Canadians Say “Play Fair” to the United States

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The international economic crisis of the 1980’s marked the beginning of a new era in the global economy. Governments, who had been previously unable to protect their nation’s economies, began to discuss new and profound policies such as free trade. The concept of free trade, combined with new ideologies, created a new sense of what it meant to be sovereign, and secure.[1] In addition, national interests began to be discussed in the context of global aspirations. These global aspirations, although positive for many, also sparked questions and concern pertaining to the security of the state, as free trade began to challenge notions of boundaries.[2] As a defense mechanism, when states felt threatened they had the option to prohibit lucrative options, which favoured private and foreign interests.[3]

These changing paradigms and interests were all justified in the name of a misplaced patriotism. With the concept of patriotism in mind, one of the events in American history that has shaped the hearts and minds of Americans and American foreign policy alike was the War in Iraq in 2003. When countries such as Canada said “NO!” to entering the war, it was seen as the ultimate foreign policy initiative, which aligned with Canada’s national interest. As a result, when the discussion about reconstruction projects in Iraq came about in late 2003, it was made very clear by the Bush administration that Canadian companies would have no part in the primary bidding process for reconstruction projects of Iraqi infrastructure.[4] Their reasoning was that as a matter of “national security”, they must protect American national interest by denying these “private and foreign interests” as a way of securitizing the nation. Many Canadians refuted this claim, including Prime Minister Paul Martin, as a violation of international law, while

others felt that the American claim to national security was completely legitimate, based on the fact that American foreign policy must be taken into consideration.

The question I seek to answer in this paper is whether the U.S. rejection of Canadian companies bidding in the Iraqi infrastructure reconstruction process was a violation of international law? I will argue that based on the North American Free Trade Agreement (NAFTA) article 1105 of Chapter 11, which requires all NAFTA governments to live up to the standards of "fair and equitable treatment of investment", the denial of equitable access to industry can in fact be seen as a violation of international law.[5] Accordingly, I will begin with a brief discussion of NAFTA under which I will seek to analyze this chapter and article, which will aid in the process of understanding why the rejection of Canadian companies from the reconstruction projects in Iraq were a violation of international law. I will then provide the alternative perspective as seen by Rosalyn Higgins and the New Haven Approach, argue that international law is a policy process, and that states should use it to protect policy initiatives. Finally, I will seek to reject this notion proposed by The New Haven Approach, by analyzing a case within NAFTA, and demonstrating that decisions in everyday legal cases do not necessarily account for this policy protection.

Canada's involvement in NAFTA has always been controversial. As argued in the article No to NAFTA Canada's desire to be involved in NAFTA was about more than the idea of "free-trade"; it was about gaining a mechanism to protect Canadian exporters from measures that would block their access to the American market.[6] These Canadian exporters are given the name "investors" under NAFTA. It is important to keep in mind that "investors" in NAFTA refer to individuals such as corporations, as opposed to only states as dictated in the World Trade Organization.[7] As such, it was necessary that to enable this concept of free trade, these investors must be protected. This protection

was largely unattainable until the creation of Chapter 11 in NAFTA, in 1994.

Under Chapter 11, investors have the right to take NAFTA member states to arbitration for compensation when actions taken by those member states have adversely affected their investments.[8] In addition, there are three mechanisms outside of NAFTA? that allow investors to seek recourse against member states: the World Bank International Centre for the Settlement of Investor Disputes, The Rules of the United Nations Commission for the International Trade Law, and the member states' domestic courts.[9] These courts seek to remove impunity from states, and allow for the settlement of investment disputes that will ensure equal treatment and due process before an impartial tribunal under Chapter 11.[10]

Within this chapter, there exist three sections. The scope of this paper will focus explicitly on Section A, specifically article 1105. Article 1105, according to Foreign Affairs and International Trade Canada, "assures a minimum absolute standard of treatment of investment of NAFTA investors based on long-standing principles of customary law."[11] In addition, Article 1105 sets forth a further minimum standard of treatment to which investors are entitled. The article states, "each party shall accord to investments of investors of another party, treatment in accordance with international law, including fair and equitable treatment and full protection and security."[12] Finally, the Free Trade Commission (FTC), which consists of members from each state, has declared that international law is limited to and includes international customary law.

