

Peru – United States Free Trade Agreement and applicability of ILO's Convention 169 for the protection of the Peruvian Indigenous People's rights

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Introduction

The Peru-United States Free Trade Agreement, officially known as the Trade Promoting Agreement (Acuerdo de Promoción Comercial), subscribed between the parties, was approved by the Peruvian Congress June 27th and is currently pending approval by the United States Congress. This treaty was approved without any previous consultation process with the indigenous peoples having taken place, as is the obligation of the Peruvian State under the provisions contained in Convention 169, 1994 of the International Labour Organization. In spite of the fact that a citizens' initiative to call for a referendum was officially submitted before Congress, organized and led by – "Coordinadora TLC Así No" ("No to the FTA as it stands today" organization), with the active participation and social mobilization of the Peruvian Peasants Confederation –CCP- (Confederación Campesina del Perú) Foro Salud (Health Forum), Convención Nacional del Agro - CONVEAGRO (National Farmers Convention) among others.

Identifying the FTA as a driver of greater threats to their future possibilities and also as the most serious roadblock to reaffirming and deepening their right to achieve the necessary social, political, cultural and economic democratization of Peru are key definitions shared by all of the National Peasant Unions and Amazon Confederations. This analysis explores some of the potential impacts of the covenants contained in the FTA - Chapters on Intellectual Property, Investments and the Environment – within the context of the current and potential application of the ILO's Convention 169 provisions on Indigenous and Tribal peoples in Independent countries" taken due account of the rights violations faced by indigenous peoples in Peru and linked to these covenants.

The indigenous peoples and population: embraced and neglected by the Official Peru

At least 6.8 million people, it is to say one quarter of the Peruvian population can be considered as being indigenous based on the fact that the couple-headed household uses indigenous language – Quechua or Aymara – or one of the numerous Amazon languages – more frequently than Spanish, according to the findings of a recent study by the World Bank (2005). Of this number of people, approximately 5 million (18% of the country's total population) are organized under peasant communities (5,818 in the year 20002) and native communities (1,225 in the year 2005). The land surface covered by collective ownership deeds of which 75% of the communities are holders, reaches 19.7 and 11.0 million hectares respectively. This accounts for 24% of the national territory.

The indigenous community, called as of 1969, the peasant or native community is the oldest and most politically significant institution in the “non-Official” popular history of the republican life of the country. This institution was consolidated within the framework of the colonial Spanish domination and as an means to oppose it, based on the various first nations cultures that had the Ayllu as their basic common ethnic institution (the maternal communal origin) and the new territorial zoning imposed after the model used in the Castilian Communities of the Spanish Empire (the paternal origin). However, its legal existence was recognized by the Peruvian Sate one century after the political independence of Peru was declared. This recognition was ratified by the Political Constitution in force at the time and has further on incorporated the obligation to respect their political identity, the legal validity of their long standing right to exercise jurisdictional functions within their territorial environment. Additionally, even though the State recognizes and protects the nation's ethnic and cultural plurality, no progress has been made toward developing relevant regulations at the level of basic political rights as provided under ILO's Convention 169.

Even within the context of this void, the Peruvian Congress had the obligation to approve the undertaking of a referendum in order to determine whether citizens approve or disapprove the FTA with the United States, a framework enabling the communities to express their views in a visible manner as provided in Article 6 of the ILO's Convention 169: "1. In applying the provisions of this Convention, governments shall:

(a) Consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;

(...) and 2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, for purposes of reaching an agreement or building consent around the measures being proposed". Much to the contrary, the neither the general population was consulted nor the indigenous peoples communities, especially those officially identified.

The FTA negotiating context finds the indigenous organizations weakened institutionally, not fully recovered yet from the internal armed political violence, the economic liberalization and the crisis of the traditional partisan system. On the other hand, this context finds a central government legitimized in the international arena by the promising macroeconomic figures while losing its legitimacy at the domestic level by reason of the continued social inequity, both of these outcomes being compatible with the continuity of the neo liberal policies. However, any government, as is the case with the former and the current one, that has so blatantly neglected the demands for a more democratic relationship between the State and the Communities, and the State with itself without including to their full extent the collective rights of the indigenous peoples, and an agenda that lies at the heart of the political lessons learnt from the process of violence.

