

**Indigenous peoples' land and resource rights in Latin America:  
The impacts of free trade agreements.<sup>1</sup>**

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<sup>1</sup> This article is based in part on a previous paper written by the author on “The TPPA and Indigenous Peoples: Lessons from Latin America” published in *No Ordinary Deal. Unmasking the Trans-Pacific Partnership Free Trade Agreement*, edited by Jane Kelsey (Wellington: Bridget Williams Books, 2010). It was presented at a conference on “Globalization and the Impact of Natural Resource Extraction Industries in Latin America and the Caribbean” organized by the Latin American Research Centre, University of Calgary, April 26-27, 2011.

## **Introduction**

Indigenous peoples in Latin America have strongly opposed free trade agreements (FTAs) with the US and other leading economies (Canada, the European Union, and China, among others) that have been signed by several states in the region in the last two decades.

Their opposition is rooted in experience. Such agreements have been ratified by different states without consultation with the representative organizations of indigenous peoples, nor with their free, prior and informed consent. Moreover, FTAs have triggered foreign investments in natural resource extraction in their ancestral lands and territories, often resulting in their dispossession and relocation. These investments, in particular those related to mining, have also had devastating environmental implications for indigenous communities where this activity is carried out.

States have repressed and criminalized protest against such investments. The events that occurred in Bagua in the Peruvian Amazon in 2009, where thirty-four people died when indigenous communities demonstrated against legislation enacted to make possible the implementation the US–Peru FTA, exemplifies this repression.

In this article I will analyze the implications that FTAs and other commercial agreements, signed by different Latin American states with industrialized economies, have had on indigenous peoples' rights to lands and natural resources as a consequence of large investments. I will analyze in particular the contents of those FTAs signed by Mexico (NAFTA), Chile and Peru with the US and other large economies, including Canada and the European Union, as well as the implications they have had in this regard, taking into consideration international human rights law and guidelines concerning indigenous peoples.

## **The US Free Trade campaign in the Americas**

For the last two decades, the US has promoted free trade throughout the Americas. In 1990 the US government announced plans to negotiate an FTA with Mexico, an initiative that later evolved into the North American Free Trade Agreement, which included both Mexico and Canada<sup>2</sup> as commercial partners. NAFTA was signed in 1992 and came into force on January 1<sup>st</sup> of 1994. On the same day that NAFTA came into operation, the Zapatista Army of National Liberation, an organization bringing together indigenous and peasant communities in the south of Mexico, rose up in arms in the state of Chiapas against globalization and the threat of corporate incursion into their territories. The Zapatistas demanded that the government of Mexico recognize their rights as peoples, including the right to autonomy and self-determination. Since then, the Zapatista movement has become a symbol of indigenous resistance to the expansion of the global economy in Latin America and worldwide.

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<sup>2</sup> The first FTA signed by the US in the Americas was the Canada–US Free Trade Agreement in 1988.

After initiatives promoted by the Bush (George H. W.) administration in the early nineties to create a Free Trade Area of the Americas failed, the US government decided to move forward with its free trade agenda through a different strategy, by negotiating bilateral or sub-regional FTAs with different states. Since then, agreements with Chile (2004), Dominican Republic–Central America (Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua) (CAFTA) (2004), Peru (2006), and Panama and Colombia (the latter of which was implemented in 2012.)<sup>3</sup>

Most of these agreements have common features. Chile, a state which has entered into FTAs with the world's largest economies<sup>4</sup> signed an FTA with the US which began operating in January 2004. In this agreement both states restated their previous obligations under WTO agreements. In Chapter 10 of the agreement investors – namely US investors in Chile – were strongly protected through several principles that are common to most FTAs imposed by the US in the region<sup>5</sup>. This chapter also provided a mechanism for an investor of a party to pursue a claim against the other party on grounds that it has breached an investment right protected by the FTA.

In contrast with first-generation FTAs which dealt mainly with tariff reductions, and with second-generation agreements such as NAFTA that include investment and other commitments, the US–Chile FTA is considered to be a third-generation agreement, which is more ambitious and regulates matters that go beyond trade, such as environment, labor and intellectual property.

The US- Chile FTA was strongly criticized when it came into effect because of the protection of US commercial interests that it entailed, and Chile's self-imposed restrictions in its relations with the US superpower that considerably limited the autonomy of Chile's public policy<sup>6</sup>. Another concern expressed by different sectors of society, including

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<sup>3</sup> These last two FTAs have been signed, but the US Congress must enact legislation to approve and implement them in order for them to come into effect. Available at <http://www.ustr.gov/trade-agreements/free-trade-agreements>, accessed April 15, 2011.

