

A Critical Examination of Investor State Dispute Settlement in Canada

By

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LIST OF ABBREVIATIONS

BIT	Bilateral Investment Treaty
CETA	Comprehensive Economic and Trade Agreement
ERA	<i>Electricity Restructuring Act, 2004</i>
FIT	Feed-in Tariff Program
FTA	Canada-United States Free Trade Agreement
GEGBA	<i>Green Energy and Green Economy Act, 2009</i>
GoC	Government of Canada
GoO	Government of Ontario
ICSID	International Centre for Settlement of Investment Disputes
IFI	International Financial Institutions
ISDS	Investor State Dispute Settlement
MEI	Ministry of Energy and Infrastructure
MOE	Ministry of Environment
MNR	Ministry of Natural Resources
NAFTA	North American Free Trade Agreement
OPA	Ontario Power Authority
REA	Renewable Energy Approval
TPP	Trans-Pacific Partnership
UNCTAD	United Nations Conference on Trade and Development
USMCA	United States-Mexico-Canada Agreement
WWIS	Windstream Wolfe Island Shoals

ABSTRACT

This study critically examines rulings of Investor State Dispute Settlement (ISDS) tribunals. Under the North American Free Trade Agreement's (NAFTA) Chapter 11, ISDS provides foreign investors with the tools to launch a claim against signatory countries should they feel their investment was inhibited by local regulations. Empirically this study draws upon *Windstream Energy LLC. v. the Government of Canada* as a case study to analyze the competing responses exchanged during the tribunal's hearings. The claim by Windstream Energy LLC¹ against the Government of Ontario (GoO) serves as both a central and relevant example for examining the ramifications of ISDS, as it is one of Canada's most recent defeats featuring the largest award outside a pre-tribunal ISDS settlement. Information was drawn from tribunal documents, referred to as a Memorial and Counter Memorial, which outline each party's argument and supporting claims. Additionally, the tribunal publishes their final decision and justifications. A critical discourse analysis method, theoretically informed by the corporate crime literature and Gramsci's theory of hegemony, helps in critically examining the economic, political, and cultural assumptions that influenced the tribunal's decision and the state's approach to foreign investment. Overall, dominant voices reinforced neoliberal beliefs about transnational market expectations and the role of the state under a globalized capitalist system. Justifications rooted in market logics prioritized the accumulation of foreign capital over the potential dangers of Windstream's project. Ultimately, it is the inclusion of corporate safeguards, like ISDS, in free trade pacts that help to (re)produce neoliberal capitalist ideals and further reinforce status-quo economic relations.

¹ Hereinafter referred to as Windstream

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Chapter 1: Introduction

Windstream Energy LLC v. the Government of Canada

In 2003, the Government of Ontario (GoO) began exploring alternative sources of power such as solar, wind, biomass and hydro-electric. These efforts led to the development and implementation of several green initiatives such as encouraging electricity conservation under the *Electricity Restructuring Act, 2004* (ERA), and the promotion of clean energy sources under the Renewable Energy Supply programs. Although these programs were enacted with good intentions they were still considered the first of their kind. Such unfamiliarity resulted in relatively low volumes of energy and thus failed to attract investors (Government of Canada, 2013). If the GoO was going to continue its search for a reliable source of renewable energy it had to commit to new programs on a larger scale.

In 2009, the GoO began development of the largest renewable electricity initiative in Canada. Its centerpiece, the *Green Energy and Green Economy Act, 2009* (GEGEA), paved the way for the Ontario Power Authority (OPA) to establish and coordinate a Feed-in Tariff (FIT) Program. With investors in mind, the FIT program was designed to “procure energy from a wide range of renewable energy sources ... and is considered critical to Ontario’s success in becoming a leading renewable energy jurisdiction” (Government of Canada, 2013). It immediately generated significant interest from energy investors around the world, as the OPA received a total of 454 FIT applications (Government of Canada, 2013).

While moving away from pollutants such as coal-fired power plants, the GoO recognized the potential health and environmental risks in the construction and operation of renewable energy projects. At the time, they believed that they consistently communicated this to all applicants within the FIT program. For instance, the OPA explicitly stated that an award of a FIT

contract was not a final authorization by the GoO and thus by no means a guarantee that a project would proceed. In other words, as the GoO pursued green initiatives, it also wanted to prioritize the development and implementation of appropriate health, safety and environmental regulations (Government of Canada, 2013).

On 4 May 2010, the OPA offered an American corporation, Windstream, a FIT contract for its Canadian subsidiary's, Windstream Wolfe Island Shoals (WWIS), proposed 100-turbine offshore wind project. Windstream's project would position an energy generation facility in Lake Ontario. Both parties knew this project would serve as the first freshwater offshore wind energy generator in the world (Government of Canada, 2013). As such, there was significant uncertainty surrounding the impact of Windstream's project for both nearby residents and the environment. The lake provides more than 80% of Ontarians with clean drinking water and support for Ontario's fishing and tourism industries (Government of Canada, 2013). The Ministry of Environment (MOE), the primary regulator, had yet to properly establish the necessary regulatory safeguards, as the GoO was unfamiliar with the construction of offshore wind facilities in Ontario's lakes. The MOE admitted that it lacked scientific insight into the potential consequences of a project of this scale and therefore required further research (Government of Canada, 2013).

On 25 June 2010, the MOE released a proposal entitled, *Offshore Wind Policy Proposal*, for public comment. It outlined an approach for developing the necessary regulatory requirements for offshore wind facilities. The public consultation period ran from 25 June 2010 until 23 August 2010. The MOE received over 2,000 comments from Ontarians and various activist groups expressing concerns about the health, safety and environmental effects of an offshore wind project in the Great Lakes (Government of Canada, 2013). Many residents feared

the project's potential for negatively impacting their primary source of drinking water, while other expressed concern with similar projects having caused illnesses in those living close to turbines (The Canadian Press, 2011).

Undeterred by the growing concerns with the project, on 20 August 2010, Windstream signed their FIT contract. Less than one year later, on 11 February 2011, the MOE, Ministry of Natural Resources (MNR) and the OPA held a conference call with Windstream, during which government officials stated that the scientific studies required for developing regulations were still underway, with no immediate end in sight. As a result, the GoO did not feel comfortable moving forward with Windstream's project. An official moratorium was enacted later that day and was to remain in effect until the completion of the necessary scientific research (Award dated 27 September 2016, para.146). Beth Harrington of Wind Concerns Ontario, a coalition of individuals and grassroots citizen's groups across Ontario, demanded even further action: "the people of Ontario have been complaining [about the risks of the project] for four years and the only thing the government has stopped so far is something they haven't even started" (The Canadian Press, 2011). Harrington claimed that existing on-shore wind energy projects in Ontario are believed to have caused local residents headaches, nausea, and other symptoms resulting from the low-frequency sounds produced by giant turbines (The Canadian Press, 2011). Former Ontario Energy Minister, Brad Duguid, disputed Harrington's remarks, claiming: "On-shore [wind projects], there's 30 or 40 years of peer-reviewed science ... there's no evidence of health impacts from on-shore wind..." He did agree that "... fresh water wind turbines are somethings that's relatively new ... off-shore wind [like Windstream's project] is completely different" (The Canadian Press, 2011). Nevertheless, over the next year Windstream grew impatient with the moratorium. The company made multiple suggestions for revising the project,

including replacing the facility with a new solar project and/or conducting its own research on the effects of the turbines and their construction (Counter-Memorial, 2015, para.452). Neither of these met the FIT program requirements and therefore were not actioned.

Believing they had exhausted all other options, the company turned to the North American Free Trade Agreement's (NAFTA) Chapter 11. NAFTA's Chapter 11 is the investment component of the trade pact. It established a framework of rules that provided investors from NAFTA countries with a predictable, rules-based investment climate, as well as dispute settlement procedures (Ciocchini & Khoury, 2018; Sinclair, 2018). Referred to as ISDS, the foreign corporation of a signatory country can launch a claim against a host-country should it believe that particular regulations or decisions inhibit its investment (Beder, 2010; Been & Beauvaist, 2003; Sinclair, 2018). Once a claim has been launched an arbitral tribunal is formed to lead the proceeding and issue a ruling. A tribunal operates similarly to a quasi-court. It determines the validity of allegations and if founded or necessary, will penalize the country for damages. These tribunals are composed of three members: one chosen by the investor, one chosen by the challenged country and a third to be mutually agreed upon by both parties (Beder, 2010; Been & Beauvaist, 2003; Sinclair, 2015, p.30). After both parties have presented their arguments the tribunal will present its decision in an award document. This document provides a factual background section detailing the primary disputed facts under each party's position. Additionally, each alleged breach will be addressed and feature the tribunal's analysis justifying whether the claim is valid. After deciding which, if any, article(s) has been violated, the tribunal will provide an analysis of the damages justifying the figure awarded to the claimant. Finally, the tribunal will outline its decision summarizing the major findings and awards. If the respondent is

found to have breached an article under NAFTA it will be required to pay the damages to the claimant within 30 days.

Since WWIS is a Canadian subsidiary of an American corporation, Windstream is entitled to ISDS when investing in Canada. On 17 October 2012, Windstream launched a claim under NAFTA's Chapter 11, alleging the GoO's moratorium violated Canada's obligations under NAFTA, resulting in approximately \$475 million CAD in damages to their investment – e.g. lost investors, lost profits, and similar. The company further accused the GoO of making a politically-motivated decision – essentially grandstanding during an election year by issuing the moratorium (Award dated 27 September 2016, para.305). In contrast, however, Kristopher Stevens, executive director at the Ontario Sustainable Energy Association, which is a non-profit organization that aims to foster community-owned renewable power, argued that “the delay regarding offshore wind definitely slows things, but it points out the cautiousness of our government” (Hembrey, 2011). Under NAFTA's Chapter 11, Windstream stated Canada violated its obligations with respect to Articles 1102 (National Treatment), 1103 (Most-Favoured Nation Treatment), 1110 (Expropriation) and 1105 (Minimum of Standard)². In the end, the tribunal ruled against the claims filed under Articles 1110, 1102, and 1103 – the tribunal had established that Windstream did not receive treatment less favourable than accorded to national investors in similar circumstances (Articles 1102 & 1103), and that after carefully reviewing the relevant evidence, no expropriation had taken place (Article 1110) (Award dated 27 September

² Article 1105 regards the fair and equitable treatment and full protection and security of an investor's investment. Under NAFTA, the concept of minimum standard of treatment is to rise to the level accorded under international law, as there is not a newly created NAFTA standard to which foreign investors can apply in Chapter 11 cases (Anderson, 2017, p.2955). However, international law is generally difficult to define since it refers to ever-changing customary practice of states (Anderson, 2017, p.2955). Therefore, scholars such as Fietta (2006) and Kirkman (2002) fear that NAFTA tribunals have interpreted “fair and equitable” and an investor's expectations too broadly.

2016, para. 515). However, the tribunal awarded Windstream \$25, 182, 900 CAD in damages and \$2, 912, 432 CAD in legal costs, finding that Ontario was in violation of Article 1105 (Award dated 27 September 2016, para.515). Despite the tribunal finding that the GoO's decision to impose a moratorium on offshore wind development, or the process that led to it, were not in themselves wrongful (Award dated 27 September 2016, para.376), it declared that the GoO's acts and omissions following the moratorium left Windstream in a "regulatory and contractual limbo" for years (Award dated 27 September 2016, para.380). Thus, the tribunal concluded that the failure of the GoO to take the necessary measures after the imposition and bring clarity to the regulatory uncertainty surrounding Windstream's project constituted a breach of Article 1105 (Award dated 27 September 2016, para.380).

Under NAFTA, Canada has attracted significantly more ISDS claims than either Mexico or the United States. Presently, Canada has faced 41 claims, followed by Mexico at 23, and the United States at 21. This means that, to date, 48% of the 85 NAFTA claims are against Canada (Sinclair, 2018, p.3). What is more, between 2005 and 2010 the number of claims against Canada has tripled from 12 to 41, meaning Canada has been sued over twice as many times as Mexico (15) and the United States (2) combined (Sinclair, 2018, p.4). Canada's record under ISDS features nine wins, eight losses and five settled cases that total \$219 million CAD paid out in damages – the remaining cases have either been withdrawn or are currently inactive (Sinclair, 2018, p.4). All of Canada's losses concern important regulations, and almost exclusively environmental matters. For example, The *St. Mary's* claim (2011) involved a U.S.-based company that attempted to open a quarry near Hamilton, Ontario. After residents campaigned against the quarry on environmental grounds the GoO prevented the site from being converted from agricultural to extractive industrial use (Sinclair, 2018, p.6). However, *St. Mary's* filed a

claim and both parties reached a settlement on 28 February 2013, which saw the company withdraw its case in exchange for \$US 15 million in compensation from the GoO (Sinclair, 2018, p.6). According to the United Nations Conference on Trade and Development (UNCTAD), Canada is the sixth most sued country in the world, and the second most sued developed country overall, next only to Spain (Sinclair, 2018).

Windstream's claim against the GoO serves as a relevant example of the ramifications of ISDS. All of Canada's losses concern important public policy issues or regulatory matters, just as Windstream's does. This case is one of Canada's most recent defeats under ISDS and features the largest award outside of an ISDS settlement (opposed to a settlement that occurred before a tribunal's decision). In 2010, Canada settled a case involving the expropriation of an abandoned lumber mill with a corporation, AbitibiBowater Inc., for \$130 million CAD in exchange for the withdrawal of their Chapter 11 claim (Sinclair, 2018, p.6). Provincial legislation expropriating the abandoned mill provided a process for determining compensation for the assets, but the investor did not avail itself to the process. The company was compensated largely for the loss of water and timber rights on Crown lands (Sinclair, 2018, p.6). There are currently eight outstanding cases against Canada with claimants seeking more than \$475 million in damages (Sinclair, 2018). Much like Windstream's claim, all eight of these cases allege violations under Article 1105, possibly signifying a worrying trend of foreign investors turning to future trade pacts that feature this clause. Despite the exclusion of it in the United States–Mexico–Canada Agreement (USMCA), an agreement set to replace NAFTA, other trade pacts, like the Trans-Pacific Partnership (TPP), still feature ISDS and offer an alternative route for investors when their proposals for environmentally controversial projects encounter regulatory hurdles.

Consequently, the implementation of these corporate safeguards has a larger role in the neoliberal project than simply providing foreign businesses with investment protection. The process enables multinational corporations and the state to isolate themselves from public scrutiny by framing the conflict as a “contractual issue” (Cicocchini & Khoury, 2018, p.13), despite being about so much more – when the state consents to the implementation of ISDS a system responsible for removing barriers to capital accumulation, regardless of whom this may harm, is legitimized. Furthermore, it is important to note that tribunal decisions can have a lasting effect, as these decisions normalize private enterprise, which then makes it difficult to see what these organizations do as harmful or even potentially criminal. Therefore, the purpose of this study is to critically examine ISDS and the role this dispute mechanism plays in securing consent for a globalized neoliberal capitalist system.

Research Questions and Objectives

Using *Windstream Energy LLC. v. The Government of Canada* as a case study, this study seeks to explore the underlying factors and justifications behind the tribunal’s rulings and how their decisions reproduce corporate capitalism. Further, the study will investigate the role of ISDS in normalizing corporations and in the process how it obscures the harms they cause and/or whether their actions are potentially criminal. The critical discourse analysis method described below will be utilized to answer the research question: What factors shape ISDS decisions and to what extent do these factors reflect capitalist ideals? The study’s overall objectives are:

1. To examine the structural relationship between organized capital and the state. What was the state-corporate relationship like prior to neoliberalism, and how did the rise of neoliberal mentalities affect the state-corporate relationship?

2. To examine the extent to which the broader cultural, economic and political factors shaped the tribunal's decision. How do these factors reflect and reproduce dominant corporate capitalist interests? To what extent do they obscure corporate harm?

Theory and Methodology

Antonio Gramsci's theory of hegemony, along with related insights from the corporate crime literature, guides this study's analytical framework. Gramsci's methods are best suited for moving beyond simply understanding the relationship between states and corporations as antagonistic – one party seeking compliance with the law, while the other seeking to avoid it, otherwise known as the “state as policeman” model (Whyte, 2014, p.237). A Gramscian approach acknowledges the deep structural relations between organized capital and the state, therein providing the analytical lens for grasping the formation and role of capitalist hegemony in shaping and reproducing the economic, political and legal discourse that reinforces global capitalism. An analysis of such nature should capture the material foundations of a system responsible for an intensified state-corporate relationship, or ‘symbiosis’, through which economic and social harms and crimes flourish (Tombs, 2012, p.188). The critical discourse analysis method deconstructs the process through which certain knowledges about corporate capitalism are (re)produced via ISDS processes. This study draws upon Gramsci's theory of hegemony to examine the role of discourse in these reproductions of neoliberal hegemony responsible for reinforcing ruling-class interests. To accomplish this, the underlying factors behind the responses made by arbitrators, the GoO and Windstream during the private tribunal are examined to uncover the various justifications that support the tribunal's ruling. As we shall see, this ruling ultimately paints a picture of corporations in modern capitalism that downplays the harms they cause and makes it difficult to see their actions as potentially criminal.

Outline of Chapters

The remainder of the thesis is organized as follows. Chapter 2 contextualizes the research in the criminological, corporate and state-corporate crime literature. Chapter 3 discusses the theoretical influences that underscored the analytical framework of the thesis. Chapter 4 presents the research project's methodology and explores my analysis of the responses present in the case, *Windstream Energy LLC v. The Government of Canada*. Finally, Chapter 5 outlines the main thesis findings and discusses their theoretical significance. The chapter concludes with a brief discussion of the emerging resistance toward ISDS, particularly within the context of CETA and USMCA.

Chapter 2: Literature Review

Introduction

This chapter situates the study within the corporate crime literature, particularly in terms of the symbiotic nature of the state-corporate relationship within global capitalism. Section I examines ISDS within neoliberal capitalism. Section II discusses the implications of neoliberalism and its influence on the state-corporate relationship. It recognizes the various shortcomings present in the state-corporate crime literature and advocates for an analysis of the structural relations between organized capital and states. Section III explores the economic and political factors that underpin corporate safeguards within international treaties and the resulting ramifications for free trade agreements. Finally, Section IV explores the literature on ISDS, particularly the effect of its private tribunals. Overall, it is evident that more attention to ISDS's surrounding context, their implementation and the associated relations of power, is required to fully understand the nature of state-corporate relationships in modern capitalist society.

1. Contextualizing ISDS in Neoliberalism

This section focuses on the neoliberal ideals responsible for ISDS. This mechanism continues to undermine regulation and public policy on social issues while perpetuating the prioritization of capital accumulation over social justice (Anderson, 2017; Been & Beauvaist, 2003; Cumming & Froehlich, 2007; Sattorova, 2012). This is the result of corporations utilizing this mechanism to circumvent regulatory hurdles and national courts in favour of the mechanism's private tribunals (Been & Beauvaist, 2003; Sattorova, 2012, p.223). This section will provide an understanding as to how corporate safeguards within trade pacts, such as ISDS, were produced and how they effectively reinforce the corporate capitalist status-quo.

