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Finding a Duty to Consult Aboriginal Peoples During the Negotiation of Free Trade Agreements (FTAs) and Foreign Investment Promotion and Protection Agreements (FIPAs)

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Finding a Duty to Consult Aboriginal Peoples During the Negotiation of Free Trade Agreements (FTAs) and Foreign Investment Promotion and Protection Agreements (FIPAs)

Abstract

This article explores whether there is a legal duty to consult with Indigenous groups prior to the ratification of international trade and investment agreements. It considers both the content of the duty to consult and the circumstances under which such a duty is triggered. In doing so, this paper analyzes the arguments of *Hupacasth First Nation v Canada*, the only case that has been brought to the courts on this issue. Although the Federal Court of Appeal dismissed the Hupacasath First Nation's claim that the duty to consult extends to negotiations that the federal government enters into with other State governments for Foreign Investment Protection Agreements (FIPAs), the analysis was confined to the particulars of the case. It remains to be seen whether the circumstances may yet exist in which the duty to consult will be found to apply to the negotiation of international trade agreements. To conclude, this paper investigates other potential sources of the duty to consult in law, including First Nations treaties, exemption clauses in Free Trade Agreements and FIPAs, and international obligations to indigenous peoples.

Keywords

Aboriginal Law, Duty to Consult, International Trade Law

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FINDING A DUTY TO CONSULT ABORIGINAL PEOPLES DURING THE NEGOTIATION OF FREE TRADE AGREEMENTS AND FOREIGN INVESTMENT PROMOTION AND PROTECTION AGREEMENTS

KATYA RICHARDSON*

INTRODUCTION

Since it signed the North American Free Trade Agreement (NAFTA) in 1994, Canada has participated in the global expansion of Free Trade Agreements (FTAs) and Foreign Investment Promotion and Protection Agreements (FIPAs). Canada has ratified eleven FTAs and thirty-three FIPAs, and has signed or is in negotiations for another eleven FTAs and 10 FIPAs.[1] FTAs are meant to facilitate greater cross-border exchange of goods and services by eliminating tariff and non-tariff barriers to trade, such as quotas or technical barriers.[2] In contrast, FIPAs focus on the protection and promotion of foreign investment between States.[3] Today, the general trend is to include the type of investment provisions typically found in bilateral international investment treaties into FTAs as States tend to prefer to negotiate the terms of an individual all-encompassing international agreement rather than many bilateral agreements.[4]

FTAs and FIPAs are generally negotiated privately between States.[5] Diplomats favour secrecy during negotiations because it allows for more efficient negotiations and

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[1] Global Affairs Canada, "Canada's Free Trade Agreements" (11 February 2016), online: <www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fta-ale.aspx?lang=eng> [Canada's FTAs]; Global Affairs Canada, "Foreign Investment Promotion and Protection Agreements" (9 June 2016), online: <www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?lang=eng> [Canada's FIPAs].

[2] Canada's FTAs, *supra* note 1.

[3] *Ibid*.

[4] Victoria Tauli-Corpuz, *Report of the UN Special Rapporteur of the Human Rights Council on the rights of Indigenous peoples*, UNGA, 70th Sess, UN Doc A/70/301 (2015) at para 11 [UN Special Rapporteur]; See the Trans-Pacific Partnership for recent example of a FTA with a substantial investment chapter: *Trans-Pacific Partnership*, 5 October 2015.

[5] Michelle Limenta, "Open Trade Negotiations as Opposed to Secret Trade Negotiations: From Transparency to Public Participation" (2012) 10 New Zealand YB Intl L 73 at 82, 87.

creates an environment of confidence for negotiators.[6] By excluding NGOs and civil society groups, a State is able to present a unified position to its negotiation partners without concerns that its position could be compromised by conflicting perspectives offered by third parties.[7] Over the past two decades, activists concerned with the potential effects of trade agreements on the general population, and Indigenous groups in particular, have protested the secrecy surrounding these negotiations.[8] They argue that the process leading to the ratification of international agreements must be made more transparent and include greater public participation.[9]

Some Indigenous groups are concerned with the adverse impacts FTAs and FIPAs may have on the scope of their land rights.[10] A recent example of the potential conflict between investor rights and Aboriginal rights under FTAs and FIPAs arose in response to a proposal to build a natural gas terminal on Lelu Island, British Columbia—a project met with strong opposition from some Indigenous groups.[11] The company that proposed to build the terminal is Malaysian-owned and would have been protected by investment clauses under the Trans-Pacific Partnership, a recently signed FTA.[12] The concern was that the non-discrimination and expropriation clauses in the Trans-Pacific Partnership prioritized investor rights and failed to recognize the legal rights that Aboriginal peoples have over their territorial land.[13]

Another concern amongst Indigenous groups is that corporations and investors are increasingly using the investor–State arbitration mechanisms included in many FTAs and FIPAs to challenge Canadian laws and regulations.[14] A potential consequence of this trend is that the threat of an arbitral award against Canada will have a chilling effect on the Canadian government when considering measures aimed at protecting Aboriginal rights.[15] This is because Canadian law requires the Crown to consult with Indigenous groups when contemplating conduct that might adversely affect an

