister, or National Treasury^{xxviii}. On the same day, a Sale of Shares and Claims Agreement was entered into by Glencore, OCH, Oakbay, and Tegeta. According to the agreement, Tegeta would have to pay the full purchase price three days after the suspensive conditions for the sales agreement had been met or waived.

Over and above the R 1.68 billion guarantee, Eskom initiated a set of additional measures which would support Tegeta in their purchase of OCH. Chief amongst these, was the awarding of lucrative short-term coal contracts to Tegeta to supply Arnot Power Station. In order to do so, Eskom prejudiced Exxaro (which was until recently Eskom's foremost majority black-owned coal supplier) by prematurely cancelling their Arnot and Mafube contracts^{xxix}. The subsequent coal emergency for Arnot Power Station that was declared by Eskom's Primary Energy Division's Tactical Command Centre on 23 December 2015 provided the basis of the award of contracts to Tegeta. Eskom also inexplicably reduced the coal requirements at Hendrina Power Station. As a result, OCM was able to divert coal from Hendrina (through which Tegeta earned R150 per ton of coal) to Arnot (through which Tegeta earned R467 per ton) from January 2016.

Despite these radical efforts, when it came time for Tegeta to purchase OCH's shares – having fulfilled the suspensive conditions on 8 April 2016^{xxx}, they had not yet managed to raise the necessary R 2.1 billion^{xxxi}. On 11 April 2016, just hours after a consortium of banks had refused to advance a R600 million loan to Tegeta, a ~R 600 million coal prepayment was approved^{xxxii} at an urgent Eskom meeting convened at 21:00 via teleconference. On 13 April 2016, an agreement between Tegeta and Eskom was entered into and a prepayment amounting to ~R659 million (incl. VAT) was confirmed and paid on the same day. On 14 April 2016, Tegeta was able to purchase all shares held by OCH. Based on the evidence presented during the Inquiry, Eskom has never made a prepayment or pre-purchase of this nature. Indeed, the unusual and seemingly irregular events leading up to the sale of OCH to Tegeta would likely not have been possible unless facilitated by a network of actors working within Eskom's executive and board governance structures, while colluding with and to the benefit of external interests related to the Gupta and Zuma families.

Trillian

Similarly to the case with Tegeta, the Gupta network had been attempting to secure a certain type of consulting relationship with Eskom for some years. When one considers that Regiments Capital, alongside McKinsey^{xxxiii}, was able to steer a tender process that netted Essa's front company Tequesta R5.3 billion on a locomotives deal at another state owned company, Transnet^{xxxiv}, in addition to the 30% share of McKinsey's advisory fees Regiments' reaped as a supplier development (SD) partner, it is not difficult to understand why. During the Eskom Inquiry, it emerged that Eskom officials had been under pressure to award contracts to Regiments - emanating from the Department of Public Enterprises and certain executives and board members at Eskom - since at least 2014. Ahead of Minister Brown's governance coup, however, these efforts came to little effect^{xxxv} and members of the Eskom executive and board blocked the award of at least one lucrative contract through an unwarranted emergency procurement process - one that might have seen Regiments earning R500 million on a 'risk-based' contract - for work of limited value, much of which Eskom could do itself.

Less than a year later, under Minister Brown's newly appointed board and executives, McKinsey was awarded its first contract with Regiments as its SD partner. But things were souring at Regiments, after an attempt by the Gupta network to buy a 51% stake in the company was thwarted in June 2014. Trillian was born from the fracturing of Regiments which ensued, with majority shareholder Essa's Elgasolve and headed up by former Regiments director, Eric Wood. Trillian went on to become McKinsey's unofficial SD partner on two contracts – earning close to R 600 million in just one year though there is little evidence that any work was done to justify this. Much like the original Regiments proposal, the second contract had a 'risk-based' structure. Flouting National Treasury rules and regulations, and ignoring the advice of legal counsel, the PFMA approvals required for a 'risk-based' contract were never secured – allowing the steerco, chaired by CFO Singh, to calculate returns that seem incommensurate with the work done or possible value added for Eskom^{xxxvi}. There is also some doubt around whether the second contract with McKinsey ever entered into force – as various conditions appear not to have been fulfilled before the Conditions Precedent expired on 31 January 2016. As such, the contractual basis for all the payments Eskom made to McKinsey and Trillian in relation to the second contract (~R 1.5 billion) are highly questionable.

At this stage, there is no evidence that a contract between Eskom and Trillian or McKinsey and Trillian exists. This means that all payments made to Trillian are likely in contravention of the PFMA, as well as internal Eskom policies^{xxxvii}. Much like the Tegeta deal, payments to Trillian thus required executives at Eskom to use command and control tactics with subordinates^{xxxviii}, under the guise of broad mandates requested from and approved by the compromised board. A similar cast of actors has emerged in a number of legal and forensic investigations into the matter^{xxxix}, including: Singh, Koko, Charles Kalima, Prish Govender, and Edwin Mabelane.

2017- 2018: The Battle Against State Capture Begins

With the release of the *State of Capture* report in November 2016 giving a name to the string of events occurring not only at Eskom but across SOCs, state institutions, and within the ruling party, the shadows in which the Zuma-Gupta network operated no longer gave the same cover as before. Under pressure, Eskom CE Molefe resigned in the same month the report was released, unable to account for his regular phone (and other) contact with the Ajay Gupta and other high profile Gupta business

associates with whom Eskom had business dealings. Five¹⁰ board members also resigned in 2016, some before the release of the report and other after, as it became clear that the rampant corruption being perpetrated by the state capture network was increasingly being exposed through the media and other investigations, including that of the Public Protector and the National Treasury's Special Investigations Unit. But the battle was not yet over and under the watch of Koko, who was appointed acting CE, CFO Singh, Board Chairperson Ngubane and others, Eskom continued to work with and for Zuma-Gupta interests – including Trillian – while doubling down on the command and control governance that had made these deals possible. Meanwhile, Minister Brown feigned ignorance and continued to delay investigations and failed to take appropriate action in the face of mounting evidence against members of the board, executive, and management.