<sup>4</sup> In the last two decades, Chile has signed 21 trade agreements, including FTAs and Bilateral Investment Agreements (BITs) with more than fifty states, including Canada, Mexico, the US, Korea, China and Australia. It also signed Economic Association Agreements with the European Union, and the Trans-Pacific Strategic Economic Partnership Agreement (or P-4) with New Zealand, Singapore and Brunei. Chile has also been invited to be part of the Trans-Pacific Partnership Agreement, a free trade initiative promoted in 2009 by the US with the largest economies of the Pacific Rim. These FTAs have deepened the liberalisation of the country's economy and attracted foreign capital to Chile largely because of its political stability, favourable legislation, and low environmental and labour standards. See <http://rc.direcon.cl/pagina/1897>, accessed April 20, 2011.

<sup>5</sup> Among these principles: non-discriminatory treatment relative to domestic investors or investors of non-parties; freedom from 'performance requirements'; free transfer of funds related to an investment; protection from expropriation; 'minimum standard of treatment' in accordance with customary international law; and the ability to hire key managerial and technical personnel without regard to nationality, are to be mentioned. See <http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta>, accessed April 15, 2011.

<sup>6</sup> As Pizarro, a Chilean environmental economist, stated:

indigenous peoples, was the lack of consultation or public debate prior to its approval by Congress on the real need for such an agreement.

In December 2005 Peru became the first of the three Andean states invited by the US to negotiate an FTA to sign what was called a Trade Promotion Agreement (TPA). This TPA was negotiated and approved during the second administration of the populist President Alan Garcia, notwithstanding opposition by large sectors of society, including unions, small farmers and indigenous peoples. The TPA deals basically with the promotion of investment and trade. It required two-thirds of US farm exports to Peru to become duty-free immediately, and tariffs on most US farm products to be phased out within fifteen years and all tariffs eliminated in seventeen years.

Chapter 10 of this agreement provides different measures aimed at promoting and facilitating investments. The TPA established strong protections for US investors in Peru by granting them, in almost all circumstances, the right to establish, acquire and operate investments in Peru on equal footing with local investors. It prohibited expropriation and measures ‘tantamount to expropriation’, with the exception of a ‘public purpose’, and provided investors with due process protection and the right to receive a fair market value for property in the event of expropriation. The same chapter established that disputes should be brought before the International Centre for Settlement of Investment Disputes (ICSID)<sup>7</sup>.

The agreement included additional provisions on labor and environment which were similar to those considered in the US–Chile FTA. It is interesting to note that the investment chapter (Chapter 10) stated that the agreement should not be construed to prevent a party from adopting measures, including environmental, to secure compliance with laws and regulations that are not inconsistent with the agreement, necessary to protect human, animal or plant life, or related to the conservation of endangered or depleted natural resources. Moreover, it affirmed that in the event of an inconsistency between Chapter 10 and other chapters (including the chapter on environment), this Chapter should prevail<sup>8</sup>.

Pressure by different actors in the US, including Democrats in Congress, led to a renegotiation of this agreement in 2007 (Amendment Protocol), and to the inclusion of

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The Free Trade Agreement with the USA involves profound commitments in public policy, which further reduces the ability of the Chilean authorities to modify the current economic development strategy. Therefore, the decision by the current government to accept new restrictions upon its freedom of action in economic policy and international integration, constitute a bet in favour of the status quo, and a commitment with the neoliberal economic model.

Pizarro, Rodrigo *The Free Trade Agreement Between the USA and Chile: An Instrument of Commercial Interests*, 2006, p. 2. Available at [www.networkideas.org/working/oct2006/02\\_2006.pdf](http://www.networkideas.org/working/oct2006/02_2006.pdf), accessed March 30, 2010.

<sup>7</sup> Arbitration procedures of the ICSID between private investors and states are known for granting a higher level of protection to investors and for being reluctant to apply international human rights law.

<sup>8</sup> Office of the United States Trade Representatives, *Free Trade with Peru*, available at [http://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset\\_upload\\_file585\\_13067.pdf](http://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file585_13067.pdf), accessed on April 15, 2010.

improved protection on access to medicine, environment and labor rights, thus theoretically allowing Peru to maintain its international human rights obligations on these matters. The TPA finally entered into force on February 1, 2009.

### **Other free trade partners of Latin American states**

Aside from the US, Canada and the European Union have also promoted free trade partnerships with Latin American states in recent years. The first FTA entered into by Canada in the region was that with Chile in 1997. The main provisions of the Canada-Chile FTA (CCFTA) dealt with investments. Similar clauses to those included in the FTA signed by Chile and the US are contained in this agreement<sup>9</sup>. The CCFTA, however, went beyond trade and investment by including an additional Agreement on Labour Cooperation and another on Environmental Cooperation.

In recent years Canada signed FTAs with Costa Rica (CCRFTA), which came into effect in 2002, and with Peru (PCFTA), coming in effect in 2009. Additional FTAs following the same patterns were signed by Canada and Colombia in 2008 and with Panama in 2010. The Canada-Colombia agreement entered into effect in 2011.