[6] *Ibid* at 78 – 79.
[7] *Ibid* at 79.
[8] *Ibid* at 85 – 86.
[9] The Council of Canadians, "Not so fast: TPP needs public consultation, says Council of Canadians" (5 November 2015), online: <www.canadians.org/media/not-so-fast-tpp-needs-public-consultation-says-council-canadians>.
[10] See *Hupacasath v Canada (Minister of Foreign Affairs),* 2013 FC 900 [*Hupacasath* 2014]: discussed at Part III of this paper. See also UN Special Rapporteur, *supra* note 4.
[11] Lax U'u'la, "Stop Pacific Northwest LNG/Petronas on Lelu Island" (13 September 2015), Lax U'u'la Camp Updates (blog), online: <www.laxuula.com>.
[12] The Council of Canadians, "UN says the TPP threatens Indigenous Rights", (27 February 2016), online: <www.canadians.org/blog/un-says-tpp-threatens-Indigenous-rights>.
[13] *Hupacasath* 2014*, supra* note 10 at para 60.
[14] The Council of Canadians, "The CETA Deception: Investment protection" (17 July 2012), online: <www. canadians.org/sites/default/files/publications/CETADeceptionreport-finalJuly2012.pdf >.
[15] *Hupacasath* 2014*, supra* note 10 at para 84.

Aboriginal right or title; however, it is unclear whether the duty extends to international trade and investment negotiations.[16]

The Minister for International Trade, Chrystia Freeland, affirmed that First Nations groups will be included in the consultation process prior to ratification of the Trans-Pacific Partnership.[17] Since signing the agreement on February 4, 2016, the federal government has engaged Indigenous groups in formal consultation on the agreement on four occasions.[18] While this may seem encouraging, a question remains—can the Canadian government be held legally accountable to a duty to consult Aboriginal peoples?

This paper attempts to locate a legal duty to consult with Aboriginal peoples prior to ratifying international trade and investment agreements. In Part I, it looks to various sources of law, beginning with an analysis of the duty to consult at common law. Part II of the paper will analyze *Hupacasath First Nation v Canada*,[19] the only case brought to the courts regarding the duty to consult in relation to FTAs or FIPAs. Finally, Part III investigates other potential sources of the duty to consult in law, including First Nations treaties, exemption clauses in FTAs and FIPAs, and international obligations to Indigenous peoples.

I. THE DUTY TO CONSULT

The duty to consult with Indigenous peoples and, where appropriate, the duty to accommodate their interests, is a Crown obligation. It was established at common law through three Supreme Court of Canada[20] cases, starting with the *Haida Nation v British Columbia (Minister of Forests)*[21] and *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*[22] decisions in 2004, which were followed by the *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*[23] decision in 2005. The duty to consult entails balancing Indigenous interests against competing interests and reflects the Crown's goal of reconciliation and fair dealing.[24] This duty

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[16] 2004 SCC 73 at para 35 [*Haida Nation*].

[17] Janyce McGregor, "Chrystia Freeland signs Trans-Pacific Partnership deal in New Zealand" (3 Feb 2016), *CBC News*, online: <www.cbc.ca/beta/news/politics/freeland-tpp-auckland-signing-1.3431631> [McGregor].

[18] For more information on the four consultations that were held see: Government of Canada, "TPP Consultations" (10 November 2016), online: <www.international.gc.ca/tradecommerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/consulting-corner_coinconsulations.aspx?lang=eng>.

[19] *Hupacasath* 2014, *supra* note 10.

[20] Hereinafter referred to as the "Supreme Court".

[21] *Haida Nation*, *supra* note 16.

[22] *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 [*Taku River*].

[23] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 [*Mikisew Cree*].

[24] *Haida Nation*, *supra* note 16 at para 32; Minister of the Department of Aboriginal Affairs and Northern Development Canada, *Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* (Ottawa, 2011) at 5.

stems from the honour of the Crown, requiring it to act honourably in all dealings with Indigenous peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties.[25] This principle is rooted in the imbalance of power and resulting injustices that have historically characterized the relationship between the Crown and Indigenous peoples.[26] In *Haida Nation* the Court stated that the honour of the Crown is *always* at stake in its dealings with Indigenous peoples and is a corollary of the recognition and affirmation of Indigenous rights pursuant to section 35 the *Constitution Act, 1982*.[27]

Triggering the Duty to Consult

When analyzing whether the duty has been triggered, courts often break down the requirement into three constituent elements. In *Haida Nation*, the Court held that the duty to consult arises when: (1) "the Crown has knowledge"; (2) "that knowledge is real or constructive of the potential existence of the Aboriginal right or title"; and (3) "the Crown contemplates conduct that might adversely affect that Aboriginal right or title."[28]

In *Rio Tinto*,[29] the Court affirmed that the duty to consult is neither confined to the government's exercise of statutory powers nor to conduct that has an immediate impact on Aboriginal lands and resources.[30] The Federal Court in *Courtoreille v Canada (Aboriginal Affairs and Northern Development)*[31] further held that the duty to consult extends to high-level strategic decisions, including proposed legislative amendments.[32] This reasoning suggests that the duty to consult may apply in the context of international negotiations. Further, *Courtoreille* indicates that where legislative amendments are required to give force to international agreements such decisions would also fall within the purview of the duty to consult.[33]

In *Mikisew,* the Supreme Court stated that *Haida Nation* and *Taku River* set a low threshold for triggering the duty to consult.[34] However, subsequent courts have established some limitations on when the duty is triggered, which makes finding a duty to consult during international negotiations difficult. For instance, in *Rio Tinto*, the Court held that the duty is only triggered where the claimant can show a "causal relationship between the proposed government conduct or decision and a potential for