At the same time, the broader state capture network – including those positioned at Eskom - was working toward something much bigger: the procurement of a fleet of nuclear power plants that could cost South Africa over a Trillion rand. The deal had been in progress for years, chiefly negotiated between President Zuma and Russian President, Vladimir Putin, behind closed doors. In line with the broader state capture strategy, the careful placement of Ministers and other's in veto positions over preceding years had allowed due process to be circumvented so that the deal could be muscled through. If successful, it would have likely financed the state capture network's expansion and complete takeover of the state – supporting a Zuma dynasty (which was being groomed ahead of the ANC's leadership elections in December 2017), extending patronage further across the ruling political party and associated business interests, and keeping the wheels of the Gupta's money laundering and fraud business in good stead to manage the new captured state.

But these plans began to unravel as civil society and the media, prominent business and political actors, and concerned citizens began 'connecting the dots' of state capture and pushing back where it was possible. In April 2017, the High Court declared the nuclear deal unlawful and set it aside in a case brought by civil society organisations Earthlife Africa and the Southern African Faith Communities' Environment Institute against government. The following month, a trove of emails was leaked – known as the #Guptaleaks – which contained email correspondence between public servants and officials (including Ministers, politicians, senior staff members at SOCs and other institutions) and the Zuma and Gupta families and their business associates. Researchers and investigative reporters began mining the #Guptaleaks and conducting their own investigations, whistle-blowers came forward, and a number of official investigations were launched – including the Eskom Inquiry.

During this period, four¹¹ more board members left Eskom – including Chairperson Ngubane, who had overseen some of the more blatant acts of fraud and corruption at the utility. Minister Brown, still publically denying that Eskom had fallen victim to state capture, appointed new board members and began suspending members of and shuffling the executive – creating greater instability, obstructing remedial action and investigations, and protecting those who had or continued to pervert due process at the institution. However, this only became more difficult when the Eskom Inquiry had begun in October 2017.

¹⁰ Board members Nazia Carrim, Devapushpum Viroshini Naidoo, Mark Vivian Pamensky, Romeo Khumalo and Mariam Cassim resigned in 2016.

¹¹ Chwayita Mabude, Venete Klein, and Ben Ngubane resigned in 2017. New board members, appointed in June 2017, included Pulane Molokwane, Simphiwe Dinga, Banothile Makhubela, and Sathiaseelan Gouden.

When the ANC held its elective conference in December 2017, Zuma's faction – led by Nkosazana Dlamini Zuma – lost to Cyril Ramaphosa. Having won the ANC leadership race, one of Ramaphosa's first actions was to appoint a new Eskom board and institute changes in the executive leadership and top tier management. President Jacob Zuma was eventually forced to resign in February 2018, at which point Ramaphosa became state President as well. The current administration, however, is that of the former President's and Ramaphosa has only been able to make limited changes thus far. Nonetheless, they have been decisive and include appointing new Ministers to the Public Enterprises and Energy Portfolios. Ramaphosa also initiated the Judicial Commission of Inquiry into allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State.

Under new leadership, Eskom has taken progressive action against implicated individuals and investigated irregular supplier contracts, uncovering R19.6 billion in irregular expenditure which had previously not been reported by auditors. However, the financial crisis at the utility – precipitated by the governance crisis brought on by state capture – remains dire and it is unclear whether the utility will be able to (or should) survive in its current structure, which is no longer in line with international best practice or the changing needs of the energy sector.

Significant progress has been made, but the war against state capture is not over. The Gupta-Zuma network remains powerful, while the ANC is divided between those loyal to Zuma and those who follow Ramaphosa. In the lead up to the 2019 national elections, the energy sector remains a prime site of contestation – with Eskom at the centre of the battle. South Africa is a live case study in state capture, in which the future of the economy and democracy lie in the balance. The importance of understanding the phenomenon to combatting and recovering from it should not be underestimated. In the following section, we try to do just that – using the definition presented in part one of the paper to explore the distinctive features of state capture at Eskom, while looking at how it fits in and what it reveals about the larger project.

Conceptualizing State Capture in the Case of Eskom

In part one of the paper, we proposed that state capture could be understood as a *political-economic project* whereby *public and private actors collude* in establishing *clandestine networks* that *cluster* around *state institutions* in order to *accumulate unchecked power*, *subverting the constitutional state* and *social contract* by operating outside of the realm of public accountability. We also noted that state capture involves the *re-purposing and re-engineering of state institutions, governance and functions* in order to serve this network – allowing it to accumulate resources from the state and extend its reach and solidify its power. In this section, we apply this definition to the case of Eskom – drawing further links to the wider state capture phenomenon in South Africa - by breaking the definition down into five primary components and applying them to the case study.

1. State capture is a political-economic project.

The case of state capture demonstrates the linkages between political and economic interests active in state capture, underscoring the dual nature of the state capture project. On the one hand, evidence suggests that political and other actors involved would have been motivated not only by economic interests – the spoils of rent-seeking and corruption – but also by the desire to stay in power or to maintain power through securing resources to fund patronage networks and – possibly – the ANC (which has been losing ground at the polls), to govern without having to follow the principles of democratic policy-making and implementation, and to reform the political settlement to a more

dominant and authoritarian system whereby an elite characterised by clientilistic relationships was able to rule without contending with the strictures of a constitutional democracy. In a country where democracy is not yet consolidated, where persistent inequality mirrors the divides of the Apartheid past, and the desire for ‘radical economic transformation’ trumps underdeveloped democratic values, it is perhaps not wholly surprising that there are many who would trade in democratic process and accountability for power and resources. It is possible that some within this network would believe – or could be made to believe – that such a project is in the best interest of the country, that such a form of government would be better suited to bringing about ‘radical economic transformation’ that could dismantle ‘white monopoly capital’ – that the loss of political freedom would be worth the prize of economic freedom. However, this has not born out in practice. Instead, the old adage that “power corrupts and absolute power corrupts absolutely” seems to better describe the effects of state capture, whereby political and economic interests converge on corrupt self-enrichment and the abuse of power to the detriment of broader developmental goals of increasing economic growth, advancing economic development, and reducing inequality.

