The Second Conquest

The EU Free Trade Agreement with Colombia and Peru

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by Thomas Fritz | FDCL (Berlin), TNI (Amsterdam) | October 2010

Published by:

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Author: Thomas Fritz
Layout: Mathias Hohmann
Publisher: FDCL-Verlag, Berlin

Cover photo: Miguel Araoz, Quisca producciónes, Peru / Protests against high food prices in Cuzco (Peru), December 2008.

Acknowledgement: Special thanks for help and comments to Cecilia Olivet and Nick Buxton of TNI.

This project is funded by the European Union.

This publication is published within the framework of the EU funded project ‚Just Trade'. The project advocates for greater policy coherence between EU development and trade policy, with a view to promote equitable and sustainable development. Partners in the project are: Ecologistas en Acción (Spain), FDCL (Germany), Glopolis (Czech Republic), Protect the Future (Hungary) and Transnational Institute (Netherlands). The content of this publication is the sole responsibility of the publishing organisation(s).

 | ISBN: 978-3-923020-50-8

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1 Introduction

On 19 May 2010, at the margins of the EU-Latin America summit in Madrid, the EU, Peru and Colombia announced the conclusion of negotiations for a Free Trade Agreement (FTA). However, the FTA will not yet come into force as it still has to be endorsed by the European Council, the European Parliament and the Peruvian and Colombian Congress. Since this treaty qualifies as a so-called 'mixed agreement', which falls outside the exclusive competence of the EU, additional ratification by the parliaments of the 27 EU member states will also be necessary. The European Council will first meet to make a decision on this classification. Then the European Parliament is expected to debate the Treaty in the second half of 2011. Meanwhile, due to the FTA's social and environmental impacts, opposition is growing not only within civil society but also among several members of parliament. The agreement has been overwhelmingly opposed by trade unions and social movements in the Andean Community and the European Union.

This publication contains an overview of the FTA's history, of human rights violations in Colombia and Peru as well as a critical analysis of the draft agreement which recently leaked to the public. It appears that the main beneficiaries of the agreement would be European transnational corporations (TNCs) working in Colombia and Peru. The text, therefore, describes European TNCs' activities in these two Andean countries and their involvement in human rights violations, particularly in commercial agriculture and extractive industries like mining and petroleum.

The analysis concentrates on the possible impacts of enforced liberalisation of goods and services trade, foreign direct investments and intellectual property rights. Special emphasis is placed on the far-reaching provisions concerning intellectual property rights since these might foster biopiracy and endanger access to medicines and seeds. The situation is exacerbated by the fact that the draft treaty only contains very weak provisions on environmental and labour standards. Most notably, the draft lacks effective sanctions and enforcement provisions to tackle violations of international environmental and labour law.

This publication is part of a joint project of the Transnational Institute (TNI) in Amsterdam and the Center for Research and Documentation Chile-Latin America (Forschungs- und Dokumentationszentrum Chile-Lateinamerika – FDCL) in Berlin. For several years now, both institutions have been challenging the trade agenda of the European Union by raising awareness of the social and environmental impacts of the free trade and association agreements the EU negotiates with Latin American and other countries in the world. Together with social movements in Europe and the Global South, TNI and FDCL are putting forward alternatives to the EU's neoliberal trade and investment regime.

2 Divide and Conquer: Destroying the Andean Community

Negotiations on a so-called Association Agreement between the European Union and the four member states of the Andean Community of Nations (*Comunidad Andina de Naciones* – CAN) – Bolivia, Ecuador, Peru and Colombia – began in June 2007. The EU's Association Agreements encompass three pillars: political dialogue, development cooperation and free trade, with the latter the most controversial element. In Latin America, the EU had already signed bilateral association agreements with Chile and Mexico. This time, though, the Europeans tried to hammer out one of their first region-to-region association agreements. This went ahead despite all the parties involved in these negotiations being perfectly aware of the possible risks for the Andean integration process.

Only a few years ago, Venezuela left the Andean Community protesting against the United States' free trade agreements with Colombia and Peru. Venezuela claimed the FTAs would violate Andean Community law, which stipulates that individual CAN members negotiating treaties with third parties must take into account the possible impacts on other members not involved in these negotiations. The FTAs would undermine Andean integration because lowering barriers for US exports not only affects the contracting parties of these agreements, but the regional block as a whole.

Bolivia had similar apprehensions. The government of President Evo Morales was concerned it might lose export markets because of the liberalisation requirements set out in the US FTAs with Colombia and Peru. About one third of Bolivian soya exports went to these latter two Andean countries, which having committed themselves to opening up their markets to highly subsidised US agricultural products had compromised Bolivian export opportunities.

In the run-up to the negotiations with the European Union, the Bolivian government presented a list of 17 criteria that the Association Agreement should meet. According to these criteria, such an agreement should contribute to narrowing the enormous economic gap between the EU and the Andean Community. It should further ensure the participation of civil society, protection of domestic markets, access to basic services, food sovereignty and the deepening of Andean integration.[1]

The government of Ecuador also expressed reservations about the European Union's intention to negotiate not only the trade of goods, but also investments, public services, government procurement as well as far-reaching provisions protecting intellectual property rights of European TNCs.[2] At that time, Ecuador, the world's largest banana exporter, also quarrelled with the EU over its banana regime. It was only in December 2009 that this long-running dispute ended with an agreement at the WTO.[3]

Inside the Andean Community, Bolivia and Ecuador, both economically weaker than Colombia and Peru, advocated for a diversified strategy preserving the unity of the Community while at the same time conceding special treatment to Bolivia and Ecuador. On 8 June 2007, the four CAN members adopted Decision 667, satisfying these demands.[4]

According to this decision, the association agreement with the EU would need to consider

the asymmetries within the Andean Community allowing each member state commitments of varying scope. The bi-regional treaty would need to grant 'special and differential treatment' to Bolivia and Ecuador, a recognised principle of international trade law also enshrined in the WTO treaties.[5] Since the European Commission did not accept the flexible approach envisaged by Decision 667, the governments of Colombia and Peru subsequently expressed their desire to negotiate bilateral trade agreements with the EU, i.e., independently of the Andean Community.[6]

On 30 June 2008, the European Commission surprisingly cancelled the fourth round of bi-regional negotiations and put the talks on hold, referring to the internal conflicts of the Andean Community. Then, in November 2008, former EU Commissioner for External Relations, Benita Ferrero-Waldner, announced the commission would continue negotiations only with Colombia and Peru, since both countries had signalled willingness to conclude a trade accord. She, nevertheless, added that participation "will always be open to all CAN members wishing to do so."[7]

The talks resumed in January 2009. This time, though, they didn't aim at concluding an association agreement but a free trade agreement. The two pillars 'political dialogue' and 'cooperation' were dropped. Initially, Ecuador participated alongside Colombia and Peru but left the negotiations in July 2009 due to the banana dispute with the European Union. By March 2010, the negotiations between Peru, Colombia and the EU reached a conclusion, which was officially announced in May 2010. To come into effect, it now must be endorsed by the Peruvian and Colombian Congress, the European Council, the European Parliament and the national parliaments of all EU member states (see Chapter 6.1).