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[25] *Haida Nation*, *supra* note 16 at paras 16 – 17.
[26] Dwight G Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon: Purich Publishing Ltd, 2014) at 15 [Newman].
[27] *Haida Nation*, *supra* note 16 at paras 16, 17, 21.
[28] *Ibid* at para 35.
[29] *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council,* 2010 SCC 43 [*Rio Tinto*].
[30] *Ibid* at paras 43 – 44.
[31] *Courtoreille v Canada (Aboriginal Affairs and Northern Development),* 2014 FC 1244 (CanLII) at para 45[*Courtoreille*].
[32] *Ibid*.
[33] *Ibid*.
[34] *Mikisew Cree, supra* note 23 at para 34.

adverse impacts on pending Aboriginal claims or rights."[35] In this decision, Chief Justice McLachlin differentiated between actual adverse impacts and speculative impacts, the latter of which would not suffice to trigger the duty.[36] She also clarified that the duty only applies to the future exercise of the right itself and does not apply to adverse impacts on an Aboriginal group's future negotiating position.[37] Citing the B.C. Court of Appeal decision in *R v Douglas*, she wrote that there must be an "appreciable adverse effect on the First Nations' ability to exercise their aboriginal right" before a duty to consult is triggered.[38] As will be elaborated in Part II of this paper, these limits make it challenging to find a duty to consult in the context of FTAs and FIPAs.

Even where the duty to consult is triggered, there may be practical considerations that impede either a First Nation's capacity to exercise this right or the Crown's ability to provide suitable accommodation after the duty is triggered. For instance, Aboriginal groups may lack adequate knowledge of how trade and investment agreements operate to meaningfully participate in consultations on FTAs and FIPAs. The United Nations Special Rapporteur for Indigenous Rights advocates for Indigenous peoples' representation at trade negotiations, and has argued that the exclusion of Indigenous groups from negotiations represents a violation of their rights to free, informed, and prior consent as well as participation, consultation, and self-determination.[39] Applied to the Canadian context, it is difficult to envisage how Aboriginal peoples will be represented at FTA and FIPA negotiations. Unlike some other States where there is a unified Indigenous population (e.g., the Maori in New Zealand), there is no unified Indigenous voice in Canada.[40] This presents the problem of predicting which Indigenous communities will be affected by an FTA or FIPA—something that is practically impossible at the time of negotiation. This will be elaborated on in Part II of this paper.[41]

Content of the Duty to Consult and International Trade Agreements

The Supreme Court has established that the content of the duty to consult falls along a spectrum: it is proportionate to the strength of the *prima facie* case supporting the existence of the Aboriginal right or title as well as the seriousness of the potential adverse effect on that right or title.[42] In cases where Crown conduct will cause a

[35] *Supra* note 29 at para 45.
[36] *Ibid* at para 46.
[37] *Ibid*.
[38] *Ibid* citing *R v Douglas*, 2007 BCCA 265 at para 44.
[39] UN Special Rapporteur, *supra* note 4 at para 31.
[40] The Assembly of First Nations may be the closest form of unified Aboriginal political representation in Canada.
[41] Gus Van Harten, *Sold Down the Yangtze River: Canada's Lopsided Investment Deal with China* (Toronto: James Lorimer & Company Ltd, 2015) at 145 [Van Harten].
[42] *Haida Nation*, *supra* note 16 at paras 39, 43–45; aff'd in *Mikisew Cree*, *supra* note 22 at para 62.

relatively minor impact on Aboriginal rights or title, the duty might only require that the Crown discuss the decision with the Aboriginal group affected.[43] Where the impact is more serious, the duty might require the full consent of an Indigenous group before the Crown can proceed with the contemplated conduct.[44]

If a duty to consult exists in relation to FTA and FIPA negotiations, it is likely that the content of that duty will fall on the lower end of the spectrum. As will be discussed in the following section, establishing a *prima facie* case supporting the existence of a duty to consult is challenging due to the speculative nature of claims about the future consequences of FTAs and FIPAs. Further to this, when considering the practical obstacles to accommodating the Aboriginal duty to consult on FTAs and FIPAs, courts might consider it more feasible to consult only with the Aboriginal communities that have expressed concerns about FTAs and FIPAs, rather than requiring direct involvement from Aboriginal representatives during State-to-State negotiations.

II. *HUPACASATH FIRST NATION V CANADA (FOREIGN AFFAIRS)*: A DUTY TO CONSULT IN COMMON LAW?

Hupacasath First Nation v Canada (Foreign Affairs) is the only Canadian decision on the issue of whether there is a duty to consult owed to a First Nations group during the negotiation of a FIPA.[45] The court held that the duty did not arise on these facts; however, as its analysis was confined to the duty owed to the Hupacasath First Nation (HFN), that is to say, not generally to First Nations peoples, this case is arguably not a determinative precedent for other First Nations groups seeking inclusion in formal discussions surrounding FTAs and FIPAs.[46]

In *Hupacasath*, the HFN brought a judicial review of the pending ratification of the Canada-China FIPA, seeking a declaration that Canada is required to engage in a process of consultation and accommodation with affected First Nations prior to taking any steps that would bind Canada under the Canada-China FIPA.[47] Particularly concerning to the HFN was the length of the agreement, which would last for thirty-one years.[48] In its submissions to the Federal Court of Canada, the HFN argued that the