Capitalism functions under an assumption that private ownership of goods and services sold between individuals through a free market is the most efficient way to control equal distribution of resources in society (Glasbeek, 2002, p.18). This is because profit-oriented market systems enable those who contribute to wealth production to receive rewards greater than the size of their contribution (Resnick & Wolff, 2010, p.172). Therefore, competition among individuals is thought to ensure a healthy market that will maximize profits and offer consumers the best goods and services at the lowest possible price, thus meeting social demands for the fair distribution of resources (Resnick & Wolff, 2010, p.172).

However, capitalism has historically demonstrated that it cannot function without sufficient regulations and policies to maintain its stability (Harvey, 2005). This is particularly relevant to Western democracies. After the Second World War, states such as the United States transitioned towards a liberal democratic system. There was widespread acceptance that the government would focus on full employment, economic growth and the welfare of its citizens. In order to ensure these commitments were upheld, fiscal policies termed 'Keynesian' were rolled out. Keynesian policies permit the state to intervene in, or even substitute, for market processes. They require states to actively construct standards for social wages and welfare systems, such as health care and education (Harvey, 2005, p.11; Peck, 2010).

It was not until the later years of the 1960s that the Keynesian model started to break down. A global wave of slow economic growth, or 'stagflation', coupled with stagnating rates of employment persisted through the 1970s (Bittle, 2015, p.137; Harvey, 2005, p.12; McBride, 2005; Peck, 2010, p.5). This essentially broke the back of the Keynesian orthodoxy, which was exchanged for neoliberal interpretations of capitalism – denouncing state intervention and prioritizing 'freedom' in the market (Harvey, 2005). In the 1980s, politicians such as Reagan and

Thatcher famously declared that government was too big and, in the process, had been impeding free markets from reaching their full potential (Barack, 2017, p.151; Snider, 2000). This marked a paradigmatic shift in economic thinking and practice, as the tenants of Keynesianism were superseded by those of neoliberalism.

Canada followed Reagan and Thatcher's lead declaring the country was open for business. In the 1980s, the conservative Government of Canada quickly began systematically disassembling the welfare state (Fudge & Cossman, 2002; Snider, 1990, p.131). For example, the government initiated wide-ranging budget cuts to programs regarding advocacy groups, especially those representing women and Aboriginal people (Fudge & Cossman, 2002, p.14). It was to be understood that the state's new role in governing was to create the conditions under which individuals would govern themselves. Neoliberal rhetoric about the need to reduce state spending, cutback on state regulation and maximize exports in pursuit of capital investment started to significantly influence Canada's economic policies (Fudge & Cossman, 2002, p.14).

NAFTA was introduced in 1990. The purpose of the pact was to promote trade and investment between Canada, the U.S., and Mexico by eliminating tariffs and establishing rules for conducting business. This included regulations of investment, services, intellectual property, competition and even temporary entry into the country for business executives (Luz & Miller, 2002, p.973; Cummings & Froehlich, 2007; Maryse, 2000). The negotiations over these rules sparked concerns that without strong safeguards for investors, countries would be reluctant to invest in foreign projects. This prompted the implementation of NAFTA's Chapter 11 and its centrepiece, ISDS.

NAFTA's Chapter 11 and ISDS are largely influenced by bilateral investment treaties (BITs). These treaties establish conditions for investment by nationals of one state in another.

Generally, they function under three basic objectives: investment, protection, and economic liberalisation (Anderson, 2017, p.2946). These goals are solidified through provisions that facilitate resolutions between foreign investors and sovereign hosts. These provisions also define the treatment of private investment by containing rules for dispute settlements, typically revolving around fair and equitable treatment, and awarding monetary compensation.

When the U.S. adopted its formal BIT program in 1981, it cited concerns over protecting the investments of U.S. nationals from expropriation (Anderson, 2017, p.2938). These fears were almost exclusively the result of prior investments in developing countries that succumbed to corruption and illegitimate expropriation (Anderson, 2017, p.2938). Therefore, when NAFTA negotiations started the Americans pushed hard for a comprehensive agreement that included similar provisions related to BIT's safeguards on such matters as investment and dispute settlements (Anderson, 2017, p.2949; Cummings & Froehlich, 2007; Maryse, 2000). This desire was largely the result of Mexico's poor track record of expropriation. At the time, it was still considered a developing country and had spent much of the previous decade overcoming debt (Anderson, 2017, p.2939). Eventually, both Mexico and Canada obliged with the American demands, marking the first time ISDS would be integrated into a comprehensive regional trade agreement (Sinclair, 2015, p.30).

Although NAFTA formalized a common set of investment rules where none had previously existed, the implementation of Chapter 11 appears primarily about providing foreign investors with access to dispute resolutions. Critics widely believe it to be much more favourable to corporations than states and more likely to protect the value of foreign investment – especially since only investors can launch claims if expectations are not being met (Anderson, 2017; Brower & Steven, 2001; Cummings & Froehlich, 2007, p.114). When it was revealed that the

private sector had a major role in the negotiations relating to ISDS, academics, environmentalists, the media and general public expressed serious concerns that Chapter 11 could impose severe constraints on national sovereignty and prevent Canada from properly protecting its natural environment (Cummings & Froehlich, 2007; Maryse, 2000). The same concerns are still echoed today, as corporations are known to circumvent domestic courts and opt for ISDS tribunals when they believe public policy is interfering with their investment (Been & Beauvaist, 2003; Sattorova, 2012, p.223). Investors commonly allege that regulations, such as environmental laws or required research and development stipulations, are unfair and inconsistent with profit-centred performance expectations. Therefore, they argue for the removal or weakening of such provisions to effectively benefit the corporation and the economy (Beder, 2010, p. 499; McBride, 2006, p.755; Sinclair, 2015, p.30).

Neoliberal capitalism discourages state oversight and touts self-regulation by means of competition where corporations are trusted to watch over their own conduct and adhere to social, moral, and legal obligations in order to ensure competitive advantages over other businesses (Bittle, 2015, p.137; Glasbeek, 2002, p.19; Tombs & Whyte, 2015). This idea reflects ‘trickle-down’ economics, described as privately accumulated capital eventually spreading throughout the social hierarchy from the top elite to even the most poor and marginalized groups (Haiven, 2014; Harvey, 2007; Soederberg, 2010, p.149). Evidently, this strongly contrasts with Keynesian principles, as neoliberalism promotes deregulation or “the eradication of state intervention only until it would be needed to preserve the market” (Harvey, 2005, p.13; see also Resnick & Wolff, 2010; Soederberg 2006, p.11; Tombs & Whyte, 2003, p.13). Therefore, the current era of regulation under a neoliberal mentality abides by a political and economic rhetoric that only advocates for state intervention when corporations require a more business-friendly environment.

Authors such as Tombs (2016) and Peck (2010) believe it would be naïve to classify the evolution of neoliberalism as a story of deregulation. It has never been about a permanent liberalization and evacuation of the state. Instead, neoliberalism has always been about the capture and reuse of the state to shape a pro-corporate, free-trade market order (Peck, 2010, p.9; Davies, 2014). Legislation, such as ISDS, and regulatory frameworks are produced to benefit corporations as they collaborate intimately with state actors (Harvey, 2005, p.77). Canada and Mexico were ultimately willing to adopt American-style investment protections if it meant securing new inflows of capital into their respective jurisdictions. Now NAFTA's implementation of ISDS is considered a milestone in that it triggered the replication and proliferation of this mechanism in similar North American pacts (Braithwaite & Drahos, 2000, p.216). For example, despite growing global concerns about ISDS, the Obama Administration made virtually no changes to how it pursued investment protections in 2015 with the TPP (Anderson, 2017, p.2961). Canada had also shown its previous support for ISDS, as the country was responsible for negotiating the mechanism into the Comprehensive Economic and Trade Agreement (CETA) – a free-trade agreement between Canada, the European Union and its members (McGregor, 2016). Fortunately, the EU pressed for retroactive changes to which the Justin Trudeau Liberal Government complied – if the provisions were not removed the pact could have been quashed. Instead, CETA now features investment arbitration with a state-centric form of dispute resolution. This means that states have been granted more power in dealing with investment disputes. For example, a joint committee of government elected officials now appoint tribunals, not the associated parties as they do under NAFTA (Anderson, 2017, p.2961).

There is a clear divide on trade dispute settlements. Despite the recent progress demonstrated through CETA and the removal of the clause in USMCA (Grandoni, 2018;

McGregor, 2018; Vomiero, 2018), North America has historically shown a preference for mechanisms like ISDS. While the recent removal of the mechanism certainly deserves recognition, cases like Windstream's have already set a tone when it comes to prioritizing private investment over public interest. Therefore, we have, and are currently still witnessing, a series of complex re-regulatory strategies. As we shall see in the following Sections, the critical corporate crime literature suggests corporations have evolved into vehicles for speculative investment rooted in opportunities for quick profit (Haiven, 2014, p.107). They prioritize the accumulation of capital over all other considerations. This is facilitated through the state, wherein "the interests and objectives of the state and market become progressively indistinct" (O'Reilly, 2010, p.203). These neoliberal principles still dominate discussions and practices towards global capitalist systems, which are ultimately responsible for rendering associated harms a mere consequence of doing business. An examination of the underlying factors that have contributed to such practices can help to reveal the resulting ramifications of ISDS and their effect on social justice within our country.

II. Neoliberalism and State-Corporate Crime

ISDS is just one example of the many mechanisms constructed by the state to facilitate a healthy stream of capital for the corporation. As Keynesianism was exchanged for neoliberalism, ISDS too reflects a similar transition from governing and state regulation to governance and faith in markets (Bittle, 2012). For many scholars, it has become common practice to study corporate crime with a focus on the role of regulators or on the conditions that undermine effective regulation. However, this focus has limited research to only half the function of regulations, "the coercive state function", or what Gramsci refers to as "state as policeman" (Whyte, 2014, p.237).

To elaborate, the advent of neoliberalism transformed the state's role from governing and oversight to one that mediates and facilitates. It is important to note that the state has always been a capitalist state; however, with neoliberalism the state-corporate relationship has become more obvious. For example, the state establishes juridical and administrative frameworks for corporations, transport and communication infrastructures, and organizes diplomatic relationships to enhance opportunities for import, export and investment (Bernat & Whyte, 2016, p.77). Therefore, critical corporate crime scholars argue that a historical and systemic analysis of the relationship between states and corporations is required for an understanding of the deeper structural problems responsible for the criminogenic and profoundly harmful system of capital accumulation. This section examines corporate crimes within a framework of state-corporate symbiosis and the wider implications of neoliberal capitalism on the (re)regulation of corporate crimes.

Edwin Sutherland is credited for famously calling attention to the various harms caused by the rich and powerful, a class at the time often neglected by academics and criminal justice authorities. His studies on white-collar crime have influenced academics from various disciplines since the 1940s (Sutherland, 1940; 1949). However, as the research inspired by his works progressed, the corporate crime literature appeared to avoid serious scrutiny of the relationship between corporations and the state. This focus has typically fallen to the sidelines in favor of research regarding one or the other: either organizational deviance within private businesses, or the examination of crimes and malfeasance by governments, termed “state-organized crime”³ (Chambliss, 1989).

³ Chambliss (1989) defines state-organized crime as “acts defined by law as criminal and committed by state officials in the pursuit of their job as representatives of the state”. To expand, the state must provide a climate and a set of international relations that facilitate accumulation of

In modern capitalist society, the corporation is regarded as the most efficient vehicle for the accumulation of capital. To encourage shareholders to take risks and invest their money in the corporation, these organizations have been granted rights to enter contracts, borrow money, and sue for damages. These rights are referred to as limited liability. Under limited liability a corporation may be sued without exposing its owners or shareholders to personal liability because neither they, nor any of the directors or executives, are the corporation (Barak, 2017, p.32; Gilbert & Russell, 2002). Thus, the corporation has been structured to allow individuals to personally profit without having to be fully liable for any illegal and harmful actions. Therefore, the criminogenic problem with the limited liability corporation ultimately lies with the state and its role in reproducing the social conditions necessary to sustain the capitalist social order.

The critical corporate crime literature suggests that corporations are ultimately profit-seeking entities formed for the sole intent of prioritizing the accumulation of capital over all other considerations. These scholars argue that harms resulting from corporate practices need to be problematized within the broader contexts of neoliberal capitalism. The wider political, economic and social contexts that underpin this rhetoric contribute to the institutional tolerance and legitimation of corporate harms. These corporations heavily depend on the state to provide business friendly environments for profit maximization. Therefore, as previously noted, state interventions in markets are not strictly antagonistic to capitalist interests, as the relationship between public and private in the market is organized around a balance of forces; the state is caught between law enforcement and a responsibility to ensure “the wheels of industry keep on turning” (Whyte, 2014, p.240, see also Bittle, 2015; Bruff, 2009; Tombs, 2012). The result is

capital to succeed. However, the laws of every nation-state inhibit officials from maximizing conditions conducive to capital accumulation while they facilitate the process. When there are pressures to serve the interests of the state, the state may cross its boundaries leading some officials to behave ‘criminally’ (Chambliss, 1989).

often that regulations surface only after a moment of crises – environmental damages, financial instability, or workplace safety disasters – otherwise, the state guarantees corporations various privileges and other infrastructural capacities (Whyte, 2014). However, this is not to say the state does not also rely on the corporation. The government depends upon the private sector for goods and services, employment, and economic growth (Jessop, 2002). This further demonstrates that the advent of neoliberalism has both materially intensified and made more visible the interconnectedness of the public and private sphere.

This study recognizes this interconnectedness via the state-corporate relationship and builds from the work of corporate crime scholars Raymond J. Michalowski and Ronald C. Kramer, who first coined the term state-corporate crime in the early 1990s. Prior to this, Kramer had been working with the term “organizational crime”. At the time, this concept best described corporate and government criminality, as harms and/or crimes committed by these entities were not yet explicitly analyzed as a collective product of their interactions. However, as Kramer worked on his case study of the space shuttle Challenger disaster (Kramer, 1992), it became apparent that the disaster was the result of numerous instances of state-corporate collaboration between two separate organizations: The National Aeronautics and Space Administration (NASA), a government agency, and Morton Thiokol, Inc., a private business (Kramer et al., 2002, p.269). The fact that these two organizations had acted together to generate serious social harm suggested the need for a more general conceptualization of “deviant interorganizational relationships” between corporations and government agencies (Kramer et al., 2002, p.269). At Michalowski’s suggestion to label the phenomena *state-corporate crime*, the concept was born. Kramer began using it in his work on the Challenger case, noting that although a considerable amount of work had been done on both corporate and state crime, there had been no mention of

the fact that corporations and government agencies can act together to produce criminality (Kramer et al., 2002, p.269).

Kramer and Michalowski's work produced both a serious criminological insight and oversight. The insight emerged from the criminologists' previous works on organizational deviance. Given corporations are formal organizations, the study of corporate crime may be categorized as a form of organizational deviance. Therefore, it can and should incorporate the field's theoretical and substantive insights (Kramer et al., 2002, p.270). The oversight was the failure to recognize that the modern corporation could not have developed or efficiently functioned "without the legal, economic and political infrastructure provided by the government" (Kramer et al., 2002, p.270). As a result, the literature thus far had failed to recognize the importance of exploring structural relations between corporate and governmental organizations, as instead, two nearly independent bodies of research on the state or the corporation had developed, respectively (Kramer et al., 2002, p.270).

Kramer and Michalowski define state-corporate crime as "illegal or socially injurious actions that occur when one or more institutions of political governance pursue a goal in direct co-operation with one or more institutions of economic production and distribution" (Michalowski & Kramer, 2006; Tombs, 2012, p.173). They expand their definition by identifying two types of state-corporate crime: state-facilitated and state-initiated.

State facilitated crimes are the result of state negligence or inactivity that contributes to the commission of corporate harms (Aulette & Michalowski, 1993; Kramer et al., 2002, p.271; Michalowski & Kramer, 2006; Bernat & Whyte, 2016, p.74). In other words, the state fails to regulate corporate activity to ensure compliance with the law and avoid serious wrongdoing. This concept is applied by Aulette and Michalowski (1993) in their examination of the 1991

Imperial Food Products chicken processing plant fire in Hamlet, North Carolina. The fire resulted in 25 fatalities and 56 people injured. It was determined that the company deliberately locked fire doors, which would have led the workers to safety, to prevent the theft of chicken and, they argued, to keep flies from coming into the building and onto the chicken (Aulette & Michalowski, 1993, p.171). Kenneth Booker, the regular inspector for the United States Department of Agriculture (USDA) told a congressional panel he was aware of the locked doors after a worker complained to him. However, he did not do anything about it because he believed he lacked the authority to act, and he was told by Imperial management that the door could be quickly unlocked in the case of an emergency (Aulette & Michalowski, 1993, p.198). Perhaps had state safety inspections been properly conducted, this disaster could have been prevented. Unfortunately, in North Carolina, state safety inspections had fallen to their lowest level in sixteen years (Aulette & Michalowski, 1993, p.172). In fact, a year prior to the fire, the state had returned \$453,000 in unspent Occupational Safety and Health money to the Federal Government, despite the fact that the Occupational Safety and Health program already was both underfunded and overwhelmed (Aulette & Michalowski, 1993, p.171).

On the other hand, state-initiated crime is defined as state institutions pursuing proactive strategies that play a leading role in the commission of state-corporate crimes (Kramer, 1992; Kramer et al., 2002, p.271; Michalowski & Kramer, 2006; Bernat & Whyte, 2016, p.74). Not only does the state fail to regulate corporate activities, but it also has a prominent role in producing criminal activity. To reiterate, Kramer (1992) first documented this in his exploration of the Challenger explosion, a 1986 disaster responsible for the death of six astronauts and a school teacher, Christa McAuliffe, who was to be the first private citizen in space. As

aforementioned, the explosion is a collective product of the interaction between NASA, a government agency, and Morton Thiokol, Inc. (MTI), a private corporation.

The study documents numerous instances of state-corporate collaboration including significant pressure on NASA by the Reagan administration to “fly and fly often” (Kramer, 1992, p.223) and a fear of cutting into MTI’s profits. Ultimately, the explosion was caused by a design flaw regarding the shuttle’s O-ring. The O-rings were considered to be a potential “single failure point” that could result in “loss of mission, vehicle and crew due to metal erosion, burn through, and probable case burst resulting in fire and deflagration” (Kramer, 1992, p.226). Both NASA and MTI concealed concerns and decided that fixing this problem would require grounding the shuttle program (Kramer, 1992, p.229). This would see the agency lambasted by not just the government, who placed pressure on the agency to have the shuttle flying, but by the media as well. Further, MTI would risk maximal profits, as the corporation would sacrifice the second phase of their lucrative contract with NASA – the company would have been penalized for missing a crucial deadline (Kramer, 1992, p.229). In the end, both parties decided that the program would move forward declaring concerns an “acceptable risk” (Kramer, 1992, p.229). NASA, with the concurrence of MTI, made the decision to launch the Challenger on January 29th, 1986, despite the various warnings from internal engineers.