This notion of international customary law brings forth serious problems in disputes, particularly related to linguistic differences.[13] This is because definitions of "fair and equitable treatment" are heavily debated and critiqued. Consequently, in 2001 the FTC, in their desire for an enhanced procedure, issued an interpretive note to clarify the application of Article 1105. In this

note they state, "the customary international law minimum standard of treatment of aliens [is] the minimum standard of treatment to be afforded to investments of investors of another party."[14] This interpretive note has been controversial in demonstrating international customary law. While it has led to many awards (successful claims) being granted to disputing parties, many question the court's ability to interpret certain cases under Article 1105 which as seen by the New Haven school, is a measure of taking into account foreign policy in the decision making process.

Rosalyn Higgins from the New Haven School of International Law, which offers an unconventional approach to international law, argues, "international law is a continuing process of authoritative decisions."[15] This view rejects the notion of law merely as the impartial application of rules. International law should be seen as the entire decision-making process, and not just in reference to past decisions, which are termed 'rules.'

This decision making process is where choices over competing rules are made every day, which draws on notions of legal realism, and challenges the very notion of law as being objective.[16] Academics from the New Haven school believe that international law is about the union of law and politics. Discussing politics Higgins states:

> (P)olicy considerations, although they differ from "rules", are an integral part of the decision making process which we call international law…. A refusal to acknowledge political and social factors cannot keep law 'neutral', for even such a refusal is not without political and social consequence.[17]

From the New Haven Perspective, the bidding process in Iraq may not necessarily be constituted as a violation of international law, as the tribunal could view this as a means of foreign policy-

that which protects the interest of the American people. The decision would then be up to the tribunal, in how they interpret America's claim to "securitizing the nation", which Higgins would see as having primary importance over the objective nature of the claim of violation. As a result, while notions of international law as a process of authoritative decision-making in, can be useful in widening our scope of analyses, it is important to keep in mind the significance of these approaches in everyday legal disputes.

This can be highlighted in the relationship between the principles of international law, and what actually happens on the ground. This is more commonly referred to as *de jure* (concerning law) vs. *de facto* (concerning fact). Claire Cutler discusses the importance of this binary relationship and the complications of corporation as central players linking global and local politics when she states, "the *de jure* insignificance of corporations in the face of their *de facto* significance reflects a disjunction between theory and practice."[18] It is the influential nature of individual corporations, or "investors", which renders discussions of law as a process, and series of authoritative decision-makings, theory laden while having very little practicability.

Such practicability can be highlighted in examining cases such as S.D. Myers vs. Canada. This case occurred when Canada banned the export of polychlorinated biphenyl waste, which effectively shut S.D. Myers out of the Canadian PCB waste treatment market. S.D. Myers argued that this was a violation of Article 1105, in the denial of fair and equitable treatment.[19] Canada counter-argued S.D. Myers claim by stating that they were simply carrying out orders and complying with various international environmental agreements, and effectively with Canadian policy on the environment. However, it was argued that Canada's attempt to ban S.D. Myers was as a means of preventing its competition in the Canadian PCB waste market. The tribunal found that the intentional discrimination on the basis of nationality is in fact a breach of international law, and therefore, a breach of Article

1105.[20] This decision shows that the tribunal clearly did not take into consideration the effective environmental policy claims, which were presented by the Canadian government from a policy perspective, and which the New Haven School would see as a necessary part of the authoritative decision making process based on the interplay between law and politics.[21]