[43] *Delgamuukw v British Columbia* (1997), 3 SCR 1010 at para 168, as cited in *Haida Nation*, *supra* note 16 at para 40.
[44] *Ibid.*
[45] No case has ever been brought before a Canadian court on the duty to consult in relation to the negotiation of a FTA.
[46] The Hupacasath First Nation (HFN) appealed this decision, but the Federal Court of Appeal dismissed the appeal, holding in favour of the respondents. See *Hupacasath First Nation v Canada (Minister of Foreign Affairs),* 2015 FCA 4 [*Hupacasath* 2015].
[47] *Hupacasath* 2014, *supra* note 10.
[48] *Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments*, Canada and China, 9 September 2012 art 35 (entered into force 1 October 2014) [*Canada-China FIPA*]: The agreement will remain in force for at

Canada-China FIPA would give rise to two general categories of adverse effects on its Aboriginal rights: (1) the Canada-China FIPA would result in a significant change in the legal framework applicable to land and resource regulation in Canada; and (2) the rights granted to Chinese investors would directly and adversely affect the scope of HFN's self-government in the future.[49] The HFN is in the process of seeking recognition of its right to self-government. It was concerned that the FIPA could adversely affect the future exercise of its Aboriginal rights, the treaty-making process, or its delegated authority from Canada or the government of British Columbia.[50]

The court applied the test from *Haida Nation* to determine whether a duty to consult the HFN had been triggered. It held that the facts satisfied the first two elements of the three-part test.[51] First, with respect to knowledge held by the Crown, the respondents confirmed it was aware of the Aboriginal rights advanced by HFN, both in treaty negotiations and in litigation.[52] Second, both parties also accepted that the contemplated Crown conduct at issue was the ratification of the Canada-China FIPA.[53] However, the parties' arguments differed with respect to the third element of the test. The court found in favour of the respondents, holding that the HFN failed to demonstrate the required causal link between the Canada-China FIPA and the potential adverse impacts it had identified.[54] The court referred to the adverse impacts that the HFN identified as "speculative, remote and non-appreciable,"[55] which, as established in *Rio Tinto*, was insufficient to trigger the duty to consult. [56]

The court placed a heavy evidentiary burden on the HFN. To convince the court of its position, it appears the HFN would have had to produce evidence of a series of detailed future expectations. Arguably, this is an evidentiary problem related to the nature of FTAs and FIPAs, rather than a failure on the part of the HFN to produce sufficient evidence. The HFN relied on the expert testimony of Gus Van Harten, a law

least 15 years, after which either party may terminate the agreement, but investments made prior to termination will continue to be effective for an additional 15 years.

[49] *Hupacasath* 2014*, supra* note 10 at para 3.

[50] *Ibid* at para 137.

[51] *Ibid* at paras 49 – 59.

[52] *Ibid* at para 54.

[53] *Ibid* at para 55.

[54] *Ibid* at paras 59, 79, 144.

[55] It is understandable that the Federal Court of Appeal in *Hupacasath* 2015 had difficulty finding a causal connection between the Canada-China FIPA and the adverse impacts contemplated by the HFN. In order to reach the conclusion that the FIPA had potential to cause adverse impacts to the HFN, the Court noted that it would have to make five leaps in reasoning. First, that Chinese investment in the HFN territory may occur in the future; second, that a measure may one day be adopted in relation to that investment; third, that a claim may be brought against Canada by the hypothetical investor in relation to the measure taken; fourth, that an award will be made against Canada; and fifth, that Canada's ability to protect and accommodate HFN's interest will be diminished, either as a result of that award or because Canada would be chilled by the prospect of such an award. Not only was the Court required to follow a lengthy chain of reasoning, this chain was made up of "assumptions, conjectures, or guesses."

[56] *Rio Tinto, supra* note 29 at para 46.

professor at Osgoode Hall Law School. In his case commentary, Van Harten noted that it is nearly impossible to predict the future impact of a FIPA that is not yet in force.[57] Information about behind-the-scenes discussions or settlements under the FIPA, which may help illuminate the intentions of the drafters, may be impossible to uncover even after the FIPA has been in force for some time.[58] In the absence of direct evidence, Van Harten provided the Court with examples of disputes that have led to investor lawsuits under other investment treaties.[59] However, the Court disregarded Van Harten's testimony on the basis that he was not an impartial witness.[60] In his case commentary, Van Harten critiques the court's decision to dismiss his testimony and suggests that it unduly relied on the testimony of the Crown's expert witness, Christopher Thomas.[61] Van Harten argued that Thomas used a few international arbitral cases that supported his view in order to understate Canada's potential liability under the Canada-China FIPAs.[62]

Despite the evidentiary difficulties with establishing the HFN's case, we should question whether the court adequately applied the interpretative principles of upholding the duty of the Crown and the goal of reconciliation to its analysis. Chief Justice Crampton only briefly referenced the goal of reconciliation in the context of explaining the root of the duty to consult.[63] This was a minor improvement from the Federal Court of Appeal's complete failure to mention reconciliation. This inadequacy is particularly apparent when considering the court's analysis of the inconsistencies and uncertainties in the law and the evidence before it.