Michalowski and Kramer are applauded for their effort in bringing the state squarely into the study of corporate crime. However, their work is also interpreted as perceiving state-corporate relations as an autonomous agency (the state) intervening – or not – against another autonomous organization. While many criminologists are supportive of Michalowski and Kramer’s concept, they simply want it to go further, to analyze the increasingly symbiotic

relationship between states and corporations in the production of harm and crime (Tombs, 2012, p.171).

The theoretical construct of a state-corporate symbiotic relationship was first explored by O'Reilly (2010), who borrowed the analytical framework of symbiosis from the natural sciences to provide a mechanism for theorizing state-corporate relationships in the context of transnational policing. Specifically, O'Reilly (2010) focused on the transnational security consultancy industry and its interaction with state security agencies to demonstrate how leading firms acted as key facilitators of dominant interests (p.183). These interests were reflected in how the security sector imposed itself upon agendas, discourse, methods and ideologies present in the global policing environment. Further, O'Reilly (2010) explored the factors responsible for the present symbiosis. He emphasized that the prevailing neoliberal agenda has shaped contemporary state-corporate relationships pointing to a need to explore its role in prioritizing market solutions – both as a way of enhancing governmental efficiency and promoting global competitiveness. The perception of such benefits is embedded deep within the core of the contemporary regulatory sector and ultimately, how these frameworks aid corporations in accruing capital through different means (O'Reilly, 2010, p.200; see also Coleman, Sim, Tombs & Whyte, 2009; Evertsson, 2017; Griffin III & Spilanne, 2016; Bernat & Whyte, 2016). For example, O'Reilly (2010) specifically details the consequences of a rapid embrace of neoliberalism in the field of security. He states that the unwavering enthusiasm for the neoliberal agenda among security respondents and their associations has resulted in discussions of state outsourcing that laud the private sector's cost-effectiveness, while referring to the economics as "inarguable" (p.200). One industry panelist referred to outsourcing as both "here to stay" and constituting "a way of life for first-world governments" (O'Reilly, 2010, p.200).

O'Reilly focused on the manifestation of the relationship between state security institutions and the British and U.S. transnational security consultancies (TSCs). By concentrating on the role of these security professionals, O'Reilly was able to explore neglected aspects of transnational security governance – the state-corporate relationship and the extent of the private sector's gains resulting from the state's agenda. He conceptualized the state-corporate symbiosis by focusing on the role TSCs play abroad where the interests of “high politics and private finance intersect” (O'Reilly, 2010, p.184). Ultimately, O'Reilly (2010) states the neoliberal agenda within Western governments is responsible for shaping contemporary state-corporate relationships within transnational policing (p.200). National security remits have been expanded to include economic well-being, as the contemporary state is principally judged in terms of economic success (O'Reilly, 2010, p.201). Therefore, the notion that market solutions enhance government efficiency and promote global competitiveness is further advanced. To O'Reilly, this was the key factor in the advent of transnational commercial security, as we have witnessed the emergence of an array of transnational policing regimes to combat new global security threats – TSCs have assumed the responsibility both to secure, and enhance, the global competitiveness of key national industries (O'Reilly, 2010, p.201).

This study demonstrates the importance of recognizing that the relationship between these actors is systematic. Since corporations are created and regulated by the state, the autonomy of corporations is never complete since “corporations always exist simultaneously ‘inside’ and ‘outside’ of state rules and institutions” (Tombs, 2012, p.173). That being said, it is important to note that this does not detract from individual responsibility, whether it is executives or state officials, but rather it draws attention to the fact that structural factors must be considered as well (McMullan, 1992, p.45).

Evidently, the aforementioned scholars' work drastically differs from a majority of the state-corporate crime literature that consistently analyzes the state and corporation as adversaries – the state perceived as an institution ontologically distinct from a capitalist society.

Unfortunately, much of the state-corporate crime literature has overwhelmingly focused upon discrete acts, events and contexts, abstracting such incidents from ongoing relationships and wider contexts (Tombs, 2012, p.175). These analyses generally observe joint ventures between corporations and states drawing connections across two similar events and a focus on immediate criminal outcomes. To reference Michalowski and Kramer, there are certainly cases that can be described as either state-facilitated or state-initiated; however, in order to fully understand the formative conditions of state-corporate crime, it is not enough to limit the analysis to the immediately apparent empirical conditions of regulatory collusion or failure (Whyte, 2014).

With the advent of neoliberalism, the state-corporate relationship has become stronger and more entwined making state-corporate crime more relevant and central than ever. However, this is not to say that the working relationship between the state and corporation is new, as scholars such as Mahon (1979) have acknowledged this relationship in their early discussions of the capitalist state, specifically in terms of how the state has provided business-friendly conditions for the reproduction of capital and ruling-class interests. The state-corporate relationship is simply becoming more obvious, as corporations become bigger and more globalized. As per Marx, “capitalist states are understood as a structure - a relation between conflicting classes” (Mahon, 1979, p.164). This conceptualization suggests that power relations within the state apparatus express and reinforce class power, which ultimately, reinforces the corporate capitalist status-quo (Mahon, 1979, p.174). This is accomplished through the production of the social conditions that in turn enable criminal and harmful practices to occur

(Bernat & Whyte, 2016, p.77; Chambliss, 1989; Green & Ward, 2004; Mahon, 1979; Michalowski & Kramer, 1987; Whyte, 2014).

Should the corporation drastically overstep the socially acceptable moral boundaries by seriously injuring and/or killing workers and/or the public, then the capitalist state will step in to mediate or *control* the situation. This means that rather than eliminating the structural issues behind the crisis, which may impede profit, solutions are often carried out in the form of new laws that do not necessarily challenge the status-quo (Coleman et al., 2009; Slapper & Tombs, 1999; Snider 1990). Additionally, capitalist states normalize these business-friendly conditions through their influence over non-economic institutions such state-corporate committees and/or boards (Barak, 2017, p.37). For example, in 1984, the conservative Government of Canada set up a committee to recommend revisions to the laws on mergers and monopolies. The committee was composed largely of members of Canada's corporate elite; the Canadian Manufacturers Association, the Canadian Chamber of Commerce, and the Business Council of National Issues (Snider, 1993, p.110). The resulting legislation was the *Competition Act*, enacted in 1986. The Competition Act was explicitly designed to improve and facilitate corporate operations, while removing criminal sanctions from the merger/monopoly sections (Snider, 1993, p.110). Businesses argued that the stigma of criminality was inappropriate to handle well-meaning but occasional and unfortunate acts of wrongdoing by corporations.

Recent literature on state-corporate crime suggests criminologists are moving toward a focus on the deeper structural relations between organized capital and state institutions (Bernat & Whyte, 2016; Evertsson, 2017; Griffin III & Spilanne, 2016; O'Reilly, 2010; Tombs, 2012; Whyte 2014). Analyzing broader political, economic and social contexts are revealing the effects of a neoliberal agenda and how it reinforces a corporate capitalist status-quo. In this sense,

capitalist states are advancing regimes of capital accumulation through various forms of (re)regulation. The following Section focuses on the state's role in advancing capitalism on a global scale through free trade agreements, and neoliberalism's influence in shaping international efforts to circumvent procedural barriers that may impede corporate profit making.

III. Globalization and the Multinational Corporation

This study defines globalization as an expansion of capitalism in international markets resulting from cheaper transaction costs and faster exchanges of capital and labor – primarily due to the breakthroughs in transportation and communication technologies in the 1980s (Harvey, 2005; Pakes, 2013; Sharma, 2008). States have not only been the principal agents of globalization, but still remain the guarantors of the political and social conditions necessary for global capital accumulation (Coleman, et al., 2009). By embracing neoliberalism, states have advanced the rhetoric that global capitalism is the 'saviour' that will alleviate material and social inequalities through political, economic and legal systems organized around capitalist values of freedom to participate in markets and accumulate wealth (Sharma, 2008). Therefore, notions of globalization are invoked by governments seeking to attract private capital and foreign investment. The International Monetary Fund, the World Bank, and the World Trade Organization largely advance this agenda through their consistent promotion of neoliberal ideals such as 'trickle-down economics and liberalized trade (Friedrichs & Friedrichs, 2002; Pakes, 2013; Rothe, 2010).

Braithwaite & Drahos (2000) believe free trade agreements were vital to the rise and spread of neoliberal mentalities and a globalized capitalist system. They believe that free trade agreements perpetuated the emergence of horizontal networks that ultimately allowed corporations to circumvent state regulation and connect with other businesses at a global level

(p.176; see also Friedrichs, 2007b; Jessop, 1993, p.7; Pearce & Snider, 1995; Sharma, 2008).

Under the guise of promoting economic prosperity, Western states and intergovernmental organizations have promoted free trade since the purge of Keynesian policies in the early 1980s (Harvey, 2005). Unfortunately, these agreements are riddled with corporate safeguards ensuring social and environmental policies do not interfere with foreign investment. For example, Clarke (2008) and Smandych & Juneneman (2010) argue that by ratifying the Canada-United States Free Trade Agreement (FTA) in 1988, Mulroney's conservative federal government shackled Canada to the United States' economy, essentially rendering the country captive to big oil. In particular, the FTA contained a 'proportional sharing clause' that obliged Canada to provide continuous exports of energy resources to the United States. As such, Canada was prohibited from placing a ban or quota on its oil and natural gas exports (Clarke, 2008). However, this did not deter Mulroney, as it is believed he merely considered this a bargaining chip that would ultimately turn a quick profit and ensure that United States negotiators would sign the deal (Clarke, 2008).

In 1994, when Canada replaced the FTA with NAFTA, Canada's negotiators failed to eliminate the proportionality clause despite Mexico's objection that it would damage its sovereignty and negatively affect control of its energy resources (Clarke, 2008, p.138; Smandych & Kueneman, 2010, p.92). Now with the addition of NAFTA's ISDS, United States' oil companies are provided with the tools necessary to determine, if not dictate, Canada's policy decisions, as any attempt to constrain the industry's operations can be met with legal action. Clarke (2008) strongly believes that under NAFTA, Canada has lost its power to democratically determine energy policy, "Instead, it is the U.S. market, the oil industry in Houston and the policy-makers in Washington that now largely determine Canada's energy policies ... we are

now an energy colony within an American empire” (p.147).

The general thrust of these agreements culminated with the principal IFIs: The World Bank, WTO and IMF. Initially, these institutions were established as international aids for postwar reconstruction, development, and stabilization (Mackenzie, 2006, p.165). However, the roles and responsibilities of these institutions evolved into regulating the exchange of international finances involving corporations and states. They continue to play a central role in promoting business-friendly policies and practices so far as even being characterized as the “unholy trinity of greed” (Friedrichs, 2007b, p.170) – critics charge that they are increasingly complicit in large-scale “crimes of globalization” (Friedrichs, 2007b, p.175; Friedrichs & Friedrichs, 2002; Friedrichs & Rothe, 2013; Mackenzie, 2006). For example, some criminologists argue that for the past fifty years, these IFIs, driven by the interests of capital over people, have invested in large, export-oriented projects, such as pipelines and dams, that cause severe environmental damage and threaten the livelihood of the very people in need: the oppressed and the poor. These people’s lives are consistently overturned, as major infrastructure projects continue to displace them from their lands (Friedrichs & Friedrichs, 2002, p.25; Pakes, 2013, p.2; Rothe, 2010, p. 458).

Crimes of globalization are defined as the demonstrable harms that results from policies and practices of international financial and trade institutions (Gilbert & Russell, 2002; Friedrichs, 2007a; Friedrichs & Friedrichs, 2002; Friedrichs & Rothe, 2013, p.49; MacKenzie, 2006). Friedrichs & Rothe (2013) believe these crimes share a generic relationship with state-corporate crimes insofar as the intersection of business and government has led to increased cases of a ‘globalized criminality’ and consequential harms (p.51). Therefore, it is worth noting that Western states have vested interests in ensuring neoliberal approaches to transnational value

production (that are primarily at the root of said harms) that dominate popular discourses and practices in emerging capitalist markets (Rothe & Friedrichs, 2015). Agendas featuring international development projects – such as the aforementioned pipelines and dams – give Western states, and by association their corporations, the upper hand in governing globalised business and international development (Beder, 2010; Soederberg, 2006, p. 8; Rothe & Friedrichs, 2015, p. 76). For example, IFIs that issue loans to so-called developing countries are structured on the rate of monetary donations. This means that states with higher financial contributions are granted more voting seats and overall, greater influence in management and decision-making processes (Rothe, 2010, p.465). Presently, G7 nations hold 45 percent of voting power within IFIs, ensuring the wealthiest nations hold substantial power over discussions of international political and economic relations (MacKenzie, 2006, p. 166).

The influence exercised by the wealthiest nations has significantly extended the neoliberal agenda. With the assistance of IFIs, these forces have driven the expansion of a global liberalized market. Under an ideal of economic growth, neoliberal principles have become “truths” (Rothe & Friedrichs, 2015, p. 71). Despite contrasting studies, the perpetuation of the neoliberal agenda makes it increasingly difficult to challenge these “truths”, as corporate practices become normalized as a contributing factor to economic prosperity, whether they are harmful or not (Friedrichs & Friedrichs, 2002). For example, a study by the International Trade Commission projected that by 2025, “The Trans-Pacific Partnership (TPP) would augment its member countries’ growth by a meager 0.1%” (Barak, 2017, p.177). Dissenting arguments that question realities of ‘trickle-down’ economics are dominated by these “truths” that support and legitimate the expansion of globalized capitalism (Rothe & Friedrichs, 2015).

Critical corporate crime scholars describe this situation as rooted in neoliberal hegemony. Corporate capitalism continues to flourish, as states continue to provide economically-conducive environments. As a result, this common sense has reached a point where it is able to simply squash dissenting probes by referencing the benefits of ‘trickle-down’ economics. As such, the sustained attack on ‘red tape’ has been legitimated as a necessary response to the realities of globalization (Coleman et al., 2009, p.5). In Canada, capitalism’s globalizing efforts have consumed the economy. In the context of free trade, this shift has resulted in a greater presence of multinational corporations within the country, including considerable US presence through the operation of branch plants (Bittle, 2012, p.62).

Corporations commonly take advantage of the differences in territorial regulation when deciding where to investment, choosing the suitable legal framework for their business (Nowrot, 2011). If states fear losing investments it is not unheard of for them to weaken their regulatory sector or eliminate it altogether before corporations ‘shop’ for countries offering better incentives. This is what scholars refer to as “race to the bottom” (Beder, 2010, p.497; Brathwaite & Drahos, p.208; Friedrichs, 2007a, Gillbert & Russell, 2002, p.214; Michalowski & Kramer, 1987; Radavoi & Bian, 2014, p.179; Sharma, 2008, p.6; Snider, 2000, p.171; White, 2003, p.497). This typically means corporations will move their business to so-called under-developed countries with weaker regulations and who cannot afford to lose investments. However, Canada has consistently proved to be an equally suitable destination for U.S companies. Pearce & Snider (1995) provide a particularly relevant example. During the 1990 election, the New Democratic Party of Ontario introduced a provincial auto-insurance plan. Upon learning this, State Farm, the largest U.S. auto insurance company, claimed that under the FTA \$1.3 billion would be owed by

Ontario as compensation to U.S. auto-insurance companies. The province responded by officially scrapping the policy (Pearce & Snider, 1995, p.42).

This example parallels perhaps one of the most prominent critiques of ISDS, regulatory chill. As it will be discussed in more detail in the next section, the mechanism provokes fear that may prevent politicians from acting in public interests or implementing policy choices that could threaten corporate profits (Been & Beauvaist, 2003, p.132; Sinclair, 2015, p.37; Gauthier, 2016, p.4; Matveev, 2015, p.358). Corporations have gained unprecedented power within this global economy, as nation-states have shifted their responsibility to authors of a regime which defines and guarantees, through international treaties, the global and domestic rights of capital over civil society (Bittle, 2012; Fudge & Cossman, 2002). The following Section explores the literature on ISDS, particularly the effect consenting to the implementation of it has had on the state-corporate relationship.

IV. Investor State Dispute Settlements

This section positions the thesis within the extant literature on ISDS. Doing so will reveal the importance of a state-corporate crime lens for analyzing this dispute mechanism. Dominant discourses continue to promote ISDS as a necessary safeguard for foreign investors who question the ability of host states to ensure the rule of law is sustained. However, a critical scholarship reveals the mechanism's ability to provide a business-friendly environment conducive for foreign investors and an unimpeded flow of capital.

Miles (2013) argues that investor-state arbitration offers a one-sided rule of law that only protects the investor (p.332). As such, he is most concerned with a lack of transparency and potential for corruption through appointed arbitrators. There are those that contrast such

positions by arguing that the mechanism is fully compatible with the rule of law given the system behind it features numerous checks and balances in an independent judiciary. Kriebaum (2015) and Kim (2016) assert that an independent judiciary ensures due process, predictability and transparency. As such, this third-party adjudication system guarantees both sides will be heard and followed by a legally binding settlement. These legal analyses of ISDS are useful to identify potential contradictions with the rule of law; however, this study will largely build off the work of critics Beder (2010), Ciocchini & Khoury (2018), Sinclair (2015), and Van Harten (2007, 2013) by exploring the state's responsibility for these contradictions.

A state-corporate crime lens provides the means to extend beyond the symptoms of ISDS, such as transparency and arbitral integrity, to a greater issue: how consent for a neoliberal capitalist system is being reproduced through tribunal decisions. Ciocchini & Khoury (2018) reviewed 356 concluded claims at the UN level since 2014 (United Nations Conference on Trade and Development – hereinafter UNCTAD – 2015). At first glance the results appear favourable considering the state has won more claims than investors – 37% were decided in favour of the state, 25% in favour of the investor, 28% of cases were settled⁴ and the remaining were discontinued (UNCTAD 2015). However, these statistics actually illustrate a crucial aspect of neoliberal capitalism's dominance, which is for the ruling class to concede when necessary to maintain the legitimacy of a system that overwhelmingly favours capitalist interests (Ciocchini & Khoury, 2018, p.9; see also Pearce, 1976). To elaborate, regardless of whether foreign investors win or lose their claim, the ISDS arbitral system gains legitimacy – it is recognized as a viable

⁴ This statistic can be misleading, as settled cases often result in some kind of agreement, or concession by the state (Ciocchini & Khoury, 2018). Furthermore, Howse's (2017) recent study shows that in almost all 121 settled investment proceedings he investigated, the investor still obtained either significant monetary relief or a significant adjustment to the regulatory framework in question.

solution to international trade disputes by the state, foreign investors, and society. Thus, although foreign investors may not win every claim they launch, they are still normalizing the ISDS process, and by association perpetuating a neoliberal capitalism system that enforces laissez-faire solutions. As stated by Sum (2009, p.191), neoliberal hegemony is achieved when dominant discourses are institutionalized through market-based policy.