Meanwhile, Bolivia has asserted that it never voluntarily withdrew from the negotiation table and filed a complaint with the Andean Community Court of Justice in February 2010. The government of Evo Morales accuses Colombia, Peru and Ecuador of, inter alia, violating CAN Decision 667 stipulating joint Andean Community negotiations with the EU.

3 Human Rights Violations in Colombia

In Colombia, state actors are directly or indirectly involved in the majority of human rights violations like forced displacements, murder of trade unionists, extrajudicial executions, torture and enforced disappearances. Several members of Congress have been convicted of links with right-wing paramilitary groups responsible for the majority of these crimes. The military and the police, in close cooperation with paramilitary forces, have committed many human rights abuses as well. The two main guerrilla groups fighting against the government, FARC (*Fuerzas Armadas Revolucionarias de Colombia*) and ELN (*Ejército de Liberacíon Nacional*), also perpetrate crimes such as homicide, kidnapping and child recruitment.

The former government of President Álvaro Uribe proved unwilling to pursue crimes committed by state actors with the necessary emphasis, and it is doubtful whether an improvement of the human rights situation can be expected of Uribes' successor, Juan Manual Santos, who won the run-off elections on 20 June 2010. It was during his term as defence minister under Uribe (2006-2009) that one of the worst army scandals was uncovered, the case of so-called 'false positives' (*falsos positivos*). In order to show results in the war against guerrillas, soldiers of the Colombian army kidnapped and murdered civilians, who were then dressed in rebel uniforms and presented to the media as guerrillas 'killed in combat'. The exact number of victims is unknown; estimates range from one thousand to two thousand assassinations over the period 2002-2009.[8]

Furthermore, Santos announced the continuation of its predecessor's controversial 'democratic security' policy, which aims at defeating the guerrillas by increasing the number of military troops across the country and by combating coca production and drug trafficking. This policy, however, goes hand in hand with many human rights violations and it is accompanied by extreme impunity. About 97% of killings of trade unionists, 98% of forced evictions and 99% of extrajudicial executions remain unpunished. Only a small fraction of these cases are being investigated by the judiciary, and convictions remain sporadic.[9]

Since 2006, the *parapolítica* (paramilitary politics) scandal has brought to light the very close ties between state representatives and paramilitary groups. Politicians used paramilitary forces to eliminate social activists and political opponents in order to get public offices. In return, they channelled information and public funds to the armed groups. By the end of 2009, there had been criminal investigations against 93 of the 286 members of the Colombian Congress while 19 parliamentarians had been convicted.[10]

A scandal about the unlawful methods of Colombian secret service DAS (*Departamento Administrativo de Seguridad*) also revealed the role of the state in repressing political opposition. DAS documents seized by the attorney general's office in April 2010 showed that the secret service conducted widespread illegal intelligence operations against politicians, journalists, NGOs and trade unions. Its methods comprised of death threats, terror acts, extortions, defamation, sabotage, burglary and information theft.[11]

Furthermore, a DAS mission known as 'Opera-

tion Europe' was set up, which intended to sabotage the work of European human rights institutions. In order to influence the debate on the FTA with Colombia and Peru, DAS agents apparently spied on members of the European Parliament and several NGOs critical of the FTA.[12] A group of EU parliamentarians called on the European Commission to investigate these illegal activities, but the Commission is afraid such an investigation could undermine the ratification of the FTA and has failed to do so.[13]

For trade unionists, Colombia is the most dangerous country in the world. Since Álvaro Uribe took office in 2002 over 500 union leaders and activists have been murdered. Two-thirds of all trade unionists killings in the world occur in Colombia. Fundamental labour rights like the freedom of association, the right to strike and the right to collective bargaining are not respected. As a result of anti-union policies, less than 5% of Colombian workers are unionised and fewer than 2% are covered by collective labour agreements. In the last couple of years, anti-union violence has increased considerably. A total of 49 trade unionists were assassinated in 2008, 48 in 2009.[14]

The most widespread human rights abuses in Colombia are forced displacements. Since 1985, more than 4.6 million people – ten percent of the population – have been violently expelled from their homes and lands, mainly by paramilitary groups often supported by the national army. Many victims possessed land that companies collaborating with paramilitary forces subsequently appropriated. Since 2000, displaced families have had to leave behind parcels of land amounting to 5.5 million hectares – an area larger than Switzerland.[15]

Between 2002 and 2006, the Uribe government carried out a demobilisation process that has had little success. Although 30,000 paramilitaries laid down their arms, many of these groups remain active. Very few of the demobilised have been prosecuted so far, and only a tiny fraction of the stolen land has returned to its owners.[16] The seized land is mainly being used by cattle farms, the mining industry or agribusinesses like oil palm, sugarcane or cocoa plantations. When Colombian human rights organisations supported a draft law that would restore stolen land and compensate displaced people, the *Ley de Víctimas* (Victims' Law), it was blocked by the Uribe government in June 2009.[17]

3.1 European Extractivism: Land Grabbing and Brute Force

Human rights organisations are concerned that the EU FTA could reinforce violent displacements as it encourages investments in extractive industries like mining, energy and agriculture without strengthening the social rights of the local population.[18] Recent developments in these sectors confirm this fear.