This process has been the longest (1980-2000) the cruellest (69,000 victims) and most de-structuring in our republican history since the XXth Century. In the words of the report produced by the Commission for truth

and Reconciliation : *" In the Peruvian map, the intensity of violence appears as a dark stain along the Sierra and the jungle of the central mid country"* (CVR 2004:21) that overlaps essentially with that of the monolingual Quechua, Aymara and Amazon Language speaking Peruvians" . *" Out of every four victims of violence, three were female or male peasants whose mother tongue was Quechua, a broad sector of the population historically neglected – even disdained – by the State and by the urban society, the one that does enjoy the benefits of the political community"* as put by Salomon Lerner, who chaired the CVR (Address 28.08.2003)

The tension between the bet by the Peruvian government in favour of the "FTA Yes or Yes" and the obligation to consult under ILO's Convention 169 facilitated by a Referendum promoted by "No to the FTA as it stands" was resolved by imposition negating this democratic avenue. In the near future we will hear again the choir of Peruvian voices who as Primitivo Quispe, will repeat once more "In those times my peoples made up one kind of peoples, I do not know, aliens inside Peru" An inhabitant of Ayacucho who place his testimony on records in a public hearing held April 8, 2002. (This testimony was quoted in the CVR's Report).

Biodiversity and Intellectual property rights within the FTA Framework: Turning Indigenous Peoples/Peasants collective rights unprotected

Before the FTA was negotiated and approved, the signing of ILO's Convention 169 produced one of its first off springs in terms of regulatory developments through the enactment of Law 27811 that deals with the " Regime governing the protection of the collective knowledge of the indigenous peoples on biological resources" (10.08.2002) whereby a definition of the Indigenous Peoples is given as " first nations who have rights that preceded the establishment of the Peruvian State, maintain a culture of their own, a territorial space and recognize themselves as such; including expressly in this denomination those peoples who live in voluntary isolation or have not been contacted, as well as the peasant and native communities. Likewise, collective knowledge is defined as the

cumulative trans-generational knowledge developed by the indigenous communities regarding the properties, use and characteristics of the biological diversity, as included in the intangible component of Decision 391 of the Cartagena Agreement Commission”

This Act reflected the progress made as it provides that: “The Peruvian State recognizes the right and power that the indigenous communities and peoples have to make autonomous decisions regarding their collective knowledge” (Article 1). Collective knowledge makes part of the cultural heritage of the indigenous peoples” (Article 11) and for this reason, it is to say, because it is part of their cultural heritage, the indigenous peoples rights over their collective knowledge are inalienable and non-prescriptible” (Article 12). This Act also gave raise to specific measures implementing two of the objectives sought through this Act, i.e. guarantee that the use of collective knowledge is made upon prior informed consent by the indigenous peoples and avoid that patents be granted to inventions obtained or developed based on the Peruvian indigenous peoples collective knowledge without making due consideration of this knowledge as background when examining the novelty and inventive nature and level of such inventions. The second Complementary Provision requires that a licensing contract for the use of the collective knowledge be submitted as pre-requisite to obtain the patent for any given invention.

The progress achieved with this special regime will be nearly nullified by the nature of the Agreements signed in Chapter sixteen on Intellectual property rights. For example, through Article 16.3 Peru undertakes to adhere the *International Convention for the Protection of Vegetal Attaints (UPOV Covenant)* therefore it will be bound to broaden the granting of the seed breeder’s rights not only to those who have bread but also discovered a variety. However, it does not refer to the classical definition of variety in the scientific argot but rather to one that facilitates the patenting of plants, because the term variety is assumed as a set of plants that can be differentiated from other sets of plants because it expresses at least one genotype character and for the capability to propagate as one single unit without becoming altered. On the other

hand, through Covenant 16.6 each Party undertakes to allow the granting of patents for any invention, whether a product or a procedure, in all fields of the technological sphere, in so far as it is a new one, it involves an inventive activity, synonym of "non-evident" and it may be used for industrial applications, synonym of "useful" and in spite that the governing authorities are aware of the fact that it is through these facilities that have permitted and continue to do so, that the "Cat claws" (Uña de Gato), "Maca" and "Sacha Inti" first nations' products have been patented from abroad and against which official patent rights actions have been filed for their annulment."