As a consequence of these FTAs Canada's direct investment in Latin America has rapidly increased. The total value of those investments made by Canadian companies in the region more than doubled between 2003 and 2007, from US \$ 18.3 billion to US \$ 37.4 billion<sup>10</sup>. Aside from the finance sector, Canadian direct investment in Latin America has largely been destined to natural resources extraction or processing, such as investments in metallic minerals and wood, as well as to the energy sector. The investments of Canadian mining companies in the region are focused mainly on Mexico, Chile, Brazil, Argentina and Peru. Mining is the single activity in which Latin America is the most prominent region for Canadian foreign direct investment (FDI). Share of mining exploration in Latin America by Canadian companies grew from 35% in 2002 to 50% in 2007.<sup>11</sup> A recent study points out that Canadian investment in Chile amounts to 24% of the total foreign investment made during the period 2002-2011<sup>12</sup>.

A different form of FTAs, known as Association Agreement s(AAs), have been promoted in Latin America by another major economic block composed of 27 member

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<sup>9</sup> Among the investment provisions of the CCFTA are those dealing with treatment that is not less favorable than the one given to its own investors; most favoured nation treatment; minimum standard treatment; transfers, expropriation and compensation; arbitration by ICSID, etc. Chapter G of the CCFTA, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/chile-chili/menu.aspx?lang=en>, accessed on April 10, 2011.

<sup>10</sup> The North South Institute, *Canadian Foreign Direct Investment in Latin America* (Background paper prepared by Juan Martín Arellano, May 2010), available at <http://www.nsi-ins.ca/english/pdf/FDI%20backgroundunder.pdf>, accessed on April 20, 2011

<sup>11</sup> *Ibid.*

<sup>12</sup> “Canadá desplaza a EEUU como mayor inversor en Chile en última década”, in *La Tercera*, January 28, 2012, p. 55

states, including the European Union (EU). The EU promotes AAs in exchange for the commitment by signatory states to trade and human rights. The signatory state may be offered tariff- free access to some or all EU markets (industrial goods, agricultural products, etc) and financial or technical assistance. Two AAs, one with Mexico in 2000 and another with Chile in 2002 have been in effect for almost a decade. Additional AAs are being negotiated by the EU with Central America and with Andean countries (Colombia, Ecuador and Peru).

European investments have also increased in the region as a consequence of these agreements. Major EU investments in the region are banking, water management, energy and mining. Major destinations of these investments again include Brazil, Mexico, Argentina and Chile<sup>13</sup>. Several of these investments, in particular those related to power generation (ENDESA Spain) and to exploration and exploitation of oil and gas (Repsol YPF) and mineral resources (Anglo- American and BHP Billiton) have impacted indigenous lands and resources.

Finally, the increasing commercial role of China in the region should be highlighted. China has already signed FTAs in the region with Chile (2006), Peru (2009) and Costa Rica (2010). A recent study undertaken by the United Nations Economic Commission for Latin America and the Caribbean (ECLAC) concludes that during 2010 China invested US\$ 15.3 billion in Latin America, becoming the region's third largest investor. Most of these investments are related to natural resource extraction or processing as well<sup>14</sup>. Such investments are predicted to grow fast, since these resources are needed to sustain China's industrial growth.

## **The Implications of FTAs for Indigenous Peoples in Latin America**

### *Mexico*

NAFTA has been in effect for a decade and a half, with significant political and economic consequences. This FTA triggered the reform of the Mexican land tenure system that had been structured throughout the twentieth century after the revolution. Laws were passed shortly after the signing of NAFTA that enabled the privatization of the *ejido*<sup>15</sup>. Due to these reforms, indigenous peoples and *campesinos* who communally owned the *ejidos* have been slowly disenfranchised from their land and water rights at the hands of outsiders, who have acquired these resources for agro-industrial activities. Consequently, small

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<sup>13</sup> Ocampo, José Antonio, *El papel de Europa en la inversión extranjera directa hacia América Latina*, CAF Special Reports on Current Economic Affairs, 2010, available at [http://www.caf.com/attach/19/default/201001\\_CAF\\_Ocampo\\_IED.pdf](http://www.caf.com/attach/19/default/201001_CAF_Ocampo_IED.pdf) , accessed on December 10, 2011.

<sup>14</sup> Bethel, Eric, "Why is China investing in Latin America's natural resources?", December 21, 2011, available at <http://seekingalpha.com/article/315266-why-is-china-investing-in-latin-america-s-natural-resources> , accessed on January 18, 2012.