Between 2002 and 2006, foreign investments in the petroleum sector quadrupled from US$ 500 million to US$ 2 billion as ten new oil companies entered the Colombian market, and hundreds of exploration contracts were signed. By 2008, the National Agency for Hydrocarbons (*Agencia Nacional de Hidrocarburos*) allocated 17 million hectares to oil companies in concessions for exploration and production – an area half the size of Germany. Of these, nearly 6 million hectares overlap with territories of indigenous peoples and Afro-Colombians.[19]

Numerous European corporations engage in the Colombian petroleum market, e.g., Repsol YPF (Spain), British Petroleum, Gold Oil, Global Energy Development (UK), Royal Dutch Shell (Netherlands-UK), Perenco (France-UK), Total and Hocol (France). European TNCs have also been accused of human rights abuses. In one case, BP was formally accused in an English High Court by Colombian farmers who alleged that an oil pipeline built by a BP-led consortium damaged their land. They further claimed that paramilitaries employed to guard the pipeline terrorised the local population and obstructed farming. The following year, the Colombians reached an out-of-court settlement with BP in which the company agreed to compensation payments.[20]

According to its national plan for the mining sector, Colombia's government plans to double the production of coal and to quadruple that of precious metals by 2019. To achieve this expan-

Photo: Jochen Schüller

Grabbed land Palmtree plantation in Colombia

sion, the government wants to triple the area in which to grant mining concessions.[21] While the concessions already granted cover an area of 2.9 million hectares, it is estimated that pending applications exceed this area ten times. Nearly half of the mining districts, assigned by the government, overlap with indigenous reserves.

One example is the gigantic open pit coal mine of Cerrejón in the department of La Guajira, which has already forced out several villages and threatens several more. Relocation and compensation measures offered by the mine remained entirely insufficient.[22] The unit of the Colombian army responsible for the security of Cerrejón is accused of involvement in a paramilitary massacre of indigenous Wayúu.[23] The mine is a joint venture equally owned by Anglo American (United Kingdom), BHP Billiton (Australia-UK) and Xstrata (Switzerland), which together hold concessions of more than 124,000 hectares.[24]

Colombia is the fourth largest coal exporter in the world. Almost half of its exports originate from Cerrejón. The bulk of its thermal coal production goes to Europe with Dutch ports like Rotterdam and Amsterdam acting as important distributors to other European countries.[25] As a result, many NGOs in Switzerland, Germany, Denmark, the UK and the Netherlands have highlighted the responsibility of European mining and trading companies as well as power generators (Vattenfall, E.ON, RWE, Dong, EnBW, Evonik and others) for these human rights abuses.[26]

In a recent report on the situation in Colombia, the UN Committee on Economic, Social and Cultural Rights expressed its concern "that infrastructure, development and mining mega-projects are being carried out in the State party without the free, prior and informed consent of the affected indigenous and afro-colombian communities."[27] The principle of 'free, prior and informed consent' is an international norm laid out in the 2007 UN Declaration on the Rights of Indigenous Peoples.[28]

In the agricultural sector, the Colombian government seeks to increase exports of coffee, bananas, sugar and tobacco as well as palm oil, agrofuels and natural fibres. Most notable is the growth of palm plantations, doubling in size from 150,000

to 300,000 hectares between 2001 and 2006.[29] In 2009, they occupied an area of 365,000 hectares.[30] Two-thirds of Colombian palm oil exports go to Europe, with Germany as the main destination.[31] The palm oil is mainly used as an ingredient for the production of food, cosmetics and biofuels.

However, using Colombian palm oil is a risky undertaking, particularly for those claiming to engage in ethical business practices. Last year, the British cosmetics chain The Body Shop came under fire after reports that it bought palm oil from Daabon Organics, a Colombian firm that pushed for the forced eviction of 500 farmers in Las Pavas to develop a new plantation. The farmers had previously been displaced in 2006 by paramilitaries, but returned half a year later, created a cooperative and applied for a land title. They allege their displacement by Daabon was illegal, because their pending land claim had been ignored.[32]

Yet, Daabon is not an isolated case. Many of the peasants who have been violently forced off their lands try to return and recover at least part of the property they lost – a very risky undertaking including for human rights organisations which support their struggle. In recent years, aggressions against human rights defenders, including assassinations, death threats, torture and arbitrary arrests, have increased considerably. According to the programme *Somos Defensores*, there were 177 attacks on human rights defenders in 2009, including 23 murders. Over the period 2002 to 2006, the programme counted, on average, 16 killings per year.[33]

4 Human Rights Violations in Peru

In Peru, too, social movements are concerned human rights might suffer due to the free trade agreement with the EU. They have already had bad experiences with the free trade accord between Peru and the United States, which, after being ratified by the Peruvian (June 2006) and US Congress (December 2007), came into force in 2009. In order to implement the liberalisation commitments within the accord, the government of Alan García obtained special powers enabling the issuance of 99 presidential decrees, several of which affected the land rights of indigenous and farmers communities who frequently lack secure land titles.

In his infamous article "The syndrome of the gardener's dog" (*El síndrome del perro del hortelano*), published in September 2007, President García depicted indigenous and farmer communities as impediments to progress and their land claims as illegitimate. García argued that throughout Peru there are "artificial" farmer communities possessing on paper 200.000 hectares, but unable to cultivate more than 10.000 hectares. They live in poverty and expect help from the state. The property rights of all those poor farmers who lack expertise or resources for cultivating their land are, as García puts it, only "ostensible". If their plots were sold to well-funded and qualified investors, they could be used productively to the benefit of all. To García's annoyance, antiquated communitarian ideologies had prevented such a valorisation of land. Small farmers were behaving like the gardener's dog that neither eats cabbage itself nor lets anyone else do so.[34]

In this spirit, Garciá's liberalisation decrees aimed at facilitating access to land for investors in the mining, petroleum and agricultural sector. Decree 1015, for instance, reduced the votes of approval required for the sale of collectively held land from two-thirds to 50% of the members of a local community. Decree 1064 enabled state authorities to declare common lands as fallow, thus allowing their expropriation. At the same time, investors interested in resource extraction on these plots were exempted from the obligation to obtain the prior consent of the original owners. Finally, Decree 1090 allowed the government to convert forest areas in the Peruvian Amazon to arable land, mainly for the production of agrofuel feedstock like palm oil or sugarcane.[35]

There were no consultations on any of these decrees with representatives of the affected communities – a clear violation of Convention 169 of the International Labour Organisation (ILO)[36] and the UN Declaration on the Rights of Indigenous Peoples.[37] The liberalisation decrees led to massive protests of farmers organisations, indigenous peoples and trade unions, that were violently suppressed. On 5 June 2009, special forces of the National Police dispersed peaceful road blockades of indigenous protesters in the northern province of Bagua, an operation that resulted in 33 deaths and 200 people injured.[38] Due to the ongoing resistance, the government was finally forced to suspend a few of the decrees.