The Institute for the Defence of Consumers and Intellectual Property INDECOPI-Peru that promoted the afore mentioned Law 27811 admits that the FTA's side letter is not binding upon United States as regards compliance with the requirements that the Peruvian legal system has established for accessibility to genetic resources and the protection of traditional knowledge, such as the subscription of access contracts whereby compliance with the prior informed consent and fair distribution of benefits required are set and that these be approved by the national authorities. "This way, a door remains open for bio piracy to sneak thru since compliance of the items acknowledged by both countries remains up to the free will of the corporations and communities entering such contracts". The letter has not considered the need for protecting traditional knowledge linked to genetic resources (2006) via intellectual property rights.

The subscription of this chapter of the FTA will facilitate "illegal looting" of Peru's biodiversity, one of the 5 mega diverse countries on planet earth, and this mega diversity has been possible only thanks to the indigenous peoples, the first nations and their descendants up to this day. As Antonio Brack has put it: *"The biodiversity of the genetic resources is an achievement of the human aboriginals who in a process that has lasted a minimum of 10,000 years have domesticated native plants, have selected them and adapted to the ecological levels and have tamed fauna species"* In Peru, there are 182 plant species of domesticated

native species, 174 of which are Andean, Amazonian, and coastal in origin and 7 are American in origin. The aboriginal groups have significant knowledge in regard to the uses and properties of the different species, management techniques and in situ conservation of a broad diversity of genetic resources, 4,400 species that have known uses, among which 1,200 for use as food, and 1,408 for medicine applications, and 5 species of domesticated animals (2005).

Because the genetic resources of Peru are of paramount strategic importance for the world, the United States will not allow any barriers to stand on the way of any biotechnological developments and patents on genetic resources that American and trans-national firms request. This is the same reason for which the United States has not ratified the Convention on Biological Diversity (Rio 1992) and Peru did.

Investments and the Environment in the FTA: The very survival of the Indigenous/Peasant peoples in the Andean and Amazon Basins is at risk

The Agreements contained under Chapter ten of the FTA on investment" shall apply to state owned companies or any other person whenever it exercises any regulatory, administrative authority, or any governmental authority delegated by that Party, such as the authority to expropriate, grant licenses, approve business transactions or levy quotas, charges or rates" (Article 10.1 paragraph 2). In the case of Peru this applies not only to the central government but also to the regional and local governments that make part of the new political territorial zoning resulting from the State's decentralizing reform that Peru undertook in 2002. It is evident that those government levels are the closest and most direct for the application and regulatory development of ILO's Convention 169 because the Peasant and Native communities are located in at least 70% of the total number of municipalities, especially in the Andean and Amazon municipalities (Directorate 2002 of PETT-Ministry of Agriculture.

One of the main threats to the protection of the basic rights of the indigenous peoples stems from the acceptance of "indirect expropriation" as a cause for controversy and of claims subject to international arbitration because in practice this would mean that the State is willing to abdicate its regulatory function over the collective assets and would facilitate the privatization of these assets, affecting thereby particularly and to a high degree, the survival of a large portion of the indigenous peoples. The fact is that the determination of this situation of indirect expropriation considers: "The extent at which the government's action interferes with the unequivocal and reasonable expectations of an investment" (Annex 10-B to Article 10.7). It is to say the expectations for (future) gains of the North American investors.