In the case of Eskom, the political (rhetoric and power) and economic interests active in the progression of state capture are visible in the types of deals – and the justification thereof – that the Zuma-Gupta network orchestrated. The example of Gigaba’s unilateral 50+1% policy for coal contracts, which allowed Eskom to prejudice not only the old ‘white monopoly capital’ coal majors but also legitimate BEE accredited mining houses to benefit the Zuma-Gupta owned Tegeta, reveals the tension between the rhetoric of economic transformation and the practical needs to secure resources to fund patronage or pay off those who manage the complex financial flows of the state capture network. Former President Zuma’s involvement in the 2015 executive coup reveals his interest in establishing leadership at Eskom that would be loyal to him, that would advance his political or economic interests – that shared in his vision of the type of political leadership that was needed for a developmental state, where SOCs could be used as tools of transformation. Similarly, the nuclear deal with Russia reveals a geopolitical element – for which big infrastructure projects are often used, not only in cases where corruption may be involved, but also for solidifying long term political alliances. State capture at Eskom – and more broadly – is demonstrably about more than the economic interests that benefit, but also includes the political motivations behind these deals and governance changes at state institutions like Eskom. For this reason, understanding it as a political-economic project is fundamental to understanding the nature and motivation for state capture.

2. The political-economic project of state capture involves public and private actors, who collude to establish clandestine networks.

While traditional definitions of state capture – and corruption more broadly – focus on the actions of public actors, we argue instead for a relational understanding that necessarily includes both public and private actors. When it comes to state capture specifically, these relationships are characterised as collusive where public and private actors establish clandestine networks across the state and state institutions. In the case of South Africa, this could not be more perspicuous in the relationship between the Zuma and Gupta families, as well as their associates and extended, overlapping networks. Typically, the public and private actors play distinctive roles – where public actors are gatekeepers to state resources, information, processes etc. and private actors have access to or provide services related to money laundering, fraud, and other necessary elements that allow the resources needed by the network to circulate without triggering the types of checks and balances public servants often have to contend with. However, these roles can reverse at times and as needed, specifically where

private actors might be able to provide information or resources relevant to political processes (eg. elections) or public servants are able to smooth the process of resource management (eg. tax fraud). What is distinctive is thus not the roles that each play, but that the relationship of collusion allows the state capture network to steadily gain power and resources in a flexible, sometimes opportunistic but more often strategic, manner. The network structure is probably one of the most important features for the identification of state capture, when it becomes possible to show how public and private actors are linked in ways that could undermine sound governance and reveal collusion.

Through the Eskom Inquiry, the *State of Capture* report, and other investigations, the discovery of undisclosed relationships and connections between public and private actors has been integral to exposing the project of state capture at the utility – and its parallels and links to the broader state capture project. Strong examples can be found in:

- the appointment of Gupta associated persons to the Eskom board – and the relationships between board members sitting on other state owned company boards;
- board members’ and executives’ undisclosed interactions or private meetings with Gupta Lieutenant Salim Essa, the Gupta brothers, Duduzane Zuma, state ministers, and CEO’s at various Gupta owned companies;
- public officials’ (including Eskom staff) undeclared trips to Dubai paid for and organised by the Gupta’s (as revealed in the #Guptaleaks), and;
- phone calls and emails between the Guptas and their associates and public officials.

In exposing these connections or ‘connecting the dots’, the extent of the network, its means of establishment, and the deals and processes that were coordinated by the network have become clearer. Though the full extent of the network and its dealings are still under investigation, its uncovering and evidence of collusion have been determinative to efforts to circumscribe and dismantle state capture at Eskom and across the state.

3. Clandestine networks cluster around state institutions.

The clustering of the network around state institutions is also a distinctive feature of state capture and, where successful, exhibits a strategic progression. It is not enough to cluster at nodes which offer access to resources under conditions of limited transparency, neither is it prudent to go for the ‘biggest fish’ first. Rather, the success of state capture rests to some extent on establishing political legitimacy and support (clustering within political parties and politically powerful groups, such as unions – often through the use of patronage and populist campaigns), disarming state institutions which could discover or combat corruption (for example - the police, national prosecuting authority, and state security agency), experimenting at sub-national levels (eg. provinces or municipalities) or institutions that bear less scrutiny (eg. smaller state owned companies or government departments), and then scaling up to bid for the real seats of power and resource distribution (eg. National Treasury or the biggest SOCs, like Eskom). This strategy can be traced in South Africa¹², offering a potentially critical lesson: state capture is progressive, the sooner it is identified – the sooner it can be stopped.

The Eskom case study provides a stark example. While Eskom had been able to resist attempts by the Zuma-Gupta network to secure coal contracts, media deals, and consulting services until about 2014, the smaller state owned company, Transnet, had already been captured and the Zuma-Gupta network

¹² See: State Capacity Research Project (2016) - Betrayal of the Promise: How South Africa is Being Stolen.

was netting billions in inflated deals involving fraud and corruption. The board appointed by Gigaba in 2010 included a number of Gupta linked individuals who signed off on irregular processes, while frontmen CEO Brian Molefe and CFO Anoj Singh managed the implementation of multi-billion rand projects to the benefit of the network. If this pattern of state capture had been exposed and combatted at this stage, Minister Brown would not have been able to transplant Molefe and Singh to Eskom, her board appointments would have born greater scrutiny, and it is possible that some reforms may have been instituted to prevent the type of supplier deals that had been abused at Transnet. Instead, Eskom became the next node around which the state capture network clustered – allowing it to secure billions more through irregular deals and harness the company, as it had other state institutions, to advance the power of the network over the constitutional state and resource distribution centres.