Nevertheless, the García administration sticks to its ruthless attitude towards indigenous and rural communities. The government has made every endeavour to undermine a law that would guarantee the prior consultation of indigenous peoples

before the adoption of legislative or administrative measures that may affect them. This law is tied to Peru's obligations under the ILO Convention 169, which has been ratified by Peru. After the Peruvian Congress adopted the draft law in May 2010, President García made various objections and referred the draft back to the Congress. To the consternation of social movements, a parliamentary committee subsequently watered down the draft according to García's wishes. Due to the government's obstruction, it is possible that further debate on the law might be postponed until after the general elections of April 2011.[39]

In July 2010, the UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya, issued a declaration criticising the Peruvian government's course of action. According to Anaya, the draft that has already been adopted by the Congress in May 2010 complies with ILO Convention 169 and international law and should therefore be signed and implemented by the government.[40]

The majority of socio-ecological conflicts in Peru occur in the mining, petroleum and forestry sectors. According to official data, 11.6% of the national territory has already been granted in concessions to mining companies.[41] Even more extensive is the land occupation by the oil industry. By 2008, the government had leased up to 64 blocks to transnational corporations for oil and gas exploration. Amounting to 49 million hectares, these blocks cover 72% of the Peruvian Amazon – an area nearly as large as Spain (50,4 million hectares). About 58 of the blocks overlap with lands titled to indigenous peoples.[42]

There are numerous European mineral oil companies among the investors, including Repsol YPF (Spain), ENI (Italia), Skanska (Sweden), Perenco (UK/France), Gold Oil (UK) and CEPSA (Spain). The free trade agreement will strengthen the legal security of their investments at the expense of local communities.

The agrofuels boom has provoked conflicts as well. In the northern Peruvian department of Piura, the company Caña Brava produces sugarcane ethanol that is exported by Mitsui and British Petroleum to Germany, where it is mixed with petrol.[43] The regional government of Piura auctioned off the land, even though local communities traditionally used it for pasture and the collection of firewood.

„The rainforest bleeds to death"
Violent police intervention on 5 June 2009 in Bagua (Fronpage, *La República*, 6 June 2009)

Back in the 1990s, the communities' traditional use rights had been acknowledged by the state. After protests of affected small farmers, Caña Brava offered compensation to individual families, but the majority of them demanded restitution of the land.[44]

Abuses of worker's rights also occur very frequently, in part due to Peruvian law facilitating anti-union practices. In many cases, a minimum of 20 members is legally required to form a trade union, hence there are no unions in most small- and medium-sized enterprises. The law enables unfair dismissals like the sacking of workers without any justification. In cases of mass layoffs, which are also allowed, the state's labour authority is banned from verifying whether the collective dismissal unfairly targeted trade union members. Finally, it is not the courts that decide the legality of a strike, but the officials of the Administrative Labour Authority, an entity subordinate to the government.[45] In this environment, several European corporations felt encouraged to take anti-union measures like the targeted dismissal of trade unionists, such as ENI (Italy)[46], Telefónica (Spain)[47], ING (Netherlands)[48] and Repsol YPF (Spain).[49]

The violent escalation and repression by police and military in Bagua is also not an exception. Repeatedly, Peruvian security forces have resorted to excessive violence, including the use of firearms, when trying to quell social protests. In the last two years alone, dozens of demonstrators have been killed during police operations. In April 2010, the police killed five workers of the informal mining industry who participated in road blockades in the southern department of Arequipa. After attacks on a copper mine in December 2009, police forces shot dead two residents of the village Cajas-Canchaque in northwest Peru while searching for suspects. Another eight persons received gunshot wounds.[50]

In order to contain the wave of protests, Alan García's government has increasingly criminalised social movements, trade unions and NGOs. For instance, several human rights defenders who supported victims of the mining industry in the department of Piura were charged with a large list of crimes, such as terrorism, illicit association, incitement of violence, conspiracy, torture and assaults. Furthermore, many trade unionists have fallen victims of arbitrary detentions.[51]

5 Law of the Strongest: The Free Trade Agreement

There is considerable evidence that the Free Trade Agreement between the EU, Colombia and Peru will worsen inter-regional and intra-regional disparities and inequality. The leaked draft, which has been published on the website of the civil society network 'Linking Alternatives' (*Enlazando Alternativas*), shows that the FTA deepens the traditional division of labour between Europe as an exporter of industrialised goods and services and raw material exporting countries in Latin America.[52] It reinforces the extraction of natural resources, the privatisation of public services and the protection of investments and intellectual property rights while necessary counterbalances, like effective social, environmental and human rights provisions, are lacking.

The FTA goes beyond the requirements of the World Trade Organisation (WTO) as it contains, for instance, far-reaching liberalisation of investments, patents, competition law and government procurement. In some respects, the FTA is also more far-reaching than other bilateral agreements. In its own assessment of the treaty, the European Commission praises the outcomes of the negotiations, as Colombia and Peru committed to tariff reductions beyond those made in their FTAs with the US, e.g., in cases of automobiles, electrical products and machinery.[53]

Regarding agricultural goods, the European Union offers duty-free market access for 'crude palm oil for technical or industrial uses'. Free market access for palm oil in the EU will of course stimulate the growth of palm plantations in Colombia and Peru and contribute to ongoing land conflicts. The EU also commits to continuously lower its tariffs on bananas until 2020 and to open up duty-free beef and sugar quotas, the latter with a growth rate of 3% per year. Moreover, it offers free market access for ethanol and biodiesel.[54] All these tariff commitments are likely to boost the expansion of agricultural monocultures and fuel further land grabbing in Colombia and Peru.

On the other hand, both countries fall victim of the failed EU agricultural policy, particularly the 2009 "Health Check" reform. The EU decision to increase the ceiling for milk production, the so-called milk quota, stimulates overproduction and a price decline that drives small dairy farmers out of the European market while it only benefits highly subsidised large milk producers.

Yet, the impacts of this politically enforced consolidation do not stop at the European borders.