In its submissions, the HFN raised at least three issues related to inconsistencies in the law of investor–State relations and uncertainties about the impacts of FTAs and FIPAs. The first was that there is significant uncertainty with respect to how an investor–State arbitral panel would interpret the Minimum Standard of Treatment clause, Most Favoured Nation clause, and expropriation clause of the Canada-China FIPA if a dispute arose between the two parties.[64] Both the HFN and federal government agreed that these are the clauses most likely to be relied on by Chinese investors who wish to bring a claim against Canada.[65] The court agreed that there is significant uncertainty regarding how these clauses will be interpreted but dismissed arguments by the HFN that they could have adverse impacts on the First Nation's rights

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[57] Van Harten, *supra* note 41 at 145.
[58] *Ibid.*
[59] *Ibid* at 146 – 149.
[60] *Hupacasath* 2014*, supra* note 10 at paras 38, 42.
[61] Van Harten*, supra* note 41 at 151.
[62] *Ibid* at 152.
[63] *Hupacasath* 2014*, supra* note 10 at paras 33, 43, 46.
[64] *Ibid* at paras 84, 86.
[65] *Ibid* at para 88.

on the grounds that they were speculative and not grounded in evidence.[66] Second, the HFN argued there is little jurisprudence on the distinction between possible and speculative adverse impacts in the context of the duty to consult, and the court agreed with this position. [67] Third, the HFN submitted that the Crown's argument that it is not obliged to consult with First Nation's prior to adopting international obligations was inconsistent with evidence of First Nations treaties that provide for this right.[68] The court agreed and cited various First Nations treaties that do provide a right to consultation in such circumstances.[69]

The Supreme Court has instructed that, when analyzing whether there is a duty to consult, courts must take a generous and purposive approach to the evidence.[70] This is due to the Court's recognition that "actions affecting unproven Aboriginal title or rights or treaty rights can have irreversible effects that are not in keeping with the honour of the Crown."[71] It is unclear whether the evidence in this case supports a finding in the HFN's favour. Nevertheless, given the uncertainties and inconsistencies described above, there is some concern that, in their decisions, neither the Federal Court nor Federal Court of Appeal imported the principles of upholding the honour of the Crown, the goal of reconciliation, or a broad and purposive approach to their analysis.

Finally, it is noteworthy that at both the trial and appellate levels, costs were awarded against the HFN. Tucker remarked that the cost awards were punishing and seemed misplaced given the government's far greater capacity to bear the cost of litigation.[72] The HFN's claims were neither frivolous nor vexatious, and they dealt with novel legal issues of public importance.[73] Yet, the HFN had to engage in substantial fundraising activities to finance the costs awards and the legal expenses incurred during the appeal.[74] This outcome could clearly discourage other First Nations from bringing future claims with respect to FTAs and FIPAs.

III. OTHER SOURCES IN LAW OF THE DUTY TO CONSULT

The ruling in *Hupacasath* suggests that other First Nations seeking inclusion in negotiations of FTAs and FIPAs will have trouble finding a duty to consult in the common law. It is therefore worth exploring other available options. These might

[66] *Ibid* at paras 105, 119, 120.
[67] *Ibid* at para 80.
[68] *Ibid* at para 69.
[69] *Ibid.*
[70] *Rio Tinto, supra* note 29 at paras 43, 46, 89.
[71] Newman, *supra* note 26 at 30.
[72] Kathryn Tucker, "Reconciling Aboriginal Rights with International Trade Agreements: *Hupacasath First Nation v Canada*" (2014) 9:2 JSDLP at 121.
[73] *Ibid.*
[74] *Ibid*; See also Shayne Morrow, "Appeal Court Shoots Down Hupacasath FIPA Challenge", *Ha-Shilth-Sa* (16 January 2015), online: <www.hashilthsa.com/news/2015-01-16/appeal-court-shoots-down-hupacasath-fipa-challenge>.

include the following: (1) negotiating for new terms or relying existing terms in First Nations agreements that require the Crown to consult with First Nations communities prior to adopting international obligations; (2) pressuring the federal government to negotiate FTAs and FIPAs that include exemptions for Aboriginal rights; and (3) reminding the various levels of government of their obligations under international law to consult with Aboriginal groups that may be affected by FTAs and FIPAs entered into by Canada.

First Nations Treaties

As previously stated, it may be possible for some First Nations that have negotiated agreements with the Canadian government to assert a duty to consult by relying on clauses within those agreements. This section analyzes and compares the contents of two First Nations agreements, the Tsawwassen Final Agreement[75] and the Tilcho Treaty.[76] Both agreements require that the Government of Canada engage in some form of consultation with First Nations prior to consenting to be bound by an international treaty.[77] They differ slightly with respect to the circumstances when the consultation is required and the form of consultation.

The Tsawwassen Final Agreement requires that the consultation occur when an international treaty gives rise to a legal obligation that "may adversely affect a right of Tsawwassen First Nation under this Agreement."[78] By contrast, the Tlicho Treaty states that consultation is required prior to consenting to be bound by "an international treaty that may affect" a Tlicho right flowing from the Agreement.[79] Although the distinction may appear insignificant, the Tlicho Treaty arguably offers more opportunities for consultation as it applies to *all* situations where Tlicho rights are engaged—and not only in those situations where there is concern that the contemplated government action will adversely impact their rights.[80] This difference in evidentiary requirements is especially important given the onerous burden of establishing a causal connection between a FTA or FIPA and an Aboriginal right, as previously discussed with regard to the HFN claim.

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[75] Tsawwassen First Nation Final Agreement, 6 December 2007, online: <www.tsawwassenfirstnation.com/pdfs/TFNAbout/Treaty/1_Tsawwassen_First_Nation_Final_Agreement.PDF> [Tsawwassen].

