Journal für Entwicklungspolitik (JEP)

Austrian Journal of Development Studies

Herausgeber:
Mattersburger Kreis für Entwicklungspolitik an den Österreichischen Universitäten
Projekt Institut für Internationale Entwicklung / Zentrum für überfakultäre Forschung der Universität Wien

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Gefördert aus öffentlichen Mitteln Österreichische Entwicklungszusammenarbeit

Journal für Entwicklungspolitik (JEP)
ISSN 0258-2384, ISBN 3-86099-630-4, Erscheinungsweise: vierteljährlich, Heft 2/2002; XVIII. Jg.
Preis Einzelheft: € 9,90/ sFr 18,30, Preis Jahresabonnement: € 39/ sFr 68,-
Abonnementsbezug für Deutschland, Schweiz u. a.:
Brandes & Apsel Verlag GmbH, Scheidswaldstr. 33, D-60385 Frankfurt a. M.
Abonnementsbezug nur für Österreich:
Südwind-Buchwelt Buchhandelsges. m. b. H., Baumgasse 79, A–1034 Wien
Redaktionsadresse:
Journal für Entwicklungspolitik, Währingerstr. 17/104, A-1090 Wien
E-mail: int-entwicklung@univie.ac.at

1. Auflage 2002

Offenlegung nach § 25 Mediengesetz: Medieninhaber: Mattersburger Kreis für Entwicklungspolitik an den Österreichischen Universitäten, Währingerstr. 17/104, A-1090 Wien. Grundlegende Richtung des JEP: Wissenschaftliche Analysen und Diskussionen von entwicklungspolitischen Fragestellungen und Berichte über die entwicklungspolitische Praxis. Verantwortlich für Inhalt und Korrekturen sind die Autoren bzw. die Redaktion.
Umschlaggestaltung: Volker Plass, Wien
Satz: Ch. Weismayer, A–1080 Wien/A–5026 Salzburg
Druck: Difo-Druck GmbH, Bamberg, Deutschland
Gedruckt auf säurefreiem, alterungsbeständigem und chlorfrei gebleichtem Papier

Die Deutsche Bibliothek – CIP-Einheitsaufnahme:
Ein Titeldatensatz für diese Publikation ist bei der Deutschen Bibliothek erhältlich.

ISSN 0258-2384
ISBN 3-86099-630-4

JOURNAL FÜR ENTWICKLUNGSPOLITIK, XVIII. Jg., Heft 2, 2002
Austrian Journal of Development Studies

Mutationen der Entwicklungspolitik

Schwerpunktredakteure: Gerald Faschingeder und Inge Grau

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Journal für Entwicklungspolitik XVIII/2, 2002, S. 135–152

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No Power to International Free Trade with Indigenous Property

Trade Liberalization Threatens to Drain the Rights and Energy of Indigenous Peoples

1. Introduction

The following article tries to draw attention to the newest assault on the rights of indigenous peoples: international trade agreements. Economic interests have always been a driving force of colonization but now they are being inscribed in international law and made enforceable. What does this mean for indigenous peoples' struggle for the recognition of their inherent rights? Canada is used as an example for a stalling recognition debate on the national level while resource rights are being allocated on the international level. Trends like the commodification of water, long a postulate of the corporate world, are diametrically opposed to indigenous values and threaten the multi-facetted use of their traditional territories.

In order to understand the full extent of the threat to inherent rights enshrined in international trade agreements they are analyzed in more detail. Starting off with key provisions in international trade agreements and their emerging enforcement mechanisms which increase the leverage of multinational firms over national governments, we move on to what we call the new wave. A new generation of trade agreements are emerging, such as the General Agreement on Trade in Services, pretending to regulate a certain sector of the global economy, it is meant to further break down regulative powers on the local and national level. Provisions on investment are making their way into more and more trade agreements, in Chapter 11 of NAFTA they have found a powerful enforcement mechanism. Pricing mechanisms are put in place, reducing land, water and natural resources to commodities when they are the essence of indigenous peoples' lives.

It will take the unified struggle and energy of indigenous peoples around the world to reverse the tide of trade liberalization and stop the constant undermining of their inherent rights and national regulations by international trade agreements and regional developments, like the proposed Free Trade Area of the Americas, that would even lower standards.

2. The First Wave of Colonization

One of the major motivations of colonization of the Americas has been the exploitation of natural resources. The Spanish Conquista was mainly aimed at the discovery of gold and other natural resources and the exploitation of the native workforce. In Peru for example the first explorer Pizzarro (for more detail see Bazan 1998) set up a big enterprise comparable to multinational firms, engaging in short- and long-term investments, speculation and the sale of natural resources. Of course without taking the proprietary interests of the indigenous peoples into account, selling off resources that they had used and owned for thousands of years.

Even in North America, where different nations were mainly looking for new land to settle, companies like the Hudson Bay Company were put in control of specific settlements. For example they were granted the right to open Vancouver Island for "civilization" according to the power of government they had been granted in the 17th Century Royal Charter (Adams Lake and Neskonlith Shuswap 1999: 3). Still the mainland of British Columbia was not open for settlement when the Interior gold-rushes set in. What followed was uncontrolled invasion of indigenous lands. The exploitation of natural resources began before any government regulations were put in place.