Like many other countries in the global South, Colombia and Peru, under the FTA, must open up their markets for the surplus milk production of the European food industry. Both countries offer EU exporters duty-free tariff rate quotas for milk powder, cheese and processed dairy products, with the quotas growing 10% each year. Peru offers full liberalisation of dairy products, i.e., the complete dismantling of all tariffs and quotas, 17 years after the agreement comes into force, Colombia after 15 years.[55]

As a consequence, dairy farmers and parts of the processing industry in both countries will be jeopardised by cheap milk imports from the EU. What is worse, Colombia and Peru have not only agreed to open their markets for European exporters; they

are also required to throw open their doors to North American dairy industries, due to their FTAs with the US and Canada. Moreover, both countries are planning FTAs with Australia, another highly competitive milk exporter.[56]

In Colombia, where milk producers already suffer from overproduction and low prices, thousands of dairy cattle farmers protested against the FTA with the European Union. Half of the 400,000 cattle farms in Colombia own less than ten head of cattle. These small dairy farmers in particular are unable to compete with European milk exports dumped on the Colombian market.[57]

In the services sector, the agreement provides for the liberalisation of telecommunication, transport, financial, environmental and energy services. Despite the present economic and financial crisis, the EU Commission insisted on risky deregulation of the financial markets. Colombia and Peru were pressed to make several commitments on market access and national treatment, i.e., equal treatment of foreign and domestic investors for insurance and banking services. They further agreed to liberalise current payments and capital movements between the contracting parties. These commitments impede the use of capital controls, aimed at preventing the sudden outflow of huge amounts of money in times of crisis, such as compulsory deposits of certain ratios of inflowing capital with the central bank.

According to the draft FTA, the signatories shall ensure the free movement of capital relating to direct investments, including "the liquidation and repatriation of these investments and of any profits stemming therefrom." Safeguard measures like capital controls would only be allowed "in exceptional circumstances", when capital movements "cause, or threaten to cause, serious difficulties for the operation of exchange rate policy or monetary policy". However, those measures may only be applied "for a period not exceeding one year." An extension would also only be allowed in exceptional circumstances and after consultations with the other signatories of the agreement.[58]

The FTA obviously turns the purpose and rationale of capital controls upside down. In order to have a preventive effect, they can not only be applied once a crisis unfolds, but rather must be applied well in advance and in 'normal' circumstances.

On establishment, Colombia and Peru offer European investors market access and national treatment in agriculture and forestry, in the extraction of coal, oil, gas and minerals as well as in a wide range of services.[59] The agreement considerably strengthens investment protection because the European Union can file a complaint under the dispute settlement mechanism in cases of alleged infringements. As remedies for non-compliance, the FTA provides for compensations by the losing party and for suspensions of trade concessions by the prevailing party.[60] In this way, the agreement secures and perpetuates resource extractivism in both Andean countries.

Additionally, European companies gain far-reaching access to the public procurement markets in Colombia and Peru. They will have the right to bid for contracts of central governments, sub-central departments, local municipalities and state enterprises and will therefore directly compete with domestic providers.[61]

5.1 Monopolisation of Medicines and Seeds

The FTA extends the protection of intellectual property rights even beyond the problematic provisions of the WTO's TRIPS-agreement (*Trade-Related Aspects of Intellectual Property Rights*). Such far-reaching requirements are called 'TRIPS-plus'-regulations. They impede access to medicines and seeds and facilitate biopiracy by pharmaceutical and biotech companies.

The agreement contains a five-year exclusivity period for the test data of pharmaceutical companies, which constrains the production of cheaper generic versions of licensed drugs.[62] To prove the safety of their products, pharmaceutical companies have to submit their test data to drug regulatory authorities when applying for approvals. For five years, drug authorities are prevented from using these test data to assess the safety of equivalent generic medicines.

If generic producers want to obtain an earlier approval for their equivalent drugs, they have to repeat the same trials already done by the producers of the original medicine – an expensive and redundant procedure only prolonging the monopoly of

pharmaceutical corporations. These companies can even prevent generic competition from appearing on the market when their original product hasn't been patented. The limitation on generic medicines follows the bad example of the US government that also obtained a five-year data exclusivity period in their respective FTAs with Colombia and Peru.[63]

In its recent report on Colombia, the UN Committee on Economic, Social and Cultural Rights warned that the FTA between Colombia and the US "contains provisions on intellectual property that may result in increase of prices of medicines and negatively impact on the enjoyment of the right to health, in particular of those with low income".[64] This warning surely holds true for the FTA with the EU as well.

In addition, the agreement contains detailed provisions on the enforcement of intellectual property rights, which may have a considerable dissuasive effect on generic producers. It will be far easier for pharmaceutical companies to initiate proceedings of public authorities against products of their competitors, allegedly infringing their rights. "Precautionary measures" will enable the withdrawal of goods, even on the mere suspicion that they might be in breach of intellectual property rights. The agreement also provides for tough penalties ranging from high compensation payments to the destruction of goods at the expense of the infringers.

"Border Measures" will enable companies to initiate the seizure of goods by customs authorities if they suspect – or pretend to suspect – infringements of copyrights and trademark rights. According to the FTA, these measures can also affect goods in transit, neither enjoying trademark protection in the country of origin nor in the country of destination. In this way, the EU is internationalising its practice of detaining generic medicines destined for developing countries.

Such seizures have been enabled by EU regulation 1383 of 2003. In 2008 and 2009, Dutch and German customs officials, at the behest of pharmaceutical corporations, detained 18 shipments of generic medicines. Manufactured in India and

Centre of potato diversity Farmers in Peru

passing through Europe, the seized generics were intended for Colombia, Peru, Brazil, Nigeria and Vanuatu to treat diseases like HIV and AIDS, cardiovascular diseases and common infections. These medicines were not counterfeit products, but legitimate generics without applicable patents or trademark rights in India or in the countries of destination. If generic producers are now forced to establish alternative trade routes to avoid the EU and its discriminatory border measures, the duration of transport will increase and freight costs will rise – to the detriment of all those depending on timely access to essential medicines.[65]

The free trade agreement also threatens farmers' access to seeds. The draft FTA demands that Colombia and Peru guarantee the protection of plant varieties based on the 1991 version of the International Convention for the Protection of New Varieties of Plants (UPOV).[66] The UPOV Convention was adopted in 1961 and has since been revised three times (1972, 1978 and 1991). The latest version, the 1991 Act of the UPOV Convention, considerably extended the rights of commercial plant breeders at the expense of the rights of farmers.