<sup>15</sup> The *ejidos* are a consequence of the agrarian reform process undertaken after the Mexican Revolution (1910–20). From 1930 to 1990, approximately 28,000 communally owned *ejidos* were created serving as both employment and residence for 3 million rural Mexicans, most of whom were indigenous peoples.

farmers have increasingly been forced to abandon production and to migrate to nearby cities or to emigrate out of the country. Water law reforms have made water a commodity valued as an economic good, which has enormous social implications for impoverished urban residents and small farmers<sup>16</sup>.

Aside from the privatization of the *ejido* and of water rights, NAFTA increased Mexico's imports of agricultural products that were traditionally grown by indigenous peoples and rural communities, severely harming rural economies. By 2003 Mexico was importing basic crops that had been traditionally grown by indigenous peoples. More than a fifth of the corn, a third of the wheat, nine-tenths of the rice and soybeans, and a third of the sorghum that was consumed in the country was imported, causing the ruin of millions of farmers<sup>17</sup>.

Another major implication of NAFTA in Mexico has been the growing foreign investment on mining. Of the 1800 mining projects existing in Mexico today, more than 800 (813) are transnationally owned. According to Camimex, the Mexican National Mining Chamber that oversees the industry, 87% of these investments are Canadian. Such investments have benefited from the revisions to Article 27 of the Mexican Constitution enacted in the context of NAFTA, which allowed them to "buy, rent, or enter into association" with the nation's 2800 *ejidos*. Prior to the revisions, Article 27, non Mexicans were not allowed to invest in the mining sector<sup>18</sup>.

### *Chile*

The implications of the US–Chile FTA should be analysed in the broader context of the liberalisation of Chile's economy in the last two decades, facilitated by FTAs and bilateral investment treaties (BITs) signed with the world's largest economies, including among them Canada (1997), the European Union (2002) and China (2006). Such agreements have resulted in the installation of large development projects that are both extractive and productive. These projects involve national and foreign capital and are situated on indigenous peoples' legal or ancestral lands, where natural resources that Chile exports are predominantly located<sup>19</sup>.

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<sup>16</sup> Wilder, Margaret, 'Water, Power and Social Transformation: Neoliberal Reforms in Mexico', *Vertigo hors-série* No. 1, September 2005, available at <http://www.vertigo.revues.org/1925?file=1>, accessed April 10, 2011.

<sup>17</sup> Arroyo Picard, Alberto, *Impacts of the North America Free Trade Agreement in Mexico: Lessons for the Free Trade Area of the Americas Negotiations*, Mexican Action Network on Free Trade, 2003, available at <http://quest.quixote.org/sites/quest.quixote.org/files/pdfs/albertoarroyo.pdf>, accessed on March 28, 2011.

<sup>18</sup> Ross, John, "Canadian mining companies undermining Mexico", 2009, available at [http://mostlywater.org/canadian\\_mining\\_companies\\_undermining\\_mexico](http://mostlywater.org/canadian_mining_companies_undermining_mexico), accessed on April 10, 2011.

<sup>19</sup> Mineral resources are largely located in the North of Chile in the territory of the Andean peoples (Aymara, Lickanantai, Quechua, Coya and Diaguita). Water and forest resources are located in the south of the country, in the territory of the Mapuche people.

The US–Chile FTA has strongly increased US investment in Chile. Such investment, which totalled US\$12.1 billion in 2008, is mainly related to the finance, manufacturing, mining and banking sectors. Although most of this investment has not had a direct impact on indigenous lands and resources, Chile’s exports to the US have also grown, amounting to US\$8.2 billion in that same year. Of these exports, an important percentage was on natural resource products, including copper (US\$2.8 billion), fish and seafood (US\$938 million), wood products (US\$658 million) and precious stones (specifically gold) (US\$542 million).<sup>20</sup>

Such exports were mainly extracted and/or processed on indigenous lands by Chilean companies or by foreign investors attracted by incentives under the FTA and BITs. Probably the best example of an investment impacting indigenous peoples is mining, an activity that has grown at high speed in the last decade, not only due to the rising prices of minerals, but also because of Chile’s competitiveness through its low labour costs, and environmental and taxation standards. According to the Fraser Institute Annual Survey of Mining Companies 2008/2009, Chile is a world leader that has ranked for more than a decade among the top ten states where investment for metal mining is considered to be safe, taking into account factors such as taxation and other mining-related regulations.<sup>21</sup>

The largest mining investors in Chile are CODELCO, a Chilean state-owned corporation, followed by Canadian and Anglo-Australian companies. CODELCO is responsible for one-third of Chile’s copper exports, largely to the US, and the company’s exports from 2006 to 2009 generated US\$26.7 billion in income for the Chilean state<sup>22</sup>. Most of its mining operations are in the territory of the Andean peoples (Aymara, Lickanantai, Quechua, Coya and Diaguita) in the north of the country. The remaining two-thirds of copper exports are from private companies, largely controlled by foreign investors.