[76] *Land Claims and Self-Government Agreement among the Tlicho and the Government of The Northwest Territories and the Government of Canada,* 25 August 2003, online: <www.aadnc-aandc.gc.ca/eng/1292948193972/1292948598544> [Tlicho Treaty]. See also *Hupacasath* 2014, *supra* note 10 at para 69.

[77] Tsawwassen, *supra* note 75, s 30; Tlicho Treaty, *supra* note 74, s 7.13.2.

[78] Tsawwassen, *supra* note 75, s 30.

[79] Tlicho Treaty, *supra* note 76, s 7.13.2.

[80] Tlicho Treaty, *supra* note 76.

With respect to the form of consultation required, the Tlicho Treaty states that the "Government of Canada shall provide an opportunity for the Tlicho Government to make its views known with respect to the international treaty."[81] The language used to describe the form of consultation owed to the Tlicho is vague and could give rise to disputes between the two parties vis-à-vis the sufficiency of the form of consultation provided for. The equivalent provision of the Tsawwassen Final Agreement contains more robust language. It states that "Canada will Consult with Tsawwassen First Nation in respect of the International Treaty, either separately or through a forum that Canada determines is appropriate."[82] "Consult" is defined in Chapter One of the Agreement and contains five specific procedural requirements.[83] Thus, the Tsawwassen First Nation might argue that Canada breached its duty to consult in circumstances where a duty was owed but the Crown failed to meet any one of the procedural requirements. The Tlicho Treaty contains a similar definition of "consult" in Chapter One of the agreement; however, the term is not used when detailing the government's responsibilities to the First Nation with regard to international treaties. The choice not to use the word "consult" may indicate that the treaty drafters did not intend to provide all of the procedural requirements associated with consultation.[84]

The Tsawwassen Final Agreement and Tlicho Treaty also provide opportunities for consultation once an international agreement is in force. Both agreements state that if Canada is taken before an international tribunal concerning a First Nation law or exercise of power that has affected its performance of an international obligation, the federal government must consult with the affected First Nation government on the position Canada will take before the tribunal.[85] In situations where the federal government and First Nation government disagree that the First Nation law or exercise of power affects Canada's ability to perform an international obligation, the Tsawwassen Final Agreement and Tlicho Treaty provide dispute resolution mechanisms.[86] The outcome of the arbitration is binding on the parties, and will either: (1) require that Canada refrain from taking any further action aimed at changing the First Nation law or exercise of power if the outcome is in favour of the First Nation; or (2) if it finds in favour of Canada, it will require that the First Nation remedy the law or

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[81] *Ibid.*

[82] Tsawwassen, *supra* note 75, s 30.

[83] Procedural requirements are embedded within the definition, which reads as follows: "Consult" means provision to a party of notice of a matter to be decided; sufficient information in respect of the matter to permit the party to prepare its views on the matter; a reasonable period of time to permit the party to prepare its views on the matter; an opportunity for the party to present its views on the matter; and a full and fair consideration of any views on the matter so presented by the party.

[84] Tlicho Treaty, *supra* note 76.

[85] *Ibid*, s 7.13.5; Tsawwassen, *supra* note 75, s 33.

[86] Tsawwassen, *supra* note 75, s 32; Tlicho Treaty, *supra* note 76, s 7.13.4.

exercise of power to enable Canada to perform its international obligation.[87] That being said, if an *international* arbitration finds against Canada on the basis of a First Nation law or other exercise of power, it must, at the request of Canada, remedy the law or exercise of power to a degree that enables Canada to comply with the disputed international obligation.[88] It should also be noted that, contrary to the position taken by the Special Rapporteur for Indigenous Rights, neither of the First Nation agreements contain an express invitation for the First Nation to participate in international negotiations of treaties with foreign governments.[89]

As demonstrated above, there are a number of interpretative challenges with respect to the international obligation clauses in the Tsawwassen Final Agreement and Tlicho Treaty. Perhaps most importantly, it remains unclear whether a court would interpret the international obligation clauses in those agreements as providing for a more onerous duty to consult than that provided for at common law. If either First Nation group were to bring a claim against the federal government for failure to consult, they may find themselves having to overcome similar evidentiary hurdles to those experienced by the HFN. The First Nations can only rely on the international obligation clauses when an international agreement may adversely impact their Aboriginal rights. As seen in HFN *Hupacasath*, it is practically impossible to prove that a FIPA will impact a First Nation at the time of negotiation.

There is minimal jurisprudence on the interpretation of modern treaties, and no Canadian court has ever interpreted the international obligation clauses of a First Nation treaty.[90] The recent judicial trend indicates that modern treaties will not be interpreted as liberally as historical treaties and that courts will more often defer to the words in the treaty as representative of the intentions of the parties.[91] In *Beckman*, the Supreme Court affirmed that modern treaties will still be interpreted so as to uphold the honour of the Crown, but it also noted that there are significant differences between historical and modern treaties.[92] The Supreme Court described historical treaties as ambiguous and "typically expressed in lofty terms of high generality."[93] In comparison, modern treaties were intended to place Aboriginal and non-Aboriginal relations in the mainstream legal system, thereby creating greater predictability.[94] Therefore, the degree of flexibility available to courts to defer to general principles of Aboriginal law when

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[87] Tsawwassen, *supra* note 75, s 32.
[88] *Ibid* s 34; Tlicho Treaty, *supra* note 76, s 7.13.6.
[89] UN Special Rapporteur, *supra* note 4.
[90] Julie Jai "The Interpretation of Modern Treaties and the Honour of the Crown: Why Modern Treaties Deserve Judicial Deference" (2009) 26:1 NJCL 25 – 65 at 52.
[91] *Ibid* at 58.
[92] 2010 SCC 53 at para 12.
[93] *Ibid*.
[94] *Ibid*.

interpreting historical treaties, or when there is no treaty in place, may be less available in cases involving modern treaties.

