TITLE:	International Trade Agreements and Indigenous Rights
SUBJECT:	Duty to Consult
MOVED BY:	Chief Nelson Genaille, Sapotaweyak Cree Nation, MB
SECONDED BY:	Chief Isadore Day, Serpent River First Nation, ON
DECISION:	Carried by Consensus

WHEREAS:

A. By way of Resolution 4-1989, the Chiefs-in-Assembly put forward a number of principles regarding Crown Consultation. These continue to be valid, and should form the basis of any federal policy or approach to dealing with First Nations rights and lands. The Chiefs-in-Assembly adopted Resolution 22/2008 which set out First Nation's expectations regarding the Crown's legal duty to consult with First Nations and accommodate.

B. Through Resolution 37-2007 the Chiefs-in-Assembly ratified the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) and called on Canada to immediately endorse the UNDRIP and to work in partnership with Indigenous Peoples in Canada. Both the Government of Canada and the People's Republic of China subsequently endorsed the UNDRIP.

C. On October 22, 2012, at the Third Committee to the General Assembly of the United Nations, the government of China stated that it, "will continue to work with others and play a proactive and constructive part in safeguarding the rights and interests of indigenous peoples, promoting their full participation in economic and social development, and pushing for the comprehensive implementation of the Declaration."

D. The UNDRIP states at Article 19: "States shall consult and cooperate in good faith with the indigenous peoples concerned…in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them"; and also states at Article 32: "States shall consult and cooperate in good faith with the indigenous peoples concerned…in order to

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obtain their free, prior and informed consent prior to the approval of any project affecting their land or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."

E. On September 9, 2012 Prime Minister Harper and Chinese President Hu Jintao witnessed the signing of the Canada-China Foreign Investment Promotion and Protection Agreement (FIPPA) after a private one-on-one meeting on the margins of the annual Asia Pacific Economic Co-operation Summit.

F. On September 26, 2012 the FIPPA was tabled in the House of Commons. It was able to come into effect by October 31, 2012, but has not yet been ratified by Canada.

G. First Nations across Canada have expressed their concerns and opposition to the FIPPA (as documented through letters) and these concerns include:
   a. Recognition of Aboriginal title, Treaty rights and governance of reserve lands could be considered expropriations from foreign investors;
   b. Impact on First Nation Aboriginal and Treaty rights including impact on outstanding Treaty claims and interests, existing Treaty Land Entitlement Agreements and unresolved related claims and interests;
   c. Environmental issues; and
   d. Removal of resolution of First Nation disputes from Canadian courts to an international body.

H. A spokesperson for International Trade Minister Ed Fast said the Government of Canada always consults on trade agreements, stating: "The (investment agreement) contains the exceptions found in our other treaties that preserve policy flexibility for certain sensitive sectors and activities, including rights or preferences provided to Aboriginal peoples. The (investment agreement)…provides a policy carve-out for government measures concerning 'rights or preferences provided to Aboriginal peoples.'"

I. Canada is currently negotiating a Canada Europe Free Trade Agreement (CETA), with similar provisions to the FIPPA.

J. Contrary to the UNDRIP and Canada's stated position, there was no consultation with First Nations in the drafting of the FIPPA, and the FIPPA contains no express provision that protects Aboriginal and Treaty Rights.

THEREFORE BE IT RESOLVED that the Chiefs-in-Assembly:

1. Direct the Assembly of First Nations National Chief to engage with the federal government to ensure that Canada fulfills its duty to consult and accommodate with First Nations on the Canada-China Foreign Investment Promotion and Protection Agreement (FIPPA) and other trade agreements, such as the Canada Europe Free Trade Agreement (CETA), consistent with the standard of Free, Prior and Informed Consent as identified in Article 19 of UNDRIP.

2. Mandate the Assembly of First Nations to expeditiously develop a legal analysis of FIPPA and its impact on First Nations including:

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a. Impact on First Nation Aboriginal and Treaty rights including:

   i. existing Treaties, outstanding Treaty claims and interests, modern agreements and traditional territories and

   ii. existing Treaty Land Entitlement Agreements and unresolved related claims and interests.

   iii. current and future land claim agreements, including specific claims, comprehensive claims and other land related claims;

b. Impact on Crown initiatives to implement the duty to consult and accommodate, including the possibility the FIPPA may induce a 'chill' to recognition and implementation of First Nation rights;

c. Impact on Natural Resources Transfer Agreements and impact benefit agreements;

d. Impact on treaties and arrangements, and other land or resource related agreements;

e. Inconsistencies with recognition of indigenous rights at international trade law and under international indigenous rights law; and

f. National and international remedies, including a potential Reference Case to the Supreme Court of Canada.

3. Direct the Assembly of First Nations National Chief to work with AFN Regional Chiefs to determine what province(s) or territory / territories would be willing to put forward a Reference Case to the Courts including, if needed, the Supreme Court of Canada, and also determine what First Nations would be willing to seek to be an intervenor.

4. Direct the Assembly of First Nations National Chief to engage with the official opposition and other federal parties to ensure their opposition to the FIPPA, and their positions on other trade agreements like the CETA, includes a commitment to recognizing and affirming Aboriginal and Treaty rights and to the standard of free, prior and informed consent.

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SHAWN A-IN-CHUT ATLEO, NATIONAL CHIEF