A large percentage (62%) of Canadian investments in Chile since the CCHFTAs entered into effect in 1997 has been in the mining sector<sup>23</sup>. One of the Canadian companies involved in mining activities is Barrick Gold, which is responsible for two mining projects (Pascua Lama and El Morro) which have been opposed by Diaguita communities due to their location on their traditional lands, and the appropriation and contamination of ancestral waters<sup>24</sup>. An Anglo-Australian company Cerro Colorado, a subsidiary of BHP

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<sup>20</sup> Office of the United States Trade Representative, *U.S.–Chile Trade Facts*, available at <http://www.ustr.gov/countries-regions/americas/chile>, accessed April 10, 2011.

<sup>21</sup> Fraser Institute, *Annual Survey of Mining Companies 2008/2009*, available at <http://www.fraserinstitute.org/>, accessed on March 30, 2011.

<sup>22</sup> Riesco, Manuel ‘El alza de impuestos de Piñera’, 20 April 2010, *El Mostrador*, available at <http://www.elmostrador.cl/opinion/2010/04/19/el-alza-de-impuestos-de-pinera>, accessed on April 21, 2011.

<sup>23</sup> Gobierno de Chile, *Evaluación de las Relaciones Comerciales entre Chile y Canadá a Doce años de la Entrada en Vigencia del TLC*, July 2009, available at [http://www.sice.oas.org/TPD/CAN\\_CHL/studies/Eval2008\\_s.pdf](http://www.sice.oas.org/TPD/CAN_CHL/studies/Eval2008_s.pdf), accessed on April 5, 2011

<sup>24</sup> The case was taken by the Diaguita people to the Inter American Human Rights Commission. The Diaguita have accused the Chilean government of violating several human rights acknowledged in the Inter American Convention on Human Rights, including the right to equal treatment and to property. This as a consequence of its approval of Barrick Gold’s Pascua Lama mining project.



Billiton, has been involved in the extraction of underground waters in the Pampa Lagunilla, which has dried up the wetlands of the Aymara community of Cancosa.

In the south of Chile, the traditional territory of the Mapuche has been severely affected by the expansion of forestry, the building of hydro dams, and the proliferation of fishing and salmon farms. Almost two million hectares acquired mainly by Chilean companies have been planted with fast-growth exotic species (radiata pine and eucalyptus) for the production of timber and cellulose, which is largely exported to the US and China.<sup>25</sup> Hydro dams that supply the power needed for paper mills and forest operation have been built on Mapuche lands. Several investments in the area have been made by Spanish capital (ENDESA) Salmon farms, which have made Chile the second-largest exporter of farmed salmon worldwide, have been installed along Mapuche river and ocean shores.<sup>26</sup>

Indigenous, and particularly the Mapuche's, social protest triggered by the proliferation of these investment projects without proper consultation with them and without their participation in the benefits, has been criminalised by the Chilean state. Such criminalisation is evidenced by acts of police brutality against individuals, resulting in many cases of torture, and cruel, inhuman and degrading treatment affecting community members. Three Mapuche activists involved in social protests against the expansion of forest activities in their communities have been killed by police agents in the last decade.<sup>27</sup> Those responsible for these acts remain free with impunity. By contrast, hundreds of Mapuche activists have been prosecuted by the state after they were accused of committing ordinary or terrorist crimes listed in the Anti-terrorist Law (No. 18,314). Fifty of them were imprisoned in 2010 charged with terrorist crimes.

The application of anti-terrorism legislation to prosecute Mapuche human rights defenders has caused concern among a number of UN human rights entities, including the Human Rights Council, the UN Committee Against Torture and the UN Committee for the Elimination of Racial Discrimination. In 2009 this last entity, as well as UN Special Rapporteur on the rights of indigenous peoples, James Anaya, recommended that the Chilean state ensure that investments are not implemented in violation of indigenous rights to land and natural resources. Moreover, the Committee on the Elimination of Racial Discrimination recommended that such activities should not be implemented without the indigenous people free, prior and informed consent<sup>28</sup>.

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<sup>25</sup> Most of the investment in forestry in Chile has been made by two large national holdings, Arauco (COPEC) and CMPC. The first of the two companies had a joint venture initially (1987–2000) with Carter Holt Harvey, a New Zealand company, and later with International Paper (2000–4), a US company.

<sup>26</sup> IWGIA, *The Indigenous World 2009*, IWGIA, Copenhagen, 2009, available at [www.iwgia.org](http://www.iwgia.org), accessed on March, 15, 2010.

<sup>27</sup> Observatorio Ciudadano, comp., *Los Derechos Humanos en Chile: La Evaluación de la Sociedad Civil, los Pueblos Indígenas y las Naciones Unidas*, Observatorio de Derechos de los Pueblos Indígenas, 2009.