Therefore it is wrong to speak of the conflict of interest between indigenous groups and commercial interests as the new frontier, because they constitute one of the oldest frontiers.

What has changed is the structure of the companies that in the time of globalization have gone international, still tightening their grip on national governments. It is mainly due to their pressure that multinational trade agreements are being negotiated to further liberalize trade in goods and services and international investments.

Indigenous peoples are not part of those negotiations that are under way within the World Trade Organization and on the regional level. Presently the governments of the Americas are negotiating the framework for a Free Trade Area of the Americas agreement. Indigenous Peoples have to be very wary of those developments and the potential impacts on their indigenous rights and the access to their lands and resources.

3. The Drive for the Recognition of Inherent Rights

3.1 The Fundamental Issues

Indigenous Peoples have called the Americas their home since time immemorial. It is from their strong historic and present link to their traditional territories that their indigenous rights arise:

> "For Aboriginal People the land is part of their identity as people ... When Europeans came to the Americas they were considered as outsiders, but were permitted to share in the land and its resources ... Whatever rights the Europeans wanted had to be sought from those who were placed upon the land first by the Creator." (Hamilton/Sinclair 1991: 115–116)

For a long time the colonial legal systems disrespected the rights of indigenous peoples in their legal system and claimed exclusive jurisdiction over the land. It took the long unified struggle of indigenous peoples to gain recognition of their inherent rights and parallel jurisdictions.

Indigenous peoples have maintained those rights despite the undermining forces of colonization and assimilation, because they fought for them in any way they could. After long judicial struggles the courts recognized the inherent rights of indigenous peoples to the land and water. The Supreme Court of Canada recognized Aboriginal Title in the 1997 Delgamuukw Decision (Delgamuukw v. British Columbia (1997) 3 S.C.R. 1010) as the collective proprietary interest indigenous peoples hold in their traditional territories. This follows international developments: in 1992 the rights of Aboriginal Peoples to the Australian continent had been recognized as Native Title (Mabo v. Queensland (no. 2) (1992) 107 A.L.R. 1) and many of the new Latin American constitutions enshrine legal pluralism (Diaz-Polanco 2000), meaning the inherent, parallel jurisdiction of indigenous peoples, as a central principle.

Also, in Canada First Nations fought for constitutional recognition of their inherent rights. In the 1980s thousands of Indians traveled from British Columbia to Ottawa and to Europe to have their rights recognized. Today Section 35 of the Canadian Constitution extends constitutional protection to Aboriginal Title and Rights, by stating:

> "(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." (Canadian Constitution. 1982. Section 35)

The United Nations has recognized that indigenous people have the inalienable right to self-determination, including the right to pursue and sustain their culture, as a central part to their traditional and spiritual life.

3.2 Priority Resource Allocation

Yet these rights are not a priority for the Canadian government who maintains its policy calling for the extinguishment of Aboriginal Title and who has pursued a policy of guaranteeing corporate rights to natural resources for decades.

This despite the fact that various court decisions in the United States and Canada have established priority resource allocation to indigenous peoples.

The Winters Case of the United States in 1908 is a landmark case in Indian water rights, it was held that:

> "Indians had command of the lands and the waters – command of all their beneficial use." (Winters v. United States (1908) 207 U.S. 564, at 575–576)

Similarly the Sparrow Decision (Regina v. Sparrow (1990) 70 D.L.R. 385. of the Canadian Supreme Court recognized that Aboriginal Peoples have a priority

right to water to sustain their communities, it ranked the right of indigenous peoples to water and to fish over commercial and industrial use. Indigenous peoples therefore have a right to priority resource allocation.

The court also held that, reasonable regulations were necessary to ensure the proper management and conservation of the resource and that:

> "the conservation and management of our resources is consistent with Aboriginal beliefs and practices and indeed with the enhancement of Aboriginal rights". (Regina v. Sparrow (1990) 70 D.L.R. 385, at 413)

Indeed Aboriginal Title in its broader jurisdictional sense gives indigenous peoples the right to jointly manage their traditional territories and in the specific case the water resource.

4. Traditional Knowledge and Current Use

Therefore indigenous peoples call for the co-management of their traditional territories, a right that has been made clear in the 1997 Delgamuukw decision:

> "For the first time, the right of Aboriginal peoples to participate as equal partners in resource development on Aboriginal lands has been acknowledged. But for this new partnership to work, the federal and provincial governments will have to shed out-dated attitudes and accept the new legal landscape." (McNeil 1998: 29)

Also indigenous elders and community members still hold part of the traditional ecological knowledge that their ancestors amassed over centuries of land-use. This is the most detailed and long-term data (see Adams Lake and Neskonlith Shuswap 1999) that can be collected and made instrumental for the sustainable use of their traditional territories and resources by indigenous peoples themselves.