Before, farmers could freely use a protected variety – they once bought – to develop or exchange seeds and propagation material derived from this variety. UPOV 1991, though, limits the customary right of farmers to save and reuse farm saved seed. Under the 1991 Act, the development and multiplication of seeds generated from protected varieties is only allowed by authorisation of the rights-holders, i.e., the commercial breeders. If the propagation occurs on the farmers' own landholdings, national governments may, under certain circumstances, allow the reuse of protected varieties; however, the farmers are required to pay royalties to the commercial breeders. Furthermore, UPOV 1991 extends the breeders' monopoly not only to the propagation material but to the whole harvest of the farmer's crop and all the products derived thereof. Plant protection must be accorded to varieties of all species, and the minimum protection period has been prolonged from 15 to 20 years.[67]

Of the 68 UPOV members, only 45 ratified the 1991 version of the Convention. The other members, including Colombia, are mainly party to the older version of 1978. Peru so far hasn't joined the UPOV Convention but recently initiated an accession procedure.[68] However, implementing UPOV 1991 endangers food security and agricultural biodiversity. In Andean countries like Colombia and Peru, the reuse, exchange and sale of seeds is widespread among farmers and ensures the diversity of food crops. Several important edible species originate in the Andean region or have a high diversity of varieties here, such as potatoes, sweet potatoes, cassava, sweet pepper, tomatoes, beans, maize, quinoa and amaranth.[69]

The UN Special Rapporteur on the Right to Food, Olivier de Schutter, has criticised free trade agreements obliging signatories to join the UPOV Convention or to adopt UPOV-compliant legislation. According to de Schutter, countries where traditional seed systems are important for the prevention of genetic erosion and for the livelihoods of farming communities "should design sui generis forms of protection of plant varieties which allow these systems to flourish, even if this means adopting non-UPOV compliant legislation".[70]

The TRIPS agreement still allows this flexibility. It states that WTO members "shall provide for the protection of plant varieties either by patents or by an effective suis generis system or by any combination thereof" (TRIPS Article 27.3(b)). Yet, by requiring UPOV-compliant legislation, which is not part of the TRIPS agreement, the FTA goes beyond WTO rules and deprives Colombia and Peru of the option to develop their own systems of plant variety protection adapted to the needs of their farming communities.

The main beneficiaries of these provisions will be the large seed corporations that accelerate the erosion of agrobiodiversity with their uniform seeds, which are highly vulnerable to pests and diseases and often genetically modified. Among the world's top 10 seed corporations, headed by Monsanto, Dupont and Syngenta, are several TNCs headquartered in the EU like the French group Limagrain and the German companies KWS Saat AG and Bayer CropScience.[71]

5.2 Legalisation of Biopiracy

Indigenous and farming communities in Andean countries have extensive traditional knowledge about medicinal plants, local agricultural crops and animal breeds, which arouses the interest of the

Amazon oil plant Sacha Ichi Desired by European biopirates for cosmetics

pharmaceutical and biotech industry. The tropical Andes are one of the richest hotspots of biodiversity in the world, harbouring between 35,000 and 45,000 plant species, about 10% of the world's species. Over half of the species are endemic, i.e, they are not found anywhere else.[72]

The EU free trade agreement paves the way for European corporations keen to exploit the biological diversity in Colombia and Peru and may thereby contribute to biopiracy in indigenous territories. The FTA demands that the signatories comply with the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure adopted in 1977[73]. Up to now, this treaty has been ratified by 73 nations.[74] Peru only recently ratified it; it came into force in 2009. In Colombia, a draft law providing for its ratification is currently being debated in the National Congress.[75] The Budapest Treaty makes it much easier for pharmaceutical corporations to obtain patent protection for a wide range of biological and biochemical material, such as seeds, DNA sequences, plant, animal and human cell cultures as well as microorganisms like bacteria, viruses and fungi.

Traditionally, patent laws obliged applicants to provide a written description of their inventions. In order to ensure technological progress, patent systems awarded temporary monopoly rights in return for the public disclosure of the invention. When the patent expired the invention passed to the public domain.

However, biotechnology firms faced the difficulty that it's nearly impossible to describe a living organism, according to the requirements of patent law, as a demonstrable invention by the company. The Budapest Treaty adapts patent laws to the needs of biotech companies, relieving them from the usual disclosure and information requirements. Instead of providing a written description of their alleged 'invention', it is now sufficient for biotech firms to deposit a sample of the life form with one of 38 International Depositary Authorities, mainly research centres in industrialised countries. Based on such a deposit, national patent authorities of all states party to the Budapest treaty can then process applications and grant patents for their territory.[76]

However, access to the samples submitted to the International Depositary Authorities is highly restricted. Only certain authorised parties may view this information. Due to this restriction, the Budapest Treaty not only hampers research and innovation, but also prevents investigation on the origin

of the deposited biological material. Indigenous communities, for instance, cannot verify whether a deposit has been extracted from their territories without their prior consent and might therefore be based on biopiracy.

The Budapest Treaty also affects the very difficult negotiations on a protocol to the UN Convention on Biological Diversity (CBD), which would ensure access to genetic resources and benefit-sharing with the providers of these resources. During the talks on access and benefit-sharing (ABS), developing countries rich in biodiversity wanted an obligation for patent applicants to present certificates demonstrating the origin of their biological material, the prior informed consent of indigenous and local communities, as well as the terms of any benefit-sharing agreements.[77] Yet, this demand goes against the Budapest treaty that enables the patentability of genetic resources without such disclosure requirements.

For this reason, the FTA's reference to the Convention on Biological Diversity (CBD) cannot ensure that biopiracy in Colombia and Peru will be prevented and that local communities will profit from a potential benefit-sharing agreement. Since the biodiversity convention provides for "national sovereignty" over genetic resources, local communities' participation depends on the national legislation. It remains to be seen if the envisaged ABS protocol, to be further negotiated October 2010 in Nagoya (Japan), really strengthens indigenous peoples' rights to genetic resources and traditional knowledge. In any case, it has to be taken into account that the CBD and the ABS protocol represent a compromise between governments in the North and South on the private appropriation and commercial exploitation of biological diversity. Biopiracy is being transformed into a well-respected business compliant with international contract and property law.[78]

Moreover, it is symptomatic that the FTA ignores important indigenous peoples' rights. The draft agreement avoids any reference to the Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly in 2007 after 20 years of difficult negotiations. This declaration recognises the rights of indigenous peoples to the lands, territories and resources they traditionally owned or used. Indigenous peoples also have the right to maintain, control and protect the intellectual property over their cultural heritage and traditional knowledge, "including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora". States shall obtain their "free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."[79] The ratification of the free trade agreement with the European Union would require such a prior consent as it affects indigenous rights to land, genetic resources and traditional knowledge.