Some scholars have suggested that the free-market provided corporations the power to usurp the authority endowed to the state (Deutsch, 2011; Schreuer, 2010; Waibel, Kaushal, Chung, Balchin, 2010; Wells, 2010). However, it would be a mistake to perceive the materialization of ISDS solely as a result of a corporate takeover. The historical context behind ISDS reveals numerous social, political and economic factors involved in the implementation of this mechanism. Suggesting that corporations seized state power neglects the role states have had in creating the environment that allowed corporations to achieve such prominence in society. For example, Luz & Miller (2002) believe that globalization compelled states to negotiate treaties in a significantly different manner to accommodate the increased number of market-based exchanges (Luz & Miller, 2002, p.972). The opening of foreign markets resulted in universal acknowledgement that national economies cannot afford to remain outside the international network of products, suppliers, financing and technologies embodied in the activities of transnational corporations. This effectively prioritizes the accumulation of foreign capital over domestic social rights, as states are responsible for relinquishing their sovereignty to corporations when they willingly commit and consent to ISDS by ratifying their free trade agreements (Barker & Mander, 2000, p.252; Beder, 2010, p. 498; Braithwaite & Drahos, 2000; Friedrichs, 2007a; Gilbert & Russell, 2002, Pakes, 2013; Rothe & Mullins, 2009).

The requirement of consent is a general characteristic of ISDS's arbitration and in order

to trigger the rights and obligations under the International Centre for Settlement of Investment Disputes (ICSID) Convention, consent must be obtained from all parties (Beder, 2010; Schreuer, 2010; Van Harten, 2007). By consenting to ISDS's arbitration, not only have states relinquished their sovereignty, but they are also solidifying both the legitimacy and legality of a symmetrical state-corporate working relationship. This is problematic, as perceiving the relationship as symmetrical draws one of two conclusions: the state is now reduced to the status of a private party or the investor is elevated to a quasi-sovereign status with the state, but without any sovereign responsibilities (Van Harten, 2007, p.130). Both outcomes taint the integrity of the legal system, as this type of private arbitration in the regulatory sphere conflicts with principles of judicial accountability and independence in democratic societies (Beder, 2010; Ciocchini & Khoury, 2018; Van Harten, 2007, p.4).

Been & Beauvaist (2003) refer to NAFTA's Chapter 11 as the "investor's bill of rights" (p.40). The scholars state that the Chapter's arbitration process provides a preferential and private legal outlet – one that is only available to foreign interests (Been & Beauvaist, 2003, p.40 see also Alvarez-Jimenez, 2006; Anderson, 2017, p.2949; De Pencier, 1999–2000; Luz & Miller, 2002, p.972). The introduction of private tribunals has 'freed' investors from an obligation to proceed through national courts by circumventing procedural barriers that may obstruct the quickest route to profit (Been & Beauvaist, 2003; Sattorova, 2012, p.223). This creation of a parallel legal system undermines public policy as arbitrators are granted the ability to challenge state regulation. These arbitrators may scrutinize state decisions, issue monetary orders against the state, and operate largely if not entirely beyond court supervision (McBride, 2006, p.755; Sinclair, 2015, p.30; Van Harten, 2013, p.7). Van Harten (2013) quotes an undisclosed arbitrator that captures the free rein that states have granted arbitrators under ISDS:

When I wake up at night and think about arbitration, it never ceases to amaze me that sovereign states have agreed to investment arbitration at all. ... Three private individuals are entrusted with the power to review, without any restriction or appeal procedure, all actions of the government, all decisions of the courts, and all laws and regulations emanating from parliament. ... Politicians have never given such authority to a national court, and no state has given an international court nearly so much power. (p.8)

Such actions are a clear compromise of judicial integrity and leaves the question of whose interests are ultimately being served. For example, because only investors can bring forth claims and only states pay damages for breaches within the treaty – excluding tribunal and legal costs (Van Harten, 2013, p.7) – adjudicators have an inherent bias towards the investor as they are dependent on prospective claims. Because they only serve when claims have been launched, objectively, it can be argued they have a financial stake in interpreting breaches in favour of investors (Van Harten, 2007, p.5). Before a claim is even heard the argument in favour of a neutral third-party has already been tainted.

The threat of corporate retaliation exerting a chilling effect on public policy and regulation remains one of the main critiques of ISDS (Been & Beauvaist, 2003; Gauthier, 2016; Matveev, 2015; Sinclair, 2015). To expand on this, politicians believe that it is easier to soften, or even abandon, proposed regulatory changes than incur the cost of defending proposals and/or paying compensation through ISDS decisions. Unfortunately, this particular implication is hard to prove, given both the secrecy that surrounds these claims and the obvious damage toward public opinion if governments were ever to disclose such a statement. To this end, Been & Beauvaist (2003) examined a 1997 case in which, Ethyl Corporation – a U.S. manufacturer of the gasoline additive MMT – brought a \$200 million claim against Canada, alleging a ban on MMT

violated a Chapter 11 Article. Canada settled the claim before the NAFTA tribunal commenced. The ban was rescinded and Canada not only paid Ethyl \$13 million, but issued a public statement conceding the government had no evidence that MMT caused any harm. While there is no direct proof these actions are the result of Ethyl's Chapter 11 claim, but this case certainly meets the criteria discussed by these scholars.

While regulatory chill may be hard to prove, it is certain that the very presence of investment protection rules between developed states incentivizes the initiation of disputes to test those legal regimes (Anderson, 2017, p.2962; Been & Beauvaist, 2003). The popularity in which claims are being launched has greatly risen indicating corporations have found a new stream of capital at the expense of taxpayer's dollars. In fact, according to the ICSID's most recent statistics, 2017 saw the highest number of ICSID cases registered to date at 53 (ICSID, 2018). By implementing trade pacts with these mechanisms, the state has not only insulated corporations from attempts to regulate them, but have provided the means to transition to the offensive, allowing corporations to take action against burdensome regulations.

Conclusion

This chapter situated the thesis within the growing body of corporate crime and state-corporate crime literature. By contextualizing this study within broader considerations of corporate wrongdoing it revealed a dominant perspective that often neglects or misinterprets the role of the state when discussing ISDS. Of particular concern is the state's role in providing the numerous advantages enjoyed by multinational corporations at the expense of civil society. In this case, the dominance of such actions stem from the struggle between how trade agreements are understood and defined and the privileged position of the multinational corporation within the global

capitalist economy. To understand the laissez-faire market policies that govern the current state of global corporate capitalism, it is imperative to explore the reproduction of neoliberal beliefs.

Mechanisms like ISDS are akin to neoliberal hegemony, as legitimacy is dependent on societal acceptance. In other words, power and dominance is not achieved through neoliberalism; rather, powerful voices that support neoliberalism and its assumptions about how the world works become accepted as the way to view the world (Dahlberg, 2014; Soederberg, 2010, p. 47). A large part of this process regards the way in which discourse shapes these understandings. Therefore, understandings of corporate conduct, free trade or even the state that are rooted in neoliberal assumptions can significantly shape perception and action. The following chapter details the Gramscian theoretical framework used for this study.

Chapter 3: Theoretical Framework

The concepts of hegemony and common sense in the works of Antonio Gramsci provide the analytical lens for examining the production of consent through ISDS and how it reproduces and sustains a ‘legitimate’ capitalist system. As previously addressed in the Literature Review, corporations did not seize the state, as the state consented to ISDS via the ratification of trade. This mechanism is often overlooked in favour of the many purported benefits of free trade; yet, it plays a significant role in reinforcing ruling class interests. Therefore, Gramsci’s theory will be used to help make sense of important concepts related to global capitalism, including the dominance of a neoliberalism and a growing state-corporate symbiosis.

Gramsci is especially useful for moving beyond a unidimensional view of the state; a perspective limited to its negative, repressive, and legal-centered role (Tombs, 2012, p.172). Such a view is responsible for the illusion of an antagonistic relationship between the state and corporation – one party seeking compliance with the law while the other seeks to avoid it. This understanding is deeply troubling, as it neglects the commitment of the capitalist state to reinforcing the status-quo. This commitment aligns with a key feature of neoliberalism in that it undermines socially protective laws by promoting values of profit maximization above most all social values (Barak, 2017; Mahon, 1979; Tombs, 2012; Tombs & Whyte, 2009). Thus, we are experiencing state intervention that gives the appearance capital accumulation is the norm and that anything else obstructs to ‘our’ progress. A Gramscian analytical lens enables me to explore how emerging discourses of multinational corporations shape popular conceptualizations of globalization and reproduce and/or challenge the social, political and economic conditions of global capitalism.

Gramsci's Theory of Hegemony

Antonio Gramsci's writings about the course of capitalist development were largely informed by what he considered to be a problematic relationship between the bourgeois and proletariat. Like Marx, Gramsci believed that capitalism was the driving force behind a class structure that would allocate a surplus of wealth to the elite while undermining workers' rights (Gramsci, 2000; LeBlanc, 1996). However, for Gramsci simply recognizing that capitalism allowed the bourgeois to exploit the labour of the working class was not enough. Gramsci considered Marx's work weak on the forms of political power, relations between social classes and political representation of the cultural and ideological forms that see social antagonisms utilized or repressed (Gramsci, 2000, p.189).

Important for Gramsci is the ensemble of social relations configured by certain social structures. Gramsci emphasizes the nature of the state and terrain on which it operates in terms of its complex relationship with the economy and civil society (Gill, 1993, p.39; Mahon, 1979; Whyte, 2014, p.240). He rejects the assumption that the state only serves the elite. Instead, he believes state power emerges from key forces in the economy and society, whereby a mutual exchange of influence exists (Gill, 1993, p.39; Whyte, 2014). It is important that these elements be understood in the context of their social relations and the physical means of production (Cox, 1993, p.56). Therefore, the nature of the state is comprised of the underpinnings of the political structure in civil society; the functionality of institutions such as the church, educational system, the media, and other institutions that may affect behaviour (Cox, 1993, p.51). As a result, Gramsci's approach is best suited for seeking to understand the nature of social reality, key components and relationships, and how they have changed over time.

Gramsci's theory of hegemony is based on the belief that, "man is not ruled by force alone, but also by ideas" (Bates, 1975, p.351). The upper class or 'ruling class' therefore exerts its power over civil society through a marketplace of ideas. These ideas reflect hegemony if they are accepted by civil society. This process is indicative of what Gramsci refers to as the "consent of the led", whereby political leadership is only successfully secured after attaining the 'free' consent of the masses (Bates, 1975, p.353). However, obtaining consent is more than a promotion of ideas. It requires a sense of legitimacy in the eyes of the public. Despite the flow of all social groups and competing interests, it is the ruling class that tends to be successful in circulating its beliefs throughout political and social structures. These ideas eventually become legitimized and are implemented in long-standing practices rooted deep in religious, political, and cultural socialization, referred to as 'common sense' (Harvey, 2005, p.39; Soederberg, 2008, p.663). It is these cultural and traditional values, or 'common sense', that are mobilized to mask certain harmful realities (Gramsci, 2000, p.196; Pearce & Tombs, 1998, p.37). For example, consider the rise of neoliberalism, as it succeeded because it was more than just economics. It also had a distinct morality that embraced the ideals of individual freedom and anti-interventionist practices (Harvey, 2005, p.40; Tombs, 2012, p.180).

The constant flow and (re)negotiation of competing interests is conducted on the terrain of civil society. Gramsci describes it as "a site of consent, hegemony, direction and conceptual opposition..." (Gramsci, 2000, p.222). This process is referred to as "war of position". Although it has been referenced that the upper class tends to rule social structures, those structures can still be transformed by collective action (Gill, 1993, p.23). This is an unavoidable aspect of the hegemonic production process, as "hegemony is the life of the state conceived as a continual process of the forming and the superseding of unstable equilibria between the interests of the

dominant group and those of the subordinate groups” (Mahon, 1979, p.165). This speaks to why a neoliberal capitalist system must consistently promote itself as being in the public’s best interests.

Gramsci coined the term “passive revolution” to describe a strategy for the ruling class to either assimilate or domesticate opposing ideas by modifying them to fit the elites’ agenda (Cox, 1993, p.55; Simon, 2015, p.48). This way criticism is essentially neutralized upon which neither hegemonic beliefs nor offending corporations are exposed to scrutiny (Pearce & Tombs, 1998, p.22). Such strategies can include a policy reform or more frequently, marketing campaigns. Corporate greenwashing campaigns are exemplar cases of passive revolution in action. These campaigns often maintain the upper hand on environmental regulations because conflicting information is now so readily available – for example, social media provides access to an unlimited amount of misinformation contradicting dissenting perspectives. Additionally, the growing state-corporate symbiosis is responsible for the millions of dollars’ worth of commercials, billboards, online advertisements and more that present corporate practices in a friendlier manner. This narrative pushed by corporations subverts fact-based analyses by either intentionally ignoring crucial data or appealing directly to society’s emotions. Such conflicting information has been shown to discourage the public, ultimately, leaving the harsh reality in doubt while presenting multinationals with a responsible public image (Smandych & Kueneman, 2010, p.97). According to Smandych & Kueneman (2010, p.100), in Alberta the provincial Public Affairs Bureau spent \$14 million annually convincing Albertans and U.S. oil consumers that the tar sands are green. Although not every Alberta citizen is going to believe this, for many it will still discourage protest or as aforementioned, effectively alter positive perceptions by redirecting oppositional hegemonic rhetoric towards the dominant perspective. Therefore,

Gramsci's concepts can certainly be applied to examine the formation and legitimation of social ideologies regarding state-corporate crimes generally, and/or in the context of a globalized capitalist system.

Hegemony and Transnational Corporate Crime

Some corporate crime scholars have applied a Gramscian lens to explore how the perceived legitimacy of corporations differentiates their harmful practices from traditional crimes (Bittle, 2012, p.69; Pearce & Tombs, 1990; Slapper & Tombs, 1999; Snider, 1990; Soederberg, 2008). For example, Pearce and Tombs (1989) applied Gramsci's theory to examine how the 1984 explosion of Union Carbide India Limited (UCIL) chemical factory in Bhopal was effectively downplayed and ignored, defined away as non-criminal, despite UCIL's explosion causing the death of approximately 20,000 people. The authors conclude that the dominance of this perspective is rooted in the struggle of how the chemical industry is defined in a privileged position within a capitalist economy – this privileged position permits corporations like Union Carbide to assert that any negligence for safety procedures resulting in the explosion were the responsibilities of local managers and regulators in India (Pearce & Tombs, 1998, p.197). When the Indian government suggested that the parent company Union Carbide be tried in the United States for the Bhopal disaster, the American courts quickly rejected the request. Similarly, efforts to summon Union Carbide to trial in an Indian criminal court were denied due to a supposed lack of jurisdiction over the company headquartered in the United States. It is this position and treatment that differentiates these corporate harms from 'real' crimes and beyond the reach of criminal law, as Gramsci's approach provides the required lens to observe the state's role in

defining such corporate practices as an unfortunate, yet unavoidable, by-product of the accumulation of capital.

Other scholars, such as Lakoff (2002), have explored the relationship between Gramsci's concepts of common sense and unconscious thought. With the use of metaphors and emotional identification, common sense has conveyed complex claims related to issues such as tax cuts for major corporations, in ways that the public can readily understand. The dominance of neoliberalism did not simply emerge as an inevitable force. For over thirty years Republicans and Conservatives have managed to shape and forge links between family, freedom and emotion with public policy and powerful slogans repeated until the connections seem natural (Tombs, 2016, p.52). The reproduction of this 'common sense' was and is still constantly (re)shaped in new forms of political, economic and cultural beliefs informed by neoliberal ideals (Gill, 1993; Soederberg, 2006, p.25). Initially, the expansion of neoliberal capitalist systems to the Global South was heavily aided by the IMF and World Bank, as free market fundamentalism was exchanged for debt rescheduling. Indebted nations would be required to implement institutional reforms, such as cuts in the welfare state, flexible market laws and privatization (Harvey, 2005, p.29). This marked the conception of structural adjustment programs and the integration of newly emerging economies with global economic systems (Friedrichs & Friedrichs, 2002, p.25; Friedrichs & Rothe, 2013, p.54; Harvey, 2005, p.73; Mackenzie, 2006, p.171).

Presently, the institutionalization of neoliberal ideals continues through globalization and the enactment of various foreign trade agreements. For example, Brathwaite & Drahos (2000) point out that today the U.S. is widely considered a trailblazer for the trade agreements it conceived (p.216). As previously stated, the U.S. adopted the BIT program in 1981, and has since been pushing hard for comprehensive trade agreements to feature provisions specifically

tailored to safeguarding investment. Brathwaite & Drahos (2000) believe the U.S.'s model for free trade agreements has been responsible for a proliferation of replicates, as other countries have taken notice of these safeguards.

That said, as with any hegemonic order, neoliberal dominance over international policy and economic issues can still face resistance. Typically, challenges arise out of controversial issues concerning corporate human rights violations, environmental degradation and rising financial inequalities. For example, between 30 November and 3 December 1999, there were massive public demonstrations outside the WTO meetings in Seattle. These protestors conveyed a growing concern that the globalization of businesses reflected only the interests of the wealthiest elites without respect for the ramifications that their policies and practices may have on people in so-called developing countries (Beder; 2010, p.509; Gillbert & Russell, 2002, p.214). They believed that free trade policies and related activities by transnational corporations produced considerable harm by damaging the environment and undercutting the livelihood of ordinary people. Such a public display of resistance posed a threat to neoliberal hegemony and corporate power, and so the global benefactors of free-market policies moved quickly to re-establish their legitimacy.

To counter the growing opposition to free trade, transnational corporations launched several public relations campaigns, labelling dissenting perspectives as a form of 'globophobia' (Beder, 2010, p.509). A negative connotation was quickly applied to what corporations labeled an 'anti-globalization' protest, as business groups sought to portray free trade in a more favorable light. Since Seattle, 'big-business' has engaged in a "multi-faceted, multimillion-dollar counter-campaign involving individual corporations, lobby groups, corporate sponsored think tanks, and the ever-faithful PR industry" (Hoedeman & Doherty, 2002, p.67). Beder (2010)

states that corporations are presently showering the U.S. Congress with well-funded lobbying campaigns, and pro-free trade think tanks are effectively waging an information war for public opinion or ‘common sense’ (p.509). Following the ministerial meeting in Doha, Qatar in 2001, several major lobbying groups such as the European Round Table of Industrials (ERT), the U.S. Business Round Table (BRT), the International Chamber of Commerce (ICC) and the Canadian Council of Chief Executives launched a multimillion dollar advertising campaign to support the meeting. The aim was to persuade the public that enhancing free trade would create billions of dollars of wealth for everyone (Beder, 2010, p.511). Thus, free trade is consistently being shaped by the neoliberal rhetoric of free markets and the purported trickle-down benefits of capitalism, permitting transnational businesses to anticipate and counter the resistance and/or scrutiny of a globalized neoliberal capitalist system. This reflects what Gramsci refers to as a “successful hegemonic process”, as the specific interests of the dominant class appear as universal interests, i.e. the subordinate classes see their own interests embedded in those of the ruling elite (Green & Ward, 2004).