Present Canadian practices in the exploitation of natural resources and indigenous lands and water violate indigenous and human rights. Many community members still live off their traditional territories and have to rely upon fishing and hunting to ensure a balanced diet for their families. Logging and other developments destroy the habitat of the animals and the whole watershed upon which they rely for their subsistence (Grand Council of the Crees 2000: 36).

The Canadian Supreme Court recognized and reaffirmed the rights of Aboriginal peoples to earn "moderate livelihoods" by using their traditional territories and waters in its 1999 Marshall decision (FR. v. Marshall [1999] 3 S.C.R. 456, Supreme Court of Canada, Sept. 15th, 1999) and has called upon the government to negotiate the co-management of fisheries with the Mi'kmaq peoples.

5. Commodification Draining Away our Rights

5.1 Water – The Essence of Life

Instead of respecting and implementing those resource rights, the Canadian government is signing international trade and service agreements that are often incompatible with Aboriginal Title and Rights.

Let us use water as an example for the possible impacts of international trade. Most indigenous peoples in Canada and the Americas have never given up their inherent rights to water. Indian organizations in Canada have maintained that the treaties were not understood by the Indians as entailing a surrender of the water and that the Indians have paramount water rights (Taylor 1975). Like other indigenous rights to hunt and fish, the right to water is an integral part of Aboriginal Title.

Indigenous peoples do not traditionally view water as a resource rather it is an important element in their daily lives, their hunting and fishing practices and spiritual and cultural existence:

> "Our wholesome respect for the land and the water has not changed. And many of our people still depend, to a large degree, upon the renewable resource harvest. The spiritual affinity with our environment continues, and we still maintain a deep-rooted appreciation for water's life-giving and cleansing qualities." (Benedict 1985)

The elders have also repeatedly made it clear that only if the ecological balance of the entire watershed is maintained their communities will be able to maintain their multifaceted use of their traditional territories. They are therefore greatly concerned with large scale developments in their traditional territories that impact negatively upon the delicate balance of the ecosystem.

5.2 The Coming Tide

Today, water is being more and more transformed into a commodity, that can be purchased and traded by corporations under national and international trade law. The list of goods subject to the provisions of the North American Free Trade Agreement includes (for the definition of a good, NAFTA relies on the GATT Harmonized Commodity a Description Coding System 22.01.):

> "waters, including natural or artificial waters and aerated waters, ordinary natural water of all kinds".

These corporate rights are increasingly in conflict with the inherent (and inalienable) rights of Indigenous Peoples. Aboriginal Title and Rights and traditional (ecological) knowledge to preserve water can be the key to the conservation of the different watersheds.

Worldwide, the consumption of water is doubling every 20 years (World Resources 1998–99, jointly published by the World Resources Institute, the

United Nations Environmental Program, The United Nations Development Program, and the World Bank. Oxford U Press, Oxford and New York 1998: 188–189), at more than twice the rate of the increase in human population, placing enormous pressures on aquatic ecosystems.

Today, over a billion people lack adequate access to clean drinking water. By the year 2025, as much as two-thirds of the world's population will be living in conditions of water scarcity and demand will outstrip supply by 56%.

From the Far North of the Americas where the traditional lands of the James Bay Cree of Quebec now lie beneath a giant hydro-electric project, over Mexico, where centuries old systems of land tenure and resource protection have been wiped out by industrialization, to the very South of the continent where the Mapuche struggle to protect their traditional territory from the construction of further dams.

Indigenous peoples often bear the greatest impacts of global development and pressures on water. People in the developing world make up 75% of those without enough water and they will make up 95% of those suffering by 2025.

In Bolivia, where indigenous people make up 80% of the population, the spring of 2000 saw a mass uprising in city of Cochabamba to throw out the transnational water companies. These companies had raised the cost of water to one quarter of the average family's monthly salary. Clashes with the police and army resulted in one death, dozens of injuries and hundreds of arrests. Even now the water companies are trying to pressure the Bolivian government to reinstate their contract.

The threat to the environment is just as great. In Canada, wetland loss includes 65 percent of Atlantic coastal marshes, 70 percent of Southern Ontario wetlands, 71 percent of Prairie wetlands, and 80 percent of the Fraser River Delta in British Columbia.

As a result of more than a century of mining, forestry and large-scale industry, toxic chemicals are found even in the most remote parts of the Far North. Less than 3 percent of the Great Lakes' shoreline is suitable for swimming, drinking or even supporting any aquatic life (Abramovitz 1996: 72). This represents a terrible danger to our fishing, hunting and trapping.

5.3 The Threat of large Scale Developments to Indigenous Watersheds

There seams to be an irreconcilable difference between indigenous rights to water and its conservation and business interests who want to exploit water as a resource, regardless of the environmental and social impacts. In Canada there is a 40 year history of this conflict.

The GRAND Canal – the Great Recycling and Northern Development Canal which calls for the building of a dike across James Bay to divert waters flowing north to Hudson's Bay, south through a massive series of dikes, canals, dams, power plants and locks to the Great Lakes and down to the American Sunbelt.

First proposed by Canadian engineer Tom Kierans in the 1959 (Holm 1988: 33), the scheme has found new prospective investors speculating on the market in the American Southwest.