We can then compare this ruling, with the case of America's decision to reject Canadian companies from the bidding process in Iraq. Although from a New Haven Perspective, policy initiatives should be kept in mind, according to *de facto*, as seen above in the case of S.D. Myers, these policy initiatives are not always taken into consideration in the ruling. From an international law perspective, and according to NAFTA regulations, we could compare the case of S.D. Myers, and the tribunal findings with that of the case of Iraq and the United State's ban. Although one clearly had environmental concerns and the other security, the two cases present a similar dilemma in the role of NAFTA and the protection of the investor at the expense of the violating states policies. One cannot speculate how the case would be handled in the tribunal; however, the fact that Canadian companies were rejected from the bidding process, means that they have suffered arbitrary and discriminatory treatment compared to US, British and Australian companies. It was corporations from these countries that were invited to participate in the process regardless of their states' contribution to the military campaign in Iraq.[22] This is a clear violation of Article 1105, which was created, as stated by Gaines, "to protect investors from government abuse when major investments are at stake and their claim has substantial merit."[23]

To conclude, approaches to international law are varied, with different interpretations of actors, arenas, and opinions about whether international law even exists. While the New Haven School of International Law could be considered a hallmark approach, its view of international law as a process of authoritative decision making based on policy making, fails to explain what

actually happens in everyday courts as seen by the case of S.D. Myers. Although one cannot completely compare the two cases, a comparison serves to illustrate that what is posited in theory and what happens in actual legal practice are often very different. In the case of Canadian companies in Iraq, it is clear that America's decision to not allow Canadian companies a part in the primary bidding process was a violation of Chapter 11, Article 1105. And while many are doubtful as to the efficacy of NAFTA, it is possible to look at the victory of Chapter 11 in laying to rest the many fears surrounding the notions of open borders and security threats that have been perpetuated. This essential development marks a way of protecting investors and their investments, and encouraging free and fair trade for all.[24] While NAFTA may not be perfect, it helps to ensure Canadians will have equal access to American markets, which is something that would not have even had been discussed thirty years ago.

Notes

[1] Stephanie R.Golob, "Beyond the Policy Frontier: Canada, Mexico, and the Ideological Origins of NAFTA," *World Politics* 55, no.3 (2003),361.
[2] Ibid., 363.
[3] Ibid., 365.
[4] Charles Gastle and Todd Weiler, "You're Not Playing Fair," *The Globe and Mail* (December 16, 2003).
[5] Maximo Romero Jimenez, "Considerations of NAFTA Chapter 11," *Chicago Journal of International Law* 2, no.1 (2002), 244.
[6] Anonymous, "No to NAFTA," *Canadian Dimension* 39, no.6 (2005), 4.
[7] Ari Afilalo, "Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels Should Solve their Legitimacy Crisis," *Georgetown International Environmental Law Review* 17, no.1 (2004), 51.
[8] NAFTA Secretariat, www.nafta-sec-alena.org
[9] Jimenez, "Considerations of NAFTA Chapter 11," 243.
[10] Ibid.
[11] Foreign Affairs and International Trade Canada. "NAFTA- Chapter 11, General information." NAFTA-Chapter 11. www.international.gc.ca
[12] NAFTA Secretariat, www.nafta-sec-alena.org

[13] Jennifer Trousdale, "The International Investor's Guide to Retaining A successful NAFTA Chapter 11 Award on Appeal," *Law and Business Review of the Americas* 12, no.1 (2007), 217.
[14] Ibid., 219.
[15] Rosalyn Higgins, "The Nature and Function of International Law," From *Problems and Process- International Law and how we us it,* 3-5. (Oxford: Oxford University Press, 1995).
[16] Ibid., 2.
[17] Ibid., 5.
[18] Claire Cutler, "Critical reflections on the Westphalian assumptions of international law and organization: a crisis of legitimacy," *Review of International Studies* 27, no. 2 (2001), 147.
[19] Brian Trevor Hodges, "Where the grass is always greener: Foreign investor actions against environmental regulations under NAFTA's chapter 11, S.D. myers, inc. v. Canada." *Georgetown International Environmental Law Review* 14, no.2. (2002), 367.
[20] Ibid.
[21] Higgins, "The Nature and Function of International Law," 5.
[22] Gastle and Weiler, "You're Not Playing Fair."
[23] S.E. Gaines, "Environmental Policy implications of investor-state arbitration under NAFTA chapter 11," *International Agreements: Politics, Law and Economics* 7, no.2 (2007), 198.
[24] NAFTA Secretariat, www.nafta-sec-alena.org