This acceptance goes against the demands for protection of their collective rights made by the 'non-contacted' indigenous populations, the Native Communities and the Peasant Communities in potential or actual conflict with investments in hydrocarbons – oil (the Schuar case in the Aguas Corrientes Basin with the support of the Inter-ethnic association for the development of the Peruvian Tropical Forest AIDSESEP) and gas (Camisea and amazon groups gaspipeline) or investments in metal mining – gold and silver (Combayo Cse and others with the support of the Nacional Coordinator of the Communities affected by Mining CONACAMI).

They are resisting in view of the lack of action by the State and the risks involved in the expansion of the extractive operations, based on their past experience regarding the environmental liabilities left behind by mining operations and foundry mills (850) as per the INACC 20.09.2006 inventory located throughout the Peruvian territory, of which the cumulative adverse impact's outcome is serious harm to health while being at the same time a cause for social discomfort among the local communities due to filtrations, acid drainage and contamination of aquifers. As well as other adverse effects over the biodiversity and its ecosystems (The World Bank 2005). They resist in view of the growth in the number of mining concessions in new zones of which the

ecosystems are fragile and in contexts of water scarcity as a result of the global climate changes, accelerated in the past three years by a skyrocketing increase in the prices of gold and silver among others. And the issue here is that their drama for survival starts from the exploration phase where the health situation becomes irreversible and migration along with a drastic reduction and contamination of the waters and hence affecting human consumption, productive activities (fishing, agriculture, and livestock breeding), disrupting their culture and affecting their right to a dignified life.

The Peruvian constitution provides that "natural renewable and non-renewable resources are the nation's heritage. The State is sovereign as regards the use of these resources. Conditions for the use of natural resources and the granting of approval for use by private individuals are set via organic laws. Concessions grant the concessionaire actual rights subject to the legal standards set for that purpose" (Article 66) The obligation undertaken with ILO's Convention 169 should have resulted in the establishment of the relevant regulatory standards and institutions needed so that the rights of the peoples concerned over the existing natural resources in their land can be duly protected and establish or maintain procedures aimed at consulting the stakeholders so as to determine whether or not their interests would be adversely affected and to what extent, before any prospective or exploitation program is either authorized or implemented of the resources existing in their land (Article 16). Ever a more important matter when there are regions such as Guancavelica, Apurimac, Ayacucho – the poorest of the country where the land surface that belongs to the communities accounts for 79%, 60% and 43% the mining concessions account for 27%,27% and 18% of the region's total surface, respectively.

As matters stand today there is no obligation to carry out a previous consultation with the communities before mining concessions are granted within the collectively owned territories. There is no obligation either to verify that water is available and what kind of use will be made of these waters which are part of the traditional rights of the communities. Licenses for non-agrarian uses are being granted without

meeting this requirement. With the FTA any measure aimed at protecting such rights could potentially be qualified as “indirect expropriation”. Even if the State wishes to deny the concession for mining exploitation, for common wellbeing reasons and as a means to enforce the ILO’s Convention provisions, given the high risk posed by oil exploitation activities, the investor could use it as recourse.

Furthermore, as the Chapter on the Environment stands today, it circumscribes the agreements to mere legal regulations governing environmental protection – without including the risk prevention field – and is applicable to the United States only when they are established and enforced by the Peruvian central government, neglecting in this manner the competencies that the Peruvian constitution grants to regional and local governments in regard to territorial and environmental zoning. Things being this way, for example, if a local government should decide to deny granting of a license for operation to an industrial plant that could potentially contaminate the waters used by the Communities, as set forth in Articles No. 23 and 70 of the General Environmental Act (No. 28611 dated 15.10.06) and Article 7 of ILO’s Convention 169, this decision could be brought up as part a claim for breaching the FTA.

The core issue is that the democratic governance of the country as a nation itself is at stake

The Peru-United States FTA will set a precedent and could potentially be demanded that in other bilateral or multilateral Agreements that Peru may enter similar provisions be included, which would tend to generalize the effects and impacts produced over the rights of the indigenous peoples and limit to a minimum the applicability of ILO’s Convention 169. It may be legally approved but it has not been legitimated socially, once more, a decision has been made for, and not only without the indigenous peoples but against their legitimate rights. The effect and impact that the FTA will cause go counter-current against the aspirations fetched by the Convention since it seeks to protect them in stating that “1. The stakeholders must have the right to decide their own priorities as concerns their development, to the extent that such development affects

their lives, their institutions and their spiritual wellbeing and the land where they live or use in any manner and to control to the largest extent possible their own economic, social and cultural development”.