The NAWAPA – the North American Water and Power Alliance – has gone through a similar rebirth. The original plan included building a large number of major dams to trap the Yukon, Peace and Liard Rivers into a giant reservoir that would flood one-tenth of British Columbia to supply the United States market (Holm 1988: 31).

Similarly, the call to export water by supertanker is heating up again. In British Columbia, a number of export companies were lined up for business when the government stopped the export of bulk water in 1991. Under just one of these contracts, sixteen supertankers sailing around the clock would have shipped to California the same amount of water Vancouver uses in one year (Holm 1988: 41).

In 1998 Nova Corp. of Sault St Marie won approval to ship 600 million litres of water a year from Lake Superior. This licenses was revoked due to pressure from the US State Department (Toronto Star May 3, 1998).

In Newfoundland, The McCurdy Group, wants to export 52 billion litres of water a year from pristine Gisborne Lake. Despite new provincial legislation, McCurdy's president remains hopeful that eventually the world price will make water exports too enticing to ignore.

Global Water Corporation of Vancouver bluntly states:

> "Water has moved from being an endless commodity that may be taken for granted to a rationed necessity that may be taken by force." (Global Water Corporation website November 2, 1999)

All the above mentioned projects have been kept at bay for various economic and political reasons, however the floodgates might now be forced open by trade agreements, as can be seen in the following example.

In 1998 Sun Belt Water Inc. of Santa Barbara California sued the Canadian government under Chapter 11 of NAFTA for $410 million US because the province of British Columbia withdrew a water export license held by its Canadian partner. Sun Belt has since increased that claim to 10.5 billion US (Sun Belt Water Inc., news release October 14, 1999) because the broad definition of investment in chapter 11 also allows them to sue for the loss of future profits.

6. The Flood – International Trade Agreements

6.1 Drowning Indigenous Rights

It is perhaps most wisely said that the structural adjustment visited on the indigenous peoples of the poorest nations of the world through development programs over the last several decades will now be visited on the indigenous peoples of the richest nations through trade liberalization agreements, despite

whatever gains they have made domestically or internationally. This second wave of colonialism will be the first common experience they share with their settler counterparts, though most likely not in equal proportion.

Indigenous rights stand in the way of the basic principles of free trade and trade liberalization as codified through international trade, investment and service agreements.

These agreements erase the concept of national or communal resources and replace it with an open commodities market. In doing so they sweep aside the fundamental rights guaranteed through treaties or the concept of inherent rights recognized in universal charters or through hard fought litigation and in some cases armed conflict.

These revolutionary agreements are the greatest threat to the viability of indigenous communities throughout the world by threatening the resources they rely upon and the modalities of development that would underpin that survival.

6.2 Diving Right in

What follows in this section is a brief survey of key provisions of some of the treaties and how they impact indigenous rights including an insight into the state of some agreements currently being negotiated. Already these agreements have cost settler governments billions of dollars through sanctions, litigation, lost national development and compensation claims. For the most disadvantaged peoples on the planet it is reasonable to assume the impact will be much worse.

There are several cornerstones to the trade liberalization movement. Among the most important are Most Favoured Nation (General Agreement on Trade and Tariffs 1947, text Article 1), and National Treatment (GATT 1947, Article 3). These principles are applied to every aspect of the opening of markets and have a direct impact on indigenous rights.

Most Favoured Nation or MFN simply but paradoxically means that no party to the agreement can be treated any better than any other party, or any other trading partner.

National Treatment then takes this further by guaranteeing that no domestic company is treated any better than a company of a nation who is a party to the agreement.

When one considers the previous discussion of indigenous rights whether assumed by an indigenous group, given status in national laws or constitutions, or won though court decisions like the Winters Doctrine (Winters v. United States (1908) 207 U.S. 564, at 575–576) in the United States or the Sparrow Decision (Regina v. Sparrow (1990) 70 D.L.R. 385) in Canada, the concept of priority resource allocation is in direct contradiction to a system that prohibits discrimination in access to resources on any basis. In fact the history of these agreements has not only been the expansion of the application of these ideas but the development of mechanisms to enforce them.

6.3 Enforcement

Why have International trade agreements been able to reshape the international landscape so effectively while clearly in contradiction to other international agreements like those on the environment and human rights? The fact is that while other agreements rely on moral persuasion and diplomacy to make sure the parties act accordingly, the trade liberalization movement has ensured that strong enforcement mechanisms have been included in the provisions of these agreements that force nations and communities to comply.

Though the General Agreement on Tariffs and Trade has been in place since 1947, it was the Uruguay Round of negotiations from 1986 to 1994 that developed the mechanisms that force governments, not only to follow the rules, but make sure that all levels of government within their jurisdiction do the same.

This was the process that created the World Trade Organization, the body that administers, adjudicates and enforces more than a dozen international commercial agreements worldwide (World Trade Organizaton web site www.wto.org). The process is simple. A panel of WTO trade bureaucrats hear disputes between countries and make a decision as to whether national legislation or regulations violate any of the agreements. The decision may be appealed to the WTO's appellant body, but once the final decision is made, countries must comply and make sure all the communities under their authority do the same.[1] If they don't comply they face trade sanctions that can be in the hundreds of millions of dollars. The WTO effectively gives one nation permission to wage a trade war against another country that can cripple its economy. The 140 nations that are part of the WTO must stand-by and watch (World Trade Organizaton web site www.wto.org states that there were 140 member countries as of Nov. 30, 2000).