4. Clustering around state institutions allows clandestine networks to accumulate unchecked power.

The progressive and strategic clustering of the state capture network around state institutions allows us to discern the broader aim of state capture. While some may argue that state capture is primarily oriented around corrupt rent-seeking, we instead argue that it is about the accumulation of unchecked power. Though this power is typically used to extract resources from the state to sustain and expand the state capture network, including through offering bribes and funding patronage networks in exchange for support and cooperation, the ultimate aim is the establishment of a network that has the power to do so – and that can do much more. From changing policy to reforming state institutions, conducting unilateral deals with geopolitical partners and oppressing political opposition, perhaps amending the constitution or withdrawing political freedoms – the type of power that state capture aims for extends far beyond rent-seeking for personal gain. It is this characteristic that makes it most concerning for developing and transition countries, especially those that are weak or young democracies, as state capture is essentially undemocratic. In South Africa, state capture has not only had deleterious effects on the economy, with negative outcomes for socio-economic and human development, high inequality and employment, and economic transformation, it has also negatively impacted on the democratic dispensation. The independence and capacity of various constitutional checks and balances have been eroded, governance across state owned companies and core institutions – including the South African Revenue Services – lie devastated, and the political rights of democratic citizens undermined. The fact that those responsible have yet to be brought to justice is a glaring result of the way in which the network has been able to accumulate and maintain unchecked power, and continues to work with impunity in trying to recover the project.

The capture of Eskom provides a tragic example. The dissolution of sound governance at Eskom has made it near impossible for the company to fulfil its mandate: to provide electricity in an efficient and sustainable manner to grow the economy and improve the quality of life of the people of South Africa. Whether considering the R19 billion in irregular expenditure, the outlandish increases in primary energy costs (primarily coal), the increasing price of electricity for customers, reduced quality and reliability of service, or the financial crisis that it now finds itself in, it is clear that the company has been damaged. But the effects of state capture go further. In destabilising sound governance structures and implanting a state capture cluster at the utility and the related Ministries of Public Enterprises, Energy, and Mineral Resources, the Zuma-Gupta network was also able to block official energy planning processes – for example, the delayed release of the Integrated Resource Plan, sideline renewable energy independent power producers (Eskom refused to sign power purchase agreements

for two years), introduce greater uncertainty into minerals extraction and energy related services in the country, and facilitate disruptive, costly, and politically divisive strike action by groups such as the coal transporters forum. In doing so, the state capture network used is power to advance various strategies aimed at serving their interdependent political and economic interests. The cost of state capture lies not only in the resources lost to rent-seeking, but also in the erosion of accountable governance, transparency, and justice through the state capture networks accumulation of unchecked power.

5. The accumulation of unchecked power enables the state capture network to subvert the constitutional state and prevailing social contract.

While a state capture network may converge on populist rhetoric around development and economic transformation or other political issues, it is by nature unaccountable to the people or to the goals it may claim allegiance. In establishing the state capture network in such a way as to allow colluding actors to operate outside of the codified laws, rules, regulations, and protocols of state institutions, it begins to work outside of the strictures of the constitutional state. In any state, excepting perhaps totalitarian dictatorships, political actors and public servants are bound to report or make transparent various processes of governance either to the public or other constitutional bodies (such as Parliament) or even the political party and its constituents. Whatever lines of accountability are built into the system, even if it is not a constitutional democracy, are thus subverted through the political-economic project of state capture and similarly, the social contract, according to which the people let those in power govern and rule, is betrayed. In the first part of this paper, we argued that it is this feature that makes state capture essentially corrupt. In South Africa, we can see the effects of this corruption beyond the billions of rands effectively stolen from the state, in the way in which the Zuma-Gupta network has undermined constitutional checks and balances, divided the ruling political party and fractured political alliances, and has – thus far – not been held to account in according to the laws of the land. While criminal proceedings may be under way, including the Judicial Commission of Inquiry, those known to be involved in corrupt tenders and governance interventions have not been criminally prosecuted or forced to face the weight of the law.

At Eskom, most of those known to have been implicated in the project of state capture have exited and eleven criminal cases have been opened. While this action has and should be applauded, it hardly seems commensurate with the R19 billion in irregular expenditure exposed at the utility and there haven't been any arrests. Indeed, Eskom appears to have closed ranks as it deals with the financial crisis and spectre of reforms, with most action being taken internally through numerous disciplinary processes. Meanwhile, the South African Directorate for Priority Crime Investigation (the Hawks) have been slow to act on any of the evidence made available through the growing number of investigations, including the Eskom Inquiry. Meanwhile, Eskom and those responsible for its precarious financial position, spiralling capital expenditure and operation costs, increased electricity prices and the other effects of state capture at the power utility remain – broadly – unaccountable to the people of South Africa. Given the virtual monopoly structure of the electricity supply industry, customers cannot choose their service providers and have no hope of holding the power company to account. As a SOC, the next avenue of accountability is government, the political party, and the various institutional structures built to ensure that Eskom serves the interests of all South Africans. But these too have been weakened by the project of state capture, there is little to no recourse for South Africans apart from at the polls in 2019.

Conclusion

The case of state capture in South Africa, and particularly in the state-owned public utility, Eskom, supports a reorientation of theoretical approaches to state capture. Traditional definitions of this phenomenon rely heavily on models of the state and state institutions that presuppose a neutral, benevolent Weberian bureaucracy, which acts in accordance with shared national values, and particularly, in a way that is just. What the case of South Africa clearly demonstrates is that, in concrete ways, the very idea of a developing country - a country in development - implies both contingency in the form and function of institutions, and contestability of the values, ideology, and models that underpin institutions and institution-making. Failure to acknowledge this might make state capture difficult to identify or combat where corrupt networks use this complexity to conceal their operations and objectives, often under the guise of reformation or transformation. The definition of state capture that is proposed here is one that specifically responds to this central challenge in South Africa, as well as other developing and transition countries like it, by focusing on the organisational structure, *modus operandi*, immediate aim, and relation to the constitutional state.

