



CANADA-CHINA FIPA 101 WHAT FIRST NATIONS NEED TO KNOW



DATE: July 24, 2014

SUBJECT

Canada-China Foreign Investment Promotion & Protection Agreement (CC-FIPA) between the Government of Canada and the Government of the People's Republic of China is for the Promotion and Reciprocal Protection of Investments. FIPAs are bilateral agreements that protect and promote foreign investment.

PURPOSE

This briefing note is intended to provide information on how CC-FIPA will impact vital areas of Aboriginal title, rights and Treaty rights. It is not intended to cover all areas because it would be too extensive.

BACKGROUND

The Canada-China FIPA was quietly tabled in the House of Commons on September 26, 2012. The original ratification date was October 31, 2012 but due to public outcry it was delayed. Subsequently, it is the Hupacasath First Nation's court challenge that has held up ratification. Canada has admitted it will not comment on CC-FIPA while the matter is before the court. Currently, it is waiting to be ratified by 38 Cabinet Ministers. Once ratified, diplomatic notes between the two countries will be exchanged and it will be irreversible for 31 years expiring in 2045.

The CC-FIPA is the most significant treaty of its kind since NAFTA. Contrary to the 31-year term of CC-FIPA, under Chapter 11 of NAFTA, 6 months notice can be given to terminate the agreement.

Stakeholder consultations took place throughout the process with provinces, territories, mining, manufacturing and financial sectors. First Nations and municipalities were not consulted nor was there a parliamentary committee struck to examine and report on the risks of the agreement.

COURT DETAILS

This is an extremely important court case initiated by the Hupacasath First Nation. No court has ever ruled on when and how the Canadian government is required to consult with First Nations about international agreements/treaties. Further no trade agreement has ever had such far-reaching implications. This is new ground for the Courts.





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COURT DETAILS (con't)

Hupacasath First Nation challenged CC-FIPA in court and documents were filed on January 18, 2013. Court dates were set for June 5, 6 & 7 when the Chief Justice heard the arguments. In August 2013, he handed down his decision in favor of the Federal Government.

Hupacasath First Nation appealed this decision filing the written argument on January 29, 2014. The Federal Government filed their response on March 17, 2014. The Court of Appeal hearing was held on June 10, 2014 and Hupacasath is anticipating a decision by early fall.

IMPORTANT ISSUES/FACTS

- The Federal Government violated Aboriginal title, rights and Treaty rights enshrined in Section 35 of the Constitution; when it failed to consult.
- The agreement does not incorporate a clause recognizing Aboriginal title, rights and Treaty rights.
- Environmental legislation gutted through Omnibus Bill C- 38 and 45 makes it easier for multi-nationals to extract natural resources.
- In addition to the gutting of environmental legislation in Omnibus Bill C- 38 & 45, the CC-FIPA will further compromise Aboriginal title, rights and Treaty rights.
- CC-FIPA is the first treaty that places Canada in the capital importing position. In other words, China has more money invested in Canada than Canada has invested in China creating an unbalanced agreement.
- Under the terms of this agreement, China state-owned companies can sue for the loss of anticipated profits if there is any opposition to resource extraction, development or transportation of such resources that harms their bottom line. This clause in CC-FIPA is known as the Investor State Arbitration (ISA).
- A 3-person tribunal outside of Canada's legal jurisdiction would decide awards to China state-owned companies without regard to Canadian Laws or Constitutional Rights.
- China is the second largest economic power in the world so it has the means and capital to buy resource based companies.
- Since 2005, China state-owned companies have purchased 27+ billion in natural resource based companies. CNNOOC purchased Nexen for 15 billion dollars and gained control of Long Lake oils sands project in Alberta. Currently PetroChina's biggest challenge is First Nations who oppose expansion of Alberta oil fields and transportation of bitumen.





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MODERN DAY TREATIES

Modern day treaties such as Tlicho, Maa-nulth and Tsawwassen contain a clause that Canada must consult prior to making international agreements. This clause illustrates Canada's awareness that international agreements affect Aboriginal title, rights and Treaty rights. Canada will breach the honour of the Crown if it ratifies CC-FIPA without consulting with them.

PENDING/ FUTURE TREATIES

The CC-FIPA restricts what First Nations can negotiate in treaties because Canada can demand that First Nations constrain their law making in accordance with CC-FIPA. This agreement would also lead to inevitable conflicts with constitutionally protected Aboriginal rights, title and Treaty Rights.

EXPROPRIATION OF FEDERAL CROWN LANDS

CC-FIPA is international law that supersedes Canadian domestic law. This is an extremely significant point. "Expropriation" under Canadian domestic law has a different interpretation than under international law.

If China files a claim against Canada, the protection of Aboriginal title, rights and Treaty rights cannot be used as a defense. This handcuffs Canada from honouring Aboriginal title, rights and Treaty rights enshrined in the Constitution.

FIRST NATIONS RIGHT TO MAKE LAWS

First Nations will be negatively impacted because CC- FIPA may make it impossible, or at the very least more difficult, for First Nations to make laws to protect land and resources subject to rights and title. China may view these laws as interfering with its ability to make a profit and subsequently sue Canada for the anticipated loss of profits.

A foreign country will be granted more powers than First Nations in Canada if CC-FIPA is ratified.

WILL CC-FIPA BENEFIT FIRST NATIONS?

A very small percentage of First Nations with established businesses in China will benefit from the CC-FIPA via the Investor State Arbitration (ISA) clause.

The majority of First Nations may end up engaged in costly court battles in order to protect their natural resources from aggressive development.





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WILL CC-FIPA BENEFIT FIRST NATIONS? (con't)

First Nations can expect the number of court battles to escalate if CC-FIPA is ratified.

ARE THERE PROTECTIONS FOR FIRST NATIONS RIGHTS AND TITLE IN CC-FIPA?

There are virtually no protections for Aboriginal title, rights and Treaty rights. Canada's own evidence affirmed it did not want to "horse trade" with China to negotiate such protections into the agreement.

THE INDIGENOUS PERUVIAN EXPERIENCE WITH A TRADE AGREEMENT

The rights of indigenous Peruvians have been greatly eroded since the *United States - Peru Trade Promotion Agreement* was implemented in February 2009. Soon after, in June of 2009, 33 people were killed and 200 people injured in the Amazonas region when police and protestors clashed at a road blockade over a new law allowing mining companies to enter indigenous territory without consent.

CONCLUSION

At the June 10th, 2014 Court of Appeal hearing, Canada was adamant that if CC-FIPA is ratified it will uphold its international obligations to China, which has the effect of seriously eroding Aboriginal title, rights and Treaty rights.

The time is now for First Nations to stand with Hupacasath First Nation in our fight to reject CC-FIPA and demand the Crown honour our constitutionally-enshrined Aboriginal title, rights and Treaty rights.

REFERENCES

1. AFN Briefing Note
2. FNBC – Judith Sayers Blog
3. Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments
4. Court Transcripts – June 5, 6 & 7, 2013