It should not be overlooked that the WTO is ruling on laws that are legally and legitimately enacted by sovereign nations, often democratic, and are being challenged by the other governments and ruled on by a group of appointed trade bureaucrats. If the power of recognized conventional governments is this undermined by the WTO, how will the emerging, often unrecognized jurisdiction of indigenous people stand up?

Indigenous peoples have not been involved in the drafting of those various trade agreements, their indigenous rights are not recognized and protected and it remains unclear if they can access dispute resolution processes. Even if they gained access the format of the panels is incompatible with indigenous culture. Most processes are "paper-trials", usually personal presentations are not foreseen, and the hearings are closed. Even in national courts that would fulfil the above criteria indigenous peoples had to struggle for the admission of oral evidence, that helps them explain their history and close relationship to their territories in their own way. No such provisions are foreseen in international trade tribunals.

7. Services – the New Wave

To incorporate traditional knowledge and practices in an economy, economic development must be free to reflect the customs and values that give rise to them. An often-overlooked component of economic development is the service sector. International agreements that include provisions on services are moving at an alarming rate to make regulation and community control of the development of this key part of their economy impossible.

As one of the WTO's "built-in" processes, the advancement of the GATS continues despite setbacks such as the mass demonstrations in Seattle in 1999 that brought the WTO to a stand-still. The purpose of the GATS is to go much further than any other agreement before and since WTO tribunals have interpreted the GATS to have an enormously wide application,[2] it will have incredibly broad impacts.

Simply put, the GATS seeks to control the implementation of measures a government may undertake that affect services. "Measures" are defined broadly as: "any measure by a member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form" (GATS Article I provides that the agreement applies to measure by members affecting trade in services and then defines "measures" in GATS Article XXVIII). All laws or any action of a community authority are subject to the provisions of the GATS in order to guarantee market access for companies seeking to provide services. In fact, the GATS does not effectively distinguish between public and private services and insists on open bidding and competition between them. It will eventually force the privatization of all public services, forcing them to serve the profits of transnational corporations instead of the good of the community as they are intended.

While the GATS claims to exempt services supplied in the exercise of governmental authority, it only applies where services are provided on a non-commercial basis and there is no competition. In other words where there are fees charged or where there is private sector participation in the industry, there is no exemption. This would mean that heath care, education, water and sewer services, to name just a few, would be subject to the rules of the GATS and open for forced privatization.

That the GATS is the next step for the trade liberalization movement and not just a trade deal for services is clearly seen in Article XVI on market access. This provision prohibits six different categories of non-discriminatory regulatory controls.[3] To this point the key principle of this liberalization movement has been the removal of discriminatory measures that treated national and foreign companies differently. Article XVI means that the GATS is now dictating the way in which authorities, national or local, can legislate or regulate services. Where is the room for the inclusion of indigenous principles in the development of a service sector of the economy. Through agreements like the GATS, established nation-states are trading away their right to govern and at the same time erecting permanent barriers to economies that reflect indigenous communities or culture.

Let us look at one key service industry that is often active in indigenous lands: tourism. The negative impacts of unsustainable mass tourism on sensitive ecosystems is known around the globe. Secwepemc elders in the Interior of BC for example can point out the negative impacts of ski-resorts and artificial snow-making on the water shed and their multifaceted use of their traditional territories (Adams Lake and Neskonlith Shuswap 1999: maps). Under GATS and NAFTA the number of tourism suppliers could not be restricted (Shrybman 2001) and no criteria for example regarding sustainable tourism and the traditional knowledge of indigenous peoples would be taken into account.

8. Investment and Expropriation – the Aftermath

Despite these realities it has been the inclusion of investment in trade agreements that, to date, has had the greatest impact.

NAFTA's provisions on investment and the rights of investors contained in Chapter 11 not only grants national treatment to foreign investors but guarantees them the right to invest despite domestic laws and regulations. They now have the ability to sue countries directly where they have lost profits or been prohibited from investing in the first place – even when domestic companies are prohibited as well. Often these rights far exceed the recourse available to domestic companies through their own national laws. Here are a few examples.

In 1998 Canada was forced to repeal a law banning the import of MMT, a gasoline additive that has known health-hazards made by American chemical giant Ethyl Corp. (Appleton and Associates International Lawyers web site http://www.appletonlaw.com/4b1ethyl.htm). MMT is banned in many countries, and at the time, almost all American states. Ethyl Corp. sued Canada under NAFTA Chapter 11 and, *without* a tribunal decision, had the law repealed, was given $13 million US in compensation, and a letter from the Prime Minister of Canada stating that there was no proven harm to human health from MMT.

A Canadian company, Methanex[4] is suing the American federal government for $970 million US because the governor of California has issued an executive order that a gasoline additive it manufactures called MTBE (methyl tertiary butyl ether) must be eliminated from gas sold in California by the 2003 due to its contamination of ground water throughout the state.