While the substance of the definition of state capture applied in this paper is built on an extensive conceptual analysis, undertaken in Part 1, it should be emphasised that much of the literature that informs this work is similarly oriented towards the use of case studies. In other words, while responding to traditional understandings, this new conceptual ground was arrived at through iterative processes of induction and deduction with respect to theory grounded in empirical observations from developing country case studies, on the one hand, and a detailed exploration of the South African case, on the other. Traditional conceptualisations of state capture have value, linking state capture to issues of public administration and corruption. However, these definitions rely on value-laden conceptions of corruption as the perversion of politically neutral, benevolent public institutions. However, all institutions, and particularly those in developing and transition countries, change over time, requiring a renegotiation of the rules of the game, and by implication, what it means to pervert those rules. The analysis in this paper also pointed to issues with hard distinctions between public and private interests, which often do not hold in developing country contexts. While empirical work in developing countries is certainly critical for the research and advisory work of development organisations acting in these countries, these insights can also prove useful in developed countries in which the reality of institutions also necessarily deviates from theoretical ideals. It is this messy intuitional reality that demands a definition of state capture that is workable and can be used as the basis for remedial actions.

While, as seen in the case of Eskom, corruption must be addressed where state institutions are captured, there are other, less contentious features that allow it to be identified and addressed, detailed in recent theoretically oriented case study work, specifically from transition and developing countries (such as: Slinko, Yakovlev & Zhuravskaya, 2005; Palidaukaitė & Ibenskas, 2007; Grizymala-Busse, 2007, 2008; Klimina, 2010; Markus, 2012; Bagashka, 2014; Chipkin, 2013; ; Innes, 2014, 2016; Menaldo, 2015; Fazekas & Tóth, 2016; Trantidis & Tsagkroni, 2017). It is from these cases that we arrived at the definition of state capture explored in this paper: a *political-economic project* whereby *public and private actors collude* in establishing *clandestine networks* that *cluster* around *state institutions* in order to *accumulate unchecked power*, *subverting* the *constitutional state* and *social contract* by operating outside of the realm of public accountability.

This definition is broad yet narrow enough for application to a range of contexts. It allows for different strategies, aims and ideologies, and can work across different sectors. It also allows for the characterisation of relationships through different patterns, including but not limited to patronage, bribery, clientelism, and coercion. The Eskom case demonstrated instances of all four forms. One of the most useful features of this definition, however, is the fact that it accommodates the blurring of public and private interests. To reiterate, it works whether “it is business capturing the state, or the other way around, or both at the same time” (Menaldo, 2015; Fazekas and Tóth, 2016: 322). The full impact of the political-economic project of state capture in South Africa may take years to assess. However, the framework presented here provides a useful conceptual clearing in which further details can be brought forward and integrated, as they emerge.

What is already manifestly clear from the Eskom case, is that a network of actors worked in concert, with a clear purpose that began with deploying key individuals to influential, decision-making positions. These people – notably at the Cabinet level – then appointed allies in lower-level decision-making positions, often displacing skilled personnel with less skilled or less rule-abiding alternatives. These deployed cadres re-purposed and re-engineered functional offices, procurement processes, and organisational structures, leading to an overall erosion of good governance. Somewhat more transparent processes and lines of accountability were replaced with an obscured, more autocratic de facto and de jure system of power that reached outside Eskom, into political and commercial structures. Symptomatic of this change, bribery, rent-seeking, collusion and coercion became pervasive, increasing in reach and scale. It is also clear that state capture entrepreneurs motivated all the institutional change, as well as the distribution of economic spoils by questioning the legitimacy of existing institutions. The necessity for economic transformation in response to racially marked socio-economic inequality in South Africa was misused as a cover for the weakening of Eskom, which has such a critical role to play in ensuring even the most basic redistribution of resources and access to basic services for the most vulnerable in society.

Whether the Trojan horse of false transformation is a universal feature of state capture in developing countries is yet to be tested, but since inequality and poverty are so pervasive in developing countries, the construction of an analogous narrative is something worth investigating when considering the role of ideology in state capture. The timespan over which state capture flourished in South Africa is certainly indicative of the fact that where institutional legitimacy is uncertain and levels of inequality or poverty are high, systems may be vulnerable to a trade-off between economic outcomes and democratic governance. As a developing country, South Africa - and the particular features addressed in this analysis - is not exceptional. In particular, the contestability of institutions, both formal and informal, as well as the concentration of political and economic power within a relatively small elite within overlapping actors in political and private spheres is typical of many developing countries. As the work on state capture so often accompanies broader developmental reforms and investments in developing countries exhibiting these patterns of organisation, the insights and lessons from the South African case may be of critical importance. In particular, the fact that this analysis has been able to engage with rich, ongoing, civil society, judicial and legislative applications of the concept of state capture, and local efforts to simultaneously stop looting of state resources and to restore and bolster state function (in support of development), makes the South African case even more valuable.

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ⁱ Recent news reports note that the majority of Nkonki Inc's shares (81.8%) were bought from then CE and board chairperson in 2016, with funds from Gupta lieutenant Mr Salim Essa through his company Trillian Capital Partners after the company was thrown into crisis when their contract with Transnet dried up.

ⁱⁱ According to Mr Tsotsi, who was then chairperson of the board, an earlier decision had been made that no board member would take up the acting CE position. Dr Lennon had then been identified as the best person for the position. Mr Tsotsi informed Minister Gigaba of this process some time toward the end of 2013 or in early 2014, who seemed comfortable with the outcome. When asked about the appointment of an acting CE, Minister Gigaba stated that he had "deferred it to the

board and said “It’s your decision, you decide who is going to be acting CE””. According to Mr Tsotsi, however, the Minister’s position inexplicably changed in March 2014 shortly before Mr Dames’ departure. Evidence that Mr Matjila’s CV had been circulated by Mr Essa to the Gupta brothers, who then forwarded it on to Mr D Zuma (former President Zuma’s son) on 22 March 2014 (found in the #Guptaleaks) provide some insight into why this may have happened.

