Policy Briefing Paper

KAIROS Policy Briefing Papers are written to help inform public debate on key domestic and foreign policy issues

No. 36 September 2013

First Nations Challenge Foreign Investment Protection Agreements

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In August, KAIROS welcomed Brenda Sayers, a band councillor from the Hupacasath First Nation on Vancouver Island. Brenda explained eloquently why the Hupacasath had filed a request in a federal court seeking a judicial review of the federal government's decision to proceed with the Canada-China Foreign Investment Protection Agreement (FIPA).

Their application asserts that the government had failed to consult with First Nations on an issue affecting their Indigenous rights as required by Section 35 of the Canadian constitution and the *UN Declaration on the Rights of Indigenous Peoples*. Their initiative also defends the rights of non-Indigenous Canadians.

The Hupacasath are concerned that the FIPA would permit Chinese firms to bring investor-state suits against Canada if any level of government were to undertake a measure deemed to restrict the firms' interests, such as access to natural resources whether oil, natural gas, fish or forest products.

On August 26, the federal court in British Columbia dismissed the request on the grounds that the potential adverse effects the First Nation cites are "speculative" and "non-appreciable," that is not capable of being estimated.[1] The Hupacasath First Nation is considering an appeal and has pledged to carry on the struggle against the FIPA in collaboration with civil society allies.

Grand Chief Stewart Phillip, President of the Union of BC Indian Chiefs, says "The Union of BC Indian Chiefs refuses to accept the Government of

Canada's argument that there is no 'causal link' or 'potential adverse impacts' on our constitutionally-enshrined and judicially-recognized Aboriginal rights [as a result of] the ratification of FIPA." He calls the Court's refusal to recognize Canada's duty to consult with First Nations "absurd, unconscionable and incredibly offensive."[2]

In this briefing paper we shall first describe how investor-state provisions in international trade and investment agreements are currently affecting Canada. Then we look specifically at the validity of the concerns raised by the Hupacasath and other First Nations in light of recent investment tribunal cases.

Investor-state Provisions in International Trade and Investment Agreements

The investment chapters of international trade agreements such as the North American Free Trade Agreement (NAFTA) and bilateral foreign investment protection agreements (FIPAs) are pacts between states that "determine the rights of foreign investors in each other's territories. They are used by powerful companies to sue governments if policy changes – even ones to protect public health or the environment – are deemed to affect their profits."[3] While over 3,000 investment treaties have been signed worldwide, in this report we shall focus on those affecting Canada.

Luke Eric Peterson, a leading researcher on investor-state cases in Canada, notes that they give foreign-owned companies an opportunity to challenge virtually any policy that can be characterized as "unfair", "unreasonable" or "disproportionate." These challenges take place before secretive international tribunals that bypass national courts.[4]

Canada agreed to investor-state provisions in Chapter 11 of NAFTA on the grounds that they were needed to keep Mexico from seizing the property of foreign investors. Yet more suits under NAFTA have since been launched against Canada than against Mexico or the United States. Canada has bilateral foreign investment protection agreements that contain investor-state provisions with 24 other countries and is negotiating several more. The FIPA with China was signed in September of 2012 but, to date, has not been ratified by the federal cabinet.

A dozen cases brought under NAFTA against Canada have been decided by tribunals or settled by agreements between the parties. Canada has won half of these and lost six, paying US$170 million in compensation to claimants. While a few claims have been withdrawn, about 18 cases are either inactive or pending decisions that may take years to resolve. Of the 16 cases that have been initiated by Canada against the United States or other countries under bilateral treaties, the record is much worse – Canadian investors have lost in every case.