On August 25, 2000 a NAFTA Chapter 11 tribunal ordered the government of Mexico to pay an American company, Metalclad, 16.7 million US because a Mexican community refused to allow the company to operate a waste disposal site on ecologically sensitive land (Greenfield 2001). The Canadian position on the decision is that Chapter 11 was never designed to allow companies to overturn domestic policy (Jack, Ian, National Post, Sept. 1, 2000, C4).

It doesn't matter how necessary the legislation or regulation. If it deprives a company of the right to profit from its investment or invest in the first place, the foreign corporation is entitled to compensation for the "expropriation" of their profits, whether actual or projected.

Whilst multinational firms now can even sue for the expropriation of profits, indigenous peoples are increasingly threatened by the ongoing illegal expropriation of their lands by multinational companies without being compensated. Most indigenous groups around the world[5] have not signed treaties regarding their land with the colonizers, instead they hold collective proprietary interest over their traditional territories. The Canadian Supreme Court recognized those rights as Aboriginal Title. Still the federal government refuses to recognize Aboriginal Title. It continues a policy of extinguishment, forcing indigenous peoples into negotiation processes from which they hope to gain their consent to extinguish their Aboriginal title in order to pave the way for the access of multinational companies. With the threat of litigation through these agreements for billions of dollars, already national governments are becoming reluctant to legislate in the public's interest. The case of the Canadian government's response to public opposition to bulk water exports in the face of growing entrepreneurial interest was to state that banning bulk water exports would violate NAFTA and the WTO.

Instead they sought to find a solution that respected their international trade obligations.[6] After two years no protections are in place. How much more reluctant will national governments be to recognize and implement inherent indigenous rights especially to land and resources if they might contravene trade agreements?

9. Pricing – the Undercurrent

9.1 Putting a Price to what is Sacred

There is another important way in which trade agreements affect indigenous control over resources and fundamentally access for it cannot be assumed in this new economy that ownership of a resource guarantees access for a people. The price of a commodity like water, natural gas, oil or any energy is dictated by the trade agreements already in place and is included in the trade agreements being negotiated now. Again National Treatment along with other provisions is at the heart of this issue.

Price is controlled in several in the NAFTA and the GATT. Both rely on GATT article XI, which prohibits import and export restrictions. NAFTA goes further by eliminating taxes, tariffs and other charges except where also charged to your domestic market (NAFTA Articles 302, 309 (2), 314). Article 603 (1) states that there can be no minimum or maximum export price and that any licensing must be consistent with the agreement. In addition the concept of proportionality outlined in Article 315 of NAFTA insist that even in times of diminishing supply the ratio of exports to supply must be maintained and any conservation measures taken against foreign markets must be taken against the domestic markets as well.

In other words, even in times of energy shortages one could not preferenlially supply or price oil for one's own people compared to the price being charged a foreign customer. Despite local needs, exports may never be stopped.

This has incredible ramifications in terms of issues of access for indigenous people who are often the least affluent groups in a region. The current energy situation in western Canada is an excellent example to illustrate this point.

9.2 Energizing the Fight for Rights

Recently the energy crisis in California has driven up demand across western North America. In response some provinces in Canada, particularly Alberta and British Columbia have begun cashing in on the demand. The result has been an increase in the local price of oil and natural gas that is causing unrest throughout the region. The reality is beginning to take hold that resources no longer belong to communities but are merely commodities in a continental market and go to the highest bidder. How much more difficult would it be for indigenous governments to ensure the people of their communities have access to water, oil and natural gas in markets where demand, and therefore price, is skyrocketing?

Finally, NAFTA explicitly addresses regulation. NAFTA obliges energy regulators to act in accordance with the provisions of the agreement (Appleton 1994: 42). In fact, in a letter to Representative Edward Markly (Appleton 1994: 42), then President Bill Clinton wrote that the U.S. government would insist that the proportionality provisions be respected to guarantee American access to Canadian energy. He goes on to say that NAFTA's obligations only bind governments and that Canadian business could bid up the price to discourage exports. This is a blatant admission that the purpose of the agreement is to remove the control of elected governments in favour of corporations with the power to significantly impact market. Markets can be the only regulators – not communities.

10. Flooding Indigenous Peoples

Trade agreements now not only have the power to challenge and change laws but also to indirectly stop legislation and regulation due to the threat of trade challenges and enormous compensation claims. Successes in the human rights field are slow and hard fought for, but might soon mean nothing, unless the negative trend initiated by international trade agreements to undermine indigenous and human rights and environmental standards can be reversed through collective pressure.

A recent case makes this point clearly. An American company S. D. Myers has successfully sued the Canadian government under Chapter 11 of NAFTA for $50 million US in losses due to a Canadian ban on exporting PCBs. S. D. Myres is a company that disposes of PCBs. Importantly, Canada's ban

was in place in compliance with its commitments under the Basel Convention prohibiting the transborder movement and disposal of hazardous waste (S. D. Myers v. Government of Canada, Partial Award, November 13, 2000).