<sup>28</sup> Committee on the Elimination of Racial Discrimination, *Chile*, CERD/C/CHL/CO/15-18, 7 September 2009.

## Peru

Peru is probably the best example of the adverse effects on indigenous peoples of FTAs signed with the US. In order to enable the implementation of the US–Peru TPA, the Peruvian Congress in 2007 granted the executive branch the use of legislative powers in matters that included trade facilitation, state modernization, administration of improved justice in trade matters and administrative disputes, promotion of private investment, institutional strengthening of environmental management, and improvement of competitiveness of farming production. Within less than six months, Alan Garcia’s government issued ninety-nine legislative decrees, thirty-eight of which affected indigenous and peasant communities.<sup>29</sup>

The legislative decrees (LD) that threatened indigenous peoples’ lands and resources with the purpose of implementing the US–Peru FTA included, among others, the following:

- LD 1089 *Extraordinary Temporal Regime of Rural Formalization and Deed of Title* eases the path to expropriation and exploitation of rural property at a national level. The decree promotes individual property on the basis of collective impairment, undermining the right to consultation, to land and territory, and the use of natural resources and development.
- LD 1079 *Natural Protected Areas* opens up natural protected areas to forest concessions, mines and oil under the US–Peru FTA by enabling the exploitation of renewable and non-renewable resources in those lands.
- LD 1090 *Forest and Wildlife Law* redefined forest patrimony to exclude from public administration around 45 million hectares of land with foresting capacities – equivalent to 64 per cent of Peruvian forests – and make it available for grants of private property to transnational corporations. This decree was modified by Law 29317, which was aimed at privatizing forests and promoting changes of land use in order to promote bio-combustible production. Law 29317 was repealed on 5 June 2009.
- LD 1015 and 1073 *Native and Peasant Communities Law* promotes private investment on indigenous peoples’ lands and in rural communities by allowing indigenous peoples to decide on the sale of their property by a vote of 50 per cent plus one, instead of demanding the agreement of the community’s general assembly, which requires two-thirds approval.<sup>30</sup>

The intention behind these legislative decrees was to encourage the new expansion of large private states – *noelatifundización* – of Amazonian forests lands. By breaking up

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<sup>29</sup> Such legislative powers were granted by Law No. 29157 of 18 December 2007. This law was aimed at ‘facilitating the execution of the Trade Promotion Agreement Peru–United States and its Amendment Protocol, and in order to support economic competitiveness for its use’.

<sup>30</sup> FIDH (International Federation for Human Rights), *Peru – Bagua. Bloodshed in the Context of Amazon Protest. Urgent Need for Good Faith Dialogue*, October 2009, No. 529a, pp. 14–16 available at <http://www.fidh.org/Bagua-Bloodshed-in-the-context-of-Amazon-protest>, accessed on March 28, 2011.

indigenous communities, their territories could be handed to large investors interested in extractive activities or in bio fuel production.<sup>31</sup>

As in the case of the negotiation of the US–Peru TPA, indigenous peoples were never consulted in the process leading to the approval of these decrees. That situation led the ILO Committee of Experts on the Application of Convention 169 to express to the Peruvian state its concern over the serious failure to consult with indigenous peoples on legislation that may affect them, and on decisions regarding the use of natural resources on their traditional territories.<sup>32</sup>

In 2008 the Amazonian indigenous peoples in the Interethnic Association of the Peruvian Amazon (AIDSESEP) demanded that the decrees affecting them and approved without their consultation be rescinded. Such protests were successful in getting LD 1015 and 1073 (which facilitated sales procedures and individualization of land ownership) overturned. President Garcia made a commitment to initiate an evaluation of other decrees questioned by AIDSESEP, and formed a Special Multiparty Commission. The Commission's report, issued in December 2008, recommended their repeal. Among the fundamentals of its recommendations were that rules regarding rights and freedoms recognized by the Constitution should be interpreted in accordance with the United Nations Human Rights Declaration and with international treaties ratified by Peru in this matter; it argued that these decrees did not comply with this obligation. New protests began in April 2009 after Congress failed to implement the Commission's recommendation to repeal seven additional decrees that affected indigenous peoples' rights.

AIDSESEP again mobilized its grass-roots organizations throughout the country. Among these organizations were those of the Awajún and Wampis people in the area of Bagua where the government threatened to reduce the Ichigkat Muja National Park on the border with Ecuador to the benefit of mining in the Condor Mountains, in accordance with the decrees. After several days of road blockade, the government ordered the police to clear the roads, generating clashes that ended with thirty-four identified deaths, including twenty-four police officers and ten people from the indigenous communities. Also, a hundred civilians were injured by firearms.<sup>33</sup>

The events of Bagua led to several investigations, including the one conducted by the UN Special Rapporteur James Anaya. In his report issued in August 2009, the Special Rapporteur not only asked the government of Peru to investigate and clarify these events, but also stressed the importance of harmonizing the development policies implemented by Peru with respect to the state's human rights obligations regarding indigenous peoples, in

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<sup>31</sup> IWGIA, *The Indigenous World 2010*, available at [www.iwgia.org](http://www.iwgia.org), accessed on March 20, 2011.