Exemptions in FTAs and FIPAs for Aboriginal Rights

The inclusion of exemptions or reservations clauses in in FTAs and FIPAs may provide another means for protecting Aboriginal interests.[95] There are two forms of exemptions found in FTAs and FIPAs: general and specific. General exemptions are used to exempt broad subject matter areas from the entire contents of the agreement,[96] whereas specific exemptions are used to exempt specific matters from the application of some or all of an FTA's or FIPA's obligations.[97] Examples of both general and specific exemptions can be found in the Canada-China FIPA.[98] For instance, article 33(2) provides a general exemption for environmental measures, and article 8 provides for specific exemptions in relation to, among other things, Aboriginal rights and privileges.[99] State governments negotiate for exemptions in FIPAs and FTAs where they wish to maintain policy flexibility for existing or future measures that do not conform to the treaty obligations. [100]

In *Hupacasath,* the government argued that the "Aboriginal Reservation" in the Canada-China FIPA allowed all levels of government to provide rights and preferences to Aboriginal people that may otherwise be inconsistent with the agreement's obligations.[101] The HFN disputed this argument on the basis that the "Aboriginal Reservation" does not apply to key provisions in the Canada-China FIPA, including the Minimum Standard of Treatment provision in Article 4, the expropriation provisions in Article 10, and the performance requirements provisions in Article 9.[102] As previously mentioned, these are the provisions the HFN argued a Chinese investor would be most likely to rely on if it brought a dispute against the Canadian government.[103]

Given the greater policy flexibility available through general exemptions, Aboriginal groups might argue that when negotiating new FIPAs and FTAs the government ought to negotiate for general exemptions for Aboriginal rights and interests, rather than specific exemptions; however, the government has exhibited some unwillingness to do so. In *Hupacasath*, Vernon MacKay, Deputy Director of the

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[95] UN Special Rapporteur, *supra* note 4 at para 68.
[96] *Hupacasath* 2014*, supra* note 10 at para 121.
[97] *Ibid*.
[98] Canada-China FIPA, *supra* note 48, art 8.
[99]*Ibid*; see *Hupacasath* 2014, *supra* note 10 at para 122.
[100] Global Affairs Canada, "Information Session on Foreign Investment Promotion and Protections Agreements (FIPA)" (22 November 2015), online: <www.international.gc.ca/trade-agreements-accords-commerciaux/agracc/fipa-apie/info.aspx?lang=eng>.
[101] *Hupacasath* 2014, *supra* note 10 at para 123.
[102] *Ibid* at para 124.
[103] *Ibid* at para 88.

Investment and Trade Policy Division, Department of Foreign Trade and International Affairs at the International Trade Committee, told the court that extending specific reservations with respect to MST and expropriation would defeat the purpose of the FIPA, which is to create reciprocal legal stability for foreign investors in the host State.[104]

An additional challenge with exemptions in FIPAs and FTAs is that even general exemptions must be carefully worded to ensure that the subject matter concerned fully escapes treaty obligations. In *Hupacasath*, the HFN argued that the wording of the general exemption prescribed by Article 33(2) narrows the scope of environmental measures exempted from treaty obligations to those which are *necessary* to achieve the stated objectives, and that the burden to demonstrate such necessity would fall upon Canada.[105] The HFN further argued that the meaning of "necessity" could be disputed since it necessity falls along a spectrum "ranging from indispensable or of absolute necessity, to a contribution to achieving the stated objectives."[106]

Lastly, it is difficult to predict how arbitrators will interpret and apply the exemption clauses in FIPAs and FTAs. The Federal Court acknowledged that a lack of jurisprudence on the issues that the HFN raised made it difficult to understand the scope of the general and specific exemptions contained within the Canada-China FIPA.[107] Unfortunately, this is an issue that may only be resolved once international arbitrator panels are forced to grapple with the interpretation of similar exemption clauses.

International Perspective on the Duty to Consult

Although the duty to consult, as it currently exists in Canadian common law, may not provide for consultations during the negotiation of FTAs and FIPAs, it is possible that international law and international norms may influence the doctrine in this direction.

The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP)[108] is considered a major statement on the rights of Indigenous peoples. It contains numerous articles on consultation that cumulatively and individually call for the need to obtain free, informed, and prior consent.[109] The Special Rapporteur of the Human Rights Council on the rights of Indigenous people referenced obligations under the UNDRIP in her report on the impact of international investment and free trade.[110] She wrote that when States apply the principle of free, informed, and prior consent to

[104] *Ibid* at para 36.
[105] *Ibid* at para 126.
[106] *Ibid*.
[107] *Ibid* at para 127.
[108] United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295 (Annex), UN GAOR, 61st Sess, Supp No 49, Vol III, UN Doc A/61/49 (2008) 15 [*UNDRIP*].
[109] Newman, *supra* note 26 at 147.
[110] UN Special Rapporteur, *supra* note 4.