NAFTA's lauded Article 104 that claims to exempt certain environmental agreements from the provisions of the deal has been ruled to only apply if the environmental agreements are applied in the way that is "least trade restrictive". The Basel Convention mentioned above is included in Article 104. Again trade liberalization dominates the agenda.

The Canadian government made it clear in negotiations regarding the Convention on Biodiversity that they could not agree to certain standards because it violates their obligations under the World Trade Organization. When negotiating the Multilateral Agreement on investment the European Union clearly ranked it over the Convention on Biodiversity, an international law instrument in whose development many indigenous peoples are actively involved, especially because its Article 8j foresees the in situ protection of traditional knowledge.

The WTO has moved to place many environmental treaties directly under its jurisdiction. In fact the often cited provisions of the WTO that claim to exempt measures taken to protect human health and the environment have never survived a challenge through the entire WTO dispute mechanism. In addition the WTO has overthrown domestic environmental protection by dictating its own standards of evaluating environmental and human health impacts.[7] Importantly almost all of NAFTA's Chapters are unaffected by any allowances for environmental and human health protection (Appleton 1994: 153). Where is there room for traditional knowledge on sustainability when trade tribunals are not even compelled to accept the scientific rational of nation-states?

11. The Growing Tide

Currently the thirty-four countries of the Western Hemisphere are involved in the negotiation of the Free Trade Area of the Americas or FTAA. The FTAA will be the culmination of the trade liberalization movement and a model for the next step of the WTO. Incorporating many of the elements of the failed Multi-lateral Agreement on Investment or MAI that was rejected by Canada's Assembly of First Nations, it would also include strengthened provisions on enforcement, technical barriers to trade (domestic laws and regulations), investment, and force the privatization of public services. It would also give special treatment or outright exemption to corporate officials from normal immigration processes when entering or leaving a country thus creating a class of the corporate executive diplomats.

The FTAA is an attempt to set low regional standards and thereby undermine stronger international standards. The Organization for American States has in the past been known for setting low regional standards, for example in the field of indigenous rights, to influence negotiations at the United Nations level.

While indigenous peoples have been fighting for the recognition of their rights domestically and internationally and the rehabilitation of their environment to protect their people, their traditions and their economies, this movement has been mounting an even more aggressive and powerful effort to override whatever gains they won. It was made clear most clear recently, in the S. D. Myers decision mentioned above (quote on trade agreements rolling back government) that while indigenous people are struggling to establish independence and self-government through control of their communities and resources, the liberalization movement is sweeping away the right to exercise that sovereignty.

12. Conclusions – Reversing the Tide

The Indigenous Peoples of the Americas have to make front against those developments that threaten to undermine their nationhood international level. Like in the 1970's when indigenous peoples first organized on the international level, starting what became known as "the Fourth World Movement" (Manuel/Posluns 1974), indigenous peoples now have to stand together and devise their own principles for protecting their inherent rights and values against the onslaught of corporate interest, because the trend that was already detected then continues today (Manuel/Posluns 1974: 253):

"Land-holding is moving under the control of multinational corporations, which have all the worst aspects of state control and none of the virtues."

International corporations cannot be allowed to circumvent the inalienable and inherent interests in their lands and resources just because of their corporate interests.

If international trade agreements were to preclude the recognition of indigenous rights, this would have the same effects as the extinguishment of those rights by national governments, which has been found to violate constitutional and international law. It would also violate the old common law principle that you cannot do indirectly what you cannot do directly.

Indigenous peoples hold collective proprietary interests in their traditional territories and natural resources that therefore can only be traded in the international market place with their informed and prior consent. There can be no free trade without taking the collective proprietary interest of indigenous peoples into account, otherwise international trade agreements just perpetuate and aggravate the injustices of colonization.

The international community has to reaffirm their commitment to indigenous rights and recognize the collective rights of indigenous peoples in all fields of law, otherwise they violate the human rights of indigenous peoples.

Abstracts

Dieser Artikel beschäftigt sich mit den Auswirkungen internationaler Handelsabkommen auf die Rechte indigener Völker. Am Beispiel Kanada wird gezeigt, dass die ursprünglich auf nationaler Ebene angesiedelten Rechte zum Schutz indigenen Eigentums nunmehr den internationalen gesetzlichen Rahmenbedingungen unterliegen. Nachdem letztere darauf ausgerichtet sind, Investitionshindernisse jeglicher Art abzubauen und die Rechte internationaler Investoren zu erhöhen, verstärken sie die Position multinationaler Konzerne gegenüber der nationalen Regierung. Diese Situation führt dazu, dass die angestammten Rechte indigener Völker übergangen werden, insbesondere ihr Anspruch auf nachhaltige Nutzung ihrer ureigenen Gebiete und Ressourcen. Nur durch ein gemeinsames Vorgehen indigener Völker kann einem weiteren Abbau ihrer nationalen Rechte durch internationale Handelsabkommen noch Einhalt geboten werden.