The implemention of the UPOV convention and the Budapest Treaty is already part of the US free trade agreements with Colombia and Peru.[80] Yet, the provisions on intellectual property set forth in the US and EU FTAs have fuelled a huge controversy within the Andean Community. The dispute erupted in 2008 when Peru adopted its package of legislative decrees in order to adapt its laws to the FTA signed with the US. Several of the decrees infringed Andean Community law on intellectual property laid out in CAN Decision 486.[81]

In order to harmonise Andean Community law with the requirements of the US FTA, Peru requested an amendment to Decision 486 which Bolivia vehemently rejected. In a first round of voting requiring the consent of all Andean Community members, Bolivia succeeded in blocking the modification. However, the second round of August 2008 required only a majority vote, so Bolivia was overruled and the amendment adopted.[82] The complaint the government of Evo Morales filed with the Andean Community Court of Justice in February 2010, is, inter alia, directed against this decision. Bolivia wants this modification of the Andean intellectual property law to be declared null and void.[83]

The controversy also affected the negotiations with the European Union. At the extraordinary meeting of the Andean Community October 2008 in Ecuador, Evo Morales confirmed his rejection of the patenting of life forms: "It's not possible to patent the life of plants, animals and biological resources", he said. "Life is something sacred that cannot be negotiated with the European Union."[84]

5.3 Toothless Social and Environmental Standards

With regards to human rights, the FTA is weaker than the EU's General System of Preferences (GSP)

through which Colombia and Peru currently receive preferential access to the EU market. Under the standard GSP, the EU grants goods of 176 developing countries reduced tariffs when entering the EU market.[85] Colombia and Peru belong to a group of 16 countries which the EU offers additional preferences beyond the standard APS, the so-called "special incentive arrangement for sustainable development and good governance" or GSP+.

According to the respective EU regulation, GSP+ beneficiaries must have ratified and "effectively implemented" 27 international human rights conventions and multilateral environmental agreements, including the UN Covenant on Civil and Political Rights, the UN Covenant on Economic, Social and Cultural Rights as well as the eight core labour standards of the International Labour Organisation (ILO). The EU Commission shall review the effective implementation of these conventions by examining the information of relevant monitoring bodies. In cases of "serious and systematic violations" of these international norms the EU may temporarily withdraw the trade preferences for individual or all products.[86]

Despite the well-documented human rights abuses of Colombian state actors, the EU Commission has never properly examined this enforcement option. Nevertheless, some critics of the FTA like the British Trades Union Congress (TUC) suggest that the mere possibility of a withdrawal of preferences might place some pressure on the Colombian government to improve its human rights record.[87]

However, Colombia and Peru will leave the General System of Preferences when the FTA with the EU takes effect. The enforcement procedures of the draft FTA are significantly weaker than those of the GSP+. The human rights clause of Article 1 states that respect for democratic principles and fundamental human rights, as laid down in the Universal Declaration of Human Rights, constitutes an "essential element" of the free trade agreement. But social and environmental standards (ILO core labour standards, Biodiversity Convention, Kyoto Protocol etc.) are only to be found in a special chapter on Trade and Sustainable Development (Title X of the draft FTA).

The whole sustainability chapter, though, has a significant weakness: It is not subject to the FTA's dispute settlement mechanism and therefore does not provide the possibility of sanctions like the temporary withdrawal of trade concessions or the suspension of the agreement. Instead, it only offers a non-binding consultation mechanism. In case of violations like workers' rights abuses a complaining party may request that a Council on Trade and Sustainable Development considers the matter. If these consultations do not lead to a solution, a Group of Experts can be convened to make recommendations that governments, however, are not bound to implement. Consultations can only be requested by parties to the agreement, i.e., the signatory governments, but not by trade unions, human rights organisations or any other social movements.

A suspension of trade concessions or of the agreement is only possible in case of infringements of one of the FTA's "essential elements". Yet, the Universal Declaration of Human Rights – an "essential element" laid down in Article 1 – does not cover all core labour standards. The right to collective bargaining and the prohibition of the worst forms of child labour, for instance, are not included. In addition, the Trades Union Congress (TUC) estimates that it is much harder to demonstrate the breach of an "essential element" of the agreement than to prove failures of the "effective implementation" of international conventions as laid out in the GSP+. According to TUC, breaching an "essential element" would probably require a signatory government to eliminate the right to freedom of association in its labour laws, which is something quite unlikely to happen.[88]

In two respects the sustainability chapter's catalogue of standards goes beyond the current GSP+ provisions. The parties to the FTA commit to promote equal treatment of migrant workers and to implement core labour standards "in their whole territory", i.e., including in export processing zones. On the other hand, important international norms are missing, such as the UN Covenant on Economic, Social and Cultural Rights that stipulates, inter alia, the right to safe and healthy working conditions. Nevertheless, the lack of provisions for sanctions makes the number of standards included in the sustainability chapter irrelevant. Adding toothless clauses does not eliminate their toothlessness.

6 Stopping the Treaty

The FTA with the European Union has been overwhelmingly rejected by trade unions, social movements and NGOs in Colombia and Peru. A joint declaration of more than 200 Andean and European organisations called for the suspension of the negotiations, claiming that the treaty endangers the Andean integration process, enforces extraction of natural resources, accelerates privatisation of public services, increases social exclusion and undermines development efforts. The signatories also criticised the insufficient participation of civil society and the disregard of human rights violations in Colombia and Peru. They also lamented that the rights of migrant workers and their families in the European Union had been ignored.[89]

Colombian signatories of this declaration included the trade union federations CTC (*Central de Trabajadores de Colombia*), CUT (*Central Unitaria de Trabajadores*) and USO (*Unión Sindical Obrera*), the national indigenous organisation ONIC (*Organización Nacional Indígena de Colombia*) as well as the network against free trade RECALCA (*Red Colombiana de Acción frente al Libre Comercio*). Peruvian signatories are, inter alia, the trade union federations CUT (*Central Unitaria de Trabajadores del Perú*) and CGTP (*Confederación General de Trabajadores del Perú*) as well as the farmers organisations CNA (*Confederación Nacional Agraria*) and CCP (*Confederación Campesina del Perú*).