Criminologists utilizing a Gramscian lens have successfully demonstrated neoliberal capitalism’s dominance on a global scale. Similarly, the corporate crime literature has illustrated how this common sense emerged and how important common sense assumptions and knowledge claims have factored prominently in the reproduction of transnational corporate hegemony (Beder, 2010; Gill, 1993; Soederberg, 2006). The present study builds upon these scholars’ work to apply a Gramscian lens to analyze not only the various harms resulting from corporate safeguards, such as ISDS, featured in free trade pacts, but how this process reinforces global capitalism. The following section highlights the corporate crime scholarship’s roots in critical socio-legal studies that constitute an important element of my theoretical framework. In so

doing, this section outlines a critical discourse analysis, influenced by Gramsci's theory of hegemony, for studying the production of consent through ISDS and its role in maintaining global capitalism.

Theoretical Links to the Corporate Crime Literature

Haines & Sutton (2003, p.11) argue that, regardless of the dominance of "free enterprise ideology," the state will develop mechanisms to safeguard against situations where the "market lets them down" (p.11). As such, "general understandings about the role of the state may have changed, but they have not been replaced entirely by faith in the markets" (Haines & Sutton, 2003, p.12). Critical criminologists employing a neo-Marxist framework have moved beyond narrow perceptions of the state-corporate relationship defined as neither an antagonistic relationship between the state and corporation nor understood as a mere tool for reinforcing capitalist interests. Instead, they encourage us to conceptualize the state as one of the many different mechanisms within society that plays an important, but not an automatic role in the reproduction of capitalism. The state is both "operationally autonomous" and "institutionally separate" from the capitalist market, meaning there is no *a priori* guarantee that the state will either advance or challenge capital interests (Jessop, 2002, p.41). Despite instances of economic reasoning significantly influencing the state, these cases "depend on the outcome of political and ideological struggles around political projects and hegemonic visions as well as on the ecological dominance of the circuit of capital" (Jessop, 2002, p.30).

Whyte's (2014) discussion of 'regimes of permission' draws upon the work of Gramsci to demonstrate the emergence of the state-corporate symbiotic relationship. Whyte (2014) prefaces his discussion with an analysis of the East India Company in the 1600s, thereby

utilizing one of the fundamental precepts of the state-corporate crime literature: that the intersection of history and political economy should shape scholarly investigation of corporate crime (Kramer et al. 2002). The East India Company, chartered in 1600, was given a legal identity separate from the investors allowing them to shed multiple legal liabilities, as the company would now be held responsible. At first, the East India Company was regarded as a maverick corporation and was routinely involved in bribery and illegal trade that by the end of the seventeenth century reached epic proportions (Whyte, 2014, p.242). Yet the East India Company was left untouched by the British government. The reason for the government's reluctance to demand legal compliance arose directly from the central function the East India Company played in the economic and colonial affairs of the British State. The corporation was a phenomenon that arose not only from those advantages to individuals, but was created out of a common interest between the Crown and a group of small wealthy elite (Whyte, 2014, p.243).

The corporate power granted to this company is wholly reliant upon the state's permission – a corporate veil provided by the state to trade as a separate entity and invest in regimes which permit limited liability. While the state may not explicitly direct corporations to engage in such nefarious practices, it is certainly responsible for coordinating its impunity, ultimately *permitting* it to operate in such a manner until it becomes normalized. For example, the history of factory crimes exhibits such behavior. A mixture of the intransigence of factory owners, the unwillingness of the judiciary to enforce the law against the bourgeois and the difficulties faced by factory inspectors in enforcing the law ensured that factory crime attained an ambiguous status until it became conventionalized and understood as something other than “real” crime (Whyte, 2014, p.243). These various regimes demonstrate how an analysis of the state-corporate relationship at the level of “moments of rupture” clearly has its limits, as it does not

provide the necessary breakdown between the state and corporation. As Whyte (2014) argues, the importance of moving beyond the narrow view of the “state as a policeman” – discussed in the literature review, building from previous corporate crime scholarship, I will also study the ways in which the infrastructural power of state institutions renew the formative conditions of corporate crime – described by Whyte (2014), and consistent with Gramsci’s view, as “regimes of permission”.

Some corporate crime scholars utilize Gramsci’s theory to study the implications of neoliberal hegemony on the treatment of corporate crimes – in addition to Whyte’s (2014) analysis on ‘regimes of permission’, Pearce and Tomb’s (1989) discussion of UCIL can be found earlier in this chapter. Another example is Bittle and Snider’s (2006) analysis of the neoliberal discourses that contributed to the enactment of the Westray Bill in Canada⁵. Their main argument was that neoliberal discourses helped ensure that the legislative framework conceptualized workplace safety as a shared responsibility between workers and employers, despite few workers having control over their working conditions (Bittle & Snider, 2006). The authors employ a theoretical lens that combined the work of Foucault and Gramsci to demonstrate that conservative conceptualizations of corporate crime dominated the process leading to the enactment of the Westray Bill, thereby limiting sufficient reform options. Instead, the final version of the Bill ensured “corporate actors and interests must be protected from corporate criminal liability” (Bittle & Snider, 2006, p.487).

⁵ The Westray Act, known officially as Bill C-45, emerged out of pressures from labour unions, members of the public, and political lobbying for reform in workplace safety standards following the deaths of twenty-six miners in 1992 (Bittle, 2012; Bittle & Snider, 2006). A public inquiry into the mining explosion revealed extreme negligence for miners’ safety at the Nova Scotian mine. Numerous safety violations including a series of cave-ins and dangerously high levels of methane gas were reported to the Department of Labour before the explosion (Glasbeek, 2002, p.62).

The present study builds from an expanded conception of discourse that considers discursive practices as containing ideas, policies, and social activity, in addition to oral and written texts (Howarth, 2000; Laclau & Mouffe, 1985). By incorporating Gramsci's theory and a critical discourse analysis, I critically analyze the discourses that animated the decision supporting *Windstream Energy LLC*. Further, this allows me to explore the ways in which these discourses "simultaneously sustain, legitimize and change" (Fairclough, Graham, Lemke & Wodak, 2004, p.2) various justifications provided during the tribunal. Therefore, such implementation will aid in a better understanding of the vital role of present discourses and knowledge claims in their formation of hegemony.

Fairclough (2013) states that ruling groups must consistently produce discourses that ensure market-based logics remain the prevailing mode of thought and action. Take, for instance, the dominate logic behind free trade pacts, which heavily relies on the acceptance and support of corporate capitalism. The resulting social inequality can certainly be attributed to corporations that benefit from pacts such as NAFTA, but do not pass their gains to workers. From a Gramscian perspective, it is imperative to examine how capitalist principles are "reinvented" to suit varying cultural, political and economic circumstances. The production of knowledge is necessary for the re-articulation of global hegemony. More specifically, the proponents of capitalism must continue to neutralize dissenting perspectives regarding the many inequalities of laissez-faire market policies and replace them with convincing benefits achieved exclusively through the free market in order to successfully secure hegemonic rule (Fairclough, 2013, p.189).

Dahlberg (2014) identifies the link between hegemony and discourse as "discursive totality". This is defined as a process in which hegemonic logics frame particular assumptions about concepts, roles, and practices as 'natural' and therefore possible. Additionally, this process

excludes the claims put forth by dissenting discourses thereby rendering them as impossible. Similarly, Fairclough (2013) discusses ideological domination as the “discursive naturalization” of constructed meanings and identities. This happens when constructions of knowledge are adopted by the popular masses as acceptable and therefore, feasible ways to organize social life (Fairclough, 2013, p.192). This is particularly important, as Mills (2003) states that by shaping what constitutes ‘acceptable’ ways of understanding the world through the production of social meaning, discourses can influence how individuals think, and by extension, act upon particular social, economic and political phenomena.

Examining hegemonic formations through the production of knowledge claims can provide a deeper understanding of the ways in which the ruling class “reinvents” and “repairs” neoliberal dominance following ‘crises’ in global capitalism. These proponents must accommodate the fluid social conditions of globalization to achieve legitimacy and expand their reach of capital accumulation. Given the current state of global capitalism, in which neoliberal principles have faced numerous critiques, especially as free trade between Canada and the United States evolves, an analysis of the (re)production of consent seems relevant. The thesis draws upon a Gramscian theoretical framework to analyze how consent for a neoliberal capitalist system is (re)produced via ISDS decisions – these decisions are not just about legal contracts, but instead also help reinforce the capitalist status-quo. The following chapter explains the methodology of the thesis and discusses the findings, which were collected using the critical discourse analysis method. This method was used to examine the competing discourses produced during *Windstream Energy LLC v. The Government of Canada*.

Chapter 4: Methodology & Analysis

Introduction

This Chapter is divided into two sections. The first section discusses the study's methodology and details the qualitative nature of the critical discourse analysis used. Additionally, it will present the study's discourses found in the data and explain how they were analysed. The second section presents the study's findings and analysis. It will be separated into three sub-sections – each identifying a major discourse found during the tribunal. After each major discourse has been discussed and situated against the relevant literature the analysis will conclude with a summary of the findings.

Methodology: Exploring Hegemony through a Critical Discourse Analysis

This study's methodology draws from the qualitative tradition of discourse analysis. Qualitative research involves studying particular phenomenon to understand their meaning, and/or interpret the object of study (Denzin & Lincoln, 2002, p.x). To expand, “qualitative researchers stress the socially constructed nature of reality, the intimate relationship between the researcher and what is studied, and the situational constraints that shape inquiry” (Denzin & Lincoln, 1994, p.4).

Over the last few decades, qualitative research has evolved into an umbrella term encompassing a variety of epistemological viewpoints, research strategies and specific techniques for understanding people in their natural contexts (Denzin & Lincoln, 2002, p.x).

Fairclough et al. (2004) state that researchers approach discourse analysis in different ways according to the nature of their project, as well as their own views of discourse (p.3). In general terms, discourse analysis typically examines how the content communicated in discourses achieves broader social objectives in relation to ideological beliefs, societal structures and processes of social interaction (Wood & Kroger, 2000; van Dijk, 2005). Although Fairclough (1992) believes there is no ‘blue print’ for conducting a discourse analysis (p.225),

this study will employ a critical discourse analysis emphasizing the role of discourse and knowledge in the (re)production of dominant conceptualizations responsible for the formation of hegemony. A key element of contextualizing discourse is determining what gives certain discourses their ‘truthfulness’. This is not an automatic or determinative process, rather an ongoing fluid exchange of renewal and transformation (Fairclough, Jessop & Sayer, 2002, p.5-6). By examining the intersection of language, discourse and social practices, or the semiotic processes/dimensions (Jessop, 2009, p.344), how social structures give ‘truthfulness’ to, and therein maintain or transform social phenomena will be revealed. When this social construction of knowledge is revealed, it exposes the implicit values and hidden assumptions that underpin dominant conceptualizations and legitimize existing unjust institutional practices (Holt, 2011, p.66).

Understanding the sociological implications of discourse requires an examination of the discursive ‘rules’ that govern the ‘credibility’ of knowledge claims and legitimize particular assumptions over others. This is a crucial aspect of the process, as these ‘credible’ and ‘legitimate’ claims are responsible for shaping prevalent social, political and economic practices (Bacchi, 2005; Fairclough, 2010; Holt, 2011; Peet, 2002, p.57; van Dijk, 2005; Wood & Kroger, 2000). A critical discourse analysis of the interactions of arbitrators, GoO officials, and Windstream representatives during the ISDS tribunal can provide an understanding of the production of knowledge and legitimization involved in dominant conceptualizations of corporations within a global capitalist system. The reproduction of capitalism does not occur automatically, as it is dependent on discourses that endorse neoliberal common-sense assumptions to overcome opposing scrutiny that highlights its inherent inequalities. While it is true that neoliberal advocates use their resources and power to ensure their own interests, the

reproduction of such ideals depends on obtaining public consent (Bates, 1975, p.353). Regardless of the vast difference in resources, public criticisms can amount to push back from the state and ultimately challenge corporate efforts in maintaining its legitimacy. Therefore, in order to explore the formation and reproduction of hegemony, it is necessary to examine the potential resistance and/or “truths” in responses that contribute to ISDS’s role in normalizing corporations and in turn obscuring and/or downplaying their harms. Contextualizing the discourses surrounding the outcome of *Windstream Energy LLC v. the Government of Canada* will reveal the extent to which ISDS plays a role in supporting and maintaining neoliberal capitalism.

Situating Investor State Dispute Settlements within a Criminological Context

Critics of ISDS express concern with the amount of power that states surrender to foreign investors through ISDS processes, as well as their “anti-democratic features” (Ciocchini & Khoury, 2018) that undermine the rule of law. In particular, since the tribunal hearings are held in private, there is a lack of transparency and public participation during the arbitration process (Miles, 2013, p.333). Other criticisms include issues of sovereignty, as foreign investors can bypass domestic courts and administrative procedures in favor of private tribunals, wherein public officials will oftentimes soften or abandon policy out of fear of corporate retaliation. There is also concern for the disregard of the general public, as tax dollars are used to cover state legal fees and penalties when foreign investors win a claim (Ciocchini & Khoury, 2018; McBride, 2006; Miles, 2013; Nichols, 2018; Sinclair, 2015; Van Harten, 2013). These and related critiques, while valid, mainly target symptoms of a larger problem. Flyvbjerg’s (2006) discussion of case studies serves as a reminder that from both an understanding-oriented and an action-oriented perspective, it is important to clarify the deeper causes behind a given problem

than to describe the symptoms of the problem and how often they occur. In other words, many critiques do not probe deeply enough into the role of the state in helping create and maintain this scenario. If we begin to heed Flyvbjerg's (2006) advice then we start to ask questions about the state ultimately shifting the conversation toward how and why it grants arbitrators the power to make decisions that affect communities and local populations. We must not forget that it is the state that integrates clauses like ISDS into its legal system upon ratification of various BITs and trade pacts.

The circumstances responsible for the implementation of corporate safeguards in international treaties reflect systemic traits of capitalism and neoliberalism. By critically analyzing ISDS, this study will reveal the problematic nature of global capitalism. What is often overlooked is how the state has maintained a role in creating a good business or investment climate for capitalistic endeavours prior to neoliberalism's rise; however, as corporations grow and become more globalized, this state-corporate 'partnership' has become more obvious. The study of ISDS explores this dynamic, revealing a larger problem with global capitalism, in which a neoliberal platform that proclaims minimal state activity continues to feature state intervention in the marketplace to aid corporations and various financial institutions (Findley, Nielson & Sharman, 2014; Friedrichs, 2007b; Harvey, 2005, p.74; Radavoi & Bian, 2014; Rothe & Mullins, 2009; White, 2003). This rise in power and influence in recent decades was made possible through the convergence of political, social and legal environments that adhere to neoliberal interpretations of capitalist systems (Bruff, 2009; Jessop, 2009; Snider, 1987). Currently, multinational corporations face minimal legal repercussions for their corporate wrongdoing, due in part to their perceived role in maintaining a healthy economy (Will, Handelman & Brotherton, 2013, p.60). The prevalence of this situation is especially troublesome, as it does not just prevent

the state from imposing regulations that may hinder profits, but gives corporations place or prominence in public matters – a process of reprivatisation facilitated by the state.

Data Sources: Discourses

The data for this study includes Windstream’s Memorial, the GoO’s Counter-Memorial, and the tribunal’s decision featured within the document: Award dated 27 September 2016. The first source of information is Windstream’s Memorial. A Memorial is a document containing the claimant’s legal and factual arguments. Windstream Energy LLC submitted their Memorial on 19 August 2014. In this case, the Memorial is a 275-page document containing Windstream’s legal and factual arguments. The corporation provides a timeline of events used to support its claims before discussing how it believes Canada is liable for breaches under NAFTA. Once a timeline has been established, the corporation addresses the various breaches it believes Canada is responsible for. In this particular case, Windstream provided separate arguments alleging Canada was in violation of Article 1110 of NAFTA, Article 1105, and a single claim grouping Article 1102 and 1103. Depending on which, and how many articles are being argued, the corporation provides an estimate of damages and justifies the alleged figure it believes it is entitled to. Finally, it will ‘request relief’ providing various declarations regarding Canada’s failure to accord under NAFTA and figures it believes it is entitled to, including awards and legal fees.

The second source of information is the Respondent’s Counter-Memorial. The Government of Canada provided its Counter-Memorial on January 20th, 2015⁶. Their Counter-

^{6 6} Although the GoO decided to impose the moratorium, the case is against the Government of Canada (GoC), as it is the country as a whole that agreed to ISDS under NAFTA. Therefore,

Memorial is 240-pages defending their actions against Windstream's allegations. The Counter-Memorial generally provides an outline of the various ministries involved and their relevant roles and mandates as they pertain to the case. In a similar fashion to the Memorial, the Counter-Memorial then proceeds to detail the respondent's legal and factual arguments against the claimant's. It will take a stand and justify its actions detailing the country's rights and compliance under NAFTA. Next, the Counter-Memorial will respond to each individual argument made per article, as well as any other allegations. Finally, since countries cannot request damages, as investors can, they will instead file a request to dismiss the claims and suggest that the respondent bear the legal costs as they pertain to the tribunal and all legal representation.

The third source of information is the tribunal's decision featured within the document, Award dated 27 September 2016. This document is 161 pages addressing both parties' claims. The tribunal looked at both parties' testimony, considered the different claims, and then rendered a decision. While the findings and analysis portion of this Chapter primarily focuses on the Memorial and Counter-Memorial, it is this document that presents the tribunal's justification for supporting Windstream's claim against the Government of Canada. Therefore, it illustrates the effectiveness of the present discourse, and in turn, paints a picture about ISDS, global capitalism and their roles in obscuring corporate harm and perpetuating a globalized status-quo.

Data Analysis

The data analysis for this project involved multiple cycles of reading through Windstream's Memorial, the GoO's Counter-Memorial, and the document titled Award dated 27 September

Windstream's case is against the country, not the province of Ontario (Government of Canada, 2013).

2016. During each cycle notes were taken to identify the ‘regularities’ that emerged from the data. These regularities helped construct dominant discourses, which can be further broken into sub-categories. This resulted in identifying dominant conceptualizations and assumptions featured in party responses that ultimately led to justifications in the final ruling.

Windstream and the Government of Canada’s perspectives, via their respective memorials, were documented and compared to provide insight on how they constructed their argument and what the process was behind it. Once I fully understood each party’s claim and how they arrived at their perspective, I then compared them to the arbitrator’s analysis via the award document. This process provided me with the necessary knowledge to understand the process and the logic behind the tribunal’s decision.

Once I documented the knowledge claims and assumptions present in the award document, I organized all perspectives and various claims into the three dominant discourses: economic, political, and cultural. At first, I noticed that each knowledge claim exhibited elements of each discourse. Upon further inspection, I recognized that these various claims supported each other while still associated with their overarching discourse. Although each discourse uniquely demonstrated neoliberal market-based principles, it was clear that they contributed to the arbitrators’ decision in a particular way. In line with Gramsci’s theory, it was only after analyzing each claim in relation to the nature of the state and the environment in which they were constructed was I able to recognize the economic, political and cultural foundation of each discourse.