Threats to Environment and Health Care

KAIROS, its predecessor coalitions and its member churches have been monitoring the evolution of investor-state disputes for a number of years. In 2002 the Episcopal Commission for Social Affairs of the Canadian Conference of Catholic Bishops issued a paper entitled *Trading Away the Future*. They voiced concerns arising from the investor-state mechanism of the NAFTA and its possible extension throughout the hemisphere through the proposed Free Trade Area of the Americas. That paper noted how the investor-state mechanism in NAFTA has been used "to limit government's capacity to support environmental, health and other public values in the face of commercial interests."[5] KAIROS global economic justice staff prepared a study for a 2004 North American tri-national churches' consultation on *NAFTA, Trade and Globalization* held at Stony Point, New York. That study warned about investor state suits under NAFTA that seek to overturn measures designed to protect human rights and the natural environment.

These concerns are expressed in *What Does God Require of Us? A Declaration for Just Trade in Service of an Economy of Life* which emerged from that consultation. The Declaration was later endorsed by KAIROS and a number of other North American church bodies.[6] It calls for trade and investment agreements to:

a) "promote and strengthen respect for creation with environment regulations." Contrary to this principle, suits filed under NAFTA's investor-state provisions have successfully challenged Canadian laws prohibiting toxic gasoline additives and the export of hazardous wastes. Ontario's decision to halt the disposal of Toronto's garbage in a Northern mine and an environmental assessment that stopped a controversial mega-quarry in Nova Scotia were also challenged. A suit filed by a U.S. company forced Mexico to compensate it for shutting down a waste disposal dump that was polluting the water supply for a village in the state of San Luis Potosi.[7]

b) "protect the integrity of publicly funded and administered health … services." A suit under NAFTA challenged measures contained in the Canada Health Act that interfered with plans by a U.S. firm, Centurion Health Corporation, to open private, fee-for-service health clinics in British Columbia and Alberta.[8] Recently pharmaceutical firm Eli Lily has served notice of its intent to sue Canada alleging that decisions to invalidate its patents for two drugs violate NAFTA's investment provisions. Eli Lilly is seeking $500 million in compensation in a case that has the potential to unleash a wave of similar suits by other pharmaceutical companies if it wins its case.[9]

c) "be transparent ... and provide for greater participation." Deliberations by investor-state tribunals are often held in secret without access for the public even though they challenge laws and policies adopted by democratically elected legislatures.

Indigenous Peoples Rights Indeed Threatened by Canada-China FIPA

One provision of the Stony Point declaration is particularly relevant in the case brought forward by the Hupacasath First Nation. It calls for trade and investment agreements to "recognize the inalienable rights of indigenous peoples to their traditional territories, resources and indigenous traditional knowledge. Indigenous peoples have to give their prior informed consent to any developments that impact their traditional territories."

The right of Indigenous peoples to give or withhold free, prior and informed consent (FPIC) to resource development projects on their territories and to government laws and administrative measures that affect their rights has been enshrined in the *UN Declaration on the Rights of Indigenous Peoples* passed by the General Assembly in 2007. In dismissing the Hupacasath First Nation's assertion that the federal government has a duty to consult Indigenous peoples, the judge cites a news release from Aboriginal Affairs and Northern Development Canada asserting that the *Declaration* is merely an "aspirational" document and not legally binding.[10]

However human rights attorney Paul Joffe states that such a characterization is "erroneous ... [as it] is inconsistent with Canadian and international law."[11] Joffe clarifies that while the *Declaration* is "not binding in same manner as treaties, [it does have] diverse legal effects [including that] Canadian courts may use the *Declaration* to interpret human rights in Canada."[12]

The B.C. court's finding that the possibility of suits under FIPA against First Nations' rights is merely "speculative" is not well grounded in actual experience. Three investor-state cases still pending under NAFTA illustrate their potential threat to Indigenous rights. In two cases U.S. investors are challenging conservation measures taken by the Quebec government to restrict their access to salmon fishing areas. In another case a U.S. owner of a hunting lodge is challenging a decision by the government of the Northwest Territories to reduce the number of caribou that can be hunted by non-residents in favour of quotas for local and Indigenous hunters.