Several consultants who are removed from the internal conflict of interests found inside the Peruvian Nation, such as the World Bank consultants do get sufficiently far as to scratch the surface and see underneath. This is made evident when they state in one of their conclusions that : *“A core element dealt with all along this report is the profound and almost tragic dichotomy between the far-reaching perspectives and growth of the mining sector on the one hand and the difficult antagonistic relationship between the parties involved in this sector, on the other” To a large extent this antagonistic stances between the stakeholders in this sector are nurtured by the existing economic divide and the deeply rooted social resentment”.* (2005).

Bibliography

Brack, Antonio. Septiembre 2005. “Biodiversidad del Perú: firmeza necesaria”. En la revista Actualidad Económica, edición especial “TLC Así No”. Centro de Asesoría Legal del Perú.

Brack, Antonio. September 2005.” Peruvian Biodiversity: Necessary firmness” Economic Update Journal, special issue on “ No to FTA as it stands”. Peruvian legal Counselling Center

Banco Mundial, Unidad de Gestión del País-Perú, 2005. “Riqueza y sostenibilidad: dimensiones sociales y ambientales de la minería en el Perú. Resumen ejecutivo”.

World Bank (Country Management Unit-Peru 2005 “Wealth and Environmental Sustainability: Social and environmental dimensions of Mining in Peru” Executive Summary.

Ballón, Francisco y Defensoría del Pueblo. 2002. “Introducción al Derecho de los Pueblos Indígenas”.

Ballon Francisco and Ombudsman’s office. 2002. “An Introduction to the Indigenous Peoples [Right/ Law](#)”

CEPES, 2005. Informativo Legal Agrario No. 21. "Legislación de Comunidades Campesinas y Nativas".

CEPES 2005 Agrarian Legal Newsletter No. 21 " Legislation of the Peasant and Native Communities"

Comisión de la Verdad y Reconciliación, 2003. "Un pasado de violencia, un futuro de paz. 20 años de violencia 1980-2000. Qayna ñakariyninchik paqarintaq hawkalla kawsakuyninchik 20 wata sipinakuy".

Commission for Truth and Reconciliation. 2003. "A violent past, a peaceful future. 20 years of violence 1980-2000. Qayna ñakariyninchik paqarintaq hawkalla kawsakuyninchik 20 wata sipinakuy".

Guillete Hall y Harry Patrinos, 2005. "Pueblos indígenas, pobreza y desarrollo humano en América Latina 1994-2004". Nota de prensa, Banco Mundial (Washington 18.05.2005).

Guillete Hall and Harry Patrinos, 2005. " Indigenous Peoples, poverty and human development in Latin America 1994-2004." Press notes. The World Bank. Washington.

INDECOPI, Gerencia de Estudios Económicos, 2006. "Biodiversidad y conocimientos tradicionales en el Acuerdo de Promoción Comercial Perú-EEUU"

INDECOPI, Economic Studies Management, 2006. "Biodiversity and traditional knowledge within the Peru-United States Trade Promoting Agreement".

Instituto del Bien Común, 2003. "Atlas de Comunidades Nativas de la Selva Central". Lima, Perú.

Collective Wellbeing Institute, 2003. "Atlas of the Native Communities of the Central Tropical Forest"

Defensoría del Pueblo, 2006. "Informe Defensorial No. 103. El Proyecto Camisea y sus efectos en los derechos de las personas".

Ombudsman's Office. 2006. " Ombudsman's Report No. 103. The Camisea Project and its effects on human rights"

Web sites: www.minen.gob.pe; www.inacc.gob.pe;
www.defensoria.gob.pe

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