At their summit in May 2010, the International Trade Union Confederation (ITUC), the European Trade Union Confederation (ETUC) and the Trade Union Confederation of the Americas (TUCA) adopted a joint statement requesting that the agreement should not be signed because of scarce participation, the weakening of the Andean Community and the ongoing violence in Colombia.[90]

Similar agreements with Colombia have already been put on hold in several states. Due to the human rights abuses in Colombia, Democratic delegates of the US Congress in 2008 blocked the ratification of the FTA with this country, which has remained on the back burner since then. In Norway, the government refrained from presenting to parliament ratification of a trade agreement between the EFTA group (comprised of Norway, Switzerland, Iceland and Liechtenstein) and Colombia because of human rights concerns.[91]

After a campaign of the Belgian decent work coalition (*Travail Décent*), the government of the Flemish Community in March 2010 blocked a bilateral investment treaty between Colombia and the Belgium-Luxembourg Economic Union. The Flemish government refused to initiate the ratification process as Colombia had blocked the inclusion of a social clause in the treaty.[92]

6.1 After Lisbon: The Ratification Process

The Lisbon Treaty, which entered into force in December 2009, brought about some important changes to the ratification process in the European Union. The most significant one concerns the extension of the European Parliament's powers in trade policy. From now on, the Parliament's consent is required for the ratification of all trade

agreements. On the other hand, the Lisbon Treaty also extended exclusive EU competencies in the common commercial policy covering now trade in goods and services, commercial aspects of intellectual property and foreign direct investment, thus minimising the necessity for 'mixed agreements' requiring the additional ratification of national parliaments.

However, if a trade deal covers policies outside the exclusive EU competence in trade matters, additional ratification by all EU member states is still necessary. In this case, any member state discontent with any provision of a treaty could veto the agreement. Regarding the FTA with Colombia and Peru, such a scenario is not unlikely given the widespread opposition to a trade deal with Colombia.

Observers speculate the Commission might try to avoid the national track by classifying the FTA as a pure trade agreement, not as a mixed one. However, although the two pillars 'political dialogue' and 'cooperation' were dropped, the FTA still includes several topics making it a mixed agreement. Article 2 of the draft, for instance, contains the non-proliferation clause, also called weapons of mass destruction (WMD) clause, obliging the signatories to co-operate in the implementation of non-proliferation treaties. Non-proliferation treaties belong to the realm of the common foreign and security policy, which is still a shared competence of the EU and its member states. Since the European Council's adoption of the WMD clause in November 2003, this clause has been inserted in several EU treaties with third countries that are either in force, awaiting ratification or still under negotiation.[93]

According to the respective Council note of 2003, the WMD clause is exclusively intended for "future" and "existing mixed agreements", not for Community-only agreements falling under exclusive EU competence. This note explicitly states that "Community-only agreements (…), cannot include a 'non-proliferation' clause for reasons linked to the Community's competences".[94] In other words: Only mixed agreements requiring national ratification may contain the WMD clause.

Other elements qualifying the FTA as a mixed agreement are the ILO core labour standards included in the chapter on Trade and Sustainable De-

Photo: Agencia Peruana de Noticias Andina / Serpres

EU-Latin America Summit in Madrid 2010 Conclusion of the negotiations on the FTA

velopment. The parties to the FTA commit to the "promotion and effective implementation in their laws and practice of internationally recognised core labour standards as contained in the fundamental ILO Conventions".[95] Yet, the EU on its own cannot provide for the effective implementation of labour standards because social policy is still a shared competence and the European Union is not a member of the ILO. As Professor of Law Marc Bungenberg puts it, "trade deals which would go beyond the harmonisation possible at intra-EU-level – in such fields as occupation, social policy, health, industry or culture – would 'after Lisbon' still qualify as mixed agreements".[96]

The same holds true for the transport sector. With the FTA, the EU committed to opening up certain transport services (maritime, internal waterways, rail, road and pipeline transport) to Colombian and Peruvian providers.[97] In its Opinion 1/08 of November 2009, the European Court of Justice came to the conclusion that the transport aspect of a trade agreement – in that case the WTO General Agreement on Trade in Services (GATS) – is a shared competence of the European Community and the member states and does not fall within the sphere of the common commercial policy.[98] Consequently, a briefing paper of the EU Centre in Singapore states that "transport does not fall within trade policy and any trade agreement containing provisions applying to the transport area requires mixed agreements. This remains the case with the entry into force of the Lisbon Treaty." [99]

Although there may be more elements requiring a mixed agreement such as the human rights clause and the commitments on education and health services, the decision on the classification has not yet been taken. The FTA, which is currently subject to a legal review, still has to be initialled by the negotiators. After that, it will be translated in the official languages of the EU. The European Commission will then submit it to the European Council for signature and conclusion together with a proposal on its classification and possibly its provisional application. Having signed the FTA, the Council subsequently passes it on to the European Parliament (EP) for ratification. Provisional application of the FTA might therefore occur even before the EP has taken a decision, though parliamentarians could press the Commission to avoid proposing provisional application. If the EP gives its consent, the Council can conclude the agreement. In the case of a mixed agreement, the Council would have to await the endorsement of all national parliaments for the conclusion of the ratification process.

In addition, a mixed agreement requires a unanimous vote instead of a qualified majority in the European Council. According to Article 207 of the Lisbon Treaty, unanimity shall also be applied, under certain circumstances, for the conclusion of trade agreements covering cultural, audiovisual, social, education and health services.[100] Since the EU's commitments under the FTA do include market openings in cultural, social, education and health services, unanimity might be necessary in any case.[101]

Members of the EP and some national parliaments have already pronounced their opinions on the classification of the FTA. In a draft report of the EP's Committee on International Trade on the EU's trade relations with Latin America, the rapporteur Helmut Scholz (GUE/NGL) "clearly considers this agreement a mixed agreement".[102] Likewise, 36 members of the British parliament, mainly belonging to the Labour Party, signed a motion urging the British government to ensure that the FTA "has to be expressly ratified by the Parliaments of each member state, including the UK".[103] German Bundestag's group *Die Linke* (The Left) also filed a motion on the treaty demanding "ratification by member states' parliaments".[104]

The chance to block the ratification of this disgraceful treaty would obviously increase once it was dependent on national ratifications, possibly prolonging the whole process for a few years. Nevertheless, the vote of the European Parliament will also demonstrate whether its newly-acquired powers effectively strengthen the enforcement of the EU's declared commitment to human rights and sustainable development – a pledge that all too often has proved to be lip service.

It must therefore be hoped that both the European Parliament and the parliaments of EU member states will refuse to ratify this FTA. Otherwise, human rights violations would be rewarded, repression of social movements fostered and plundering of natural resources accelerated. It is high time for the European Union to change course. Sustainable development and protection of human rights must now be given priority over free trade.

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This project is funded by the European Union.

The Second Conquest
The EU Free Trade Agreement with Colombia and Peru
Thomas Fritz | FDCL (Berlin), TNI (Amsterdam) | October 2010

ISBN 978-3-923020-50-8