The Hupacasath First Nation is concerned with defending old-growth forests on its traditional territory from encroachment by a firm called Island Timberlands. The China Investment Corporation, an arm of the Chinese government's sovereign wealth fund, is seeking a 12.5% ownership stake in Island Timberlands. The possibility that a Chinese corporation might launch a suit if a conservation measure threatened its investment is not unreasonable. A disturbing precedent was set when forestry corporation Abitibi Bowater won a $130 million settlement from a NAFTA suit alleging that Newfoundland had irresponsibly taken away its water and timber rights on public lands after it had closed its last mill in the province and filed for bankruptcy.[13]

The Hupacasath First Nation wrote to the federal government on October 26, 2012 requesting a consultation on the Canada-China FIPA. They were soon joined by the Union of B.C. Indian Chiefs (October 30), the Serpentine River First Nation (October 31), the Chiefs of Ontario (November 5), the Tsawwassen First Nation (November 29), the Special Chiefs Assembly of the Assembly of First Nations (early December), and the Dene Tha' First Nation (March 13, 2013). Court documents indicate that none of these requests received substantive responses.

According to a memorandum filed in the federal court by the Hupacasath's lawyer:

> *There is significant oil and gas development, including shale gas development ("fracking"), in the Traditional Territory of the Dene Tha'. The Dene Tha' are concerned about the impact of this activity on the land, water and resources which they rely upon in the exercise of their aboriginal and treaty rights. Some of this activity is being carried out by Nexen, which … has recently been taken over by the Chinese state owned company CNOOC. Chief Ahnassay expressed his concern to the Ministers that [the FIPA] would make it more difficult to create protected spaces in the Dene Tha's Traditional Territory.*

The possibility that Chinese-owned Nexen would undertake a case under the FIPA to challenge any restriction on hydraulic fracturing (fracking) for shale gas is very real. In November 2012, Lone Pine Resources launched a suit challenging a decision by the government of Quebec to institute a moratorium on hydraulic fracturing until an environmental impact assessment has been carried out. Lone Pine is seeking US$250 million in compensation for the "expropriation" of its permit to explore for shale gas under the St. Lawrence River.[14] [15]

Osgoode Hall law professor Gus Van Harten warns of another potential suit under a Canada-China FIPA. Chinese corporations have already undertaken investments in the Alberta tar sands and are considering minority investments in Enbridge's proposed Northern Gateway pipeline to ship bitumen across the traditional territory of several Indigenous nations in northern British Columbia. Van Harten asserts that if the Canada-China FIPA "comes into effect and there's any Chinese ownership whatsoever in assets related to [the Northern Gateway] pipeline ... then Canada will be exposed to lawsuits under this treaty, because [a] BC government [attempting to stop the pipeline] will be discriminating against a Chinese investor, which is prohibited by the treaty."[16]

Professor Van Harten, who has written extensively on investment treaty arbitration, submitted evidence to the court in support of the Hupacasath First Nation's application. However, the judge refused to give weight to his evidence on the grounds that he was not impartial, while accepting government lawyers' arguments at face value.[17]

Resistance to Investor-State Agreements Growing

In 2011, Australia announced that it will no longer include investor-state provisions in any of its trade agreements. This declaration gives Australia a strong hand in obtaining an exemption from any investor-state mechanism in the Trans Pacific Partnership (TPP) it is negotiating with 11 other nations including Canada and the United States. Canada cannot seek the same exemption as Canada joined the talks late under the condition that it not seek any roll-backs of agreements already reached by the other countries. Canada is also in the final stages of negotiating a Comprehensive Economic and Trade Agreement with the European Union that will include a binding investor-state mechanism if it is ratified.

