INTERNATIONAL TRADE AND INVESTMENT LAW & INDIGENOUS PEOPLES’ RIGHTS IN MINING PROJECTS

WHAT ARE THE INTERACTIONS?

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Presentation plan

- Roots of the project
- Objective of the project
- Methodology
- Preliminary results
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Why this project?

- International corporation = international investment
  - BIT/MIT protect corporations’ interests

- Mining projects taking place on Indigenous peoples’ lands
  - trigger IP’ rights

INTERNATIONAL INVESTMENT and TRADE LAW

INDIGENOUS PEOPLES’ RIGHTS

What are the objectives of the project?

1- Interactions between ITIL and IPR in mining projects

   --> survey of what currently exists:

   a. What are the references to IP rights in International Trade and Investment Instruments?

   b. What is the state of the literature on that topic?

2- Formulation of hypothesis regarding the impacts of Trade and Investment Law on IP rights in mining projects
What methodology are we using?

- 1- Systematic literature review

  a. Positive law: key words in English, French, (Spanish, Russian, Portuguese)

  b. Secondary and grey literature: key words in English and French
Some preliminary results (positive law, Eng/Fr, 1-a)

Numbers of references (treaties, arbitral awards, procedural documents, articles...)

- 3 references to « Autochtones » (exception provisions)
- 174 – Aboriginal(s)
- 313 – « Indigenous » (various)
- 76 - « Sami(s) » / « Saami(s) »
- 22 - « Maori »
- 12 - « Inuit »
- 1 - « Eskimos »
- 116 - « M(é)ti(s) »
- 135 - « Tribal(s) »
- 386 - « Tribu(s) »

No reference/irrelevant references with: « Indig(è)ne(s) » / « Aborig(è)ne(s) » / « Indien(s) » / « Indian(s) » / « Premi(è)re(s) Nation(s) » / « First People(s) / « First Nation(s) »
Some preliminary reflections \textit{(literature, 1-b)}

- Investment Law only, mainly under NAFTA, based on literature review made in July 2018

- 2 scenarios
  - Investor = Indigenous
  - Investor = non-Indigenous

- 2 times
  - BIT / MIT
  - Arbitration
ITIL & IPR from a legal perspective – 2 potential scenarios

Scenario 1

Scenario 2
Scenario 1 – The investor is Indigenous

■ Does he/she enjoy specific treatment?
  – *No?* Grand River v. United States of America Enterprises Six Nations, Ltd., Et Al. v. United States of America, ICSID Case No ARB/10/5, Award, 12 January 2011.
Scenario 2 – Indigenous Peoples are affected by mining corporations’ activities

Time 1:
- Consultation of IP during negotiation of BIT/MIT?

- Could they enjoy specific rights under international investment law?
  - Applicable law
  - Exception provision
Example of the USMC Agreement – General Exception

I am taking a measure to protect Indigenous peoples rights/interests

No! You do not enjoy protection from BIT when it comes to such measure, that aim to protect Indigenous peoples’ rights

That « measure » is an « expropriation » according to the BIT signed between you and my country. You owned me compensation »
Time 2:

- How can the arbitrators take into account IP rights?
  - Applicable law (international customary law)
  - Principle of systemic integration
  - Investor’s legitimate expectation

- How can they participate in the arbitral procedure?
  - *Glamis Gold, Ltd. v. United States, Award, 8 June 2009.*
Next steps

Objective 1 – Literature Review

- Analysing of positive law
- Updating literature review and integrating International Trade Law component
THANK YOU!

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