<sup>32</sup> Observation, CEACR 2008/79a conference, available at <http://webfusion.ilo.org/public/db/standards/rules/appl/appl-displaycomment.cfm?hdroff=1&ctry=0490&year=2008&type=O&conv=C169&lang=EN>, accessed on March 30, 2011.

<sup>33</sup> IWGIA, *The Indigenous World 2010*, available at [www.iwgia.org](http://www.iwgia.org), accessed on March 20, 2011.

particular ILO Convention No. 169 to which Peru is a signator, and the UN Declaration on the Rights of Indigenous Peoples which was approved in 2007 with Peru's support.<sup>34</sup>

The US–Peru TPA has only been in effect for a short time. The same can be said of the Canada Peru FTA, which only came into effect in 2009. However, both agreements coincide with a period of strong economic growth, where foreign investments on natural resource exploration and exploitation on indigenous peoples' lands and resources, both in the Andes and in the Amazon, are booming.

Canadian corporations are dominant in the country's mining sector. It is estimated that more than 200 mining exploration companies, mostly Canadian, are searching for oil, gas and other natural resources across Peru. Forty percent of conflicts involving local communities, most of them indigenous, are related to mining. The majority of the mining sector in Peru is currently Canadian<sup>35</sup>.

## Conclusions

Opposition of Indigenous peoples to FTAs and other commercial agreements signed by Latin American states with large economies in the last two decades is not surprising. This is especially true when considering that they have not been informed of, consulted or considered by the states during the negotiation process and in defining the contents of the FTAs. Moreover, far from participating in the benefits from investments promoted by such agreements - mostly on resource extraction- their communities, as well as their lands and resources, have been negatively impacted as we have seen in the cases of México, Chile and Peru.

Concerns about the compatibility of trade agreements with human rights' obligations have been raised in recent years by human rights organizations. The Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Mr. John Ruggie, in his reports, aimed at the duty of states to "Protect, Respect and Remedy", has highlighted the need to raise awareness amongst developing country negotiators, on the risks of such investment and trade agreements, in particular stabilization clauses, in discharging their human rights' obligations<sup>36</sup>.

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<sup>34</sup> Naciones Unidas, *Observaciones sobre la Situación de los pueblos Indígenas de la Amazonía y los sucesos del 5 de Junio y días posteriores en las provincias de Bagua y Utcubamba, Perú*, Informe del Relator Especial sobre la situación de los derechos humanos y las libertades fundamentales de los indígenas, Sr. James Anaya, /HRC/12/34/Add.8, 18 de agosto de 2009. See [http://unsr.jamesanaya.org/PDFs/Peru\\_special.pdf](http://unsr.jamesanaya.org/PDFs/Peru_special.pdf), accessed March 25, 2010.

<sup>35</sup> During 2008 Canadian resource companies in Peru were responsible for several socially damaging events including: an oil and gas company entered an area inhabited by a nomadic tribe that refused contact with the outside world; a mine destroyed pre-Columbian carvings; and the government declared a state of emergency over fears that arsenic, lead and cadmium from a mine near Lima could pollute the capital's main water supply. Engler, Yves, "Mining Peru", available at <http://lamula.pe/barra/com/17>, accessed on April 10, 2011

<sup>36</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Business and Human Rights: Further*

As the International Federation on Human Rights declared on this matter in the context of the work of the UN Special Representative Mr. Ruggie:

The conclusion of multilateral trade and investment agreements within the World Trade Organization and at the bilateral level, in isolation from the human rights regime, has contributed to the fragmentation of international law. Notwithstanding the challenges posed by such fragmentation, the international human rights law regime cannot be set aside and treated in isolation from other legal regimes. States cannot on the one hand ratify human rights treaties and, on the other hand, conclude agreements that prevent them, or other States, from fulfilling their human rights obligations<sup>37</sup>.

Another concern expressed by the UN system is related to human rights violations which arise from investments made in developing states by transnational companies based in industrialized states. Often, these investments do not comply with human rights obligations enforced in their own country of origin, or with human rights stipulated by international conventions and ratified by these countries. The fact that many of these investments adversely impact indigenous peoples' rights has been addressed by the UN Committee on the Elimination of Racial Discrimination. On several occasions this Committee has urged developed states to take measures in preventing these human rights violations by transnational companies registered in their countries<sup>38</sup>.