Like Australia, India and South Africa are also rethinking their involvement in foreign investment protection agreements. Bolivia, Ecuador and Venezuela have gone a step further and terminated several investment treaties and have withdrawn from the International Centre for Settlement of Investment Disputes, the arm of the World Bank that arbitrates disputes between investors and states.[18]

Lawrence Herman, a lawyer who has helped to negotiate treaties for Canada, has suggested it "may be time to rethink ... Canada's policy on foreign investment promotion and protection agreements."[19]

The Hupacasath First Nation has promised to continue the fight against FIPAs. They are not alone in their resistance to investor-state agreements. Twelve labour federations, including the AFL-CIO in the U.S. and the Canadian Labour Congress, are sponsoring an online petition campaign to change key provisions of the Trans-Pacific Partnership (TPP), including the removal of the investor-state dispute settlement provisions.[20]

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[1] *Hupacasath First Nation v. Minister of Foreign Affairs Canada and the Attorney General of Canada*, Reasons for Judgement and Judgement. Ottawa: Federal Court. August 26, 2013. Para 3 (i).

[2] *Hupacasath Disappointed with Federal Judicial Review of Canada-China FIPA*. Joint News Release. Hupacasath First Nation and Union of BC Indian Chiefs. August 27, 2013 at http://www.ubcic.bc.ca/News_Releases/UBCICNews08271301.html#axzz2dD6QC9iX

[3] Pia Eberhardt and Cecilia Olivet. *Profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment boom.* Brussels/Amsterdam: Corporate Europe Observatory and the Transnational Institute. November 2012. Page 7.

[4] Luke Eric Peterson. "Time to study Canada's approach to foreign investment deals*." Embassy*. March 20, 2013.

[5] Episcopal Commission for Social Affairs of the Canadian Conference of Catholic Bishops. *Trading Away the Future*. Ottawa: Canadian Conference of Catholic Bishops. January, 2002. Page 5.

[6] *What Does God Require of Us?* Declaration of the North American churches' consultation on NAFTA, Trade and Globalization. Stony Point, New York. January 2004.

[7] For details on these and other cases filed under NAFTA see Scott Sinclair. *NAFTA Chapter 11 Investor-State Disputes to October 1, 2010.* Ottawa: Canadian Centre for Policy Alternatives.

[8] Ibid.

[9] Stuart Trew. "Eli Lilly's NAFTA lawsuit should prompt rethink of investor 'rights' deal." Blog writen for the Council of Canadians. August 30, 2013.

[10] *Hupacasath First Nation v. Minister of Foreign Affairs Canada and the Attorney General of Canada*. op. cit. Paragraph 51.

[11] Paul Joffe. *UN Declaration on the Rights of Indigenous Peoples Not Merely "Aspirational*". 23 August 2012. p1.

[12] Paul Joffe. Powerpoint presentation on "UN Declaration: Legal Effects and 'Free, Prior, and Informed Consent.'" prepared for the Americas Policy Group, Montreal, February 5, 2013.

[13] See Scott Sinclair. "NAFTA payout sets troubling precedent." *Embassy*. March 30, 2010. P.10.

[14] Luke Eric Peterson. "Canada threatened with quarter billion dollar NAFTA claim over cancelled permits for gas fracking ventures." *Investment Arbitration Reporter*. Nov. 14, 2012.

[15] See John Dillon. "Coal and Shale Gas Obstacles to Climate Justice." *KAIROS Briefing Paper No. 30*. December 2011. for a description of the ecological threats posed by hydraulic fracturing.

[16] Beth Hong. "Chinese companies can sue BC for changing course on Northern Gateway, says policy expert." *The Vancouver Observer*. Oct. 12, 2012.

[17] *Hupacasath First Nation v. Minister of Foreign Affairs Canada and the Attorney General of Canada*. op. cit. Paragraphs 37, 38, 42.

[18] Pia Eberhardt and Cecilia Olivet. op. cit. Page 9.

[19] Lawrence Herman. "Time to rethink foreign protection investment agreements? Perhaps." *The Globe and Mail*. March 4, 2013.

[20] The labour federations' petition is available at **http://act.aflcio.org/c/18/p/dia/action3/common/public/?action_KEY=7025**