Once I had compiled my three discourses, I situated them against my Literature Review and Theoretical Framework to interpret the data and answer the research questions. This process provided a deeper understanding of the events that led up to the implementation of corporate

safeguards such as ISDS. The following section will present the analysis and findings of the thesis. It will identify each dominant discourse and reveal their nexus to the economic, political and cultural contexts of global capitalism and the extent of their influence during the proceeding.

Analysis and Findings

This section identifies three major discourses: economic, political, and cultural. These discourses dominated during the *Windstream Energy LLC v. the Government of Canada* tribunal and helped justify the arbitrators' decision to rule in favor of the corporation. Several key assumptions about global capitalism shaped discussions of transnational approaches to foreign investment. These underlying assumptions are responsible for influencing the outcome by constructing prevailing knowledge claims used to justify the ruling. This ruling ultimately affects dominant conceptualizations of corporate harm, or (state)corporate crime, further reinforcing a globalized capitalist status-quo.

The analysis is divided into three sections, each documenting a dominant discourse regarding the treatment of foreign investment under ISDS. The prominent discourses are broken into different knowledge claims, or sub-categories, in order to demonstrate their contributions to the final decision made by the arbitrators. First, an economic discourse was found to have dominated discussions throughout the tribunal. Rooted in neoliberalism, economic-based concerns about the potential impact suffered by Windstream reinforced beliefs that the duties of the state should be limited to those that facilitate rather than regulate the accumulation of foreign capital. Such neoliberal interpretations of the state emphasized its role as a 'caretaker'. Second, a dominant political discourse effectively shaped conceptualizations of social harm – discussions of political motivations and transnational market-expectations undermined Ontarians' concerns over the various health hazards related to Windstream's project and aided Windstream in

vilifying the GoO, effectively portraying itself as the true victim. Lastly, a cultural discourse was present during the tribunal. This culture was composed of goals, ideas, and practices influenced by the financial sector. It was demonstrated through parties' perceptions of risk and their adherence to recurring market-based logics. It is important to note that despite each section discussing separate knowledge claims associated with an overarching discourse, recurring patterns of all of these sub-categories can be identified throughout this entire chapter as they emerged in three distinct, yet related ways. These various discourses consistently supported each other and ultimately contributed to the ruling that further reinforced ISDS's role in (re)legitimizing free trade under corporate capitalism.

I. Economic Discourse

This section discusses the dominant knowledge claims that conveyed Windstream's case in economic terms, stressing the importance of having the GoO protect and maintain its investment. Numerous examples from all parties in the tribunal detail the ways in which the government catered to the corporation; however, Windstream had expected it to maintain such commitment at all costs. After the GoO's declaration that "Ontario is open for business" (Memorial, 2014, para.91) Windstream had entered its FIT contract with expectations rooted in neoliberal market-logics; the state is to only intervene in the accumulation process, therefore the onus of responsibility was on the GoO to ensure Windstream's project would maintain a healthy profit. The GoO claimed it had fulfilled its duties in tending to the corporation's investment, but Windstream's frustration with the ongoing scientific research and fear of consequential regulations dominated dissenting perspectives. Economic discourse rooted in knowledge claims of (1) government responsabilization, and underscored by (2) neoliberalism, consistently shifted attention away from the potential harms of Windstream's project back to the GoO and its role as

a facilitator of private economic activities.

The Capitalist State and the (re)production of Neoliberalism

Responsibilization strategies reduce the burden of responsibility for corporate practices and instead attribute the onus to other parties (Bittle, 2012). This dynamic is further amplified in today's global economy when coupled with neoliberalism, as neoliberalism emphasizes the state's role in mediation and facilitation, as opposed to regulating (Whyte, 2014). Thus, the prominence of neoliberal political ideals accompanied by responsibilization strategies absolves corporations of potential liability, shifting blame for any oversight and/or omissions to the state. In Windstream's case, the sub-category of government responsibilization is identified, as dominant framings of such (re)produced neoliberal beliefs that the government's priority should be restricted to facilitating and producing a supportive environment for the corporation's project. Further, these framings (re)produce neoliberal common-sense views that "the state is committed to fostering optimal conditions for the flourishing of economic competition and an entrepreneurial spirit" (Barry, Osborne & Rose, 1996, p.10). The market thus becomes the most natural and efficient way for accumulating wealth, which is seen in everyone's best (economic) interests (Glasbeek, 2002, p.20), spurring the pressing concern over how shared interests between the private and public sphere can result in non-economic issues being neglected (Kramer et al., 2002; Michalowski & Kramer, 1987; Tombs & Whyte, 2015). This co-dependent relationship, or symbiosis, between the state and private corporations is therefore considered crucial for the reproduction of capitalist processes (Jessop, 1997).

Under neoliberalism, corporations expect state interventions to be discouraged should they interfere with the accumulation of profit. While it is true that it is the capitalist state's role to

produce favourable conditions for the corporation and ultimately not restrict them (Bernat & Whyte, 2016, p.77; Mahon, 1979; Michalowski & Kramer, 1987; Whyte, 2014), it is important to remember that the capitalist state also occupies a contradictory role in which it must balance an efficient flow of capital, yet maintain the overall sustainability of the system (Bittle, 2015, p. 136; Bruff, 2009, p. 336; Tombs & Whyte, 2007, p.109). There are notable examples of the GoO providing favorable conditions for Windstream, as the government sought to accommodate the corporation on numerous occasions. However, these instances failed to meet Windstream's expectations of operating under a predictable market environment.

During the tribunal, the GoO provided numerous examples of their accommodations. However, while trying to demonstrate their cooperation with Windstream, it is likely that they further reinforced their image as a facilitator of economic activities. As documented in their Counter-Memorial, on 4 May 2010, Windstream was offered its FIT contract. Pursuant to FIT contract rules, this offer would be open for ten business days, until 18 May 2010 (Counter-Memorial, 2015, para. 193). However, Windstream did not sign the contract by 18 May 2010. The company was not satisfied with the regulatory risk and sought to first have this resolved. Meetings between the two parties carried on well beyond 18 May 2010, as the deadline to sign the contract was eventually settled for 20 August 2010 – after its seventh extension (Counter-Memorial, 2015, para.221). It appears that Windstream's regulatory uncertainty was heavily rooted in the fact that under FIT contracts, investors were expected to bring their project into commercial operation within four years after the contract date (Counter-Memorial, 2015, para.206). Troubled, on 9 August 2010, Windstream's lobbyist, Chris Benedetti, wrote to the Ontario Power Authority (OPA) requesting that the commercial operation date be amended (Memorial, 2014, para.98). On 12 August 2010, the OPA agreed to change the commercial

operation date from four-years to five-years following the initially proposed contract date.

Satisfied that the corporation now had the optimal environment for their project to operate, on 20 August 2010, Windstream executed the FIT contract.

What follows was presented to the arbitrators by the GoO in order to explicitly demonstrate that they had provided a favorable environment for Windstream. They believed that they had upheld their responsibility in ensuring that foreign investment would be treated favorably. In fact, the government felt that they had surpassed what was expected of them:

Contrary to the Claimant's assertion that it was "singled out and prevented from receiving the benefit of its FIT Contract", the Claimant's Project actually received more favorable treatment than any other offshore wind proponent in Ontario pursuant to the deferral decision. Whereas the FIT applications and the Crown land applications of all other offshore wind proponents were cancelled, the Claimant's Project was merely frozen and could continue after the necessary science is conducted and an adequate policy framework can be developed (Counter-Memorial, 2015, para.445).

However, Windstream did not agree. The GoO's detailed discussion of accommodations was met with resistance. Although the corporation did not refute the GoO's recount, it demonstrated its belief that the government had still not done enough:

When the FIT Program was adopted, there was broad coordination across the Ontario Government to "streamline" approvals and to ensure that project proponents received the necessary approvals as expeditiously as possible (Award dated 27 September 2016, para.166).

Windstream had made it abundantly clear that by investing in Ontario, the corporation believed the onus of responsibility lied with the government to ensure their project came to fruition as quickly as possible.

The Counter-Memorial presented before the tribunal details the GoO's actions leading up to the moratorium. While the government acknowledged the promising features of foreign investment, the concerns over the safety of the Great Lakes, drinking water, and other similar issues were consistently referenced amongst public officials and civilians (Counter-Memorial, 2014, para.124; see also Award dated 27 September 2016, para.369). As such, moving forward would potentially jeopardize the health of local constituents and the system altogether. Therefore, on 11 February 2011, officials from the MEI, the MOE, the MNR and OPA held a conference call with Windstream representatives to inform them that the GoO had decided it would not be moving forward with offshore wind until further regulatory work was complete, marking an official moratorium:

“[Andrew Mitchell of MEI:] We set this call up today just to give you some notice about a decision of the Government of Ontario is going to be announcing this afternoon. And that decision is that we will not be moving forward with offshore wind until further science regulatory work and co-ordination with our U.S. partners is complete. Our feeling is that offshore wind in freshwater lakes is in its early developments and to date there are gaps that exist in the science that don't support siting wind projects in freshwater at this time... (Award dated 27 September 2016, para.146)

These actions mark the division between the GoO and Windstream. The government had presented their concerns over Ontarian's health and safety; however, these concerns were dominated by references to their responsibility as a facilitator of capital, not a regulator.

Windstream consistently criticized the GoO's decision to impose a moratorium on behalf of its citizens' safety. The corporation provided statement to undermine such concerns:

Ontario's significant experience with construction projects in fresh water lakes and rivers throughout the province also demonstrates that there was not, in fact, any significant scientific or regulatory uncertainty concerning permitting or environmental effects of offshore wind (Memorial, 2014, para.362).

Windstream had even gone so far as to accuse the MOE of "issuing requests for further study proposals in 2013 merely to give the impression that it is proceeding with scientific research" (Award dated 27 September 2016, para.183). Such an unsubstantiated accusation is indicative of Windstream's scramble to discredit the GoO's position. Further, it is reflective of a potential crack in hegemony, as the GoO has demonstrated they possess hard-evidence to support their claims, contrary to Windstream's argument. As neoliberal hegemony must constantly be (re)legitimized (Soederberg, 2010, p.16), the corporation stressed to the tribunal that the GoO had no excuse for relinquishing its duties in facilitating the necessary environment for the fruition of its project.

In the end, the tribunal stated it had carefully considered the evidence brought before it in order to determine whether the GoO's actions towards Windstream's investment could be characterized as unfair, thus breaching Article 1105 of NAFTA's Chapter 11. It had found no wrongdoing with the GoO's implementation of a moratorium. That being said, the tribunal still felt it was necessary to note how the government was not transparent enough with the corporation:

The Tribunal notes that, while the conduct of the Ontario Government during the period

leading up to the moratorium could have been more transparent, and although Windstream was kept in the dark as to the evolving policy position of the Government while Windstream continued to invest in the Project, the Government's evolving position was at least in part driven by a genuine policy concern that there was not sufficient scientific support for establishing an appropriate setback, or exclusion zone, for offshore wind projects (Award dated 27 September 2016, para.376).

Faulting the government for its lack of clarity with Windstream is a recurring theme and ultimately responsible for ruling in favour of the corporation. Dominant framings of government responsabilization further reinforce the neoliberal system for ensuring governments only intervene in the accumulation of capital to enhance the process, not impede. Such justification illustrates adherence to neoliberal rhetoric that emphasizes the state as a 'caretaker' providing guidance through facilitating and/or prioritizing trade:

... The regulatory and contractual limbo in which the Claimant found itself in the years following the imposition of the moratorium was a result of acts and omissions of the Government of Ontario, and as such is attributable to the Respondent (Award dated 27 September 2016, para.380).

Decades of 'business first' rhetoric has normalized neoliberal interpretations of capitalist systems that treat corporations as fundamentally necessary for markets to survive. As a result, the expectation that production of privately-owned capital will be applauded for merely existing makes way for corporations to freely propagate their service as the most efficient means to maximize social welfare (Bruff, 2009; Harvey, 2007; Soederberg, 2010, p.149). Since the beginning of neoliberalism the state has been used to shape a pro-corporate, free-trade market

where legislation and regulatory frameworks, when produced, benefit corporations (Bernat & Whyte, 2016; Davies, 2014; Harvey, 2005, p.77). The GoO's proactive approach of freezing development on Windstream's offshore project until the proper research is conducted violates these free-market logics. These types of practices are considered burdens on businesses as they disrupt transnational flows of capital, create barriers for liberalized trade and thus, are perceived as hindering efforts to maximize economic productivity (Tombs & Whyte, 2015, p.19).

Decisions of this manner legitimize the neoliberal capitalist system allowing the capitalist state to redirect its focus to its primary function under neoliberalism – facilitating the accumulation of capital. Despite an active collaboration between the state and corporation resulting in various harms – in this case, economically via the tax dollars paying Windstream's reward, society does not and will not perceive or conceptualize the preceding actions as 'crime' so long as they are reinforced by common-sense assumptions about market-based logics. Ontarians were faced with potential health hazards and environmental damages resulting from Windstream's project, yet Canada had consented to a private tribunal through NAFTA's ISDS mechanism. While it is important to recognize that governments do not blatantly condone reckless or dangerous business practices, such consent plays a larger role in shifting the conversation away from corporate regulation to economic actions. As such, prioritizing the facilitation of capital may inadvertently produce circumstances that pose a threat to both the public and the environment (Bittle, 2015; Rothe & Mullins, 2009). The following section addresses the main political discourse found during the tribunal and its two sub-discourses responsible for the ways in which the corporation framed itself as the victim over the citizens of Ontario.

II. Political Discourse

Undermining the potential dangers inherent in Windstream's project, whether they be health hazards or environmental, to legitimize Windstream's image as the true 'victim' shifts attention away from deliberate decisions made by both the state and corporations to prioritize profits over all other social considerations. Such behaviour reminds us that dominant economic logic alone does not automatically impose its will, but instead, also depends on the outcome of political and ideological struggles around political processes (Jessop, 2002, p.30). The way in which issues are given a particular meaning within a specific social setting to shape demands and/or negotiate desired outcomes exhibits current political framings (Bacchi, 2005). In this case, Windstream emphasized GoO officials' transnational market promises coupled with their political landscape (i.e., an upcoming provincial election) to attribute the government's decision to freeze their project. Therefore, this identified political discourse is rooted in two knowledge claims regarding (1) transnational market-expectations, and (2) accusations of political motivations, and various ad hominem. Together, these sub-categories are responsible for misdirection and a reconceptualization of corporate harms or the potential of harms therein. This section expands on these two politically-informed knowledge claims that contributed to undermining Ontarian's concerns over Windstream's project and framed the company's behavior as a part of doing business under a globalized capitalist system. It is important to reiterate that despite recurring patterns of both neoliberal and government responsabilization sub-categories being present in this section, the focus will remain on transnational market-expectations and political motivations with glimpses of how said recurring patterns support these knowledge claims responsible for the overarching political discourse found.

Shaping Conceptualizations of ‘Harm’ – The Real Victim

Windstream’s consistent efforts in repeating the various assurances made by the GoO contributed to framing the corporation as ‘harmed’ or a discriminated victim throughout the tribunal. The various statements made by public officials in addition to their written assurances to all foreign investors legitimized Windstream’s market-expectations as a multinational corporation in producing a fast-moving, prosperous project. However, echoing these quotes also allowed the corporation to convey its argument from a political standpoint, moving beyond a strictly market-based perspective. Specifically, portraying itself as a victim effectively framed the controversy as a political dispute between the state and a multinational corporation, while vilifying the GoO for not upholding their commitments via the moratorium that froze Windstream’s project. Windstream contended that there is a consistent practice of arbitral tribunals when applying the standard under Article 1105 to consider “whether a state has breached an investor’s legitimate expectations arising from specific commitments made to the investor to induce the investment” (Award dated 27 September 2016, para.297). Windstream claimed that the GoO had encouraged the corporation to enter the FIT Contract by promising a multitude of incentives. As such, to effectively prove their point the company provided an exhaustive list of incentives in their Memorial:

- (i) Ontario was “open for business” for offshore wind;
- (ii) timely approval of applications to use Crown land for offshore wind energy development could be expected by those submitting applications;
- (iii) the streamlined regulatory approvals process created by the GEGEA applied equally to all renewable energy projects, including offshore wind projects;
- (iv) the GEGEA, and the FIT Program and REA process it created, would make Ontario the “destination of choice for green power developers ... including wind, both

onshore and offshore” by providing “certainty that government would issue permits in a timely way” and a fair price guaranteed “for decades,” and that the Act would “coordinate approvals from the [MOE and MNR] into a streamlined process with a service guarantee;” (v) Ontario was satisfied that its research “made clear” that developing offshore wind was environmentally sound, and as a result lifted the earlier deferral on accepting applications for offshore wind project development; (vi) the Project had the “highest priority” for receiving AOR status and would receive “priority attention from MNR;” (vii) the Ontario Government, including the Premier’s Office, supported the Project; (viii) the Government was working “feverishly” to develop offshore REA guidelines and that, as of May 2010, the guidelines would be available “very soon;” (ix) the MNR “appreciate[d] Windstream’s need for certainty” before it signed a FIT Contract, and would “move as quickly as possible through the remainder of the application review process in order that [WWIS] may obtain Applicant of Record status in a timely manner;” (x) the approval process for the Project would be expedited; and (xi) the Project could proceed as an offshore wind pilot project (Memorial, 2014, para.606).

Additionally, the company also presented several quotes from high-ranking public officials used to emphasize the GoO’s commitments not to just Windstream, but other foreign investors.

Ontario’s Minister of Natural Resources, Minister Cansfield, was quoted in reference to her 30 June 2008 speech commencing the GoO’s acceptance of Crown land applications. Minister Cansfield announced that “Ontario was open for business when it comes to offshore wind” (Memorial, 2014, para.91). Minister Smitherman, the Minister of Energy and Infrastructure, was referenced several times in relation to the GoO’s commitment to an attractive investment

climate. Windstream cited the Minister's speech at the Legislative Assembly of Ontario on 23 February 2009, where he introduced and praised the Green Energy and Green Economy Act (GEGEA) of 2009:

...the GEGEA would make Ontario the 'destination of choice' for green power developers, would 'incent proponents large and small to develop projects by offering an attractive price renewable energy' and would provide 'the certainty that creates an attractive investment climate'.... the GEGEA would coordinate approvals from the Ministries of the Environment and Natural Resources into a streamlined process with a service guarantee... so long as all necessary documentation is successfully completed, permits would be issued within a six-month service window (Award dated 27 September 2016, para.95).

Windstream had buttressed their reference of Minister Smitherman by having him confirm his intentions when presenting his introduction, "The Claimant points out that Minister Smitherman stated in his witness statement that remarks he had made on the occasion of the introduction of the GEGEA were designed to attract investors to Ontario" (Award dated 27 September 2016, para.300).