This concern is especially applicable to human rights' obligations of indigenous peoples that emerge from international legislation which have been ratified or approved by most Latin American States in recent years, such as the ILO Convention 169 and the UN

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*steps toward the operationalization of the "protect, respect and remedy" framework, United Nations (General Assembly), April 9, 2010, A/HRC/14/27*

<sup>37</sup> International Federation for Human Rights, *Human Rights and Business: Upholding Human Rights and Ensuring Coherence. Submission to the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, October 2009, pp. 3-4, available at [www.fidh.org](http://www.fidh.org), accessed on March 20, 2011

<sup>38</sup> An example of this concern is the one expressed in 2007 by the UN Committee on the Elimination of Racial Discrimination in its concluding observations on Canada. On that occasion the Committee declared:

The Committee notes with concern the reports of adverse effects of economic activities connected with the exploitation of natural resources in countries outside Canada by transnational corporations registered in Canada on the right to land, health, living environment and the way of life of indigenous peoples living in these regions (arts 2. 1(d)d), 4 (a) and 5(e)). (Parag. 17)

Moreover the Committee stated that:

...the Committee encourages the State party to take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in Canada which negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada. In particular, the Committee recommends that the State party explore ways to hold transnational corporations registered in Canada accountable. (Parag. 17). UN Committee on the Elimination of Racial Discrimination, *Concluding observations on Canada*, CERD/C/CAN/CO/18, 25 May 2007, available at <http://www2.ohchr.org/english/bodies/cerd/cerds70.htm>, accessed on April 10, 2011.

Declaration on the Rights of Indigenous Peoples. Such obligations not only include the protection of indigenous property rights over lands and resources traditionally owned by them, but also the duty of states to consult in good faith with, and obtain indigenous peoples' free, prior, informed consent before entering into commercial arrangements such as those referred to in this article. This duty to consult is also applicable to the approval of extractive investments to be performed in their lands and territories.

The same is to be said of obligations that arise from the Inter American Convention on Human Rights, of which most states in the Americas, including the US and Canada are signatories. Although this Convention does not refer to indigenous peoples' rights in particular, the Inter American Human Rights Court has developed, in the last decade, a relevant jurisprudence, recognizing that indigenous peoples' ancestral rights to lands and natural resources are protected under provisions of the Convention (article 21 of the Convention). Moreover, in the *Saramaka vs. Surinam* decision (2007), the IACHR Court declared that states have the obligation to obtain the free, prior, informed consent of indigenous peoples when dealing with large investments or development plans which affect their existence. The Court also mandated in this decision that states have to reasonably ensure that such investments share their benefits with the indigenous and tribal peoples whose land or natural resources are affected.

At a continental summit of indigenous peoples held in 2009 in Puno, Peru, their leaders reasserted their opposition to FTAs, which are clearly seen as a form of domination and colonization:

We reject the Free Trade Agreements with United States, Europe, Canada, China and other countries which have destroyed our economies, as new instruments of subjugation of our Peoples and plunder of Mother Earth. We reject the tactics of the European Union along with the dictators of Peru and Colombia that would destroy the Andean Community in order to impose their Free Trade Agreement.<sup>39</sup>

Opposition to FTAs and other initiatives aimed at strengthening resource-based investments is grounded not only in political rationales, but increasingly in indigenous worldviews. New paradigms among indigenous movements in Latin America based on the need to respect nature (Mother Earth or *Pachamama*) proclaim that their aspiration is not that of Western societies, which is '**living better**', but instead is '**living well**'. That perspective has strongly influenced new trends in Latin American constitutionalism, as can be evidenced in the case of the recently approved Constitutions of Ecuador (2008) and Bolivia (2009).<sup>40</sup>

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<sup>39</sup> *Mama Quta Titijaja Declaration*, IV Continental Indigenous Summit of Abya Yala, Puno Peru, 31 May 2009, available at <http://www.art-us.org/content/mama-quta-titijaja-declaration-iv-continental-indigenous-summit-abya-yala>, accessed on March 10, 2010.

<sup>40</sup> The Ecuadorian Constitution (2008) recognizes that the duty of the state is to promote good life (*samak kawsay* in Quichua) (art. 3). Similarly, Bolivia's Constitution (2009) assumes and promotes the ethical and moral principles of the plural society encapsulated in the Quechua concept of *teko kavi* (good life) (art. 8). Furthermore, the Constitution of Ecuador introduces the notion of the rights of nature, which challenges the prevailing concept that only individuals or groups can be the subjects of rights. As established in article 71 of

Such trends generate a new scenario in the region which cannot be ignored by Northern economies pushing for trade agreements aimed at promoting investments in resource exploration and exploitation in the region. This, at least, if events such as those that took place in Bagua, Peru in 2009 are to be avoided.

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the Constitution: 'Nature or *Pachamama*, where life is reproduced and exists, has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its evolution processes.'