FIPAs and FTAs, it creates opportunities to integrate the needs and perspectives of Indigenous peoples into international agreements, thereby reducing the potential for future abuses of their rights.[111] She expressed similar concerns to the HFN with respect to the impact that fair and equal treatment and stabilization clauses may have on constraining a government's policy and legislative capacity.[112] The Special Rapporteur also cited the "chilling effect" that arbitration awards may have on States,[113] explaining that the potential for high-cost awards may diminish the "often already-low political will of States to take actions to fully implement the rights of Indigenous peoples."[114]

Sceptics might argue that developments at the international level have no bearing on the duty to consult in Canadian law. In some ways, they are correct. The statement by the Special Rapporteur to the Human Rights Council is not legally binding, and the adoption of a declaration by the United Nations General Assembly does not give the declaration any legal force.[115] Canada has endorsed the UNDRIP, but its endorsement was accompanied by a statement from Indigenous and Northern Affairs Canada,[116] asserting that UNDRIP is an aspirational document that is not legally binding and neither reflects customary international law nor changes Canadian laws.[117] In *Hupacasath,* the Federal Court quoted the aforementioned public statement of the Special Rapporteur to justify its decision not to analyze whether the contents of the UNDRIP affected the HFN's right to a duty to consult.[118]

While all this may be true, Canada has expressed a commitment to respecting the values of the Declaration, and this may indirectly influence the development of the duty to consult. In *Elsipogtog First Nation v Canada (Attorney General)*, the Federal Court addressed the UNDRIP, stating, "[i]ndeed, while this instrument does not create substantive rights, the Court nonetheless favours an interpretation that will embody its values." [119] Additionally, the Special Rapporteur, through country visits and reports, will hold Canada accountable for failures to apply the duty to consult in keeping with the UNDRIP.[120] The former Special Rapporteur, James Anaya, in his report from an official visit to Canada in October 2013, suggested that Canada's duty to consult fell

[111] *Ibid* at para 34.
[112] *Ibid* at paras 47–48.
[113] *Ibid* at para 50.
[114] *Ibid* at para 48.
[115] Newman, *supra* note 26 at 149.
[116] Formerly the department of Aboriginal Affairs and Northern Development Canada.
[117] Newman, *supra* note 26 at 150.
[118] *Hupacasath* 2014*, supra* note 10 at para 51.
[119] 2013 FC 1117 at para 121.
[120] Newman, *supra* note 26 at 152–153.

short of international standards because it did not provide for obtaining free, informed, and prior consent to resource projects on traditional territories.[121]

Additionally, we might expect the principle of consultation to become customary international law. This occurs where there is widespread state practice of the principle and *opinio juris* or a belief on the part of states that their practice is mandatory as a matter of law.[122] There is a mounting argument from international legal scholars that consultation with Indigenous peoples is already a norm of customary international law.[123] While worth noting, this analysis is ultimately beyond the scope of this paper.

CONCLUDING REMARKS: RECOMMENDATIONS FOR FUTURE CONSULTATIONS

The uncertainty regarding Canada's responsibility to Indigenous peoples when negotiating FTAs and FIPAs has raised a number of concerns. This paper sought to identify a legal duty to consult Indigenous groups prior to the ratification of international trade and investment agreements. Ultimately, it concludes that common law does not currently support a duty to consult Indigenous peoples prior to the signing of FTAs and FIPAs. *Hupacasath* revealed some of the difficulties with applying the doctrine of the duty to consult within the context of FTAs and FIPAs. We might view the decision in *Hupacasath* in one of two ways:

(1) In light of the uncertainties and inconsistencies in the evidence, the judges failed to properly apply the interpretive principles that require a broad and generous approach to the evidence, as well as the principles of upholding the honour of the Crown and the goal of reconciliation; or,

(2) The arguments put forward by the HFN were speculative and, therefore, did not establish the potentially adverse impact of the Canada-China FIPA.

Yet, the latter conclusion is difficult to reconcile with the fact that some First Nation treaties do provide this right. It should lead us to question whether it is acceptable to permit a hierarchy of rights between those who have signed treaties with the government and those who have not (or are in the process of negotiating a treaty).

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[121] James Anaya, "Statement upon Conclusion of Visit to Canada" (15 October 2013), James Anaya (blog), online: <www.unsr.jamesanaya.org/index.php>.

[122] Newman, *supra* note 26 at 144, 149.

[123] See e.g. Kenneth Deer, "Free, Prior, and Informed Consent" (Joint Statement delivered at the 10th Permanent Forum on Indigenous Issues, New York, 16-27 May 2011), online: <www.ubcic.bc.ca/News_Releases/UBCICNews05191101.html#axzz4a5h8zVDJ>; and Tara Ward, "The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law" (2011) 10:2 Northwestern Journal of International Human Rights 54.

Even where there is a right to be consulted during FTA and FIPA negotiations, there are practical obstacles to accommodating Aboriginal groups. More research should be pursued to assess the viability of producing Aboriginal political representation that can engage in this process, either through direct consultation with the federal government or as delegates in international negotiations. We might also consider when consultations should take place within the various stages of reaching an international agreement. It has been suggested that public consultations on the Trans-Pacific Partnership, which the government is currently engaged in, are meaningless because the agreement has already been signed, and it is unlikely that the government has the authority to amend the agreement before ratification.[124] The international law on consultation with Indigenous people is evolving quickly and international norms may soon push the Canadian government to expand the legal concept of consultation so as to involve Aboriginal peoples in the international negotiation process.

[124] McGregor, *supra* note 17.