ⁱⁱⁱ At the start of 2014, before his appointment as Acting CE, Mr Matjila had been implicated by a forensic audit conducted by SNG – according to which he had played a central role as CE of COSATU’s investment holdings company (Kopano Ke Matla) in orchestrating a duplicitous property deal that cost COSATU millions of rands – to the benefit of a Gupta associate - with the help of Mr Essa. The appointment of Mr Matjila as acting CE under these circumstances is highly irregular and indicates a failure in oversight on the part of the board and Minister.

^{iv} This was not the first time Mr Matjila had directed business to TNA. During his tenure as BTC chairperson, TNA had been contracted to provide 10 shows – costing Eskom a total of R 12 million.

^v Ms Johnson testified to the fact that the strategy proposed by Mr Laher was audited at least twice at Mr Matjila’s insistence (“once just on its own, and a second time on the CIO’s integrity and what he was putting on the table”) but that “in both cases, it was confirmed that the nature in which the IT system was going to be changed would have saved the company a lot of money”.

^{vi} Of those with numerous and direct business and personal connections to the Gupta family, Minister Brown had submitted Dr Baldwin Ngubane as her preferred candidate for board chairperson. Cabinet did not ratify this decision in December 2014 due to his tarnished directorship at SABC, but Dr Ngubane would go on to replace Mr Tsotsi just a couple of months later. Dr Ngubane not only had business relationships with Mr Essa, but in his testimony stated that he had “met almost all of [the Guptas]” and had been to their Saxonwold home numerous times during his tenure as Eskom chairperson.

^{vii} Guests on the show over these years included President Zuma (multiple appearances), Minister Brown, the ANC Top 6, Mr Ace Magashule, Mr Mosebenzi Zwane, Dr Ngubane, Mr Ajay Gupta and others.

^{viii} Due to the contentiousness of the allegations, it should be noted that the description of the events outlined are based on the robust triangulation of prima facie evidence presented by Mr Tsotsi, Mr Nicholas Linnell, Ms Molefe, Mr Matona, Ms Suzanne Daniels, Mr Zenthebe Khosa, Ms Venete Klein, and Ms Viroshini Naidoo, as well as primary documentary evidence. Implicated in these events, Ms Dudu Myeni and Mr Salim Essa were called and then summons to appear before the Inquiry, but did not do so.

^{ix} At the time, Minister Brown was visiting the United Arab Emirates (UAE) to attend the International Defence Exhibition (IDEX). There have been allegations that the Minister met with the Guptas and/or Salim Essa on this trip, while the #Guptaleaks show that Mr Singh was in Dubai on a trip organized by the Guptas at the same time.

^x The board expressed some doubt about the request, some even going so far as to say that the Presidency and/or the DPE should have issued a directive, which would have more transparently and accurately captured the origin of the mandate for the inquiry. Other board members were not convinced that an inquiry of the nature proposed was necessary as they felt that the board had already received a significant amount of information from management and had positive relations with the relatively recently appointed CE and CFO, some voiced concerns that the inquiry would take up time and divert the board and management’s focus from their duties, others did not understand why the Presidency required a deviation from the normal protocol for initiating an inquiry and procuring the requisite legal services.

^{xi} Which are peculiarly vague given the weight of these decisions.

^{xii} Toward the end of March 2015, Mr Tsotsi was forced to resign after the board levied charges against him relating to the actions he undertook in setting up the inquiry, most of which related to Mr Linnell’s unofficial appointment as a consultant on the inquiry. According to Mr Linnell, the advice that he offered to the board had mostly been ignored anyway – specifically his suggestions that the terms of reference for the inquiry should be comprehensive and allow for an unfettered investigation, that three independent forensic teams should be contracted for the work, and the appointment of a retired judge to oversee the inquiry. Mr Linnell’s services were also dispensed with in March 2015.

^{xiii} A number of recommendations were reportedly drawn from the final report by ARC, most of which Eskom has indicated were implemented over the course of 2016 and 2017. Nevertheless, the report seems to have only been read and utilised by the board, and the inquiry had clearly been limited in its scope and closed prematurely.

^{xiv} The inter-ministerial committee comprised: Finance Minister Gigaba, Public Enterprises Minister Brown, Justice Minister Michael Masutha, and Energy Minister Mmamoloko Kubayi. This committee found that Eskom had mistakenly paid Mr Molefe his pension but that “mistakes were made in good faith”.

^{xv} At the time of these events, Tegeta’s major shareholder was Oakbay Investments (Pty) Ltd (owned by the Gupta family). Idawala Coal and Tegeta appear to have shared directorships. Similarly to Arctos and Idwala Coal, the Eskom Primary Energy team found that Tegeta did not meet the requisite technical standards and concerns were raised over the environmental non-compliance of the mine.

^{xvi} Ms Maharaj was suspended by Mr Koko in July 2014 and would stay on suspension for 9 months, before eventually resigning in March 2015.

^{xvii} According to evidence presented by Exxaro, their Leeuwan mine (a commercial mine) is connected to the Majuba Power Station by a very effective rail system. The system obviated the need to transport coal to the power station by road which was more expensive. Exxaro had a CSA with Eskom which came to an end in March 2015 – the same month that Eskom entered into the first CSA with Tegeta, for supply to Majuba Power Station. During the Inquiry, it became clear that Eskom prejudiced Exxaro, forcing Exxaro to run on a month-to-month contract which is inimical to investment – while at the same time affording Tegeta preferential treatment despite issues with coal price, quality, and reliability of supply.