This article deals with the negative effects that international trade agreements have on the rights of indigenous people. Canada is used as an example of how indigenous rights that were originally allocated on the national level are now undermined by international laws. The new legal framework has been set up to reduce all barriers for international investors and therefore increases the leverage of multinational companies over national governments. Under such circumstances the inherent rights of indigenous people are swept aside especially their claim for a sustainable use of their traditional territories and ressources. It will take the unified struggle of indigenous people to reverse the tide of trade liberalization and stop the constant undermining of national regulations by international trade agreements.

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1 Marrakesh agreement establishing the WTO Article XVI (4): "Each member shall ensure the conformity of its laws, regulations and administrative proceedures with its obligations as provided in the annexed agreements."

2 Shrybman 2001: "Water and The GATS: An Assessment of the Impact of Services Disciplines on Public Policy and Law Concerning Water. In his discussion of the application of the GATS he points out that the GATS has been used to strike down measures on the production of goods as diverse as bananas and cars, which seem to have little to do with services." This analysis is available through the Council of Canadians www.canadians.org.

3 GATS Article XVI "Market Access": It is important to keep in mind that while this provision would only apply to those service listed under it, the point of a trade agreement is access to the markets of the other parties and that the agreements are reciprocal. A country cannot gain access to a market without granting access to its own.

4 California Governor Gray Davis issued an Executive Order on March 25, 1999 directing the removal of MTBE from gasoline sold in California by December 31, 2002.

5 Only in North America a series of treaties have been signed, the biggest area where to date no treaties were signed is British Columbia.

6 The Canadian Governments position is outlined in a document released by the Department of Foreign Affairs and Trade: "An Act to Amend the International Boundary Waters Treaty Act", February 2001.

7 The World Trade Organization "necessity test" uses the risk assessment model that requires the party seeking to protect human health or the environment to proof harm whereas the precautionary principle preferred by ecologists and many countries seeks to avoid damage by requiring proof of safety.

Anmerkung

Die Autorin wird von der Österreichischen Akademie der Wissenschaften mit einem Doktoratsstipendium gefördert.

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Journal für Entwicklungspolitik XVIII/2, 2002, S. 153–170

Clemens Six

„Just When You Thought The World Was Safe ..."*

Die indischen Atomtests im Licht einer Neuordnung des politischen Diskurses in Süd-Asien

Am 11. und 13. März 1998 erschütterten drei und darauffolgend zwei weitere unterirdische atomare Explosionen in der indischen Wüste Thar deutlich wahrnehmbar nicht nur die Erdkruste weit über Indien hinaus, sondern mit ebenso großer Wucht auch das Selbstvertrauen des amerikanischen Geheimdienstes CIA, der trotz überragender und nicht weniger finanzkräftiger Spionagetechnik nicht die leiseste Ahnung von all dem hatte, was sich da an weltpolitisch revolutionären Ereignissen abspielte. Revolutionär waren diese Zündungen vor allem deswegen, weil eine der Hauptmotivationen der indischen Regierung, die Tests anzuordnen, darin bestand, die Struktur der internationalen Ordnung, die von den fünf deklarierten Atommächten USA, Russland, Großbritannien, Frankreich und China angeführt wird, in Frage zu stellen und damit Indiens Anspruch auf Mitgliedschaft in diesem elitären Club zu unterstreichen, die sich auch mit einem möglichen permanenten Sitz im Sicherheitsrat der Vereinten Nationen verbindet. Die Entscheidung, nach 1974 zum zweiten Mal Atomtests in Indien durchzuführen, bedeutete eine gewisse Kontinuität in der bisherigen indischen Haltung gegenüber internationalen Verträgen, die die Absicherung der Vormachtstellung der fünf Atommächte sichern sollten. Mit der Inkraftsetzung des Atomwaffensperrvertrages (Treaty on the Non-Proliferation of Nuclear Weapons) 1970 und der versuchten weltweiten Durchsetzung des Vertrages zur Unterbindung weiterer Atomtests (Comprehensive Test Ban Treaty) in den 90er-Jahren durch die Clinton-Administration versuchten die bestehenden Atommächte, ihre Hegemonie in der internationalen Ordnung zu zementieren. Indiens Ambition seit der Unabhängigkeit 1947 aber war es, sein eigenes Atomprogramm, das zunächst in der friedlichen Nutzung vor allem für landwirtschaftliche Zwecke und ähnliche Entwicklungsstrategien gedacht war, unabhängig von internationalen Einflussnahmen fortzusetzen. Dazu kommt, dass Indien ebenso traditionell die politischen Konsequenzen dieser Festschreibung der internationalen Verhältnisse zugunsten der Atommächte ablehnt und seit Jawaharlal Nehru, dem ersten Premierminister des unabhängigen Indien, eine Politik der globalen Abrüstung verfolgte, die unter anderem auch zum Ziel hatte, die Hegemonie derer, die Atomwaffen besaßen, zu untergraben. Indira Gandhi lehnte daher Anfang der 70er-Jahre die Unterzeichnung des Atomwaffensperrvertrages ab, obwohl die Republik einerseits auf die Sowjetunion angewiesen

* Headline des Time-Magazine, 25.5.1998 anlässlich der indischen Atomtests.