The statements shared here were used to reinforce the notion of harm caused by the GoO while legitimizing Windstream's expectations as a foreign investor under a globalized capitalist system. According to the corporation, these representations made by the GoO reflected those presented to the corporation Bilcon in a similar case, *Clayton/Bilcon v. Government of Canada*, in which the tribunal relied on in finding that Canada had breached Article 1105 (Award dated 27 September 2016, para.300). That being said, it is worth reiterating that the government's statements/initiatives aforementioned are all non-binding in nature, as much of what Windstream

had mentioned contrasts FIT Program rules – the OPA stated it would not assess the feasibility of the project and that a FIT contract provided no guarantee that a project would actually proceed (Award dated 27 September 2016, para.167). Nevertheless, the corporation’s claims dominated dissenting perspectives, as the corporation had alleged that the GoO’s failure to meet expectations toward their investment ultimately harmed them and breached Article 1105 discriminating against their project.

Windstream pointed out that several NAFTA awards had found that discriminatory treatment can also amount to a breach in Article 1105. In this case, Windstream felt their project was discriminated against when compared to the treatment of other investors. Corporations such as Samsung had their expectations met as that company was awarded a solar project in a similar manner. When Windstream’s wind project started to take a turn for the worse, the company pitched the GoO a solar project not unlike Samsung’s. However, Windstream’s solar project was rejected – in line with FIT contract rules, prompting the company to declare discrimination, as the GoO was, “prevent[ing] Windstream from salvaging the value of its FIT Contract and project, and instead favour[ing] the interests of Samsung” (Memorial, 2014, para.625-631).

Multinational corporations have demonstrated a vested interest in ensuring that neoliberal approaches to international value production dominate popular discourses and practices towards globalized capitalist markets (Rothe & Friedrichs, 2015). The GoO’s handling of Windstream’s project does not align with these approaches. Proponents of neoliberalism argue such actions are antagonistic and threaten economic growth by minimizing productivity (Hills, 1987; Soederberg, 2006, p.11). The actions and expectations demonstrated above by Windstream reflect neoliberal market practices and are akin to Woodiwiss’s (1997) conceptualization of globalization that is about creating a borderless economic venture for the benefit of the few, “principally

transnational corporations and some of their dependent subcontractors” (p.90; also see Glasbeek, 2002, p.3). As corporations assumed unprecedented prominence within the neoliberal global economy their expectations grew matching their structural privilege – today, most western capitalist states have enthusiastically embraced their commitment to market-friendly efficiency underpinning transnational corporate practices (Mahon, 2005, p.9). Although the capitalist state is required at times to contest corporate interests in order to sustain the system, most forms of regulation that stand in the way of such corporate economic ‘progress’ were ditched in the 1980s (Tombs & Whyte, 2007, p.158). Therefore, Windstream’s frustration and accusations of discrimination against the GoO regarding the treatment of their investment is understandably unsurprising.

As Ontarian’s voiced their concerns over Windstream’s project, the GoO took a step back and acted in accordance with its constituents. The public consultation period on the Offshore Wind Policy Proposal opened on 25 June 2010. To reiterate, it was initially set to last 60 days until August 23, 2010, however, due to significant public interest the MOE extended the consultation period by an additional fourteen days (Counter-Memorial, 2015, para.123). During this 74-day consultation period, the MOE received 1,403 comments from members of the public, community based associations, environmental non-governmental organizations, municipalities, energy-proponents and Aboriginal communities (Counter-Memorial, 2015, para.123). The government stated that over 65% of feedback opposed offshore wind:

... majority of respondents expressed concern either that the proposed five kilometre exclusion zone may not be far enough from the shoreline, or that there were significant areas of scientific uncertainty resulting in the need for further study. Specific considerations for further study included measures to protect drinking water,

transportation and navigation, and potential effects on fish and wildlife and shoreline ecosystems (Counter-Memorial, 2015, para.124).

Various concerns by the general public were relayed by the GoO to Windstream, but the corporation refused to accommodate. Instead, Windstream countered dissenting voices by framing them as politically motivated. The dominant view in the data toward potential concerns demonstrates how Windstream attempted to legitimize its conceptualizations of harm and shift attention away from concerns made by representatives of civilian groups that highlighted the inherent dangers:

[The Claimant] alleges that the moratorium was “politically motivated” by the “desire to indefinitely stall offshore wind development” out of considerations including “cost savings” and “countering public opposition to offshore wind development,” rather than any “scientific uncertainty (Award dated 27 September 2016, para.305)

This is to suggest that it is somehow not the government’s duty to respect their constituents’ voice. Nevertheless, Windstream’s framing rebranded public opinion as ‘political concerns’ in order to advance the proceeding in favor of their investment while disregarding the potential harms that may result from a lack of scientific research:

The assertion that further scientific research was required was only developed as a rationale of expediency after other potential rationales for regulating offshore wind had been abandoned as untenable. The process was driven not by the Ministries’ technical and policy experts but by the Premier’s Office, the ministers and their political staff (Memorial, 2014, para.257).

After suggesting that the GoO had settled on scientific uncertainty as the basis for imposing the moratorium (Memorial, 2014, para.362), the company was determined to use the provincial Liberal Party's upcoming election as the motivating factor:

the Claimant contends that in 2010 and 2011 groups opposing wind energy were becoming increasingly active in Ontario. The Premier was frequently greeted by anti-wind protestors while on the campaign trail, and anti-wind groups had organized mail-in campaigns to facilitate complaints to elected officials about wind power and had begun to target the electoral ridings of various liberal members of the Provincial Parliament. When anti-wind opponents had mounted especially strong campaigns against offshore projects, the governing Liberal Party became sensitive to the offshore wind power issue and its perceived impact on the upcoming election (Memorial, 2014, para.336).

Despite Windstream's efforts to undermine Ontarian's concerns, the arbitrators did validate the GoO's actions in implementing the moratorium. Notwithstanding, the key claims put forth by Windstream acknowledging the role of politics were still largely considered:

... the evidence before the Tribunal suggests that the decision to impose the moratorium was not only driven by the lack of science. The impact of offshore wind on electricity costs in Ontario, as well as the upcoming provincial elections in November 2011, also appear to have influenced the decision, and the latter in particular in light of the public opposition to offshore wind that had emerged during the relevant period in many parts of rural Ontario (although not in Kingston, where the Project was located) ... however, the Tribunal is unable to find, on the basis of the evidence before it, that these concerns were the predominant reason for the moratorium, or that the decision to impose the moratorium amounted to a breach of Article 1105(1) of NAFTA(Award dated 27

September 2016, para.295).

Although the arbitrators stated that Windstream's conceptualization of harms as 'political concerns' did not sufficiently amount to a breach in Article 1105, they did not declare these concerns as unfounded. In fact, confirming the influence of such political discourse effectively legitimized it. The justification above demonstrates the resilience of neoliberal assumptions about global capitalism. In this case, these assumptions may not have been accepted in their entirety, but many were still identified as a strong contributing factor in the overall decision-making process. Windstream's implication that public opposition is not a valid excuse for denying the accumulation of capital ultimately reflects general neoliberal mentalities. Tombs & Whyte (2009) argue that, "a key feature of neoliberalism is that it ideologically undermines socially protective laws by promoting values of profit accumulation and maximization above social values" (p.108). In the end the arbitrators ruled in favor of Windstream. The citizens of Ontario may have escaped the project's potential hazards on health and environment, but overall still suffer (economically) – awarding the corporation \$25, 182, 900 CAD in damages and \$2, 912, 432 CAD in legal costs falls on Canadian taxpayers. The final section discusses the cultural discourse present throughout the tribunal. This main discourse is composed of contemporary goals, ideas and actions influenced by market-based logics. This cultural discourse will be referred to as financialization. The underlying effect of such culture is apparent when observing the sub-discourse of risk and how related perceptions impacted the arbitrators' ruling.

III. Cultural Discourse

As discussed in first section, the continued adherence to the belief that the state's primary function is to facilitate not regulate is frequently advocated by powerful corporate and state voices. Despite multiple instances of corporate negligence proving otherwise, the neoliberal-

based rhetoric that recurring harms involving multinational corporations cannot simply be the product of wilful disregard is perpetuated under common sense assumptions that markets can effectively improve social conditions if left to their own devices. Ruling in favor of Windstream reinforces this system and contributes to how society conceptualizes (state)corporate crimes and harms. The treatment of corporate crimes in such fashion symbolically removes the negative stigmas attached to (potential) corporate harms and on a larger scale converts processes of negligent corporate decision-making into ‘minor’ mistakes or mere oversights (Bittle, 2012, p.43; Tombs & Whyte, 2007, 2015). Despite the inherent dangers featured in Windstream’s project, as stated in Award dated 27 September 2016, the arbitrators still rewarded the company after having agreed that the state was responsible for ensuring Windstream was presented with viable solutions regarding their project.

In contemporary society, there is a cultural element to neoliberal market-based practices. This cultural element distinguishes itself through a certain morality; a distinct set of ideas, norms and values that have social currency in contemporary capitalist societies (Whyte & Wiegatz, 2016). In other words, neoliberalism contains a moral element that seeks to change ideas and beliefs in society as much as, or even more than, effecting change in the markets. To fully appreciate this cultural relevance, rather than focusing exclusively on the market and how it operates, an analysis of neoliberal’s effect on polity, society and subjectivities is required. These effects largely contribute to the legitimization of acceptable and unacceptable or proper and improper practices in the corporate world. Therefore, analytically, this phenomenon can be linked to neoliberal moral change and its associated character traits such as individuality, ‘freedom’ and self-interest (Whyte & Wiegatz, 2016).

Palermo (2017) analyzes the rise of neoliberalism from a cultural perspective accompanied by the material transformations of the capital/labor relations under the imperative of competition. As such, he developed an organic conception of competition, inspired by Marx, to demonstrate its role as an external coercive force that imposes capital logic over individual will (Palermo, 2017, p.22). This is especially pertinent, as Palermo (2017) believes competition underpins contemporary culture imposing capital accumulation as the only goal of society, extending beyond the economic sphere that generated it and embracing a new role in regulating social relations, "... to go against competition is simply irrational, inefficient and incompatible with individual freedoms and the *common good*" (p.15). In Gramscian terms, this logic reflects dominant class values that have become accepted by 'subdominant' social classes in line with the general process of hegemonic rule. It is here the spectrum of forces and processes that advance moral change in a capitalist society become noticeable. The relationships between such dominant values that are found in the financial sector extend beyond the subculture it operates in, as social institutions and human relationships adopt these beliefs (Whyte & Wiegratz, 2016). To elaborate, consider the frequency in which society encounters these values through the media, educational institutions, and, as recently discussed, politics. They are constantly being (re)produced as a particular set of norms in which the pursuit of a wealthy lifestyle becomes a commanding value (Whyte & Wiegratz, 2016, p.7). Therefore, this culture is responsible for shaping how contemporary society is interpreted, lived and understood under a neoliberal economy (Haiven, 2014; Wright, 2017).

Constant 'repair work' to sustain free-market mentalities helps to reinvent neoliberal principles to align with an ever-changing cultural and political landscape. To overcome dissenting criticisms, market-based logics must remain the prevailing mode of thought and action

(Jessop, 2009; Palermo, 2017). More recently it has become easier to identify the support behind this cultural ideal, as its prevalence is also closely associated with consumption (Wright & Nyberg, 2015, p.34). The rise of a 'hyper consumption' is framed as underpinning economic growth, as the purchase of new clothes, phones, cars and other 'essentials' with greater frequency and magnitude becomes a popular practice (Wright & Nyberg, 2015). Therefore, political barriers to liberalized trade or regulatory policies considered too burdensome to corporations will be discredited for hindering efforts to maximize economic productivity (Soederberg, 2006, p.11). This neoliberal rhetoric is evident in how risky business practices were expressed and conceptualized during the tribunal. The process of capital accumulation and its related processes of globalization and commodification have extended the role of capital in shaping social relations, as neoliberal character traits underpin competition, the general coercing mechanism of the capitalist society (Palermo, 2017, p.16). This cultural discourse is evident through the sub-categories of (1) financialization and by association, (2) risk that underscored the tribunal's decision.

Embracing Financialization

The result of dominant political and economic reasoning influenced by neoliberal mentalities has produced the current era of financialization – a culture of goals, ideas and practices inspired by the financial sector that shape economic actors domestically and abroad, both within and beyond markets (Haiven, 2014, p.107). State intervention in business practices evolve to reflect dominant beliefs about the private sector that emerge within specific political-economic-cultural contexts (Dahlberg, 2014; Bittle, 2012; Howarth, 2009; Snider, 2000). In this case, state interventions were considered unreasonable unless needed to support risk-taking practices by

investors, or to ‘move the goal posts’ when they exceeded their limitations (Jessop, 1982; Pearce, 2001; Tombs, 2012, p.181; Whyte, 2014). Corporations are thereby authorized to operate based on assumptions that various legislative safeguards are in place to either absolve executives from wrongdoings or deflect criticisms that may highlight the damaging circumstances inherent in this type of behavior (Bittle, 2015; Haiven, 2014, p.107; Parsons & McKenna, 2009; Snider, 2000; Tombs & Whyte, 2010). Therefore, as seen in Windstream’s case, perceptions of risk were shaped by these market-based expectations associated with how contemporary society operates under this current culture. Under the current system, or era of ‘financialization’, perceptions of risk are altered, as the accumulation of capital is worth pursuing by any means. As such, resulting consequences are legitimized and framed as the “cost of doing business” (Pearce & Tombs, 1998, p.83).

Despite welcoming foreign investment through its FIT program, the GoO reminded investors of its responsibility to proceed with caution. The government illustrates early in its Counter-Memorial that prior to Windstream executing its FIT contract, on 25 June 2010, the MOE’s proposal entitled, “*Offshore Wind Policy Proposal Notice*”, noted that the regulatory framework for offshore wind development was still ongoing. This study cited issues of human health and environmental considerations highlighting the need to protect safe drinking water, beaches, food and fish, as well as preserve the province’s natural and cultural heritage (Counter-Memorial, 2015, para. 15). This list of reasons does not even account for the many construction risks associated with Windstream’s project:

...the 130 massive 3,000 metric tonne foundations that the Claimant planned to use would have created considerable challenges in terms of lakebed preparation, fabrication, storage and transportation. Further, the presence of a major international shipping lane through

the proposed site strongly suggests that the Project's layout would have to change and that some of the 130- turbines would have been dropped [...] seasonal construction restrictions and weather disruptions, the lack of available specialized vessels, and the time required for manufacturing the foundations, all made Commercial Operation within a four- year period likely impossible (Counter-Memorial, 2015, para.13).

The GoO claimed that Windstream "demonstrated its extraordinary risk tolerance" (Counter-Memorial, 2015, para.16) in signing the FIT contract. They even brought forward an expert witness, Mr. Gareth Clarke, to attest to this claim:

[the project] had a significant risk profile as it would have been the first offshore wind project permitted in North America and particularly under the REA process and subject to more scrutiny from the various agencies involved [...] and because it was in an early stage of development as there were still a number of technical, and environmental studies and other work to do to develop the project. (Award dated 27 September 2016, para.323).

However, the dominant understanding of risk under an era of financialization offers a contrasting picture in relation to the GoO's claims. Windstream believed that if Ontario had supported the project and streamlined it as advertised, it was completely reasonable for the project to materialize. As such, there was no risk from the corporation's perspective. Windstream had framed this matter accordingly, as Ms. Sarah Powell, a Windstream expert witness, testified before the tribunal:

...it would have been commercially reasonable for a developer to *assume* that permitting of an offshore wind project could have been completed in approximately three years. A developer could not have reasonably anticipated that Ontario would later reverse its support for offshore wind projects (Award dated 27 September 2016, para.169).

Furthermore, throughout the tribunal, the GoO contended that Windstream's judgement had been overwhelmed by the possibility of profit:

...in signing its FIT Contract, the Claimant accepted the OPA's termination rights and gambled that it would be able to bring its project into commercial operation within five years, despite being well aware that the regulatory process for its permits and approvals was still under development (Counter-Memorial, 2015, para.17).

As this example demonstrates, The GoO persisted in pointing out the risks of the project. However, Windstream consistently disregarded or under-estimated them. Wright & Nyberg (2015) argue that cultural frameworks and powerful institutions' present market assumptions can influence perceptions of risk (p.52). This aligns with Lupton's (1999) constructionist perspective suggesting that such a perception of risk and how it will be addressed ultimately depends on pre-existing knowledge and discourses. Assumptions about how the market will operate permeated the tribunal and ultimately shaped this justification, as Windstream's perceptions were legitimized. This particular reference further illustrates present perceptions of risk under a culture of pro-business mentalities:

... the Government failed to clarify the situation, either by way of promptly completing the required scientific research and establishing the appropriate regulatory framework for offshore wind and reactivating Windstream's FIT Contract, or by amending the relevant regulations so as to exclude offshore wind altogether as a source of renewable energy and terminating Windstream's FIT Contract in accordance with the applicable law (Award dated 27 September 2016, para.379)

It is clear by such market-logic that pro-business mentalities dominated dissenting conceptualizations of risk. One of the alternatives noted above includes amending relevant regulations altogether to accommodate the project. This suggests that the arbitrators' perspective on risk inherent in Windstream's project prioritizes the project proceeding over addressing any dangers it poses to Ontarian's or the Great Lakes.

The decision to rule in favour of Windstream aligns with Haiven's (2014) theory of financialization. As society becomes increasingly financialized corporations become more and more fixated on accumulating as much capital as possible. This suggests corporations have evolved into vehicles for speculative investment rooted in opportunities that present quick profit through gambling (p.107). Within this culture their actions become riskier, more callous toward ecological destruction, and especially harmful to communities – and at times even their own long-term viability (Haiven, 2014, p.107). This same behavior is responsible for the unprecedented volatility and uncertainty present in today's market and reinforcing a 'financialized' culture into the fabric of everyday life (Haiven, 2014, p.108). As a result, a culture that operates off market-expectations becomes normalized, as corporate risk framings are wedded to 'business as usual' scenarios (Wright & Nyberg, 2015, p.72). Other scholars have echoed theories similar to Haiven's (2014) through reference to internal pressures – from supervisors to managers, and external pressures – between rival companies, for greater and faster returns on investments driving corporations to engage in risky behaviors (Friedrichs & Rothe, 2013, p. 49; Glassbeek, 2002; Pearce, 2001). Unfortunately, as society continues to be dominated by this belief, its ability to notice that amid the intense competition for the quickest route to profit, a system where the endemic and systemic risks of financialization is embraced, the ones

bearing the brunt of social harms are at the bottom of the hierarchy with little room to resist (Haiven, 2014, p.123).

Conclusion: Summary of Findings

This chapter explored the economic, political and cultural discourse that influenced the tribunal and ultimately shaped the arbitrators' decision in favour of Windstream Energy. Assumptions about the market underscored by political and cultural themes rooted in neoliberal logics defined the scope of discussions on how to handle foreign investment in Canada. Despite dissenting voices expressing concerns over the various health and environmental hazards, arbitrators were ultimately swayed by arguments regarding the GoO's failure in meeting Windstream's expectations for the project. Such focus reinforced various common sense assumptions about the state's primary role in a contemporary society, and effectively reconceptualised perceptions of various harms on a political and cultural scale under a neoliberal capitalist system. The various justifications discussed in Windstream's claim demonstrate the impact of a globalized capitalist system on social issues while legitimizing arbitral decisions that further perpetuate the state-corporate symbiosis and the capitalist ideals it helps to cement.