^{xviii} On 31 August 2015, Mr Koko – the only executive reinstated following the March 2015 suspensions - issued a letter to Tegeta informing them that Eskom would be suspending coal supply from Brakfontein as it had noted a “significant increase in the number of out-of-specification coal stockpiles from July to August 2015”, with “50% of the stockpiles [...] out of specification” in August, resulting in rejection. On the same day, Eskom requested the South African Bureau of Standards (SABS) to test the coal from Tegeta. SABS performed the test between 6 and 8 September 2015 and issued the results on 18 September 2015. The SABS results confirmed that Tegeta’s coal was out of specification and non-compliant. However, Mr Koko had already lifted the suspension on Tegeta on 5 September 2015 and evidently ignored the results of the SABS test. In his testimony, Mr Koko reported that he lifted the suspension based on SABS test results of “three samples [that] we took, we prepared [...], and we sent [...] to the National laboratory”. While it is not entirely clear who Mr Koko means when he says “we”, evidence presented through the Eskom Inquiry indicates that Mr Koko must have been referring to an irregular process at the SABS laboratory in Mpumalanga on 30 August 2015 (ie. before he issued the suspension). According to this evidence, samples had been delivered on a Saturday night with a request that the tests be run immediately, there was no independent verification that the samples came from the mine concerned, and there were unauthorized parties present when the tests were being conducted. As a result of these actions, Tegeta continued to supply non-compliant coal to Majuba Power Station, for which Eskom paid up to R 61 million a month. Mr Koko’s actions relating to the suspension of Tegeta’s coal supply (and lifting thereof) seem to be irregular.

^{xix} On 24 February 2016, Tegeta sold Brakfontein and its CSA to the newly formed Shiva Coal (also owned by the Guptas) yet Eskom continued to pay Tegeta, possibly to avoid Eskom’s BEE requirements (Shiva Coal is not 50+1% black-owned).

^{xx} OCH comprises of Optimum Coal Mine (OCM), Koorfontein Coal Mine, the Optimum Coal Terminal (an export allocation at the Richards Bay terminal), as well as a number of smaller mining and exploration companies. At the time of the events leading to Tegeta’s purchase of OCH, Glencore was the majority shareholder. In November 2015, Mabengela Investments (owned by Mr D. Zuma) and Elgasolve (owned by Mr Essa) purchased shares in Tegeta, resulting in an ownership structure which reflected Eskom’s 50+1% ownership policy. Various personal and professional relationships existed between the above listed shareholders and members of the Eskom board, executive, and senior management at the time. These have been described in the former Public Protector’s State of Capture report and were confirmed during the Eskom Inquiry.

^{xxi} At the start of 2015, Eskom was in the process of finalizing the negotiation of a fourth amendment to the CSA it had with Optimum Coal Mine (OCM), which would include new price and quality specifications. OCM had been battling to provide coal in accordance with the standards in their CSA since 2011 and reported that they were providing coal to Eskom at a loss of R 166.40 per ton (the price set in their CSA, the original of which was signed in 1993, was R 150 per ton). The fourth amendment was set to address these issues. On 25 March 2015, OCM was informed that the EXCOPS approved the terms of the draft fourth addendum. The draft fourth addendum was presented to the Procurement Sub-Committee of the Eskom Board on 15 April 2015 who referred the matter to the full Eskom board for consideration. The draft fourth addendum was tabled at an Eskom board meeting on 23 April 2015 for approval. The board resolved that the submission be referred to then Acting CE Mr Molefe for approval. Former Public Protector, Thuli Madonsela, states in her State Capture report that the purpose for the Eskom board referring the submission to the Acting CE is unclear and unusual. Mr Molefe then inexplicably rejected the draft fourth amendment and preceding negotiations, informing OCM’s CE of Eskom’s decision on 18 May 2015. On 10 June 2015, Mr Molefe then terminated the settlement process which had been initiated the previous year.

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^{xxii} National Treasury noted in a report conducted by PwC that Eskom’s intention for imposing the fine when it did is highly questionable. This action seems to be in direct contradiction to the previous negotiation and settlement process. Furthermore, Eskom’s decision to action this penalty when there is evidence that it failed to invoke this right in multiple other CSAs seems unusual.

^{xxiii} Representations of this issue made by Mr Koko, Mr Molefe, and Mr Singh were misleading to the extent that they argued that Eskom used the arbitration processes to re-quantify the penalty (which resulted in it being reduced to R 577 million, of which R 248 million had already been paid by Glencore leaving only R 392 million to be paid by Tegeta) when they had been made aware of the fact that the original amount had been mistakenly overinflated by more than R1 billion.

^{xxiv} Many of Eskom’s later actions – including the guarantee, awarding coal contracts to Tegeta, and the prepayment – are justified by the fact that there was an overriding risk of load shedding. Yet, the decision to impose a fine of R 2.17 billion - which posed a real risk of pushing OCM into a position where it could not supply coal to Hendrina Power Station (which supplied 2000 MW to the grid) – was made in the midst of the worst period of load-shedding. It seems that contradictory testimony was provided by Mr Koko, Mr Molefe, and Mr Singh.

^{xxv} According to former Minister of Mineral Resources Ngoako Ramatlhodi, then Eskom acting CE Mr Molefe and board chairman Dr Ngubane had asked him to suspend all of Glencore’s mining licenses in August 2015 - pending payment of the R 2.17 billion fine. Following Minister Ramatlhodi’s refusal, President Zuma appointed Mr Mosebenzi Zwane Minister of Mineral Resources in September 2015. According to interviews conducted by National Treasury, the Department of Mineral Resources issued mine stoppage notices to various Glencore mines in November 2015, during the period when OCM’s sale was being negotiated.

^{xxvi} Toward the end of November 2015, Tegeta made an offer to purchase OCH shares for R1 billion. Glencore rejected the offer. Up until this point, the evidence - in addition to testimony provided by Mr Molefe and Mr Koko that maligned Glencore - suggests that Glencore was prejudiced in the imposition of the fine and in other interactions with Eskom. But things seemed to change following an alleged meeting between Minister Zwane and Glencore CE, Ivan Glasenberg, in Switzerland at the end of November (attended or convened by Mr Essa and Mr T. Gupta).