All of this is not to suggest that Windstream's claims were accepted as "truths", or that the GoO did not attempt to resist the company's claims. The state had sided with its constituents just as the capitalist state must at times balance an efficient flow of capital with the maintenance and sustainability of the system. However, Windstream's case has demonstrated that the prioritization of a healthy economy and the role the corporation therein ultimately still factors prominently in efforts to protect the health and safety of the public and environment.

Unfortunately, these rulings further legitimize such interpretations of societal priorities. The

justifications discussed illustrate the perpetuation and resilience of neoliberal mechanisms such as ISDS and their effect on the globalized capitalist system as a whole.

Chapter 5: Conclusion

Criminological Perspectives on ISDS and a Neoliberal Capitalist System

This thesis critically examined ISDS through the ruling featured in *Windstream Energy LLC. v. the Government of Canada*. On 17 October 2012, Windstream launched a claim under NAFTA's Chapter 11 alleging that the GoO's moratorium violated Canada's obligations under NAFTA resulting in a loss of approximately \$475 million CAD. Four years later a tribunal awarded the company \$25,182,900 CAD in damages and \$2,912,432 CAD in legal costs (Award dated 27 September 2016, para.515). The tribunal declared that the GoO's acts and omissions following their imposed moratorium left Windstream in a "regulatory and contractual limbo". This 'limbo' signified the GoO's failure in providing clarity to the regulatory uncertainty surrounding Windstream's project, thus constituting a breach of Article 1105.

Drawing upon Gramsci's theory of hegemony, this thesis identified three dominant discourses that underpinned the ruling in Windstream's case. The tribunal's justifications were heavily influenced by contemporary market based logics that supported existing economic, political and cultural ideals. Economic based concerns dominated by emphasizing the government's responsibility under a neoliberal capitalist system to accommodate foreign investment. The government's environmental regulations and concerns for the general public's safety conflicted with transnational market-expectations. The GoO's failure to meet these expectations effectively reconceptualised harm and ultimately portrayed them as being at fault in this scenario. Such reasoning aligns with how contemporary society operates under a financialized culture. Actions and perceptions of this sort strengthen hegemonic ideals that normalize corporations, thus making it more difficult to see what they do as potentially harmful or criminal. As such, control over subordinated populations is exerted, not through coercion, but

ideologically by convincing us that economic decisions are not only right, but moral by emphasizing the market as the most efficient way for solving issues of social justice (Bruff, 2009; Harvey, 2007; Soederberg, 2010).

The regime resulting from ISDS secures the most favourable conditions for the operation of capital. In adopting ISDS, Canada prioritized inflows of foreign capital over environmental and social justice concerns. Windstream's claim against the GoO not only exhibits this reality, but serves as a reminder moving forward with trade pacts such as the TPP. By consenting to trade agreements that feature this mechanism, a legitimized legal narrative is advanced which normalizes corporations and empowers transnational actors to exploit our nation when their projects encounter impeding regulations (Been & Beauvaist, 2003; Cumming & Froehlich, 2007; Nichols, 2018; Sattorova, 2012). By seeking to hold governments accountable for any action that may negatively impact profitability, this regime imposes a new logic on a variety of domains that have historically been outside the purview of market commodification – environment, education, health care, and more (Nichols, 2018, p.264). The rulings that emerge from these disputes are strongly influenced by prevalent corporate capitalist ideals that downplay the harms caused by corporations and further reinforce the economic status quo. Given the recent proliferation of free trade agreements an analysis of these rulings is especially relevant for revealing the articulation of hegemony and the nature of class struggle around it in the current era of global capitalism.

At a time when translational corporations and market logics dominate national economic policy and quash social progress, a critical criminological study of a mechanism reinforcing these ideals is more prudent than ever. Windstream's claim reminds us that states have explicitly expressed their support for corporate capitalism. As such, there is a growing need for social institutions and/or grassroots coalitions, some of which are mentioned in the thesis (for example,

Wind Concerns Ontario), to express their dissatisfaction with hegemonic beliefs in the wholesale benefits of contemporary trade pacts. While it is true that global trade has many innovative benefits via globalization, it is becoming increasingly obvious that as neoliberalism continues to flourish these pacts become less about innovation and more about strengthening the state-corporate relationship. As a result, these pacts continue to feature numerous corporate advantages responsible for a variety of harmful practices. The result highlights the growing trade-offs between corporate profitability on the one hand and community and environmental well-being on the other, yet the social harms generated by this relationship continue to be normalized as the “cost of doing business” (Pearce & Tombs, 1998).

Using Gramsci’s approach toward the reproduction of hegemony, several dominant knowledge claims identified in this study have provided a closer look at the effect ISDS has in reinforcing free trade and by extension, corporate capitalism. As this thesis has demonstrated, mechanisms of this nature not only reflect capitalist ideals, but the use and maintenance of them obscures corporate harm and reinforce a global capitalist status-quo. The growth and acceptance of trade liberalisation continues to coincide with the increasing globalization of economic activities and the emergence of new markets that further empower transnational corporations (Wright, 2017, p.6; see also Coleman et al., 2009; Luz & Miller, 2002). The result has been detrimental for various social matters, particularly the environment and economic inequality (i.e. the wealth gap). Consider the TPP, as critics, specifically those representing the United Nation’s Sustainable Development Goals and the Paris Climate Agreement, state that ISDS and more generally the TPP, fundamentally conflicts with global aspirations for improved social and environmental sustainability (Wright, 2017, p.12). The belief that benefits of trade and economic growth can solve urgent social and environmental issues places inordinate faith in the

benevolence of transnational corporations and market forces while simultaneously denying citizens and democratic institutions a say in their future (Wright, 2017, p.12; see also Barak, 2017; Tombs, 2012; Tombs & Whyte, 2009).

Underpinning the globalization of trade is the rise of a financial culture. This culture stresses economic thinking in which market forces and the power of global corporations have been given free rein to pursue maximal profits (Haiven, 2014). Wright (2017, p.8) states that corporations represent approximately 40% of the world's largest economic entities, dwarfing the revenue of many national economies. In fact, the globalization of economic activities and neoliberalism has increasingly affected the growth of inequality in both developed and developing economies; the gap between the richest and the poorest countries in real income per capita has widened substantially in recent decades (Wright, 2017, p.10). In a general sense, the common justifications used to defend such ramifications are not unlike those displayed during the Windstream tribunal – discussions of economic based concerns and foreign investment dominate social justice issues by emphasizing the so-called benefits of 'trickle-down economics' (Haiven, 2014; Harvey, 2007; Soederberg, 2010, p.149). This is not to suggest that justifications of this nature are impervious to dissent, as we have seen throughout the thesis there are criticisms of the capitalist system. However, it would appear as we further embrace this neoliberal variant of corporate capitalism on a global scale society becomes more unequal, as people face even greater disadvantages resulting from the destructive impact of transnational corporations. This brand of corporate capitalism perpetually frames businesses and markets as the only means of dealing with social crises resulting in a 'political incapacity' to imagine alternative responses, thus normalizing such behavior (Wright & Nyberg, 2015).

Regardless of the urgency, whether domestic or globally, the common response has been the wholesale rejection of most any limitation upon economic growth, globalization and free trade (Wright, 2017, p.11). Barley (2007) argues that representative democracy has been replaced by a ‘corporate society’ in which social and environmental relations have become embedded within corporate capitalism (see also Jessop, 2001). Drawing upon Gramsci, Barley (2007) argues that this is principally a hegemonic struggle in which the problem is not the lack of dissent, but how it is neutralized. We have already witnessed how ISDS can play a role in this regard, as exhibited in Windstream’s claim. Furthermore, rather than impinge, it is more beneficial for dominant voices to incorporate social concerns within the hegemony of market neoliberalism. For example, a growing number of corporations have introduced sustainability programs promoting a sense of ‘leadership’ on issues such as climate change, framing their role as environmental saviours (Wright & Nyberg, 2015, p.17; see also Smandych & Kueneman, 2010). These strategies are akin to some of the previously discussed examples of Gramsci’s “passive revolutions”, mainly in relation to corporate greenwashing campaigns.

Such techniques are illustrative of a growing trend for social issues to be accorded a market value and corporations to be portrayed as the central institution through which that value should be maintained (Wright & Nyberg, 2015, p.98). Therefore, when businesses face criticism from activists, NGOs, the media, and more, the odds in which the state will be required to stray from its role as a ‘facilitator’, as witnessed in Windstream’s case, are reduced. These strategies reinforce the notion that various social issues, such as the environment, and corporate profitability can benefit concurrently from economic innovation. Ultimately, then, corporate responses to such concerns represent a process of accommodation and political struggle to ensure

that “things remain the same, that nothing really changes, that life (or at least our lives) can go on as before” (Wright & Nyberg, 2015, p.43).

Boltanski and Chiapello (2005) argue that the perpetuation of neoliberal capitalism depends on the recuperation and reinvention of its critique. Despite the relentless pursuit of new global markets and recent emergence of various trade pacts, ISDS and free trade in general has received more scrutiny now than ever before. Neoliberal interpretations of corporate capitalism have consistently demonstrated its resilience indicative of an uphill battle, but as the world continues to take notice of the advantages gifted to transnational corporations through these trade pacts, economic and political elites will be forced to act in order to preserve the system. The development of CETA (Anderson, 2017, p.2960; Cagnin, 2017; Sardinha, 2016) and more recently, the announcement of the revised NAFTA deal, USMCA (Grandoni, 2018; McGregor, 2018; Vomiero, 2018), demonstrate that corporate hegemony is not absolute. To quote Lynch and Michalowski (2006, p.192), “it is at this point hegemony begins to crack”.

Emerging Resistance?

Despite the findings of this thesis, there are signs of change. CETA signals a shift away from corporate capitalist treaties and towards a more transparent system. It is the first trade pact to specify new rules governing the identity and tenure of arbitral members and details a more extensive review function through a two-tiered investment tribunal system (referred to as ITS) – a permanent first instance tribunal and an appeal tribunal (Sardinha, 2016, p.311). This state-centric model is the result of mounting resistance to the various harms inherent in the original investor-state arbitration discussed throughout this study. However, the transition to this new model did not occur immediately, or smoothly. In fact, during the initial discussions in 2013

between the EU and Canada, the Harper Government resisted the idea of a state-centric model (Sardinha, 2016, p.314). It was not until November 2015, when Prime Minister Trudeau came into power, that the European Commission (EC) was able to convince Canada to revisit CETA's investment protection and ISDS provisions (Sardinha, 2016, p.315; see also McGregor, 2016). Although the Trudeau government expressed some hesitation with the idea, it ultimately agreed to work with the EU as the partnership was signed in Brussels on 30 October 2016.

In 2009, the Obama Administration initiated a formal review of the US Bit Model. These treaties establish conditions for investment and facilitate resolutions defining the treatment of private investment between foreign investors in sovereign states. A subcommittee of the Advisory Committee on Internal Economic Policy (ACIEP), which serves under the U.S. Government providing a forum for discussion of issues in international economic policy, was tasked with the review (Anderson, 2017, p.2957). The subcommittee's members featured representatives from major businesses, organized labor, environmental reps, state and local governments, and more. From the beginning the subcommittee was divided. Members could not reach a consensus on various issues including the model's language – definitional changes for terms like “minimum standard of treatment” and “fair and equitable treatment” that have been in dispute since 1994 (Anderson, 2017, p.2957), and of particular relevance, connections between investment, labour and the environment. Dissenting voices raised concerns over whether BITS, and by association ISDS, were the right forum for dealing with such sensitive matters; however, dominant voices steered the conversation toward economic concerns and whether the possibility of strong language addressing labour and environmental concerns would kill the entire BIT program with partnering countries (Anderson, 2017, p.2958).

Additional debates ensued over whether dispute settlements should continue as litigation between states and foreign investors or as a statist form between the state parties themselves (Anderson, 2017, p.2958). In the end, all opposing arguments of such nature were presented to the Obama Administration only to be struck down, as the government declared that “ISDS should remain a cornerstone feature of the US BIT model” (Anderson, 2017, p. 2959). No new language made its way into the 2012 Model and, as mentioned in Chapter 2, the Obama Administration made virtually no changes to investment protection in 2015 when negotiating the TPP, despite growing concerns over the social and environmental ramifications. Acknowledging protest, the White House defended the inclusion moving forward, stating that ISDS was critical for establishing and protecting the rule of law for American investment abroad (Anderson, 2017, p.2959).

In comparison, consider that while the 2009 review was underway, a high-profile case had brought an unusual amount of scrutiny to ISDS. In mid-2011, Phillip-Morris Asia, a Hong-Kong based subsidiary of the American tobacco corporation, challenged a new Australian regulation on a plain packaging tobacco requirement. Australians expressed outraged at the idea of a private firm using provisions of an investment agreement to undermine a measure put in place for public health reasons (Easton, 2015; see also Dodge, 2006). Later that year, the Australian Government announced a formal discontinuation of the inclusion of ISDS provisions in any new trade agreements (Anderson, 2017, p.2959). While this announcement deserves recognition, it must be noted that this declaration did not last, as the TPP features a traditional ISDS mechanism⁷.

⁷ However, recent reporting does suggest the possibility of side-deals being negotiated in which Canada and Australia agree to remove the ISDS clause between the two nations (Karp, 2018).

While the US has evidently embraced ISDS for now, Canada, the EU and Australia have shown their will to move toward more progressive, state-centric models. These steps serve as a reminder that the hegemony of neoliberalism is not self-reproducing, and if the capitalist system is to remain legitimate as a worldview it must continuously transform itself (Soederberg, 2010). CETA and USMCA are not perfect models, as they still provide multinational corporations with numerous advantages, but they do serve as a possible stepping-stone for change.

Investor-state arbitration under CETA no longer resembles ISDS as it is traditionally understood. Some of the biggest changes include the ITS, more concise standards to guide treaty interpretation, new rules on ethics for arbitrators, full transparency of proceedings, and an appellate review in investment treaty disputes (Anderson, 2017; Sardinha, 2016, p.314; Cagnin, 2017). The treaty is drawing positive attention, as proponents claim it will grow the economies of the EU and Canada, creating jobs and wealth for both Canadians and Europeans (Sardinha, 2016). Additionally, the EU's draft treaties with countries such as Vietnam, Mexico, Philippines, and Tunisia, are poised to follow suit, suggesting the pact could serve as a cornerstone for new investment chapters in future trade agreements (Sardinha, 2016, p.314).

CETA advances investor-state arbitration by providing a new, yet familiar, framework for testing new reforms. The ITS introduces the possibility for appeals for arbitral awards and alters the way in which the arbitrators will be appointed (Anderson, 2017; Sardinha, 2016, p.316). Each side (the EU and Canada) will appoint five members to an overall roster with an additional five members appointed by the Joint Committee⁸. The members of this roster will serve up to two five-year terms. Under CETA, the arbitrators of a proceeding tribunal cannot be

⁸ CETA's Joint Committee will be chaired jointly by the Canadian minister of international trade and the EC member responsible for trade, and it will comprise an equal, but unspecified, number of representatives of the EU and Canada (Sardinha, 2016, p.320).

appointed by the disputing parties but, rather, will be appointed in divisions of three by way of a randomized rotation procedure that ensures each member has an equal opportunity to serve (Sardinha, 2016, p.321).

Additionally, the inclusion of an appellate tribunal and an appeal procedure allows for errors and defects to be corrected (Sardinha, 2016, p.327). This appears to be especially relevant when considering prior cases such as *Compania del Desarrollo de Santa Elena S.A. v. Costa Rica*, a dispute brought under a US-Costa Rica BIT that was settled under ICSID rules. In 1978, the government expropriated a property that was intended for development as a tourist resort in order to expand a national park. During this tribunal, there was no dispute over whether a breach was made through this expropriation, rather, Costa Rica had argued over the compensation expected to be awarded to the company who lost the rights to develop the land (Tienhaara, 2006). The country argued that setting the amount of compensation too high would discourage states from adopting environmental objectives and noted that it had acted against the corporation in accordance with its obligations under multilateral environmental agreements – to protect biodiversity (Tienhaara, 2006, p.84). The tribunal did not accept the Costa Rican government's arguments and concluded that the standard of compensation could not be affected by the reasons for the expropriation the country had made (Tienhaara, 2006, p.84). While it is uncertain whether this ruling would be overturned if there was an appeal process, a case of this nature would certainly benefit from such an option. Such reasoning also aligns with Dodge (2006), who proposed the inclusion of an appellate tribunal over a decade ago. Dodge (2006) specifically argued in favour of this process, stating that despite the addition of appeals likely bearing additional costs, “when important public policies like environmental protection are at stake, additional efforts to get the answer right are likely worth the costs” (p.32).

Although these developments represent potentially significant improvements in investor-state arbitration, there is still plenty of work to be done before the public finds itself on a level playing field with foreign investors. Perhaps the most concerning element of all is that states still cannot hold corporations accountable in the same way foreign investors can check governments. Rather than providing states with the option to launch a claim against foreign investors, CETA contains a stricter set of procedures for investors that must be followed to satisfy the submission of a claim against the state (Sardinha, 2016, p.342). The most notable of these is the prohibition for foreign investors to seek parallel proceedings in domestic or alternative international tribunals and courts before the CETA tribunal or at the same time (Sardinha, 2016, p.342). Cagnin (2017, p.230) argues against this exclusion, suggesting that not only should states have the ability to launch claims, but NGOs should have the power to sue corporations that do not respect the commitments made in the trade agreement (p.230). Under this current system, only corporations can actually ‘win’; a state cannot ‘win’ an investor-state tribunal in the manner of a foreign investor. A win does not award compensation nor ensure foreign investors must adhere to regulations moving forward.

USMCA also does not feature ISDS akin to its predecessor, NAFTA (Grandoni, 2018; McGregor, 2018; Tamborrino, 2018; Vomiero, 2018). That being said, despite Canada managing to avoid the clause, the US has ensured the arbitration system is intact with Mexico (Tamborrino, 2018), perhaps leaving the door open to revisit Canada’s exclusion of it (Grandoni, 2018). Further, the new deal between the three countries is said to heavily reflect the TPP, which as mentioned earlier does still contain ISDS, to the point in which some sections “are actually cut-and-pasted” from the trade pact (Scassa, 2018). That being said, the conclusion being drawn here

is not meant to undermine the progress on ISDSs witnessed in CETA and the USMCA. Rather, it serves as a warning moving forward. Despite how they are often portrayed, contemporary trade pacts are about more than just about boosting economies. As this study has demonstrated, if these trade pacts continue to feature mechanisms like ISDS then they must continue to be subjected to critical inquiry. It is only through questioning economic, political and cultural relations of power that a resistance to the various harms inherent in a neoliberal capitalist system can materialize.

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