^{xxvii} According to the Agreement Regarding the Prepurchase of Coal from Optimum Coal (Pty) Ltd signed by Mr Singh and Mr Nath (representing Eskom and Tegeta, respectively) “Eskom will make an advance payment to OCM to prepurchase future coal [...] in the amount of R 1 680 000 [...] payable on fulfilment of the conditions precedent [by 31 March 2016]”. The conditions precedent included the same suspensive conditions set out in the Sale of Shares and Claims Agreement, which was only fulfilled on 8 April 2016 – meaning that this agreement expired. If the suspensive conditions had been met, it is possible that the Guarantee of R 1.68 billion would have been disbursed to Tegeta ahead of their purchase of OCH.

^{xxviii} Because the amount of the guarantee to Tegeta was above Eskom’s R 1.5 billion materiality threshold, it should have at the very least been approved by the board and Minister Brown. Both Dr Ngubane and Ms Klein testified that they had not been made aware of the guarantee, which they admitted was problematic. Astonishingly, Minister Brown found no fault with Mr Singh’s approval of the guarantee and testified that “the transaction did not meet the threshold of the Significant and Materiality framework agreement”, which is patently incorrect.

^{xxix} During the Inquiry, it was relayed how a 40-year contract for the supply of coal to Arnot Power Station, held between Eskom and Exxaro (which was until recently Eskom’s foremost black-owned coal supplier) was brought to a close in December 2015, despite the fact that the Dentons report noted that this contract was only due to expire in December 2023. When asked about this contract, Mr Molefe and Mr Singh both referred to the huge expense of this contract, citing a per ton cost of R 1132. Yet, the Dentons report again contradicts their testimony, recording a per ton cost as at April 2015 of R 686. It appears that the representations by Mr Molefe and Mr Singh about this contract are incorrect or inconsistent with other records. What’s more, Mr Singh and Mr Molefe curiously did not refer to a second Arnot coal supply contract with Mafube mine, jointly owned by Exxaro and Anglo, which provided the cheapest coal on Eskom’s books at a cost of R132 per ton. This contract was also due to only end in December 2023, yet Eskom cancelled this contract without reason in December 2015.

^{xxx} The speed with which Tegeta received the necessary approvals for the transfer of ownership, specifically those from the Competition Tribunal of South Africa (2 months) and the Department of Mineral Resources (3.5 months), is unusual.

^{xxxi} This is despite the inflow of funds from other Gupta owned or associated companies, starting 11 December 2015, which included a: R 10 million transfer from Albatime (a company owned by Mr Zwane’s advisor and Eskom board member – Ms Naidoo’s – husband, Kuben Moodley), R 142.6 million from Oakbay Investments (Eskom board member – Mr Mark Pamensky – also director at Oakbay, owned by Gupta family), R 40 million from Regiments Capital, and R 235 million from the Trillian Group.

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^{xxxii} The Public Protector in State of Capture reports that Ms Ayanda Nteta, Mr Edwin Mabelane, and Mr Koko signed and approved the submission requesting the prepayment.

^{xxxiii} Transnet suggested and introduced Regiments to McKinsey, and the partnership commenced in 2013.

^{xxxiv} It seems from evidence emerging from the Eskom Inquiry, that Trillian fulfilled a similar function at Eskom, to that which Regiments did at Transnet, in endorsing the award of the multi-billion-rand tender that might net it or Mr Essa special “advisory fees”. According to the testimony of Mr Fine (McKinsey), Trillian was part of a consortium bidding for the Duvha boiler refurbishment contract. In March 2017, a high-level report was conducted by Trillian (pro bono) which recommended that the Dhuvha contract be awarded to Chinese firm Dongfang, despite their offer being more expensive than the other bids. This could mean that Mr Essa illicitly offered Dongfang Trillian’s services, in order to secure the bin in their favour, for a cut. On 30 June 2017, the High Court granted GE and M&R an interdict to stop Eskom from implementing its contract with Dongfang, whilst they make a judgement on the matter.

^{xxxv} The Board did, however, without a competitive process, approve a high-level desktop review of the proposed initiatives, which was delivered for R800,000.00. When asked what value, if any, was delivered to Eskom, Molefe answered, “I would say very little...There must have been ten or 15 initiatives that they put on the table. A number of them, we said that they were not viable.”

^{xxxvi} Like Tegeta, it appears as if Trillian submitted fraudulent BBE certificates - affording the company the status of an excepted micro-enterprise.

^{xxxvii} It has been reported that Trillian subcontracted as much as 77% of the work billed for to a firm in Dubai, eGateway Consultants – suspected Gupta shell company.

^{xxxviii} G9, who testified publically at the Eskom Inquiry, undertook interviews with Eskom officials in order to establish how payments could be made in favour of Trillian, in the absence of proper contracts. It is clear that a purchase order number necessary for payment to take place was created without complete documentation. Mr Albert Mokoatedi, who created the purchase order number, provided G9 with an affidavit and was interviewed by G9. He claimed that the Acting General Manager, Ms Masedi Skosana and Manager, Mr Andile Mdakanehad discussed the fact that there were no supporting documents for the creation of a purchase order number. When documents did arrive at the request of Mr Mdakane to Ms Skosana, they were not signed. Mr Mokoatedi, in his affidavit, stated, “The creation of the Purchase Order in this instance may be irregular and not consistent with policies and/or legislation.” G9’s interview with Ms Nokwanda Gambushe, Senior Advisor, shed further light on how Trillian came to be paid without any valid contract in place. Ms Gambushe confirmed that on the 19th December 2016, Mr Charles Kalima came to her and provided her with a Board Submission document and Board Minutes to create a contract on the SAP system. She indicated that this was not the norm.

^{xxxix} Reviews and investigations into the McKinsey and Trillian contracts and payments have been conducted by: Oliver Wyman, Geoff Budlender, G9 Forensic, and Bowmans.